STB FINANCE DOCKET NO. 28905 (SUB-NO. 22)[1]

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.

(ARBITRATION REVIEW)

Decided September 22, 1998

We are affirming the orders entered by the ICC in these proceedings in its decisions served in 1988, affirming in one case (4 I.C.C.2d 1080) and affirming in part and reversing in part in the other (4 I.C.C.2d 641) the arbitration awards previously entered in these proceedings in accordance with Article I, section 4 of the *New York Dock* conditions. *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (*New York Dock*). We do so employing the reasons and the standards set forth in the ICC's subsequent 1990 decision in this matter served on June 21, 1990 (6 I.C.C.2d 715). However, we are not remanding the matters to the parties for further negotiation as that decision proposed to do because developments in the law since then have made it unnecessary to do so and because the parties have waited long enough for a final resolution of these proceedings.

We answer the question left open by the Supreme Court decision in *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 134 (1991) (*N&W*), as follows: Where *New York Dock* labor protection is required to be imposed upon a rail consolidation by virtue of 49 U.S.C. 11347, now section 11326, the scope of an arbitrator's authority to modify collective bargaining agreements (CBAs) as "necessary * * * to carry out the transaction" under section 11341(a), now section 11321(a), is limited by the provisions of these labor protective conditions as explained by the ICC in its 1990 decision and as updated and further explained in this decision. We conclude that it is unnecessary, premature and inappropriate for us to address in the abstract at this time the reach of the immunity provision of section 11341(a), now section 11321(a), where it is not constrained by the required imposition of *New York Dock* labor conditions.

[1] This decision also includes *Norfolk Southern Corporation– Control– Norfolk and Western Railway Company and Southern Railway Company* (Arbitration Review), Finance Docket No. 29430 (Sub-No. 20).

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BY THE BOARD:[2]

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[2] The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (*ICCTA*), effective January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission), and established the Surface Transportation Board (Board). The Act transferred from the ICC to the Board a number of the functions formerly performed by the ICC, including the rail carrier control functions formerly codified at 49 U.S.C. 11341-11347, and now codified at 49 U.S.C. 11321-11326.

Section 204(b)(1) of the *ICCTA* provides, in general, that any proceedings pending before the ICC at the time of its termination and that involve functions transferred from the ICC to the Board shall be decided by the Board under the law as in effect prior to the enactment of the *ICCTA*. We will therefore decide these proceedings under the old law (*i.e.*, under old 49 U.S.C. 11341, 11343, 11344, and 11347).

ICCTA made no significant changes to the substantive law as relevant to these proceedings, although it did effect a renumbering of the sections. All further statutory references in this decision will be, except as specifically indicated otherwise, to the sections of the law as in effect prior to January 1, 1996.

BACKGROUND

Finance Docket No. 28905 (Sub-No. 22). In *CSX Corp.– Control– Chessie and Seaboard C.L.I.*, 363 I.C.C. 518 (1980) (*CSX Control*), the ICC approved, subject to the *New York Dock* conditions, the control by CSX Corporation of two noncarrier railroad holding companies, the Chessie System, Inc. (Chessie) and Seaboard Coast Line Industries, Inc. (SCLI). The railroads controlled by Chessie included the Chesapeake and Ohio Railway Company (C&O). The railroads controlled by SCLI included the Seaboard Coast Line Railroad Company (SCL).[3]

In 1980, when the ICC approved the *CSX Control* transaction, C&O operated a freight car heavy repair shop at Raceland, KY, and SCL operated a freight car heavy repair shop at Waycross, GA. These two shops continued to function for the next several years. The Raceland shop continued to perform freight car heavy repair work for C&O, and the Waycross shop continued to perform freight car heavy repair work for SCL and, after a time, for SCL's corporate successor, an entity first known as Seaboard System Railroad, Inc. and later known as CSX Transportation, Inc. (CSXT).

In August 1986, C&O and CSXT (hereinafter referred to collectively as CSX) served notice under *New York Dock*, Article I, section 4, on BRC and other involved unions that, on or about December 31, 1986, the Waycross freight car heavy repair shop would be closed and its functions would be transferred to the Raceland freight car heavy repair shop. The notice stated that the work to be moved from Waycross to Raceland, which was then being performed at Waycross under the SCL Agreement, would be "coordinated with such work presently being performed at Raceland under the C&O Agreement." The notice indicated that 149 positions (121 of which were represented by BRC) would be abolished at Waycross, and that 107 positions (99 of which would be represented by BRC) would be established at Raceland. CSX and BRC

[3] In *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963) (*SCL Merger*), the ICC had approved, subject to the then standard labor protective conditions, the formation of the SCL through the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). In 1966, in anticipation of the consummation of the *SCL Merger* transaction, SAL and ACL had entered into a labor protective agreement, commonly referred to as the Orange Book agreement, with the Brotherhood of Railway Carmen (BRC) and 16 other unions. The Orange Book gave SCL the right to transfer work and employees throughout the merged SCL system, and gave all covered employees (those employed on or before July 1, 1967) certain lifetime job protections.

attempted to negotiate regarding the proposed transfer, but were unable to reach agreement. The matter was then submitted to arbitration.

On March 23, 1987, the arbitration committee entered its opinion and award (*LaRocco Award*). The committee, relying heavily upon the ICC's 1983 *DRGW* decision,[4] determined that, under Article I, section 4 of the *New York Dock* conditions, it had jurisdiction to formulate an implementing agreement, and that, pursuant to 49 U.S.C.11341(a), the implementing agreement would be immunized from conflicting provisions in the Railway Labor Act (RLA) and in existing CBAs. The committee further determined, however, that, on account of the section 11341(a) "necessity" requirement, such an implementing agreement had to "reasonably accommodate" existing CBAs and collective bargaining rights.[5] The "reasonable accommodation" formula attained particular significance on account of the committee's finding that the Orange Book, in explicitly according SCL the right to transfer Orange Book protected employees and their work throughout the SCL system, implicitly barred SCL and its successors from transferring Orange Book protected employees or their work beyond the SCL system.

The implementing agreement that the committee formulated reflected what it considered to be a "reasonable accommodation" of the section 11341(a) immunity provision with the Orange Book agreement. Acknowledging section 11341(a), the committee concluded that the Orange Book provision barring the transfer of *the work* of covered employees beyond the former SCL system "must be subordinated to the Carriers' right to engage in the authorized *New York Dock* transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland." *LaRocco Award*, at 36-37. But, reflecting its "reasonable accommodation" standard, the committee ruled that the Orange Book provision barring the transfer of *covered employees* beyond the former SCL system would not be thus subordinated. "Unlike the work, the Orange Book limitation on transferring

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[4] *Denver and Rio Grande Western Railroad Company—Trackage Rights Over Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO, et al.*, Finance Docket No. 30000 (Sub-No. 18) (ICC served October 25, 1983) (*DRGW*), *rev'd sub nom. Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), discussed *infra*, at 10. A few months after the entry of the committee's opinion and award, the D.C. Circuit's decision was *vacated* on procedural grounds in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987).

[5] "[T]he [section 11341(a)] exemption is only triggered when *necessary* * * *. To the extent that terms of collective bargaining agreements and collective bargaining rights *do not thwart or substantially impede* the approved transaction, those agreements and rights are preserved * * *. If feasible, the transaction should *reasonably accommodate* existing collective bargaining agreements and collective bargaining rights." *LaRocco Award*, at 33 (emphasis added).

covered employees throughout the SCL system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the *New York Dock* conditions." *LaRocco Award*, at 37.

Accordingly, the committee, in formulating an implementing agreement, directed the parties to adopt the implementing agreement that had been proposed by CSX, subject to this one significant exception: that Waycross employees covered by the Orange Book could not be compelled to transfer to Raceland.

In *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641 (1988) (*Carmen I*), the ICC affirmed in part and reversed in part the committee's opinion and award, and remanded to the committee for further proceedings consistent with the ICC's decision.

The ICC affirmed the part of the committee's opinion and award that approved the movement of the work performed at Waycross. The ICC noted that the committee had concluded that "it had the authority to move both work and employees to Raceland, despite potentially conflicting provisions in the RLA and the Orange Book Agreement ('the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation,' award at 34). This is a correct statement of our position and we affirm the committee's finding on its authority." *Carmen I*, 4 I.C.C.2d at 649. The ICC restated the applicable standard as follows:

> [T]he carrier is permitted to carry out and fully implement [a transaction the Commission has authorized] despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion.

Carmen I, 4 I.C.C.2d at 650.

The ICC reversed the part of the committee's opinion and award that created an Orange Book employees exception to the prescribed implementing agreement. The ICC ruled that the committee had erred in fashioning a standard of "slight impairment of the transaction" for permitting a CBA provision to conflict with the implementation of an approved transaction. This "slight impairment of the transaction" standard, the ICC stated, contradicted the correct standard ("a transaction hurdles all legal obstacles preventing implementation"), and would effectively undercut the ICC's authorization of the transaction at issue.

[E]ven if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission.

Carmen I, 4 I.C.C.2d at 649-50. The ICC added that, even if the committee's "slight impairment of the transaction" standard were appropriate, the evidence of record did not support the application of that standard in the present circumstances. The evidence, the ICC said, established that a prohibition against the transfer of Orange Book protected employees "imposed a significant, if not insurmountable, obstacle to implementation of the transfer." *Carmen I*, 4 I.C.C.2d at 649. Accordingly, the ICC set aside the portion of the decision holding that CSX may not require transfer of employees and remanded the matter with the instruction that such transfers are of course subject to the terms set forth in *New York Dock* for the protection of the interests of affected employees.

Finance Docket No. 29430 (Sub-No. 20). In *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 171 (1982) (*NS Control*), the ICC authorized Norfolk Southern Corporation to acquire control of the separate railroad systems of Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern). The approval was subject to the *New York Dock* conditions.

In 1982, when the ICC approved the *NS Control* transaction, each railroad system performed its own power distribution work. On the N&W, power distribution was performed at an N&W facility in Roanoke, VA, by supervisors who were represented by the American Train Dispatchers Association (ATDA), and who were covered by an ATDA/N&W CBA. On the Southern, power distribution was performed at a Southern facility in Atlanta, GA, by supervisors who were considered management, and who, for this reason, were neither represented by a union nor covered by a CBA.

In September 1986, N&W and Southern (hereinafter referred to collectively as NS) notified ATDA that power distribution for the two railroad systems would be consolidated. This consolidation would involve the transfer of the work performed in the N&W's Roanoke facility to the Southern's Atlanta facility, which would thereafter be responsible for power distribution for the entire NS system. It was envisioned that the work at the Atlanta facility would be performed by Southern supervisors, and therefore would not be subject to a CBA. In a proposed implementing agreement, NS offered the N&W supervisors the opportunity to request consideration for new supervisor positions to be created on the Southern. NS was unwilling, however, to assign the transferred

N&W supervisors the same duties and territorial responsibilities they had had on the N&W. NS and ATDA attempted to negotiate regarding the proposed consolidation, but they were unable to reach agreement. The matter was then submitted to arbitration.

On May 19, 1987, the arbitration committee entered its decision and award (*Harris Award*). The committee, relying heavily upon the ICC's 1985 *Maine Central* decision,[6] determined, in essence, that, under Article I, section 4 of the *New York Dock* conditions, it had jurisdiction to formulate an implementing agreement, and that, pursuant to section 11341(a), the implementing agreement would be immunized from conflicting provisions in existing CBAs and in the RLA. The committee also ruled that Article I, section 4 of the *New York Dock* conditions empowered it to approve the transfer of work from a location subject to a CBA to a location not subject to a CBA. Accordingly, the committee adopted, with one minor exception, the implementing agreement that had been proposed by NS.

In *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 4 I.C.C.2d 1080 (1988) (*Dispatchers I*), the ICC affirmed the committee's decision and award. The ICC said that, under the auspices of the section 11341(a) exemption, the mandatory arbitration scheme of Article I, section 4 of *New York Dock* took precedence over RLA procedures whether asserted independently or based on an existing CBA.

> Article I, section 4 of *New York Dock* provides for compulsory, binding arbitration of disputes. It has long been the ICC's view that private collective bargaining agreements and RLA provisions must give way to the ICC-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission. Absent such a resolution, the intent of Congress that Commission-authorized transactions be consummated and fully implemented might never be realized. Moreover, 49 U.S.C. § 11341(a) exempts from other law a carrier participating in a § 11343 transaction as necessary to carry out the transaction.
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> *Dispatchers I*, 4 I.C.C.2d at 1083 (footnote omitted).

At The Court Of Appeals. In *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) (*Carmen*), the court of appeals, ruling that the section

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[6] *Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Company—Exemption From 49 U.S.C. 11342 and 11343,* Finance Docket No. 30532 (ICC served September 13, 1985) (*Maine Central), aff'd mem. sub nom. RLEA v. ICC,* 812 F.2d 1443 (D.C. Cir. 1987). (Commission order approving transaction and imposing labor protection—rather than RLA—governs labor management relations in implementing approved transaction.)

11341(a) immunity provision did not empower the ICC to override a CBA, reversed the ICC's decisions in *Carmen I* and *Dispatchers I* and remanded the records to the ICC in order that the ICC might determine whether further proceedings were necessary. The ICC accepted the remand, and, on June 21, 1990, it served its decision on remand, *CSX Corp.— Control—Chessie and Seaboard C.L.I.*, 6 I.C.C.2d 715 (1990) (*Carmen II*). CSX and NS, however, did not agree with the decision of the court of appeals; instead, they sought certiorari; and, on March 19, 1991, the Supreme Court issued its decision on certiorari, reversing the D.C. Circuit. *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117 (1991) (*N&W*).

On Remand. In the interim the ICC issued *Carmen II*, which held that, in connection with an approved transaction, CBAs and collective bargaining rights could be modified, without resort to RLA procedures, under the auspices of section 11347 and the protective conditions imposed thereunder. Thus, according to the ICC's decision, the CBA override authority that the court of appeals had held could not be based on section 11341(a) has a basis in section 11347 and Article I, section 4 of the *New York Dock* labor conditions. Section 11341(a) was found available to be relied upon for an RLA override authority commensurate with the changes in CBAs that could be effected under section 11347.

The *Carmen II* analysis is based upon the historical development of section 11347 and ICC labor conditions. The history behind this provision, leading to its enactment in 1940 as section 5(2)(f), is long and complex, and involves the Transportation Act of 1920, the Railway Labor Act of 1926, the Emergency Railroad Transportation Act of 1933, certain amendments to the Railway Labor Act enacted in 1934, the Washington Job Protection Agreement of 1936 (WJPA), and the Transportation Act of 1940.

The ICC indicated in *Carmen II* that the enactment of section 5(2)(f) in the Transportation Act of 1940 codified the legal framework that had been agreed upon by the negotiators of the WJPA in 1936, and set the stage for a 40-year era of labor peace with regard to mergers and consolidations. Upon approving a post-1940 merger or consolidation proposed by two or more railroads, the ICC would impose WJPA-based protective conditions. Rail management and rail labor would then negotiate implementing agreements to permit smooth implementation of the transaction, and, in the event of impasse, arbitrators were empowered to modify CBAs when necessary to implement the transaction. Prior to 1936, these negotiations would have been conducted under the interminable RLA dispute resolution procedures applicable to major disputes, and deadlock might well have been the result. After 1940, the mechanism for an RLA bypass having been put in place, these negotiations would have been

conducted under the WJPA, under comparable procedures negotiated in connection with the particular transaction, or under the comparable section 5(2)(f)-mandated procedures contained in the ICC's labor conditions. These various procedures, all of which were substantially the same and provided for mandatory binding arbitration, were designed to resolve covered disputes with a certain measure of dispatch and to overcome the obstacle of CBA provisions that might otherwise have prevented consummation of an approved transaction.

Carmen II indicates that the 40-year era of labor peace ushered in by the 1940 enactment of section 5(2)(f) ended about 1980 arguably due in part to a change mandated by the Railroad Revitalization and Regulatory Reform Act of 1976: the addition of the requirement that the ICC impose labor protection at least as protective of the interests of employees as the terms established under section 405 of the Rail Passenger Service Act (RPSA). This gave birth to Article I, section 2 of the *New York Dock* conditions which provide for the preservation of collective bargaining rights. Rail labor contended for a literal reading of Article I, section 2 so as to prevent any modifications of CBA provisions in approved consolidations except through resort to RLA procedures.[7] The carriers, on the other hand, responded with a reading of Article I, section 4 of the *New York Dock* conditions which would permit an arbitrator to change any provision of a CBA deemed an impediment to the approved consolidation. In *Carmen I* and *Dispatchers I*, the ICC applied the interpretation of Article I, section 4 of *New York Dock* and the section 11341(a) immunity provision commonly associated with its 1983 *DRGW* decision and its 1985 *Maine Central* decision (hereinafter referred to collectively as the *DRGW* doctrine). The *DRGW* doctrine asserted that, as a result of section 11341(a), the ICC approval of a transaction operated automatically to override all laws, including the RLA, as necessary to carry out an approved transaction, and that CBAs conflicting with an approved transaction had to give way. Under the *DRGW* doctrine, it was understood that the Article I, section 4 binding arbitration rule trumped the Article I, section 2 "preservation of contracts" rule. It was further understood that, by virtue of section 11341(a), a *New York Dock* arbitrator acting under Article I, section 4 was authorized to override any term of a CBA that impeded the effectuation of a merger.

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[7] More specifically, rail labor forced the ICC to address the issue in *DRGW* by seeking a declaration that the DRGW and MKT railroads could not operate over trackage rights imposed by the ICC to counteract the anticompetitive effects of a merger it had approved utilizing their own crews without negotiating with the employee organizations representing employees of the merged carriers under the RLA. The ICC concluded otherwise and its interpretation was ultimately upheld by the Supreme Court in *N&W*.

In *Carmen II*, the ICC made three refinements to the *DRGW* doctrine. *First*, the ICC substituted section 11347, which provides for the imposition of labor protective conditions in connection with an approved transaction, for section 11341(a) as the authority for modifying CBAs while foreclosing resort to RLA remedies. *Second*, the ICC set forth a more balanced interpretation of Article I, section 2 of *New York Dock*. Article I, section 2, the ICC indicated, cannot realistically be interpreted as bearing its literal meaning, *i.e.*, that CBAs shall be preserved without any qualification whatsoever. What Article I, section 2 means, the ICC found, is that contract rights shall be respected and not overridden unless necessary to permit an approved transaction to proceed.[8] *Third*, the ICC tempered what it had said in *DRGW* and *Maine Central*. It was still true, the ICC stated in *Carmen II*, that CBAs and the RLA had to yield to allow implementation of an approved transaction. However, section 11347, and the protective conditions imposed thereunder, only required CBAs and the RLA to yield to permit modifications of the type traditionally made by arbitrators under the WJPA and the ICC's conditions from 1940 to 1980; and section 11341(a) reinforced 11347 by requiring the RLA to yield so as not to block the sort of changes permitted under section 11347. The ICC did not attempt to define what changes should be considered to be necessary but stated in *Carmen II* that CBAs and the RLA should not be overridden simply to facilitate a transaction, but should be required to yield only when and to the extent necessary to permit the approved transaction to proceed.

The ICC did not attempt, in *Carmen II*, to apply its section 11347 analysis to the facts of the two proceedings then before the ICC (and now before the Board). Rather, in recognition of the central role accorded negotiation and arbitration in the fashioning of an implementing agreement, these two proceedings were "remanded to the parties to continue the implementing process in accordance with Article I, section 4 of the *New York Dock* conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision." *Carmen II*, 6 I.C.C.2d at 757. The two outstanding arbitration awards were vacated, because the arbitrators in the two cases had "based their decisions on pronouncements [in *DRGW* and *Maine Central*] that the *Carmen* court found to

[8] This was the first time the concept of necessity had been expressly applied to modification of a CBA by an arbitrator under 49 U.S.C. 11347—a concept that was embraced by the D.C. Circuit in *RLEA v. United States*, 987 F.2d at 806, 814-15 (D.C. Cir. 1993) (*RLEA*).

be incorrect statements of the law and that we modify in this decision," *Carmen II*, 6 I.C.C.2d at 721.[9]

At The Supreme Court. In *N&W*, the Supreme Court, holding that a carrier's exemption under section 11341(a) "from all other law" includes the carrier's legal obligations under a CBA, reversed the D.C. Circuit's *Carmen* judgment and remanded for further proceedings. The Supreme Court's *N&W* decision amounted to an affirmation of a key aspect of the ICC's decisions in *DRGW, Maine Central, Carmen I*, and *Dispatchers I*.

> We hold that, as necessary to carry out a transaction approved by the ICC, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers.

N&W, 499 U.S. at 133.

Before addressing the merits, however, the Supreme Court emphasized that its decision did not resolve certain issues:

> By its terms, the exemption applies only when *necessary* to carry out an *approved* transaction. These predicates, however, are not at issue here, for the Court of Appeals did not pass on them and the parties do not challenge them. For purposes of this decision, we assume, without deciding, that the ICC properly considered the public interest factors of § 11344(b)(1) in approving the original transaction, that its decision to override the carriers' obligations is consistent with the labor protective requirements of § 11347, and that the override was necessary to the implementation of the transaction within the meaning of § 11341(a). Under these assumptions, we hold that the exemption from "all other law" in § 11341(a) includes the obligations imposed by the terms of a collective-bargaining agreement.

N&W, 499 U.S. at 127-28 (footnote omitted; emphasis in original).

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[9] In a decision served July 20, 1990 (with corrections served July 25, 1990, and August 13, 1990), the ICC denied petitions to stay the effectiveness of *Carmen II* that had been filed by CSX and NS. In a decision served October 29, 1990, the ICC denied petitions seeking administrative reconsideration that had also been filed by CSX and NS. The denial of the stay petitions allowed the *Carmen II* decision to become effective, and, following the denial of the reconsideration petitions, should have led in due course to further negotiation and, if necessary, further arbitration. However, so far as the record before us indicates, it did not.

At the very end of its opinion, the Supreme Court again emphasized what was not being decided:

> The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the ICC held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. *See* n. 2, *supra*.[10] It also might be true that "[t]he breadth of the exemption [in § 11341(a)] is defined by the scope of the approved transaction * * *." *ICC v. Locomotive Engineers, supra*, at 298 (STEVENS, J. concurring in judgment).[11] We express no view on these matters, as they are not before us here.

N&W, 499 U.S. at 134 (brackets and ellipsis in original).

Back To The Court Of Appeals. Subsequent to the Supreme Court's *N&W* decision, the ICC's decisions in *Carmen I*, *Dispatchers I*, and *Carmen II* were all subject to review in the court of appeals. *Carmen I* and *Dispatchers I* were there on remand from the Supreme Court; *Carmen II* was there on direct appeal. By order filed September 17, 1991, the court of appeals remanded these cases and two additional cases "for reconsideration in light of the Supreme Court's decision."

Comments Solicited. By decision served November 13, 1992, the ICC invited the parties to the *Carmen* case and the *Dispatchers* case, and other interested persons as well, to submit, with regard to any issues in these cases that remained open for reconsideration in light of the Supreme Court's *N&W* decision, comments and replies. In due course, comments and replies were submitted by CSX, BRC, NS, RLEA,[12] NRLC, UP, and Conrail.[13]

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[10] In its notes 2 and 3, the Supreme Court took note of *Carmen II*, and certain statements with respect to the interplay of sections 11341(a) and 11347. *See, N&W*, 499 U.S. at 126 n.2 and at 128 n.3.

[11] This reference is to Justice Stevens' concurring opinion in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 287 (1987).

[12] RLEA is the acronym for the Railway Labor Executives' Association, which submitted its pleadings on behalf of itself and its member organizations, one of which was ATDA. ATDA has since become a Department of the Brotherhood of Locomotive Engineers. *See, Delaware and Hudson Company—Lease and Trackage Rights—Springfield Terminal Railway Company (Arbitration Review)*, Finance Docket No. 30965 (Sub-No. 4) (ICC served August 30, 1994, at 1 n.1).

[13] NRLC is the acronym for the National Railway Labor Conference. UP is the acronym for Union Pacific Railroad Company and Missouri Pacific Railroad Company. Conrail is the acronym for Consolidated Rail Corporation.

Preliminary Procedural Matter. RLEA has moved (on behalf of itself and its member organizations) that these proceedings be assigned for oral argument. We think that the matters at issue in these proceedings have been adequately addressed in the written pleadings, and that oral argument would not assist us in any substantial way in our resolution of these matters. We will therefore deny RLEA's motion.

DISCUSSION AND CONCLUSIONS

Analytical Framework

United States Code. The analytical framework within which these proceedings arose and under which they must be decided rests primarily upon 49 U.S.C. 11343, 11344, 11347, and 11341.[14]

Section 11343(a) provided that certain rail carrier control "transactions" could be carried out only with the approval and authorization of the ICC. The control by CSX Corporation of the Chessie holding company (which itself controlled several rail carriers) and the SCLI holding company (which itself controlled several additional rail carriers) was a "transaction" within the scope of 49 U.S.C. 11343(a). The control by Norfolk Southern Corporation of rail carriers N&W and Southern was likewise a "transaction" within the scope of 49 U.S.C. 11343(a).

Section 11344(a) provided that the ICC could begin a proceeding to approve and authorize a transaction referred to in 49 U.S.C. 11343 on application of the person seeking that authority. Section 11344(c) directed the ICC to approve and authorize any such transaction when it found that the transaction was consistent with the public interest. Section 11344(b)(1)(D) provided that, if the transaction involved the merger or control of at least two Class I railroads, the ICC, in reaching its decision under section 11344(c), would first have to consider several factors including, among others, "the interest of carrier employees affected by the proposed transaction." Applications seeking approval for the *CSX Control* transaction and the *NS Control* transaction were filed with the ICC by CSX Corporation and NS Corporation, respectively; the ICC approved such transactions upon finding that each was consistent with the public interest, *CSX Control*, 363 I.C.C. at 597-98, and *NS Control*, 366 I.C.C. at 249; and, because each such transaction involved the control of at least two

[14] As indicated in note 1, these provisions have been carried forward by the *ICCTA* and recodified as 11323, 11324, 11326, and 11321, respectively.

Class I railroads, the ICC considered, with respect to each transaction, the interests of the carrier employees affected by the proposed transaction, *CSX Control*, 363 I.C.C. at 588-92, and *NS Control*, 366 I.C.C. at 229-31.

Section 11347 directed the ICC, when approving a rail carrier transaction under 49 U.S.C. 11344, to require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who were affected by the transaction as "the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." In response to the addition, in 1976, of the reference to the terms established under section 565 of title 45 (*i.e.*, the terms established under section 405 of the RPSA), the ICC developed the *New York Dock*[15] conditions which were imposed upon the primary transactions at issue in *CSX Control* and *NS Control*. *CSX Control*, 363 I.C.C. at 604; *NS Control*, 366 I.C.C. at 253.

Section 11341(a) provided that a carrier, corporation, or person participating in a transaction approved by the ICC under 49 U.S.C. 11344 was "exempt from the antitrust laws *and from all other law*, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction" (emphasis added). Section 11341(a) was variously referred to as the immunity provision, the exemption provision, and the override provision (because it "immunized" a rail carrier from laws that might otherwise have been applicable, it "exempted" that carrier from the requirements of such laws, and it effected an "override" of such laws). In the 1991 *N&W* decision, the Supreme Court held that the immunity provision reached *both* the Railway Labor Act itself (because the RLA was a "law") *and also* CBAs entered into under the RLA (because immunity from a law implies immunity from the obligations imposed by that law). *N&W*, 499 U.S. at 133. The Court noted, however, that such immunity would apply only when *necessary* to carry out a properly *approved transaction*, and the Court emphasized "that neither the conditions of approval, nor the standard for necessity, is before us today." *N&W*, 499 U.S. at 134.

New York Dock. The basic framework *both* for mitigating the labor impacts of consolidations *and also* for bypassing the drawn-out RLA procedures that would otherwise be applicable to particular transactions was created in the Washington Job Protection Agreement of 1936, was enacted into law by the

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

Transportation Act of 1940,[16] and was carried into its present form in 1979 when the ICC issued the *New York Dock* conditions. That framework provides *both* substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) *and* a procedural mechanism (negotiation, if possible; arbitration, if necessary) for resolving disputes respecting implementation of authorized transactions. *See, New York Dock*, 360 I.C.C. at 84-90.[17]

Most recently the Board affirmed the importance it places on negotiation first, and arbitration, if necessary, to arrive at implementing agreements in its recent decision in *CSX Corp. et al. – Control – Conrail Inc. et al*, 3 S.T.B. at 330 (*Conrail*), where, at the request of various organizations representing employees, it expressly stated that "approval of this transaction does not indicate approval or disapproval of any of the CBA overrides that applicants have argued are necessary to carry out the transaction; the arbitrators are free to make whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law."

Arbitration plays a central role in the process of implementing approved transactions under *New York Dock*. The *New York Dock* conditions do not prescribe, and they could not possibly prescribe, a one-size-fits-all standard respecting implementation of particular transactions. Instead, *New York Dock* prescribes a procedure (negotiation, if possible; arbitration, if necessary) for arriving at an implementing agreement respecting any particular transaction.[18]

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[16] *See, generally, Carmen II*, 6 I.C.C.2d at 732-40 (discussing the Washington Job Protection Agreement of 1936 and the Transportation Act of 1940).

[17] The ICC adopted arbitration procedures to ensure that "those most familiar with the complexities of labor law and particular problems associated with railroad employees would determine disputes arising out of such conditions." *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 9 I.C.C.2d 1021, 1025 (1993) (*Nickel Plate 4*) (citation omitted), *aff'd United Transp. Union v. ICC*, 43 F.3d 697 (D.C. Cir. 1995). *See also, Amer. Train Dispatchers Assoc. v. CSX Transp., Inc.*, 9 I.C.C.2d 1127, 1130 (1993) (*CSX 24*), *aff'd American Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 845-46 (D.C. Cir. 1995) (both the ICC and the court held, *inter alia*, that the ICC could require the parties to a dispute arising under labor protective conditions to submit that dispute to arbitration, even though a party might prefer to forgo arbitration and to have the ICC decide the dispute in the first instance).

[18] An implementing agreement is *either* an agreement negotiated by management and labor *or* an "agreement" imposed in an arbitration proceeding. The arbitrators' awards, in the absence of an agreement between the carriers and the representatives of the affected employees, constitute the implementing agreements specified under *New York Dock* and which we have required to be in effect before a transaction affecting employee rights can be consummated. *Fox Valley & Western Ltd.—Exemption Acquisition and Operation—Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway* (continued...)

The *New York Dock* conditions do not themselves specify how and to what extent CBAs may be overridden by arbitrators in arriving at arbitrally imposed implementing agreements. The authority to do so derives from 49 U.S.C. 11341 as explained by the ICC in *Carmen I* and *Dispatchers I* and affirmed by the Supreme Court in *N&W* and from 49 U.S.C. 11347 as explained by the ICC in *Carmen II*.

Under the approach reflected by the ICC's decision in *Carmen I* and *Dispatchers I*, as affirmed by the Supreme Court in *N&W*, the scope of the arbitrator's authority to override CBA terms was said to be limited only by the scope of the approved transaction—with any obstacle to its accomplishment being overridden.[19] Under the alternative approach reflected by the ICC's *Carmen II* decision, the scope of the arbitrator's authority was defined in terms of the process as conducted by arbitrators during the period from 1940-1980. *Carmen II*, 6 I.C.C.2d at 740-45.[20] It was the potential conflict between these

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[18](...continued)
Company (Petition for Emergency Cease and Desist Order), Finance Docket No. 32035 (ICC served August 26, 1993, at 3.

[19] The immunity provision has been characterized as *self-executing*. This phrase has reference to the immunizing power of 49 U.S.C. 11341(a) vis-à-vis transactions directly related to and growing out of, or flowing from, a specifically authorized transaction. Because the immunity provision was self-executing, its immunizing power did not depend upon a declaration by the ICC that a particular exemption was necessary to a particular approved transaction. "Section 11341 is self-executing and does not condition exemptions on the ICC's announcing that a particular exemption is necessary to an approved transaction." *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, 8 I.C.C.2d 715, 723 n.12 (1992) (*CSX 23*), *aff'd, American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157 (D.C. Cir. 1994) (*ATDA*). "[Section 11341], as its plain language indicates, does not condition exemptions on the ICC's announcing that a particular exemption is necessary to an approved transaction. Rather, § 11341 automatically exempts a person from 'other laws' whenever an exemption is 'necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.' 49 U.S.C. 11341. The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, J., concurring) (footnote omitted). *See also, CSX 23*, 8 I.C.C.2d at 723-24 (the immunity provision does not extend "only to matters specifically mentioned by us in approving the transaction. Rather, § 11341(a) immunity covers the future coordinations expected to flow from the control transaction that we approved, and our approval of the principal transaction also extends to these directly related actions."), *aff'd ATDA*, 26 F.3d at 1164. The majority in the *N&W* case adopted the reasoning of the Stevens opinion, 499 U.S. at 132-33.

[20] *See also, Carmen II*, 6 I.C.C.2d at 721: "It appears that arbitrators, management and labor developed approaches in the 1940-80 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace. We trust that these parties will be able to call upon their institutional memories to again resolve these matters consistently and amicably, now that we have removed two major impediments to the process."

two approaches, which the Supreme Court recognized but expressly declined to resolve in *N&W,* 499 U.S. at 134, that gave rise to the remand of these cases, and it is this issue that has remained unresolved to this date.[21]

The present proceedings arise out of implementing agreement arbitrations conducted under the auspices of Article I, section 4 of the *New York Dock* conditions. The procedural mechanism provided, like the procedural mechanism provided by the WJPA from which section 4 was derived,[22] reflects the understanding that CBA modifications necessary to permit implementation of transactions approved by the ICC under 49 U.S.C. 11344 could not be relegated to the purposefully drawn-out procedures provided by the RLA.[23] The RLA seeks to preserve labor peace by preserving the CBA status quo, and it was recognized that, in many instances, preservation of the CBA status quo would effectively thwart full implementation of rail carrier transactions approved by the ICC under 49 U.S.C. 11344.

Article I, section 4, which permits CBA modifications to be arrived at on an expedited schedule through binding arbitration, provides in pertinent part:

> Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the *selection of forces* from all employees involved on a basis accepted as appropriate for application in the particular case and any *assignment of employees* made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days [*i.e.*, 30 days after the railroad contemplating a transaction has provided written notice of such intended transaction] there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures: (1) Within (five) 5 days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said (five) 5 days upon the selection of said referee then the National Meditation Board shall immediately appoint a referee. (2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence. (3) The decision of the referee shall be final,

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[21] Other issues that were alive at the time of the remand have since been definitively resolved. The issue of the relationship between Article I, section 2 and Article I, section 4 has been resolved by a series of decisions in the D.C. Circuit culminating in *UTU v. STB*, 108 F.3d 1425 (D.C. Cir. 1997)(*UTU*). So too has the issue of necessity for purposes of 49 U.S.C. 11347 and 11326. *RLEA*, 987 F.2d at 806. We refer to these issues herein solely for clarity of exposition.

[22] Article I, section 4 of the *New York Dock* conditions can be traced directly back to the WJPA. *See, Carmen II*, 6 I.C.C.2d at 732-40. *See also, RLEA*, 987 F.2d at 813; *ATDA*, 26 F.3d at 1159-60.

[23] A copy of the WJPA can be found in *Carmen II*, 6 I.C.C.2d at 778-93. The procedural mechanism now provided by *New York Dock*, Article I, section 4 is derived from the similar procedural mechanism provided by WJPA sections 4, 5, and 13.

binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

New York Dock, 360 I.C.C. at 85.

The implementing agreements imposed in arbitration under labor conditions that antedated *New York Dock* generally focused on *selection of forces* and *assignment of work. See, e.g.*, WJPA section 5, reproduced at *Carmen II*, 6 I.C.C.2d at 779. The ICC, in the course of discussing this matter at some length in its *Carmen II* decision, noted that "[i]f the 1940-80 arbitrators felt themselves bound by these terms, they must have defined them broadly enough to include contract changes involving the movement of work (and probably employees) as well as adjustments in seniority." *Carmen II*, 6 I.C.C.2d at 721. Nevertheless, the dispute resolution mechanism established by WJPA section 5, the ICC noted, embraced more than selection and assignment of forces, narrowly defined. It encompassed also the modification of certain contractual rights; it embraced whatever was necessary to the effectuation of those projects that were the direct results of the merger.

Negotiators and arbitrators may well have followed the rubric of "selection of forces and assignment of employees" when administering the provisions governing the effect of consolidations. The scope of these terms, however, is not well defined. It must extend beyond the mere mechanism for selection or assignment of employees, and include the modification of certain important contractual rights. *Southern* [*Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151 (1967)] and Bernstein [an arbitrator cited in *Carmen II*] make it clear that work was transferred from one railroad to another despite contrary contractual provisions in CBAs. It was also obvious that contractual seniority rights were modified in order to consolidate rosters of the two separate, combining railroads. *See, Southern* at 165, 185. These rosters may have been "dove-tailed" or another method [may have been] agreed upon or decreed by an arbitrator. We can assume that the reassignment of employees would have regularly taken place despite CBA prohibitions. These actions are the sort that would be necessary to permit almost any consolidation of the functions of two merging railroads. The WJPA procedures make it possible.

Carmen II, 6 I.C.C.2d at 742 (footnotes omitted).

In short, the ICC in *Carmen II* defined the scope of authority of arbitrators to modify CBAs under Article I, section 4 of *New York Dock* by reference to the practice of arbitrators during the period 1940-1980. Although this is by no means a bright line definition, it has been accepted as a practicable working definition by the courts, *see, RLEA, ADTA*, and *UTU*, and we will adopt it too.

The ICC also explained in *Carmen II* that three additional crucial limitations restrict the CBA modifications that can be effected by an arbitrator under section 4. The transaction sought to be implemented must be an *approved transaction*; the modifications must be *necessary* to the implementation of that transaction; and the modifications cannot reach CBA *rights, privileges, or benefits* protected by Article I, section 2 of the *New York Dock* conditions. We agree with the ICC and will discuss how we intend to apply each of these limitations in the light of intervening court decisions.

Approved Transaction. Section 11343(a) provided that certain transactions could be carried out only with the approval and authorization of the ICC; section 11344(c) provided that the ICC should approve and authorize such transactions only if they were consistent with the public interest; section 11347 directed the ICC, when approving such transactions, to require the rail carrier to provide a fair arrangement protective of the interests of its employees; and section 11341(a) provided that a rail carrier participating in an approved transaction was exempt from otherwise applicable law, as necessary to carry out the transaction. But none of these provisions defined the scope of the transaction approved by the ICC under section 11344(c) and thereby immunized against other law under section 11341(a).

Although a narrow interpretation of the word *transaction* has frequently been sought by rail labor, it is now settled that the proper and court-approved interpretation of the word *transaction* is the interpretation established by the ICC. The ICC, with the approval of the courts, held that the word, as used in 49 U.S.C. 11343, 11344, 11347, and 11341, embraced two categories of transactions: the principal transaction approved by the ICC (generally a consolidation or acquisition of control); and subsequent transactions that were directly related to and grew out of, or flowed from, that principal transaction (such as consolidations of facilities, transfer of work assignments, *etc.*). "The approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to and fulfill the purposes of the principal transaction (*i.e.*, those which, the Supreme Court noted, would allow 'the efficiencies of consolidation' to be achieved)." *CSX 23,* 8 I.C.C.2d at 722.

In our view, "approved" transactions include those specifically authorized by the ICC, such as the various proposals we have approved which led to the formation of CSXT and those that are directly related to and grow out of, or flow from, such a specifically authorized transaction. The instant transaction, the transfer of the dispatching functions, falls into the latter category. The existence of this second category of transactions is implicit in the definition of the term "transaction" in the standard labor protective conditions: "[A]ny action taken pursuant to authorizations of the ICC on which these provisions have been

imposed." *New York Dock*, 360 I.C.C. at 84, *CSX 23*, 8 I.C.C.2d at 720-21 (footnote and internal cross-references omitted). The omitted footnote cites *New York Dock*, 360 I.C.C. at 70: "[T]he broad definition [of 'transaction'] is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 *et seq.*, because the event actually affecting the employees might occur at a later date than the initial transaction, yet still pursuant to our approval (consolidation of employee rosters, *et cetera*)." In *ATDA*, 26 F.3d at 1165, the court, in affirming *CSX 23*, found reasonable the ICC's view that the term *approved transaction* "extends to subsidiary transactions that fulfill the purposes of the main control transaction"; the court added that "[t]he ICC's elastic construction of 'approved transaction' in this case mirrors [the] settled understanding [of the term]." Moreover, it is now settled that the mere passage of time does not prevent a finding of nexus between the proposed changes and the initially approved transaction. *UTU*, 108 F.3d at 1430-31.

Necessity. A CBA override can be had only if such override is *necessary* to carry out a transaction approved under 49 U.S.C. 11344(c). The necessity requirement is explicit in 49 U.S.C. 11341(a); it has been held to be implicit in 49 U.S.C. 11347, *Carmen II, RLEA*, 987 F.2d at 814-15; it is therefore, on both counts, part and parcel of Article I, section 4 of the *New York Dock* conditions. "This 'necessity' finding is not optional; pre-transaction labor arrangements cannot be modified without it." *Fox Valley & Western Ltd.—Exemption Acquisition and Operation—Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company (Arbitration Review)*, Finance Docket No. 32035 (Sub-Nos. 2-6) (*Fox Valley*) (ICC served August 10, 1995, at 2) (citation omitted). Whatever the standard of necessity may be where only 11341(a) is involved, it is settled that there is one and only one necessity standard where section 11347 and the *New York Dock* conditions are relied upon by the arbitrator as the basis for overriding CBA provisions. *ATDA*, 26 F.3d at 1164-65.

Although, as we have noted above, the ICC in *Carmen II* did not attempt to define what would constitute necessity in such cases, the D.C. Circuit Court of Appeals has subsequently held, and we have accepted that holding, that a CBA override can be effected only where there are transportation benefits of the underlying transaction; it cannot be effected if the only benefit of the modification derives from the CBA modification itself. *RLEA*, 987 F.2d at 814-15. "[W]e do not see how the agency can be said to have shown the 'necessity' for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease)." *RLEA*, 987 F.2d at 815. "[T]he benefit cannot arise from the CBA modification itself; considered independently of the CBA, the

transaction must yield enhanced efficiency, greater safety, or some other gain." *ATDA*, 26 F.3d at 1164. *See also, UTU*, 108 F.3d at 1431.

Under the approach adopted in *Carmen II*, the necessity determination generally had to be made in the first instance by an arbitrator, though it was generally reviewable by the ICC.

As stated by the ICC in its *Fox Valley* decision at 3:

> Arbitrators should also be aware that in [*RLEA*] the court admonished us to identify which changes in pre-transaction labor arrangements are necessary to secure the public benefits of the transaction and which are not. *We have generally delegated to arbitrators the task of determining the particular changes that are and are not necessary to carry out the purposes of the transaction*, subject only to review under our *Lace Curtain* standards [referenced below]. Arbitrators should discuss the necessity of modifications to pre-transaction labor arrangements, taking care to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements. Arbitrators should not require the carrier to bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities, if these changes are identified with reasonable particularity. But arbitrators should not assume that all pre-transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction, must be modified to carry out the purposes of a transaction. (footnote omitted).

Rights, Privileges, and Benefits. The necessity standard of 49 U.S.C. 11341(a) and 11347 provides one check upon the CBA modification authority entrusted to arbitrators under Article I, section 4 of the *New York Dock* conditions. The rights, privileges, and benefits standard of Article I, section 2 of *New York Dock*[24] provides another check upon that authority. That provision states that certain rights, privileges, and benefits afforded employees under pre-transaction CBAs must be preserved. *RLEA*, 987 F.2d at 814 (noting, however, that not every word of every CBA establishes a right, privilege, or benefit); *ATDA*, 26 F.3d at 1163 (indicating that a CBA "scope" provision creates no rights, privileges, or benefits).

Although it was a hotly contested issue at the time these proceedings were remanded, the definition of rights, privileges and benefits has now been

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[24] Article I, section 2 of the *New York Dock* conditions, 360 I.C.C. at 84, provides: "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

established by an ICC decision, which we have adopted and applied,[25] and by the affirmance of that ICC decision by the D.C. Circuit. In *CSX Corp.–Control–Chessie System, Inc., et al.*, 10 I.C.C.2d at 849, (*CSX 27*), the ICC defined the rights, privileges, and benefits that cannot be overridden to include such things as group life insurance, hospitalization and medical care, free transportation, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation. Protected rights, privileges, and benefits do not embrace scope rules and seniority provisions. Such rules and provisions, the ICC noted, have historically been changed in arbitration conducted under Article I, section 4 of the *New York Dock* conditions, or under the comparable provisions of the predecessor labor protective conditions imposed prior to 1979. The rights, privileges, and benefits that must be preserved, the ICC added, do not include pre-transaction union representation arrangements.[26] *Aff'd, UTU.*

In explaining our denial of a petition to stay the ICC's *CSX 27* decision, we indicated that rates of pay, rules, and working conditions are not rights, privileges, or benefits that must be preserved.[27] "[I]t is now well established that changes in rates of pay, rules, and working conditions can be required by this agency or by arbitrators acting under *New York Dock*. Carriers may invoke *New York Dock* to modify such CBA terms when modification is necessary to obtain the benefits of a transaction that was approved as being in the public interest." *CSX 27 Stay Decision*, at 3.

In affirming the ICC's Sub-No. 27 Decision, the court observed (108 F.3d at 1430):

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[25] *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company (Arbitration Review)*, STB Finance Docket No. 32760 (Sub-No. 22) (STB served June 26, 1997).

[26] The ICC pointed out, however, that once a transaction has been implemented pursuant to an award imposed under Article I, section 4 of the *New York Dock* conditions, questions respecting union representation arrangements are subject to the sole jurisdiction of the National Mediation Board under the RLA. "The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act." *CSX 27*, at 15 (citation omitted).

[27] *See, CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al. (Arbitration Review)*, Finance Docket No. 28905 (Sub-No. 27) (STB served January 4, 1996) (*CSX 27 Stay Decision*).

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

Id.

The court went on to affirm this definition in the following language, which is dispositive of the issue:

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.

Takings. An argument has been advanced that any CBA override effected under Article I, section 4 of the *New York Dock* conditions amounts to a "taking" of private property in violation of the Fifth Amendment. That question cannot be resolved by a *New York Dock* arbitrator, it cannot be resolved by an administrative agency reviewing an award issued by the arbitrator, and it cannot be resolved even by an appellate court reviewing a decision entered by the administrative agency. *See, RLEA*, 987 F.2d at 815-16 (takings claims can be adjudicated only in the court of Federal Claims or, in certain limited circumstances, in a District court).[28]

[28] Because we cannot adjudicate a takings claim under any circumstances, we have no reason to determine whether certain supposed procedural defaults bar adjudication of the takings claims raised in the present proceedings.

Whether Section 11341 Is Limited by Section 11347. As discussed, in 1991 the Supreme Court left open the question whether CBA overrides authorized by 49 U.S.C. 11341 might be limited by 49 U.S.C. 11347. *N&W*, 499 U.S. at 134. We conclude that, where as here *New York Dock* conditions are required to be imposed, section 11341 is constrained by section 11347 and the provisions of these labor conditions. We believe that it is unnecessary and would be unwise here to attempt to resolve the issue of the reach of section 11341 unconstrained by section 11347 and the *New York Dock* conditions, because the orders of the ICC in *Carmen I* and *Dispatchers I* are affirmable under either section 11341 or section 11347. Therefore, following the lead of the D.C. Circuit under substantially identical circumstances in *ATDA*, 26 F.3d at 1165, we affirm the orders in *Carmen I* and *Dispatchers I* applying the reasons and standards articulated in *Carmen II* as discussed herein. We vacate the order in *Carmen II* insofar as it vacates the arbitrators' decisions and remands the matters to the parties for further negotiation and arbitration, if necessary. We believe this approach is appropriate because, as in *ATDA*, the transportation benefits from the consolidations proposed by NS and CSX are sufficient to pass the *RLEA* necessity test and we can see nothing to be gained by further prolonging this already very protracted process.

We believe it would be unwise to attempt to resolve the issue of the reach of section 11341, now section 11321, in the abstract as that issue is not presented in this case. We would prefer to address it in the context of a case in which our *New York Dock* conditions do not apply so that the question of whether section 11341, now section 11321, is limited by section 11347, now section 11326, in the modification of collective bargaining agreements is the sole issue presented. Such a proceeding will of necessity take account of changes made by the *ICCTA*, which in effect limit our imposition of *New York Dock* labor conditions to consolidations or acquisitions of control as described in current section 11326(a).

The Board continues to be committed to a process of negotiation first and arbitration, if necessary, to arrive at implementing agreements. *See Conrail*, where the Board in response to requests by rail labor made clear that the approval of the transaction does not indicate approval or disapproval of CBA overrides that have been argued to be necessary to carry out the transaction. *Conrail*, 3 S.T.B. at 329-30.

Finance Docket No. 28905 (Sub-No. 22)

In 1987, the arbitration committee directed CSX and BRC to adopt the implementing agreement that had been proposed by CSX, subject to one exception: that Waycross employees covered by the Orange Book could not be compelled to transfer to Raceland. *LaRocco Award*, at 41. In 1988, the ICC (1) affirmed the LaRocco Award insofar as it had approved the movement of the work performed at Waycross, (2) reversed the LaRocco Award insofar as it had created an Orange Book employees exception to the prescribed implementing agreement, and (3) remanded to the committee (in effect, to the parties) for further proceedings consistent with the ICC's decision subject to the admonition that the transfer of employees would be subject to *New York Dock* protections. *Carmen I*, 4 I.C.C.2d at 650, 655. In 1989, the D.C. Circuit reversed the ICC's decision and remanded to the agency to permit it to determine whether further proceedings were necessary. *Carmen*, 880 F.2d at 574. In 1990, the ICC reversed and vacated the *LaRocco Award*, effectively remanding the entire proceeding to the parties to recommence the implementing process in accordance with Article I, section 4 of the *New York Dock* conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[s] in accordance with the standards set forth in this decision." *Carmen II*, 6 I.C.C.2d at 757. Finally, in 1991, the Supreme Court reversed the D.C. Circuit's *Carmen* decision and remanded to the D.C. Circuit for further proceedings, *N&W*, 499 U.S. at 134; and the D.C. Circuit remanded both *Carmen I* and *Carmen II* to the ICC for reconsideration in light of *N&W*.

If the Finance Docket No. 28905 (Sub-No. 22) proceeding had been handled by the ICC in the usual fashion, it would have been held in abeyance while a certiorari petition was pending, and, once certiorari had been granted, it would have continued to be held in abeyance pending a decision of the Supreme Court. If this proceeding had been handled in that fashion, the Supreme Court's *N&W* decision would have returned the proceeding to the D.C. Circuit, which could then have decided the various issues it had left open in *Carmen*. And, if this proceeding had been handled in the usual fashion, the ICC would never have issued its *Carmen II* decision.

CSX contends that, even though this proceeding was not handled in the usual fashion, the outcome should be the same as if it had been. CSX argues that the order entered in *Carmen II* (reversing and vacating the *LaRocco Award*) is a nullity, because, as a matter of law, the Supreme Court's reversal of the D.C. Circuit's *Carmen* decision reinstated the ICC's *Carmen I* decision. The reversal of a court judgment, CSX insists, nullifies orders issued in any subsequent proceeding that were dependent upon the reversed judgment. *Carmen II*, in

CSX's view, was dependent upon *Carmen*, because, again in CSX's view, the ICC issued *Carmen II* solely to comply with the D.C. Circuit's *Carmen* decision. CSX therefore urges that we simply reinstate, without further ado, the ICC's *Carmen I* decision.

Carmen II was issued upon the predicate that the court of appeals decision overturning *Carmen I* was correct but it was not issued *solely* in compliance with the court of appeals decision, and therein lies the flaw in CSX's argument. As the Supreme Court recognized in *N&W*, 499 U.S. at 128 n.3, in denying labor respondent's motion to dismiss, *Carmen II* was decided on an alternative basis which could not be said to have ended the dispute between the parties there. As a result, the Supreme Court concluded that the definitive interpretation of section 11341 provided by its decision may affect the ICC's *Carmen II* decision. *Id.* There was no suggestion in the decision of the Supreme Court that its decision supplanted the *Carmen II* decision. In fact, the Supreme Court noted the pendency of a review proceeding and went on to say that the court on review might not agree with the ICC's interpretation in *Carmen II*, 499 U.S. at 126-28, n.2 and 3. It was to permit the ICC [and now the Board] to arrive at a determination as to what effect, if any, the Supreme Court's *N&W* decision would have on *Carmen II*, that *Carmen II* was remanded to the ICC. We conclude that the *N&W* decision should have no effect and that *Carmen II* should stand as decided subject of course to the subsequent developments in the law referred to in this decision and subject to our modification of the relief provided in *Carmen II*.

In cases reviewing decisions involving CBA modification under sections 11347/11326 and Article I, section 4 of our *New York Dock* conditions, the D.C. Circuit has adopted a two part test: (1) is there a nexus between the changes sought and an approved transaction, and (2) is there a transportation benefit to the public from the transaction. If the answers to both questions (1) and (2) are in the affirmative, then the modifications are deemed necessary and permitted unless they involve "rights, privileges, and benefits" protected from change by Article I, section 2 of *New York Dock*. *See, UTU,* 108 F.2d at 1430-31.

Both CSX and BRC have quoted from the following passage in *CSX Control*:

> We find that the applicants' estimate of employee impacts is reasonable. What dislocations there are promise to be short term. It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements. However, no wholesale disruption of the carriers' work force should occur. Only at points where the basically end-to-end systems meet does it appear that perceptible dislocations will result. Those common point locations are clearly identified. We believe that the standard conditions will adequately protect

those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically.

CSX Control, 363 I.C.C. at 589. Both CSX and BRC have quoted from this passage, but they have emphasized different parts of it. CSX has emphasized that the ICC was aware that there might be "additional coordinations" (*i.e.*, coordinations beyond those specifically mentioned in the *CSX Control* application), and that employees might be affected by the proposed transaction "in the future." This, CSX contends, demonstrates that the ICC anticipated that transactions such as the 1986 Waycross/Raceland transfer would be embraced within the principal transaction approved in *CSX Control*. BRC emphasizes the ICC's expectation that employee dislocations would be "short term" and that perceptible dislocations would occur only at points "where the basically end-to-end systems meet." Noting that the 1986 Waycross/Raceland transfer was 6 years delayed (and was therefore not a "short term" dislocation) and that Waycross and Raceland are hundreds of miles apart (and therefore are not located at junction points of the two end-to-end systems), BRC contends that the cited passage demonstrates that the ICC never anticipated that transactions such as the 1986 Waycross/Raceland transfer would be embraced within the principal transaction approved in *CSX Control*.

The ICC, in its 1992 *CSX 23* decision, discussed the scope of the principal transaction approved in *CSX Control*. Quoting parts of the passage we have quoted in whole, the ICC concluded that "as far back as 1980, we contemplated that the applicants could undertake operational changes to improve efficiency which we had not considered in the decision and that specific approval of these coordinations was not necessary." *CSX 23*, 8 I.C.C.2d at 725. We agree with this assessment, which was approved by the D.C. Circuit Court of Appeals on review in *ATDA*, 26 F.3d at 1165. We believe those decisions are dispositive of the substantially identical issue here.

We agree with the ICC and the D.C. Circuit and adopt the view that the approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to, and fulfill the purposes of, the principal transaction.[29] *CSX 23*, 8 I.C.C.2d at 722. As long as there is "a reasonably direct causal connection between the [principal] transaction and the operational changes sought to be implemented," such operational changes are embraced within the principal transaction. *CSX 23*, 8 I.C.C.2d at 724 n.14. The 1986

[29] Importantly, it follows that any employees affected by the transfer are entitled to labor protection.

Waycross/Raceland transfer meets these tests. It is directly related to the 1980 *CSX Control* principal transaction (common control of C&O and SCL allowed CSX to consolidate the work performed at Waycross and Raceland) and it fulfills the purposes of the principal transaction (one such purpose was the achievement of efficiencies made possible by common control). We therefore conclude that the 1986 Waycross/Raceland transfer was embraced within the principal transaction approved in the 1980 *CSX Control* decision.

In the Finance Docket No. 28905 (Sub-No. 22) proceeding, the focus of the necessity issue has always been the Orange Book, and, in particular, the twin prohibitions respecting transfer of work and transfer of employees. In 1987, the arbitration committee determined that an override of the work transfer prohibition was necessary, but that an override of the employee transfer prohibition was not necessary. *LaRocco Award*, at 35-38. In 1988 the ICC, relying heavily on the necessity standard announced in *DRGW*, determined that an override of both prohibitions was necessary. *Carmen I*, 4 I.C.C.2d at 648-50. Thus the decision in *Carmen I* affirmed the award insofar as it provided for the transfer of work but vacated and remanded for further negotiation or arbitration, if necessary, the part of the award that prohibited the transfer of employees. Two years later the ICC changed course, and vacated and remanded the entire proceeding to allow CSX and BRC to negotiate or arbitrate, "if necessary, to reach [a] new implementing agreement[s] in accordance with the standards set forth in this decision."[30] *Carmen II*, 6 I.C.C.2d at 756-57.

We are now affirming the *Carmen I* order in all respects. We expect CSX and BRC to negotiate or arbitrate, if necessary, any issues associated with the transfer of personnel we have found to be required to the extent these issues continue to have vitality.

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[30] The record indicates that, after the *LaRocco Award* was issued, CSX transferred the work and the non-Orange Book-protected employees to Raceland. *See,* CSX Comments (March 1, 1993) at 9 n.15. The record suggests that no Orange Book-protected employees have ever been transferred to Raceland. *See,* CSX's July 2, 1990 petition for stay of the ICC's *Carmen II* decision, at 4: "[T]he transfer of BRC members subject to the Orange Book protections has been deferred pending the outcome of the litigation surrounding the consolidation." *See also,* BRC Comments (March 1, 1993) at 31 ("[After the LaRocco Award was issued], the carriers closed the Waycross repair facility and abolished the positions of carmen employed at that facility. A total of 88 carmen and 11 painter positions were abolished at that time. Of these carmen, 54 accepted separation pay and terminated their employment with the SCL. Twenty-three other carmen bid on new positions on the rip track located at Waycross. Nine or 10 junior employees who were unable to hold a position at Waycross accepted transfers to Raceland.") (footnotes omitted).

CSX contends that the ICC erred in *Carmen II* in retreating from the necessity standard announced in *DRGW* and relied upon in *Carmen I*, and *CSX 23*, 8 I.C.C.2d at 721. *CSX 23*, however, was in this respect somewhat of an overstatement of our authority under the necessity provision implicit in Article I, section 4 of the *New York Dock* conditions as interpreted in *Carmen II*. *See ATDA*, 26 F.3d at 1165. We will therefore adhere to the position announced in Carmen II that the authority of arbitrators to modify collective bargaining agreements is limited by the practice of arbitrators from 1940-1980 for cases subject to the *New York Dock* conditions.

As we have indicated earlier, we need not decide whether this transaction meets the standard for necessity embodied in 49 U.S.C. 11341/11321 upon which the *Carmen I* and *Dispatchers I* decisions were based or implicit in 11347/11326 as a result of the *Carmen II* decision and certain decisions of the D.C. Circuit, especially *UTU* and *ATDA*, which have embraced the *Carmen II* approach, because it is clear that it satisfies both. Under these circumstances, we reaffirm the [ICC's] decision in *Carmen I* as consistent with the approach adopted in that decision and affirmed by the Supreme Court in *N&W* and as satisfying the alternative and more limited approach adopted in *Carmen II* which we are reaffirming here.

CSX and BRC should attempt to resolve any remaining aspects of the dispute concerning transfer of personnel from Waycross to Raceland by negotiation. If an agreement has not been reached by the end of the 30-day negotiation period required by Article I, section 4, either party may then (or thereafter) demand binding arbitration in accordance with Article I, section 4.

Finance Docket No. 29430 (Sub-No. 20)

In 1987, the arbitration committee adopted, with one minor exception, the implementing agreement that had been proposed by NS, *Harris Award*, at 17-18, and in 1988 the ICC affirmed, *Dispatchers I*, 4 I.C.C.2d at 1092. In 1989, the D.C. Circuit reversed the ICC's decision and remanded to the ICC in order that the ICC might determine whether further proceedings were necessary. *Carmen*, 880 F.2d at 574. In 1990, the ICC reversed and vacated the *Harris Award*, effectively remanding the proceeding to the parties to continue the implementing process in accordance with Article I, section 4 of the *New York Dock* conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[s] in accordance with the standards set forth in this decision." *Carmen II*, 6 I.C.C.2d at 757. Finally, in 1991, the Supreme Court reversed the D.C. Circuit's *Carmen* decision and remanded to the

D.C. Circuit for further proceedings, *N&W*, 499 U.S. at 134, and the D.C. Circuit remanded to the ICC for reconsideration in light of *N&W*.

NS, advancing an automatic nullification argument much like CSX's, contends that the outcome in the Finance Docket No. 29430 (Sub-No. 20) proceeding should be what it would have been had the proceeding been held in abeyance pending final action by the Supreme Court. NS argues that the order entered in *Carmen II* (reversing and vacating the *Harris Award*) is a nullity, because, as a matter of law, the Supreme Court's reversal of the D.C. Circuit's *Carmen* decision reinstated the ICC's *Dispatchers I* decision. The reversal of a court judgment, NS insists, nullifies orders issued in any subsequent proceeding that were dependent upon the reversed judgment. *Carmen II*, in NS's view, was dependent upon *Carmen*, because, again in NS's view, the ICC issued *Carmen II* solely to comply with the D.C. Circuit's *Carmen* decision. NS therefore urges that we simply reinstate the ICC's *Dispatchers I* decision.

We conclude, for the reasons provided above in our discussion of the equivalent argument advanced by CSX, that *Carmen II* was not nullified by the Supreme Court's *N&W* decision, and we therefore reject NS's request that we simply reinstate *Dispatchers I*. We will, however, reinstate the order affirming the *Harris Award*, but for the reasons set forth in *Carmen II*.

We now turn to the issues that remain open for reconsideration in light of *N&W*: the approved transaction issue and the necessity issue. We will decide the approved transaction issue ourselves, because it is immediately obvious that there can be but one answer to this question and because we do not want to unnecessarily extend this already protracted proceeding. There can be no doubt that the centralization of power distribution for the N&W system in Atlanta was sufficiently related to the transaction approved in *NS Control* as to satisfy the standards for relatedness established in *CSX 23* and approved by the D.C. Circuit on review in *ATDA*, discussed *supra*, and we so find. We will also decide the necessity issue implicit in the Article I, section 4 implementing agreement process, because it is clear that there are transportation benefits to N&W's proposal sufficient to satisfy the necessity criteria established by the D.C. Circuit in *RLEA*, *ATDA*, and *UTU*.

In the Finance Docket No. 29430 (Sub-No. 20) proceeding, the focus of the necessity issue has been the pre-1986 CBA that covered ATDA-represented supervisors at Roanoke. The Roanoke/Atlanta transfer proposed by NS in 1986 effected a CBA override by leaving the CBA in Roanoke while transferring the "work function" previously performed thereunder to CBA-free Atlanta. *Dispatchers I*, 4 I.C.C.2d at 1086. In 1987 the arbitration committee determined that an override of the Roanoke CBA was necessary. *Harris Award*, at 11-15. In 1988, the ICC, relying heavily on the necessity standard announced in *Maine*

Central, affirmed. *Dispatchers I*, 4 I.C.C.2d at 1086-87.[31] Two years later the ICC changed course. By order entered June 21, 1990, the ICC reversed and vacated the *Harris Award*, effectively remanding the proceeding to the parties. *Carmen II*, 6 I.C.C.2d at 775, ordering paragraph 2. The proceeding was remanded to allow NS and ATDA to continue the implementing process in accordance with Article I, section 4 of the *New York Dock* conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[s] in accordance with the standards set forth in this decision." *Carmen II*, 6 I.C.C.2d at 756-57. Eight years have now passed, but this proceeding appears to be today in essentially the same posture it was in on June 21, 1990. A new implementing agreement has not yet been reached and so far as we have been advised, neither party has attempted to compel further arbitration.[32]

As a result, the decision we reach today may be declaratory only and not affect the rights of any of the employees involved. However, the question of the manner in which the *New York Dock* labor conditions affect arbitrator's rights to set aside CBA provisions where necessary to implement approved transactions remains a vital one and it is that question we have attempted to answer here. As with the other proceeding covered by this decision, we will reinstate the order issued in *Dispatchers I*, affirming the arbitral decision for the reasons provided in *Carmen II* and discussed above at length.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for oral argument filed by RLEA is denied.

2. In Finance Docket No. 28905 (Sub-No. 22), the order entered by the ICC in its decision in *Carmen I* affirming in part and reversing and vacating in part the *LaRocco Award* is affirmed as complying with the standards established by

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[31] "Imposition of the collective bargaining agreement [*i.e.*, a transfer of the CBA from Roanoke to Atlanta] would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." *Dispatchers I*, 4 I.C.C.2d at 1086.

[32] The record indicates that, after the *Harris Award* was issued, the Roanoke/Atlanta transfer was carried out and positions at Atlanta were offered to the nine active and three furloughed Roanoke supervisors. Of the nine active supervisors, eight moved to Atlanta and one declined. Of the three furloughed supervisors, one moved to Atlanta and two declined. As of July 2, 1990: of the eight active supervisors who had moved to Atlanta, seven had retired and one was still actively employed there; and the one furloughed supervisor who had moved to Atlanta was also still actively employed there. *See*, NS's July 2, 1990 petition for stay of the ICC's *Carmen II* decision, at 3 n.3 and at 8 n.8.

the ICC in *Carmen II* and by various intervening decisions of the ICC, the United States Court of Appeals for the D.C. Circuit, and this Board.

3. In Finance Docket No. 29430 (Sub-No. 20), the order entered by the ICC in its decision in *Dispatchers I* affirming the *Harris Award* is affirmed as complying with the standards established by the ICC in *Carmen II* and by various intervening decisions of the ICC, the United States Court of Appeals for the D.C. Circuit, and this Board.

4. This decision is effective on October 25, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.