STB FINANCE DOCKET NO. 30965 (SUB-NOS. 1 AND 2)

DELAWARE AND HUDSON RAILWAY CO. -- LEASE AND TRACKAGE RIGHTS -- SPRINGFIELD TERMINAL RAILWAY COMPANY

Decided September 21, 1998

After court remand, the Board determines that certain collective bargaining agreement modifications are not protected rights, privileges, and benefits.

BY THE BOARD:

This decision responds to the remand of the court of appeals in *Railway Labor Executives' Association v. United States and Interstate Commerce Commission*, 987 F.2d 806 (D.C. Cir. 1993), *reh'g. den.* (June 2, 1993) (*Executives*).[1] In *Executives*, the court affirmed several ICC decisions in this proceeding, but not the October 4, 1990 decision concerning the Harris Award which imposed an implementing agreement that made several changes in the collective bargaining agreements (CBAs) of the individual carriers involved in this transaction. The court remanded two issues for clarification. The court first required clarification of the scope of the "rights, privileges, and benefits" in CBAs that may be entitled to special protection, and, specifically, whether the Harris Award modifications to the lessor carriers' CBAs involve any such "rights, privileges, and benefits." 987 F.2d at 814. The court also asked for clarification as to what public transportation benefits were achieved by the lease

[1] The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (*the Act*), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of *the Act* provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained and transferred by *the Act*. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction under 49 U.S.C. 10902, 11323 - 11326. Therefore, this decision applies the law in effect prior to *the Act*, and citations are to former sections of the statute, unless otherwise indicated.

transactions that could only be realized by modifying the CBAs. 987 F.2d at 815. The court indicated that if all of the transportation benefits arose solely from a transfer of wealth from employees to employer achieved by modifying the CBAs, the transaction would not be *bona fide*, and could not be used to effect modification of the CBAs.

By decision served April 21, 1993, the ICC reopened the record and directed the parties to address these two issues. The ICC also asked for comments on what the response should be if it were determined that the Harris Award implementing agreement should be set aside.[2]

Since that remand, we have defined "rights, privileges and benefits" with the approval of the United States Court of Appeals for the District of Columbia Circuit. We employ that definition here in determining that the CBA modifications which the Harris Award required are not protected "rights, privileges, and benefits." We, therefore, reaffirm the decision not to set aside the Harris Award in this respect.

This decision also clarifies the transportation benefits that were expected to flow from approval of the lease transactions, and, subsequently, the Harris Award, and finds that the record evidence developed on remand supports those initial expectations. Therefore, we reaffirm the decision declining to set aside the Harris Award in all respects.[3]

BACKGROUND

1. *The Transactions and Pre-Remand ICC Decisions.* Between October 22, 1986 and November 17, 1987, five rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI) filed approximately 16 notices under the

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[2] On May 23, 1995, the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Maintenance of Way Employees (BMWE), and the International Brotherhood of Firemen & Oilers (IBF&O) filed a notice of withdrawal from this proceeding. Likewise, on May 31, 1995, the United Transportation Union (UTU) withdrew from this proceeding. These unions have entered into new CBAs with Springfield Terminal (ST). The agreements have been ratified by their members and implemented.

ST states, in a letter to the Commission dated June 8, 1995, that active negotiations are underway with other labor organizations representing ST employees. However, because an accord has not been reached among all such representatives, and does not appear to be imminent, the withdrawal of some unions from the underlying dispute does not moot out this proceeding, and we reach the merits of the remand decision by the court.

[3] As discussed below, we also deny the individual petitions to intervene filed by numerous former employees of the leased lines who are members of the BMWE, one of the unions that has ratified and agreed to the implementation of a new CBA with ST.

class exemption procedures, 49 CFR 1180.2(d)(3), 1180.4(g), for transactions within a corporate family. The transactions involved leases of rail lines and related trackage rights from four GTI subsidiaries--the Delaware and Hudson Railway Company (D&H), the Boston and Maine Corporation (B&M), the Maine Central Railroad Company (MEC), and the Portland Terminal Company (PT)--to the fifth GTI rail carrier subsidiary, the Springfield Terminal Railway Company (ST). ST thus became the operator of the entire GTI system. GTI proposed that all 1,200 employees of its five subsidiaries work under the ST CBA, which largely eliminated craft lines and restrictive work rules.

The leases were opposed by various rail labor organizations (rail labor) contending that the class exemption was not applicable because ST had less favorable rates of pay, rules and working conditions than the other subsidiaries.[4] Rail labor alternatively sought the enforcement of the labor protection imposed on the original acquisition of control proceedings,[5] including the requirement that ST give 90-days' notice and have an implementing agreement in place before going forward with the transactions (neither of which had been done).

The ICC declined to tie the lease transactions to the earlier acquisition of control proceedings and initially imposed labor protective conditions typically appropriate for lease and trackage rights transactions set forth in *Mendocino Coast Ry. Inc.--Lease and Operate*, 354 I.C.C. 732 (1978) (leases) and *Norfolk and Western Ry. Co.--Trackage Rights--BN*, 354 I.C.C. 605 (1978) (trackage rights), *aff'd sub nom. RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982) (cumulatively *Mendocino* conditions). In the first decision addressing the cumulative impact of the multiple lease transactions,[6] the ICC responded to rail labor's concerns and determined that the cumulative impact of the lease transactions was more comparable to a merger or consolidation than to a typical lease or grant of trackage rights. Accordingly, the ICC imposed special labor conditions that combined the substantive provisions of the *Mendocino* conditions with procedural benefits of *New York Dock*.[7] In that decision, however, the ICC refused to revoke approval of the leases and trackage rights

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[4] Rail labor is the Railway Labor Executives' Association (RLEA) and the United Transportation Union (UTU). As noted, the UTU has now withdrawn from this proceeding.

[5] The Commission approved GTI's control of the B&M and MEC in *Guilford Transp. Industries, Inc.--Control--B&M Corp.*, 366 I.C.C. 294, 336 (1980), *aff'd sub nom. Lamoille Valley R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983), and its control of the D&H in *Guilford Transp. Industries, Inc.--Control--D&H Ry. Co.*, 366 I.C.C. 396, 397-98 (1982), *aff'd sub nom. Central Vermont Ry. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

[6] *February 17, 1988 Decision*, 4 I.C.C.2d 322, 338.

[7] *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), *aff'd*, 609 F.2d 83 (2d Cir. 1979).

under the exemption process. The Commission noted that ST claimed that these transactions would improve service to shippers. 4 I.C.C.2d at 334. The Commission did, however, enjoin consummation of leases that had not yet been completed until the parties had arrived at an implementing agreement.

After attempts to negotiate an implementing agreement failed, the parties submitted the matter to arbitration. On June 12, 1988, neutral arbitrator, Richard R. Kasher issued an award (the Kasher Award). Kasher's principal ruling was that the ST work force should operate under the same rates of pay, rules, and working conditions required by the existing CBAs of the four lessor carriers.

Applying the *Lace Curtain* standard of review,[8] the Commission reviewed the Kasher Award and decided to vacate those portions of the Award that mandated that the lessors' CBAs continue in effect without modification on the ST.[9] The Commission found that imposing all provisions of the lessors' CBAs on ST would result in conflicting and inflexible work rules that would undermine the greater economies and efficiencies of system operations meant to be achieved by the leases.

After further arbitration, arbitrator Robert O. Harris issued an award (the Harris Award) on March 13, 1990. Harris indicated he also would have imposed the existing CBAs, but felt this would be inconsistent with the Commission's decision. He modified the CBAs in five material respects. Rail labor appealed two of the changes: (1) employees could be required to perform work incidental to the scope of their duties outside their own craft or class, provided that the incidental work did not comprise more than 50% of their total daily work; and (2) ST could operate with reduced crew sizes (eliminating a brakeman) on certain runs.

In an October 4, 1990 decision, the Commission declined to vacate the Harris Award. The Commission found that Harris had acted within his authority and that the modifications sanctioned by Harris were necessary to effectuate the transactions. The Harris Award adopted the parties' agreement that the 6 years of labor protective benefits would begin to run with the effective date of the implementing agreement (or when an employee is adversely affected, whichever occurred last). The implementing agreement became effective on November 4, 1990.[10]

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[8] *Chicago & North Western Transp. Co.--Aband.*, 3 I.C.C.2d 729 (187), *aff'd sub nom. IBEW v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

[9] *January 10, 1989 Decision.*

[10] The Commission also issued several decisions dealing with the parties' contentions over the scope and duration of labor protective conditions. In its December 11, 1990 decision, the (continued...)

2. *Court Review.* The court affirmed all of the challenged decisions with the exception of the decision not to vacate the Harris Award. As to that, the court remanded two issues for clarification: (1) a determination of the proper meaning and, thus, scope of the "preservation of rights, privileges, and benefits" language of the Amtrak Act (RPSA),[11] as incorporated into section 11347 (*Executives*, 987 F.2d at 814); and (2) a determination of what transportation benefits were gained by implementing the lease transactions, the realization of which necessitated abrogating the CBAs. *Id.* at 815.

With regard to the "rights, privileges and benefits" language, the court stated that not every word of a CBA need be "preserved," or else no modifications could occur, a result that the court considered "an obviously absurd proposition," because "§ 565 (and hence § 11347) does seem to contemplate that the ICC may modify a CBA" if necessary to carry out a transaction. *Id.* at 814. The court found this interpretation of the ICC's power, as a general matter, to be "eminently reasonable, indeed indisputable." *Id.* Nonetheless, the court required that the ICC specifically determine whether the CBA provisions Harris permitted to be modified are entitled to "preservation" and hence cannot be modified. *Id.*

Regarding the "necessity finding," the court declared that, if the transportation benefits arose solely from modifying the CBAs, they would not be cognizable since it would be an unacceptable use of the Commission's authority "merely to transfer wealth from employees to their employer." *Id.* at

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[10](...continued)
Commission reviewed the issue concerning a work stoppage which had occurred between November 1987 and June 1988. UTU contended that the strike was motivated by safety concerns and was, therefore, a protected activity under the Federal Railroad Safety Act, 45 U.S.C. 441(a). ST asserted that the strike was motivated by economic concerns, was unlawful, and that ST was entitled to view the striking employees as having constructively resigned from their new positions on the ST. Thus, although subsequently hired back, they were new employees, not adversely affected by the leases, and not entitled to labor protection. The Commission concluded that, regardless of the lawfulness of the strike, the participating employees had not thereby forfeited entitlement to their Commission-imposed labor protections.

In its April 2, 1991 decision, the Commission resolved that the employees were entitled to no more than a maximum of 75 days of make-whole payments plus 6 years of protective period benefits. Because the 75 days make-whole payments accrued from the date of the leases and the protective period benefits did not begin to run until the effective date of the implementing agreement, a 3-year gap was created between the two kinds of benefits. In its July 5, 1991 decision, the Commission rejected rail labor's arguments that they were thus entitled either to an extended 9-year package of benefits, or that the protective period should be rolled back retroactively to commence on the date the 75 days expired.

[11] Section 405 of the Rail Passenger Service Act (Amtrak Act or RPSA), 45 U.S.C. 565, requires the "preservation" of "rights, privileges and benefits" under existing CBAs.

815. However, if the underlying leases themselves would provide transportation benefits, and those benefits could not be realized except by modifying the CBAs, the modifications would be "necessary." *Id.*

3. *Procedural History on Remand.* The ICC established a briefing schedule under the modified procedures, 49 CFR part 1112.[12] The Commission informed ST that it might submit whatever documentation it believed demonstrates the transportation benefits achieved by the leases. The documentation could be either a reproduction of the original submissions, or supplementation of the record. RLEA sought and was granted discovery. RLEA also requested an oral hearing. The record was closed on April 20, 1994. The parties were then permitted to file supplemental briefs addressing the relevance of the evidence produced by discovery. Briefing was completed July 1, 1994. Determination of the need for an oral hearing was reserved until completion of this process.

THE PARTIES' POSITIONS

1. *Rights, Privileges and Benefits.* ST suggests that the Commission has already defined the meaning and scope of the rights, privileges and benefits terms in its *New York Dock* and *Wilmington Terminal* decisions.[13] Thus, it asserts, the Commission has previously found that section 11347 does not incorporate the "rights, privileges, and benefits" language of Section 405 of the RPSA, but rather the Appendix C-1 conditions, upon which *New York Dock* conditions were based, which require preservation of "rates of pay, rules, working conditions * * * under * * * existing collective bargaining agreements."

ST states further that the Commission has previously explained that "only those changes in CBAs necessary to permit an approved transaction will be appropriate." *CSX Corp.--Control--Chessie and Seaboard C.L.I.*, 6 I.C.C.2d 715, 749 (1990) (*Carmen II*).[14] ST asserts that we have consistently viewed the

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[12] This procedure assumes that "all material issues of fact can be resolved through submission of written statements," and without oral testimony. 49 CFR 1112.1. Parties may file "verified statements" containing facts upon which a witness relies. Unless those allegations are rebutted in an opponent's reply statements, they will be considered admitted as true. 49 CFR 1112.6.

[13] *Wilmington Terminal R.R., Inc.--Purchase and Lease--CSX Transp., Inc.*, 6 I.C.C.2d 799, 822-23 (1990), *clarified*, 7 I.C.C.2d 60 (1990), *aff'd sub nom. RLEA v. ICC*, 930 F.2d 511 (6th Cir. 1991).

[14] This proceeding was remanded to the Commission by the United States Court of Appeals for the District of Columbia on September 19, 1991, following the Supreme Court's reversal of the court of appeals' adverse decision reviewing an earlier proceeding. *See, CSX Corp.--Control--Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641 (1988) (*Carmen I*), *rev'd sub nom. Brotherhood of* (continued...)

Appendix C-1 terms under RPSA as requiring it to preserve all CBA rights, privileges and benefits that need not be changed to effectuate a transaction, and, conversely, that if CBA terms must be changed to permit a transaction to go forward, they are not protected.

Thus, ST urges the agency on remand to merely explain again the Commission's prior reasoning for the benefit of the D.C. Circuit, and to explain that the ICC had concluded that the Harris Award properly applied this standard in determining what provisions of the lessor CBAs needed to be modified to permit the transactions to go forward.

RLEA agrees that we should define "rights, privileges, and benefits" as including all "rates of pay, rules, and working conditions" as those terms are employed in Appendix C-1, but asks the agency to define "working conditions" broadly, citing *Detroit & Toledo Shore Lines R.R. v. UTU*, 396 U.S. 142, 153 (1969). Thus, the terms should encompass actual working conditions in effect at the time of the leases, including seniority and scope rules, not merely contractually established rights. RLEA states that only an employer's rights, and moratorium clauses, need not be preserved.

RLEA contends that Article I, section 4 of *New York Dock* only permits an ICC-appointed arbitrator to modify CBAs for the purposes of selection and assignment of forces under an implementing agreement. Because, it believes, the Harris Award modified all affected seniority and scope rules, those modifications were impermissible, and unnecessary to effectuate the transactions.

In reply, ST rejects RLEA's contention that the only terms of a CBA that may be modified are those setting forth the employer's rights. It suggests there would have been no need for the court to remand this issue to the Commission if the court believed that every CBA term beneficial to employees was immune from change. ST also rejects RLEA's argument that all seniority rights are immune from modification, citing both *Carmen II*, 6 I.C.C.2d at 742, and *United States v. Lowden*, 308 U.S. 225, 233 (1939).

UTU declines to brief this issue. In its view, the only relevant issue to be addressed on remand is whether the Harris Award modifications were necessary, and not what is a protected right. None of the parties addressed this issue further in supplemental briefing.

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[14](...continued)
Railway Carmen v. ICC, 886 F.2d 562 (D.C. Cir. 1989), *rev'd sub nom. Norfolk & Western v. American Train Dispatchers*, 499 U.S. 117 (1991).

2. *Transportation Benefits*

A. Initial Submissions. ST argues that the D.C. Circuit erroneously determined that a CBA cannot be modified under section 11347 if the transportation benefits achieved by the transactions flow solely from modifying the CBAs. It asserts that public transportation benefits can accrue directly from the modifications of CBAs through increased efficiency and expanded service with net labor costs remaining constant. Thus, the labor-related savings need not signify a transfer of wealth from labor to management and can be a legitimate purpose of consolidations, citing *Norfolk & Western v. American Train Dispatchers*, 499 U.S. at 130.

ST views the D.C. Circuit as requiring proof that the leases themselves achieved public transportation benefits wholly unrelated to the CBA modifications. Even under what ST asserts to be erroneous analysis, ST maintains that the leases themselves did provide public transportation benefits and, consequently, the Harris Award can be reaffirmed.

ST asserts that the leases were entered into to improve service and maintain rail transportation as a viable alternative to truck transportation in New England. Service has improved both through the efficiencies achieved by operating the former B&M, MEC, and PT lines as a single system,[15] and by using the more flexible work rules of the ST CBA.

According to ST, at the time the leases were approved, the MEC was slightly profitable, the B&M was barely successful, and the D&H was in financial trouble. These three lines were receiving government subsidies and loans to stay afloat, were facing stiff competition from the partially deregulated trucking industry, and faced an economic recession that closed many of the New England manufacturing operations that had depended on rail service. ST provides data that carloads for the three lines combined decreased from 676,000 per year in 1976 to 358,000 per year in 1987. Revenues and government subsidies were drying up.

To compete with trucks, the carriers had to provide the same kind of flexible service with rapid movements and frequent pick-ups and deliveries. This level of service required frequent switching on a schedule dictated by shippers' needs. Unable to increase revenues, the carriers looked to cut costs. The separate carrier status hindered efficient crew changes and interchanges.

[15] ST remarks that it originally intended to lease the Delaware & Hudson (DH) lines as well, but when the ICC prevented consummation of those leases pending an effective implementing agreement, the D&H filed for bankruptcy.

The CBAs also created a barrier to consolidated operations. Accordingly, the carriers began to lease the light-density lines to ST and eventually leased the entire system (excepting D&H).

ST provides several examples of the many benefits that it claims have been realized.[16] By operating all of the railroads as a single system, ST moves trains through the system more quickly and efficiently; has consolidated shops and other facilities, eliminating duplication; has centralized train, crew and clerical dispatching operations; and uses maintenance of way personnel, equipment and other resources throughout the system.[17]

Reduced transit times permit shippers to maintain lower inventory levels and to lower their costs. The single system operation facilitates faster transit times because ST does not have to change crews at each of the boundaries of the lessor carriers, but only when operationally necessary. Less frequent crew changes also reduce ST's labor costs.

According to ST, centralized dispatching is more efficient because the movements of crews and trains can be more effectively coordinated throughout the system. Centralized repair shops permit more efficient volumes of work and the elimination of redundant facilities. More efficient use of maintenance crews allows repairs to be made faster, thus improving service.

As a result of these operational improvements, ST argues that it has stabilized its traffic levels and has developed new business. It has reversed its negative net railway operating income (NROI), permitting capital reinvestment to ensure long term stability.[18] Service to shippers has improved, as evidenced by letters showing a majority of its customers are satisfied.

ST avers that these improvements could not have been achieved without the lease transactions, which in turn required modifying the lessor CBAs.[19] The

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[16] ST submitted two verified statements from its Chief Executive Officer, David A. Fink, in support of its factual assertions, as well as a verified statement from a member of its counsel's firm to substantiate the shipper letters in support of its operations.

[17] As examples, ST explains that it is not renewing leases on some locomotives but rather is buying and renovating older locomotives. It also has reduced its inventory of locomotives by virtue of run-through arrangements with Conrail and Canadian Pacific.

[18] The first Verified Statement of David A. Fink states that, despite a severe economic recession over the past 3 years, ST has stabilized its total rail operating revenues at $110 million in 1990, $101 million in 1991, and $104 million in 1992. It has increased its net railway operating income from $1.1 million in 1990 to $3.7 million in 1992, and $11.5 million in 1993. This increased revenue has been reinvested for capital improvements in the sums of $5.1 million in 1990, $6.3 million in 1991, and $8.4 million in 1992.

[19] Ironically, ST mirrors rail labor's arguments somewhat. It complains that the Harris Award needlessly modified the ST-UTU CBA, entered into on behalf of ST's employees after the leases had

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B&M and MEC CBAs did not permit train crews of each carrier to operate on the other's territory. Scope rules of each CBA prevented consolidating dispatching functions and shop repairs. ST also avers that the elimination of the lessor CBAs' outmoded work rules and excess manning requirements has improved safety. It submits evidence that reportable employee injuries and fatalities have significantly declined between 1987 and 1992.

ST maintains that the Harris Award modifications were, thus, necessary. The incidental work rule has eliminated delays in the movement of freight thereby providing more reliable service. The reduced crew consist modification has made feasible more frequent service to shippers' facilities, through the use of smaller numbers of cars per train and less labor costs per unit.

RLEA contends that no transportation benefits were achieved by the leases themselves, and that all benefits flow from the labor costs saved by modifying the lessors' CBAs. It views the leases as a design to transfer wealth from employees to the carrier by abrogating the lessors' CBAs, and suggests that the single system rationale is a product of hindsight. RLEA points to prior testimony of ST officials who acknowledged a goal of reducing labor costs through the ST-UTU CBA's more flexible work rules that would allow ST to use employees under its railroader concept for different functions and on reduced crews. RLEA warns that the agency is bound by the D.C. Circuit's remand decision as the law of the case and cannot adopt ST's rationale that it is permissible to find transportation benefits that flowed solely from modifying CBAs.

Examples provided by ST of the efficiencies gained from the leases themselves are, RLEA contends, instead directly related to the modifications to the employees' seniority rights under the lessor CBAs. Moreover, RLEA asserts that the subsidiary carriers could have consolidated into a single system without employing the leases or violating the carriers' CBAs. RLEA points to efforts to accomplish this end begun as early as 1983 after GTI acquired B&M. RLEA asserts that GTI had already consolidated the dispatching functions of B&M, MEC and PT, and entered agreements to use employees across seniority lines,

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[19](...continued)
been consummated, and that these changes went beyond the permissible selection and assignment of forces parameters. Specifically, ST complains that it was wrong to substitute the lessor CBAs' wage scales and structure for prior rights employees (those who came to ST from the lessor carriers); to require it to pay train and engine crews straight hourly wages instead of wages based on mileage; to require at least two crew members on trains rather than the complete flexibility intended in the ST-UTU agreement which, with modern technology, could permit single person crews; and to limit use of the incidental work rule (the assignment of an employee to perform duties outside his class or craft) to 50% of an employee's work-day.

even on other carriers, before the leases were begun. It also contends that efforts to achieve run-through service began in 1986. Thus, RLEA argues, the lease transactions and concomitant CBA modifications were not necessary.

RLEA asserts that service over the ST lines has, in fact, worsened: safety is worse; there is more outlawing,[20] a shortage of locomotives, worse track conditions and slow orders, and low employee morale. RLEA submits two verified statements (and attached exhibits) of Michael D. Twombly, an ST engineer who serves as the local chairman of the Brotherhood of Locomotive Engineers, in support of its factual assertions.

UTU concurs with RLEA that the only benefits achieved by the leases resulted from the labor savings in modifying the lessors' CBAs.[21] UTU contends that there is no public benefit to reducing crew size or in not paying an allowance to a conductor who must work "short handed." The union also suggests that ST has improperly applied the incidental work rule as approved in the Harris Award. Moreover, UTU contends that ST has failed to maintain its track and locomotives, resulting in significant delays in freight movement and poorer service.

UTU also reminds the Commission that it cannot change the law of the case as established by the D.C. Circuit decision, and asserts that the CBA modifications were not necessary either under section 11341(a) or 11347. UTU points out that arbitrator Kasher found no need to modify the lessors' CBAs and that arbitrator Harris indicated that he would not have changed them either, if left to his own devices.

In response to RLEA, ST argues that there is no deficit in the number of locomotives available to provide service and that the decreased number of locomotives reflects some of the economies that the leases permitted ST to achieve. ST also attacks RLEA's suggestion that its tracks are in poor repair due to deferred maintenance. While acknowledging that certain tracks are subject to slow orders, ST contends that this evidence is not indicative of a lack of

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[20] Outlawing occurs under the Hours of Service Act when an employee has worked for more than a 12-hour shift. To avoid outlawing, when a train crew has been on duty 12 hours, the carrier must stop the train and send a replacement crew to the train's location to relieve them.

[21] The gist of UTU's argument is in its opening statement:

> The real question should be whether any of the modifications were *necessary* for the leases to go forward. The simple answer is no. The major modification in the Harris Award was crew size reduction. By what stretch of the imagination or law could crew size have to be modified in order to implement a lease transaction? There is no public transportation benefit derived from a reduction of train crew size. It certainly was not an obstacle to the carriers operational plans to consolidate their operations under Springfield Terminal.

overall maintenance, and it points to the increase in its capital investment in its system from $5.1 million in 1990 to $8.4 million in 1992. ST also challenges RLEA's assertion that employee morale is low and offers statistics showing a low rate of voluntary resignations. Moreover, ST denies that it has inefficiently used its employees or that "outlawing" has occurred with any greater frequency than before the leases.

ST also rejects the premise underlying RLEA's assertion that, even if the leases realized a public transportation benefit, the lessor carriers could have achieved the benefits of consolidation without the leases and concomitant CBA modifications. It contends that no law requires carriers to use one mechanism over another. In addition, ST contests rail labor's contention that ST's reliance on the transportation benefits of a single system is merely *post hoc* rationalization. Admitting that there was no overall plan to lease the entire system to ST initially, ST maintains that this was the carriers' stated intention by the time of the final leases.

B. *Nature of Discovery and Supplemental Briefs.* RLEA's interrogatories asked for information related to customer satisfaction, capital improvements, safety, track condition, and the locomotives available for service. These concerns all address the second issue, *i.e.*, transportation benefits. ST supplied answers, where available, for calendar years 1990 through 1993.

In its supplemental brief, ST more fully describes the precarious financial condition of each of the lessor carriers at the time they were acquired and the efforts GTI undertook to improve them prior to the lease agreements.[22] GTI initially tried to improve them by diverting traffic to long-haul over the railroads and by consolidating functions. These efforts largely failed due to the economic recession of the 1980's, the competitive effects of trucking deregulation brought about by the Motor Carrier Act of 1980, and a costly strike in 1986 of the MEC by maintenance of way workers.

ST presents as the reasons for having entered into the subject leases the twin goals of enjoying the economic advantage of ST's less restrictive labor agreement and the efficiencies of developing a single system of operation. ST asserts that the Harris Award partially negated some of the intended benefits of a single system operation by imposing disparate contract provisions on the former lines of the B&M and the MEC, thus recreating some of the pre-existing barrier between the carriers at Portland, Maine.

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[22] GTI acquired MEC and its wholly owned subsidiary PT in 1981. It acquired B&M in 1983 and D&H in 1984.

In addressing what transportation benefits were, nonetheless, achieved by the leases, ST divides the proffered evidence into two categories: (1) "microeconomic," *i.e.*, the specific operating improvements made by ST on the leased lines; and (2) "macroeconomic," *i.e.*, the overall success of restoring the economic viability of the lines now comprising the ST system. ST relies on its initial submissions to demonstrate the microeconomic benefits, and supplements only its discussion of the macroeconomic evidence.[23] ST addresses four areas: economic performance, capital investments, safety, and a comparison of ST's viability with that of other New England railroads.

With regard to economic performance, ST claims that it has weathered the economic recession of the early 1990's. The number of cars handled in 1990 was 178,000. After a significant decline in 1991 and 1992, that figure rose to 163,302 cars in 1993. Rail operating revenues in 1990 and 1993 were $110 million, with a decline in the intervening years. Net railway operating income jumped from $1.1 million in 1990, to $14.4 million by 1993.

ST states that it made capital improvements of $5.1 million in 1990, $6.3 million in 1991, $8.4 million in 1992, and $12.6 million in 1993. In addition, it has increased the numbers of ties installed, the amount of rail laid, and the miles of track surfaced progressively from 1990 through 1993.

As to safety, ST states that its record of injuries reportable to the FRA declined further in 1993. ST also presents a comparison of reportable injuries supplied by other New England railroads to reflect that its record is superior to theirs.

ST also compares its viability to that of the Canadian Pacific (CP), Central of Vermont (CV), and Bangor and Aroostook Railroad (BAR). ST asserts that CP is seeking to abandon lines throughout New Brunswick and Maine, evidencing that carrier's shaky financial condition, and presenting further opportunity for GTI to expand its own operations. ST reports that CV has suffered severe financial losses during the last several years. In its supplemental brief, ST states that BAR also remains for sale and has been itself the subject of a petition for exemption before the Commission.

In summary, ST asserts that its accomplishments, especially when compared to the decline of its competitors, are evidence that the leases achieved real transportation benefits. Because labor protection was imposed on the leases, these improvements were assertedly not at the expense of rail labor.

In its supplemental brief, RLEA claims that ST's answers to its interrogatories further establish that GTI has allowed its rail system to

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[23] ST submits an additional affidavit of ST President David Fink in support of these facts.

deteriorate under the leases. Accordingly, RLEA insists that these material issues of disputed fact must be resolved by an oral hearing. RLEA rejects ST's answers regarding customer satisfaction and attaches as exhibits its own evidence of customer dissatisfaction.

In addition, RLEA reasserts that ST's locomotive fleet and track condition are inadequate to safely provide satisfactory service. RLEA attaches (Exhibit H) a letter dated April 22, 1994, from FRA Administrator Molitoris to UTU's Legislative Director regarding ST's safety record. During 1992 and 1993, the FRA conducted 477 equipment-related inspections on the ST. ST paid fines amounting to over $250,000. During a recent inspection of 86 of ST's locomotives, the FRA found 50 federal defects, which it states to be "an intolerable level."

In its reply, ST details the story behind each of the RLEA's customer service complaint exhibits to show that these concerns were not significant. ST also explains that its use of excepted track reflects proper investment decisions and is not indicative of operating problems. ST characterizes the FRA letter as the outcome of rail labor's enlistment of the FRA to further its labor disputes with the carrier. ST attaches (Exhibit 5) its June 9, 1994 reply to the FRA letter, criticizing it for containing statements at odds with the facts. ST maintains that the so-called defects were minor especially since they were identified during severe winter conditions when ST's major concern was merely to keep its trains running. In rebuttal, ST compares its injuries for the first 4 months of 1994 to that of all 37 domestic railroads and concludes that its safety record is one of the best. Only five had a lower injury rate.

3. *Remedies*. In reopening the record, the Commission invited the parties to address the appropriate remedy depending on whether or not the agency finds that the CBA provisions modified "rights, privileges, and benefits," and/or that there were no transportation benefits which resulted from the lease transactions. The Commission listed six possible outcomes:

1. Commission reaffirmance of the transactions in all respects.

2. A return to the *status quo ante*, *i.e.*, withdrawing the lease exemption approvals, and requiring GTI to transfer the leases back to the lessor carriers.

3. Leaving the lease transfers and labor protections intact, but withdrawing approval of any modifications to the lessors' CBAs.

4. Leaving the leases intact but requiring that no modifications to the CBAs be permitted and no labor protection be afforded in the future (*i.e., "status quo post"*).

5. Leaving the lease transfers and labor protection intact, but reopening the proceeding in order to return the case to an arbitrator to (1) offer his services as a mediator, or (2) issue a decision in light of the court's decision and in light of the Commission's authority under both 49 U.S.C. 11341(a) and 49 U.S.C. 11347 to modify collective bargaining agreements.

6. Commission mediation in an attempt to arrive at an agreement by the parties.

ST believes that only option 1 is an appropriate remedy. It believes that the Harris Award CBA modifications were necessary; did not change protected "rights, privileges, and benefits"; and that the leases themselves furthered public transportation goals. Therefore, ST submits that the Harris Award may be reaffirmed.[24]

Alternatively, ST asks the Commission to employ option 5 so that an arbitrator might use the ST-UTU agreement as a basis for a new implementing agreement with only narrow modifications to it. In particular, ST complains that the Harris Award unnecessarily imposed artificial barriers based on the lessors' boundaries which interfere with the fullest benefits from a single system.

ST also contends that options 2 - 4 are unacceptable. The changes resulting from the leases are now "irreversible." Many facilities no longer exist. If the old crew consist rules were reinstated, ST would have to hire 152 new train employees and 8 clericals, costing $8.7 million per year in salaries and benefits. It asserts that such expenses would wipe out ST's profits.

Both RLEA and UTU ask the Commission to revoke the leases (option 2). If ST discontinues service, RLEA asks the Commission to impose the *Oregon Short Lines* labor conditions to protect adversely affected employees. If it is found that the leases may remain intact but that the CBA modifications were error (option 3), RLEA suggests that the employees should be made whole for injuries due to the CBA modifications from 1986 to the present. RLEA further

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[24] ST, although willing to have the Harris Award affirmed, believes that it contains several defects. In its supplemental brief, filed June 6, 1994, ST discloses that the moratorium in the ST-UTU agreement on serving section 6 notices under the Railway Labor Act has now expired and that, according to ST, the parties are actively engaged in negotiating changes which ST hopes will restore some of the flexibility eliminated by the Harris Award.

Accordingly, we hereby terminate a separate proceeding instituted by rail labor on January 3, 1994. In that petition, rail labor sought clarification of the Harris Award on the question of whether the Commission intended to apply the moratorium clause of the ST-UTU agreement to bar ST employees from filing section 6 notices. The lessor CBAs' moratorium clauses had expired in 1986, but the ST-UTU clause did not expire until June 1, 1994. In *BMWE v. GTI*, 808 F. Supp. 46 (D. Me. 1992), the district court concluded that this issue fell within the Commission's jurisdiction. Now that the issue is moot, the proceeding is dismissed.

asserts that it is irrelevant whether it is now physically or financially feasible to revoke the exemptions and/or restore the abrogated CBAs. UTU adds that it would be willing to participate in mediation/arbitration over the crew consist issue.

DISCUSSION AND DECISION

1. *Procedural Ruling.* On April 16, 1995, the BMWE and ST entered into a new CBA intended by the parties to supplant the Harris Award implementing agreement as applied to affected employees in operating the leased lines. Accordingly, BMWE withdrew from this proceeding on May 23, 1995. Despite that status, numerous present and former employees of the leased lines who are currently represented by BMWE have moved to intervene, each alleging that they are adversely affected by the leases, ST has abrogated their contractual rights, and the abrogation results in a compensable taking under the Fifth Amendment to the United States Constitution.

ST opposes the intervention on three grounds: (1) under section 4 of the *Mendocino* conditions imposed on these transactions, employees represented by a labor organization must pursue their interests through that union representation; (2) allowing employees to pursue interests directly would defeat that process; and (3) petitioners do not raise any issues separate from those already resolved on their behalf by BMWE. Thus, ST concludes, the petitioners lack both a factual and legal basis to intervene.

We agree that the petitions must be denied. Section 4 of *Mendocino* unambiguously requires employees to negotiate through their union representatives. Moreover, Article I, section 11 of *Mendocino* requires the employees to negotiate and/or arbitrate disputes respecting the interpretation, application or enforcement of its conditions. Thus, petitioners reliance on *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971), is misplaced. In conformance with *Nemitz*, we have already found that the Harris Award is a "fair and equitable arrangement to protect the interests of the railroad employees affected," 404 U.S. at 41, and the Court affirmed all aspects of our prior decisions with regard to the Harris Award (except as to the two instant remanded issues addressed herein, for which the Court sought further elucidation).[25]

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[25] An argument has been advanced that any CBA override effected under Article I, section 4 of the *New York Dock* conditions amounts to a "taking" of private property in violation of the Fifth Amendment. That question cannot be resolved by a *New York Dock* arbitrator, it cannot be resolved by an administrative agency reviewing an award issued by the arbitrator, and it cannot be resolved (continued...)

2. *Rights, Privileges, and Benefits.* The court has asked for clarification of the permissible extent of modification of existing CBAs in this proceeding in light of the required "preservation" of "rights, privileges, and benefits."

The Commission had occasion to examine this issue and provide the definition sought by the D.C. Circuit in holding that merging of four separate seniority rosters to create a new operating district so as to implement a series of Commission approved consolidations did not violate the prohibition against changing "rights, privileges and benefits." *CSX Corp.--Cont.--Chessie System, Inc., et al.* (*Arbitration Review*) (*CSX*), 10 I.C.C.2d. at 846-51, *affirmed sub nom. United Transportation Union v. Surface Transportation Board*, 108 F.3d 1425 (1997) (*UTU*). For the reasons set forth in more detail in that proceeding, *CSX*, 10 I.C.C.2d. at 846-51, we agree with the ICC that vested pension, health, and welfare benefits are the sort of "rights, privileges, and benefits" that Congress was referring to in the Amtrak statute, from which this language derives. Other provisions of CBAs must be susceptible to modification if and to the extent necessary to permit implementation of a transaction that has been approved as being in the public interest. *Cf. Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961).

The *UTU* court in affirming the ICC's *CSX* decision acknowledged that in that decision the Commission had provided the definition of "rights, privileges and benefits" which the court had sought in its remand of this proceeding, 108 F.3d 1430. As explained by the Court:

> [2] In this case, the Commission offers a definition: "rights, privileges, and benefits" refers to "the incidents of employment, ancillary emoluments or fringe benefits—as opposed to the more central aspects of the work itself—pay, rules and working conditions." *See*, Commission decision at 14, reprinted in J.A. 237. And "the incidents of employment, ancillary emoluments or fringe benefits" refers to employees' vested and accrued benefits, such as life insurance, hospitalization and medical care, sick leave, and similar benefits. *See, id.* at 15, reprinted in J.A. 238. According to the Commission, seniority provisions are not within the compass of "rights, privileges, and benefits" protected absolutely from the Commission's abrogation authority. *See, id.* On this point, the Commission notes that seniority provisions "have consistently been modified in the past in connection within [sic] consolidations. This may be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions."

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[25](...continued)
even by an appellate court reviewing a decision entered by the administrative agency. Takings claims can be adjudicated only in the court of Federal Claims or, in certain limited circumstances, in a District court.

Id.

The Court went on to affirm this definition in the following language which appears to be dispositive of the issue in this case on remand:

> The Commission's interpretation is reasonable. *See, American Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 847-48 (D.C. Cir. 1995) (holding that the ICC's interpretation of New York Dock rules is entitled to substantial deference by a reviewing court). Under the Commission's interpretation, "rights, privileges and benefits" are protected absolutely, while other employee interests that are not inviolate are protected by a test of "necessity," pursuant to which there must be a showing of a nexus between the changes sought and the effectuation of an ICC-approved transaction. Under this scheme, the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by Congress.

Id.

We find that the modifications permitted by Harris (the incidental work rule and reduced crew consist)[26] clearly do not involve immutable "rights, privileges or benefits," but rather consist of the sort of changes arbitrators have historically been authorized to make under the Washington Job Protection Agreement, Agreement Of May, 1936, Washington, D.C. (WJPA), in which case they can properly be made upon an adequate showing of necessity for doing so. The Harris modifications in this case are clearly permissible.

The above quoted portions of the decision of the D.C. Circuit in *UTU* also disposes of RLEA's argument that the modifications were impermissible because they went beyond issues necessary to the selection and assignment of forces and affected seniority and scope rules. It is now well settled that scope and seniority rules of collective bargaining agreements can be modified. *American Train Dispatchers Association v. ICC*, 26 F.3d 1157, 1160-1165 (D.C. Cir. 1994), *reh'g denied* (September 15, 1994) (*Dispatchers*); *UTU*, 108 F.3d at 1430, where the court after satisfying itself that employees would lose no vested fringe benefits as a result of proposed changes to the CBAs upheld the agency's holding that the proposed changes do not undermine any protected "rights, privileges, and benefits".

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[26] Harris approved four modifications: (1) giving seniority to furloughed lessor carriers' employees entitling them to preferential hiring rights to new ST positions; (2) merging the PT/MEC seniority districts; (3) the 50% incidental work rule; and (4) the 2-person crew consist rule. Of these changes, rail labor only judicially challenged the latter two. Accordingly, they are the only changes discussed herein.

In short, the parties have not presented any new reasons sufficient for us to countermand the expertise of this experienced arbitrator (a former head of the National Mediation Board). This is particularly so in view of the deferential review we give to the decisions of arbitrators. Thus, for the reasons stated herein, we reaffirm the October 4, 1990 decision that arbitrator Harris did not exceed the authority vested in arbitrators by section 11347 and the Commission's labor conditions thereunder.

3. *Transportation Benefits*. The court in *Executives* agreed with the statement in *Carmen II* (6 I.C.C.2d at 715) that whatever else a "fair arrangement" means under section 11347, the modification of a CBA must at a minimum be necessary to effectuate a transaction. 987 F.2d at 814. The court then found that "necessity" for modifying a CBA is defined by showing a purpose "to secure to the public some transportation benefit flowing from the underlying transaction [here a series of leases] * * * that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer." *Id.* at 815. The court reasoned that the purpose of the lease cannot merely be to abrogate the terms of a CBA, or "necessity" would provide no limitation upon the Commission's authority to infringe upon employees' rights under the RLA. *Id.* On remand, the Commission was instructed to "clarify whether there are in fact transportation benefits to be had from implementing the lease transactions, the realization of which necessitates abrogating the CBAs." *Id.* at 815.

Thus, there are two sub-issues to resolve on remand: (1) whether, in originally approving the leases, the Commission did so to further public transportation benefits other than those that result from a transfer of wealth from the employees to the employers; and (2) specifically for purposes of this proceeding, whether the record developed since the leases were consummated demonstrates that the Commission's original expectations were reasonable and were carried out sufficiently to justify allowing the leases to remain intact.

A. *The Commission's Purpose*. We believe that the Commission's early decisions demonstrate that transportation benefits were expected to flow from approval of the transactions. Several decisions discussed the public transportation benefits anticipated from the lease approvals.[27]

[27] Admittedly, some of these prior comments did not distinguish between benefits flowing from the leases themselves and the efficiencies to be gained by modifying the CBAs. That is why, on remand, the Commission invited the parties to supplement the record.

In the February 17, 1988 decision, determining that the impact of the series of leases was essentially that of a merger or consolidation, the Commission recognized as a transportation benefit "the economies afforded by the [system-wide application of the] railroader concept and the ST work rules." 4 I.C.C.2d at 329.[28] In the January 10, 1989 decision reversing the Kasher Award, the Commission directly rejected RLEA's contention that there were no transportation benefits to be derived from the transactions. The Commission explained:

> RLEA's argument ignores the benefits that flow from the creation of a more competitive and efficient carrier * * *. GTI is seeking, through these transactions, to become more cost efficient and to improve its service, thereby enhancing its intramodal and intermodal competitive posture.

January 10, 1989 Decision, at 4.

In addition, the Commission reversed the Kasher Award's retention *en toto* of the lessor carriers' CBAs because one "important objective" of the lease restructuring was to achieve "the economies afforded by application of the more flexible ST work rules to the entire GTI system." *Id.* at 8. Preserving unchanged the rates of pay and work rules of the lessor carriers' CBAs would, thus, "vitiat[e] one major purpose of the underlying leases." *Id.* at 7.[29]

In the October 4, 1990 decision (page 21), the Commission again expressed its reasons for approving the leases. The Commission stated:

> "[W]hat motivated our authorization was our desire to improve rail service in the region through increasing GTI's flexibility to operate more efficiently on a systematic [*sic*] [system-wide] basis." The Commission viewed the incidental work rule as "intended to promote better and lower cost rail service, by facilitating the assignment of incidental work to employees when and where needed."

Id.

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[28] At that time, however, the Commission was unable to determine from the record in the case whether that "optimism will be borne out." *Id.* at 334.

[29] Significantly, this was the same reason that the Commission applied in approving the purchase and lease by Wilmington Terminal (WTR) of certain lines of CSX Transportation. There, the Commission stated: "Its [WTR's] successful operation depends upon its ability to maintain an efficient, adaptable, and flexible work force, governed by wage rates, assignments, rules, and benefits it has established through direct discussion with the individual employees. It says that CSX's agreements require larger crews, higher wage rates, and less flexible work rules than WTR could successfully accommodate." 6 I.C.C.2d at 812-13. The Commission's approval was upheld in *RLEA v. ICC*, 999 F.2d 574 (D.C. Cir. 1993).

Indeed, there are real efficiencies in creating a single operation in place of several separate companies, each with boundaries limiting interchanges and restricting the efficient use of crews and equipment. These are not improvements which flow solely from having allowed the modification of the lessor CBAs.

RLEA rejects the single system rationale and claims it is a product of hindsight. While ST's original intent regarding the first several leases may have been more narrow, it is clear that by the time of the February 17, 1988 decision, both ST and the Commission no longer viewed the leases as piecemeal transactions, but rather as tantamount to creating a single consolidated system that would provide improved and more efficient rail service to the public.

We reject RLEA's argument that the carriers were already consolidated into a "single system" before employing the leases or affecting the carriers' CBAs. It is true that in approving GTI's control of B&M and MEC, the Commission anticipated a public benefit from the creation of "a stable and dependable regional rail network" with improved service and operational savings. *Guilford Transp. Industries, Inc.--Control--B&M Corp.*, 366 I.C.C. 294, 336 (1980). One of the planned benefits was run-through train service from Bangor, ME to Mechanicville, NY. Subsequently, the Commission authorized GTI to control D&H, with the expectation of the creation of a "consolidated three railroad system" under GTI's control, and with the hope of improved routings and more efficient operations including run-through trains. *Guilford Transp. Industries, Inc.--Control--D&H Ry. Co.*, 366 I.C.C. 396, 397-98 (1982). While these transactions permitted a degree of coordination of dispatching, repair, switching operations, and similar functions, they did not result in a fully integrated system. The subsequent lease and trackage rights transactions that are the subject of the instant proceedings did.

The Commission consistently recognized that consolidations are in the public interest when they result in operating efficiencies such as the elimination of duplicative facilities and use of more direct routings. *Union Pacific--Control--Missouri Pacific, Western Pacific*, 366 I.C.C. 462, 486 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (*MOP-UP*); *Burlington Northern, Inc.--Control & Merger--St. L.*, 360 I.C.C. 788, 934 (1980), *aff'd sub nom. Missouri-Kansas-Texas R. v. United States*, 632 F.2d 392 (5th Cir.1980), *cert. denied*, 451 U.S. 1017 (1981) (*BN-Frisco*).[30] There are significant service improvements that can result from the ability to provide efficient single system rail service throughout a region. *MOP-UP*, at 489; *BN-Frisco*, at 935-36. "Shippers prefer

[30] The potential public interest benefits to consolidations are codified at 49 C.F.R. 1180.1(c).

single line or single system service because it improves reliability and transit times, and equipment availability." *MOP-UP*, at 489. Shippers also benefit when "single rail systems are able to minimize interchange delays by increasing the use of preblocking and run-through trains." *Id.* The fact that some of the efficiencies involved could have been achieved some other way is irrelevant. It is not our role to dictate to a carrier the business means it chooses to employ to achieve economies and efficiencies in its operations, provided that the carrier complies with the ICA.[31] In sum, the Commission approved the leases presented by the carriers involved in order to foster real public transportation benefits.

B. *Transportation Benefits Achieved.* Ordinarily, we would not take a second look to determine whether benefits have been realized as a result of a transaction approved by the Commission, and to what extent. That would be unduly burdensome and could result in reversals of authority that would be extremely disruptive of business transactions that have already been consummated. But because of the unique nature of this proceeding, because of the need to satisfy the court on remand, and because the Commission allowed the parties the opportunity to supplement the record and demonstrate the extent to which public transportation benefits have been achieved since its initial approval of the leases, we will do so in this proceeding.

ST takes great pains on remand to explain how the Harris Award modifications have resulted in efficiencies and economies that have been reinvested in the system contributing to improved service.[32] It asserts that trains move through the system more quickly and efficiently; shops and other facilities have been consolidated, eliminating redundant efforts; centralized train, crew and clerical dispatching operations are more efficient; and it can better utilize personnel, equipment and other resources throughout the system. These changes, ST claims, have resulted in developing new business and accruing profits that have been reinvested in the system, thus leading to satisfied customers. In support of its position, ST has furnished nearly 100 letters from satisfied shippers, representing over 75% of its customers who, in essence, say that their rail service has never been so good. *See* ,Verified Statement of Fraley; Second Verified Statement of Fink, at 26.

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[31] Since 1940, the Commission's role has been to evaluate carrier-originated merger or consolidation proposals to determine whether they are consistent with the public interest, *id.* at 564.

[32] ST also concedes that some of the improvements flowed directly from the CBA modifications, and challenges the correctness of the D.C. Circuit's analysis that such modifications are always merely a transfer of wealth from employer to employee. However, as discussed *supra* at 26, we accept as a given for purposes of this remand that benefits which flow solely from CBA modifications cannot be considered to be public transportation benefits.

We believe that ST has satisfactorily demonstrated that it has, in large measure, achieved the efficiencies and economies of a single system operation anticipated in the Commission's approval of the lease transactions. ST has reversed the financial losses of the three leased lines and turned them into a viable consolidated New England rail service which has withstood an economic recession and a labor strike. ST's evidence on improved transit time, safety, net railway operating income, inventoried equipment, capital improvements and customer satisfaction is persuasive.

Rail labor challenges the accuracy of many of these claims, and attempts to show that ST has poorer service, worse transit times, declining locomotive inventory, and a poor safety record. It reasserts its request for an oral hearing to resolve disputed issues of material fact. We believe that ST competently rebuts each of rail labor's arguments, and that an oral hearing is not necessary to weigh the record evidence. Accordingly, we deny the request for an oral hearing.[33]

For instance, the outpouring of customer letters in support of ST's accomplishments far outweighs the incidents of unhappy clients or poorly resolved service-related disputes which rail labor presented. Similarly, rail labor's second guessing of ST's use of locomotives is unconvincing. ST's explanation that it has achieved economies by decreasing its inventory of locomotives and repairing rather than replacing locomotives is a legitimate business decision. ST also satisfactorily explains why certain track is subject to slow orders, and offers persuasive evidence of its steadily incremental increases in capital improvements for each of the years following the leases.

Finally, rail labor has introduced evidence concerning ST's accident rating, and claims the FRA has expressed concern about ST's accident safety record. But according to the record compiled, ST has established a better safety record, measured by reportable injuries, than all but five domestic railroads nationwide.

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[33] As successor to the Commission, we may properly assess the weight to be given to facts adduced under the modified procedure, without requiring an oral hearing. *See, e.g.*, 49 CFR 1112.1 (ICC may use modified procedure without oral hearing when "substantially all material issues of fact can be resolved through submission of written statements"); *Airporter of Colorado, Inc. v. ICC*, 866 F.2d 1238, 1242 (D.C. Cir. 1989) (ICC has broad discretion whether to allow oral hearing under modified procedure); *Sea-Land Service, Inc. v. United States*, 683 F.2d 491, 497 (D.C. Cir. 1982) ("the Commission must conduct whatever proceedings are necessary to ensure that it has sufficient information so that its final decision reflects a consideration of the relevant factors"); *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 241-42 (1973) (statutory hearing requirement satisfied in absence of oral hearing). We are satisfied that we can weigh the facts presented on this record without an oral hearing.

The parties clearly are offering evidence addressing two different facets of safety. Although we are troubled by rail labor's and the FRA's safety concerns, they have not been shown to be linked to approval of the lease transactions. We are satisfied that, based on all of the safety evidence, ST's overall safety record is acceptable and has not been shown to be a sufficient detriment to the public interest as to cause us to revisit approval of these transactions. Enforcement of safety for the future is of course the province of FRA.

CONCLUSION

In sum, we are satisfied that the leases meet the *Executives* standards. Thus, we find that the CBA modifications that the Harris Award allowed do not disturb immutable "rights, privileges, and benefits." We also find that the record evidence developed on remand supports the initial expectations that approval of the leases and the Harris Award would foster public transportation benefits apart from modification of collective bargaining agreements. Therefore, we reaffirm the Commission's authorization of the transactions pursuant to the implementing agreement imposed by arbitrator Harris in all respects.

It is ordered:

1. The Commission's prior decision declining to vacate the Harris Award is reaffirmed and the implementing agreement remains in effect.
2. RLEA's request for oral hearing is denied.
3. The proceeding initiated by rail labor on January 3, 1994, seeking clarification of the Harris Award, is dismissed as moot.
4. This decision is effective October 25, 1998.
5. A copy of this decision will be served upon the Clerk for the United States Court of Appeals for the District of Columbia.

By the Board, Chairman Morgan and Vice Chairman Owen.