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[499 US 117]

NORFOLK AND WESTERN RAILWAY COMPANY, et al., Petitioners

v

AMERICAN TRAIN DISPATCHERS' ASSOCIATION et al. (No. 89-1027)

CSX TRANSPORTATION, INC., Petitioner

v

BROTHERHOOD OF RAILWAY CARMEN et al. (No. 89-1028)

499 US 117, 113 L Ed 2d 95, 111 S Ct 1156

[Nos. 89-1027 and 89-1028]

Argued December 3, 1990. Decided March 19, 1991.

Decision: 49 USCS § 11341(a) held to exempt rail carriers from obligations under collective bargaining agreements as necessary to effect consolidations approved by Interstate Commerce Commission.

SUMMARY

These two, consolidated cases presented the question whether 49 USCS § 11341(a)—which provides that, where the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation, a carrier in the consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [the carrier] carry out the transaction"—exempts a carrier in an approved consolidation from legal obligations arising under a collective bargaining agreement. In one case, following approval by the ICC of the consolidation of two rail carriers, the newly consolidated carriers had proposed for reasons of efficiency to transfer certain employees of one carrier to another city. The labor union representing the affected employees contended that (1) the carriers' proposal involved a change in the collective bargaining agreement between the carrier and its employees that was subject to mandatory bargaining under the Railway Labor Act (RLA) (45 USCS §§ 151 et seq.); and (2) the carriers were required to preserve the affected employees' rights under the collective bargaining agreement and their right to union representation under the RLA. After negotiations failed to resolve these issues, arbitration was sought pursuant

Briefs of Counsel, p 747, infra.

to conditions imposed by the ICC generally upon rail carrier mergers to protect the interests of carrier employees. The arbitration committee ruled in the carriers' favor, stating that the proposed transfer of employees was an incident of the ICC-approved merger and that the provisions of the collective bargaining agreement and the RLA could be abrogated as necessary to implement the merger. On appeal, the ICC affirmed the ruling of the arbitration committee, stating that because the employee transfer was incident to the approved merger, it was by virtue of § 11341(a) not subject to conflicting laws. In the second case, a carrier formed by an ICC-approved consolidation proposed to close a repair shop and transfer the shop's employees to a similar shop at a different location. The union representing the employees contended that this proposal contravened its collective bargaining agreement. An arbitration committee ruled that (1) the collective bargaining agreement could be superseded to the extent that it impeded an operational change authorized or required by the ICC's approval of the consolidation; and (2) the repair work at the shop the carrier proposed to close could be transferred, because such a transfer was necessary to the original consolidation; but (3) employees protected against transfer by the collective bargaining agreement could not be transferred. On appeal, the ICC affirmed the ruling regarding the transfer of work, and reversed the ruling regarding the transfer of employees, stating that preventing the transfer of employees would effectively prevent implementation of the consolidation (4 ICC2d 641). On appeal of both cases, the United States Court of Appeals for the District of Columbia Circuit, considering the cases together, reversed and remanded the cases to the ICC, holding that § 11341(a) does not authorize the ICC to relieve a party of obligations under a collective bargaining agreement, which obligations impede implementation of an approved consolidation (279 App DC 239, 880 F2d 562).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, and SOUTER, JJ., it was held that § 11341(a) exempts a carrier in an ICC-approved consolidation from any legal obligations imposed by a collective bargaining agreement to the extent necessary to carry out the consolidation, because (1) the language of § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified, and includes the Railway Labor Act, which gives legal and binding effect to collective bargaining agreements between rail carriers and their employees; (2) this interpretation of § 11341(a) makes sense of the consolidation provisions of the Interstate Commerce Act, which were designed to promote economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure; and (3) this interpretation of § 11341(a) will not lead to bizarre results, inasmuch as the immunity provision does not exempt carriers from all law, but rather from all law as necessary to carry out an approved transaction.

STEVENS, J., joined by MARSHALL, J., dissented, expressing the view that the exemption in § 11341(a) does not include obligations imposed by private contracts.

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HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Courts § 775; Interstate Commerce Commission § 39; Labor § 41; Statutes §§ 82, 83, 100, 109, 173, 248.5 — consolidation of rail carriers — exemption from other laws — collective bargaining agreements

1a-1f. 49 USCS § 11341(a), a part of the Interstate Commerce Act, exempts a rail carrier in a consolidation approved by the Interstate Commerce Commission from any legal obligations imposed by a collective bargaining agreement to the extent necessary to carry out the consolidation, because (1) the language of § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified, and includes the Railway Labor

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13 Am Jur 2d, Carriers § 36; 48A Am Jur 2d Labor and Labor Relations § 1698; Railroads §§ 331-333

49 USCS § 11341(a)

RIA Employment Coordinator ¶ LR-34,087

L Ed Digest, Interstate Commerce Commission § 39; Labor § 41

L Ed Index, Carriers; Collective Bargaining; Interstate Commerce Act or Commission, Railroads

Index to Annotations, Carriers; Collective Bargaining; Interstate Commerce Commission; Railroads

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's application of the rules of ejusdem generis and noscitur a sociis. 46 L Ed 2d 879.

When is subsequent business operation bound by existing collective bargaining agreement between labor union and predecessor employer. 88 ALR Fed 89.

Meaning of "willful" under provision of Railway Labor Act (45 USCS § 152(tenth)) making willful failure or refusal to comply with Act a criminal offense. 49 ALR Fed 611.

Breach of collective bargaining agreement as unfair labor practice under National Labor Relations Act, as amended (29 USCS § 158). 6 ALR Fed 589.

Act, which gives legal and binding effect to collective bargaining agreements between rail carriers and their employees; (2) the principle of ejusdem generis—which states that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration, but which does not control when the whole context dictates a different conclusion—does not require a different result, inasmuch as (a) because repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a), (b) the otherwise general term "all other law" includes, but is not limited to, "State and municipal law," showing that "all other law" refers to more than laws related to antitrust, and (c) the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws; (3) this conclusion is supported by prior case law in which the United States Supreme Court, construing a statute which was the immediate precursor of § 11341(a) and which was substantially identical to it, held that the contract rights under state law of minority shareholders—who contended that the terms of an ICC-approved merger diminished the value of their shares as guaranteed by the corporate charter—did not survive the merger agreement found by the ICC to be in the public interest; (4) this interpretation of § 11341(a) makes sense of the consolidation provisions of the Interstate Commerce Act, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure while also requiring the ICC to accommodate to the greatest extent possible the interests of affected carrier employees before approving a consolidation; and (5) this interpretation of § 11341(a) will not lead to bizarre results, inasmuch as the immunity provision of the statute does not exempt carriers from all law, but rather from all law as necessary to carry out an approved consolidation. (Stevens and Marshall, JJ., dissented from this holding.)

Appeal § 1662 — mootness — interpretation of statute — alternative basis for decision on remand

2a, 2b. On certiorari from a judgment of a United States Court of Appeals which (1) held that 49 USCS § 11341(a)—which provides that, where the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation, a carrier in the consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [the carrier] carry out the transaction"—does not exempt a rail carrier in an approved consolidation from obligations imposed by a collective bargaining agreement; (2) reversed rulings by the ICC in two cases stating that under § 11341(a), carriers in approved consolidations who proposed to implement the consolidations by taking measures which allegedly violated collective bargaining agreements, were not obligated to honor the collective bargaining agreements or to engage in procedures mandated by the Railway Labor Act (RLA) (45

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USCS §§ 151 et seq.) for the resolution of labor disputes; and (3) remanded the cases for consideration by the ICC (a) whether § 13341(a) could operate to override provisions of the RLA, and (b) whether, under "labor-protective" conditions promulgated by the ICC pursuant to 49 USCS § 11347 and applying to rail carrier consolidations, an arbitration committee hearing a labor dispute arising from an approved railroad merger may override provisions of a collective bargaining agreement, the United States Supreme Court—where the ICC, on remand from the United States Court of Appeals, has (1) adhered to the Court of Appeals' ruling that § 11341(a) does not authorize it to override provisions of a collective bargaining agreement; (2) ruled that § 11341(a) authorizes it to foreclose resort to RLA remedies for modification and enforcement of collective bargaining agreements, at least to the extent of its authority under § 11347 to impose labor-protective conditions on rail carrier consolidations; (3) remanded its decision to the parties for further negotiation or arbitration; and (4) predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of § 11341(a)—will not dismiss the case as moot, because (1) the Supreme Court's definitive interpretation of § 11341(a) may affect the ICC's remand order; (2) the ICC's compliance with the Court of Appeals' mandate does not affect the correctness of the Court of Appeals' decision; and (3) the alternative basis offered by the ICC for its remand order does not end the controversy between the parties, inasmuch as the parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the ICC's interpretation of § 11341(a) on review of the ICC's order on remand.

Administrative Law § 276 — judicial review — construction of statute

3. When reviewing a federal administrative agency's interpretation of a federal statute, the United States Supreme Court begins with the language of the statute and asks whether Congress has spoken on the subject before it; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Contracts § 87 — legal force

4. A contract has no legal force apart from the law that acknowledges its binding character.

SYLLABUS BY REPORTER OF DECISIONS

Once the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation under the conditions set forth in Chapter 113 of the Interstate Commerce Act (Act), 49 USC § 11301 et seq. [49 USCS §§ 11301 et seq.], a carrier in such a consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ," § 11341(a). In these cases, the ICC issued orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements. The Court of Appeals reversed and remanded, holding that § 11341(a) does not authorize the ICC to relieve a party of collectively bargained obligations that impede implementation of an approved transaction. Rea-

soning, inter alia, that the legislative history demonstrates a congressional intent that § 11341(a) apply to specific types of positive laws and not to common-law rules of liability, such as those governing contracts, the court declined to decide whether the section could operate to override provisions of the Railway Labor Act (RLA) governing the formation, construction, and enforcement of the collective-bargaining agreements at issue.

Held: The § 11341(a) exemption "from all other law" includes a carrier's legal obligations under a collective-bargaining agreement when necessary to carry out an ICC-approved transaction. The exemption's language, as correctly interpreted by the ICC, is clear, broad, and unqualified, bespeaking an unambiguous congressional intent to include any obstacle imposed by law. That language neither admits of a distinction between positive enactments and common-law liability rules nor supports the exclusion of contractual obligations. Thus, the exemption effects an override of such obligations by superseding the law—here, the RLA—which makes the contract binding. Cf. Schwabacher v United States, 334 US 182, 194-195, 200-201, 92 L Ed 1305, 68 S Ct 958. This determination makes sense of the Act's consolidation provisions, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure. Whereas § 11343(a)(1) requires the ICC to approve consolidations in the public interest, and § 11347 conditions such approval on satisfaction of certain labor-protective conditions, the § 11341(a) exemption guarantees that once employee interests are accounted for and the consolidation is approved, the RLA—whose major disputes resolution process is virtually interminable—will not prevent the efficiencies of consolidation from being achieved. Moreover, this reading will not, as the lower court feared, lead to bizarre results, since § 11341(a) does not exempt carriers from all law, but rather from all law *necessary* to carry out an *approved* transaction. Although it might be true that § 11341(a)'s scope is limited by § 11347, and that the breadth of the exemption is defined by the scope of the approved transaction, the conditions of approval and the standard for necessity are not at issue because the lower court did not pass on them and the parties do not challenge them here.

279 US App DC 239, 880 F2d 562, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, O'Connor, Scalia, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined.

APPEARANCES OF COUNSEL

Jeffrey S. Berlin argued the cause for petitioners.

Jeffrey S. Minear argued the cause for federal respondents supporting petitioners.

William G. Mahoney argued the cause for private respondents.

Briefs of Counsel, p 747, infra.

[499 US 119]

Justice **Kennedy** delivered the opinion of the Court.

[1a] The Interstate Commerce Commission has the authority to approve rail carrier consolidations under certain conditions. 49 USC § 11301 et seq. [49 USCS §§ 11301 et seq.]. A carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ." § 11341(a). These cases require us to decide whether the carrier's exemption under § 11341(a) "from all other law" extends to its legal obligations under a collective-bargaining agreement. We hold that it does.

I

A

"Prior to 1920, competition was the desideratum of our railroad economy." St. Joe Paper Co. v Atlantic Coast Line R. Co. 347 US 298, 315, 98 L Ed 710, 74 S Ct 574 (1954). Following a period of Government ownership during World War I, however, "many of the railroads were in very weak condition and their continued survival was in jeopardy." Id., at 315, 98 L Ed 710, 74 S Ct 574. At that time, the Nation made a commitment to railroad carrier consolidation as a means of promoting the health and efficiency of the railroad industry. Beginning with the Transportation Act of 1920, ch 91, 41 Stat 456, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." United States v Lowden, 308 US 225, 232, 84 L Ed 208, 60 S Ct 248 (1939). See generally St. Joe Paper Co. v Atlantic Coast Line R. Co., supra, at 315-321, 98 L Ed 710, 74 S Ct 574.

Chapter 113 of the Interstate Commerce Act, recodified in 1978 at 49 USC § 11301 et seq. [49 USCS §§ 11301 et seq.], contains the current statement of this national policy. The Act grants the Interstate Commerce Commission exclusive authority to examine, condition, and approve proposed mergers and consolidations of

[499 US 120]

transportation carriers within its jurisdiction. § 11343(a)(1). The Act requires the Commission to "approve and authorize" the transactions when they are "consistent with the public interest." § 11344(c). Among the factors the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." § 11344(b)(1) (D).[1] In authorizing a merger or consolidation, the Com-

1. Section § 11344(b)(1) provides

"In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

"(A) the effect of the proposed transaction on the adequacy of transportation to the public.

"(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

"(C) the total fixed charges that result from the proposed transaction.

"(D) the interest of carrier employees affected by the proposed transaction.

"(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region."

mission "may impose conditions governing the transaction." § 11344(c). Once the Commission approves a transaction, a carrier is "exempt from the anti-trust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." § 11341(a).

When a proposed merger involves rail carriers, the Act requires the Commission to impose labor-protective conditions on the transaction to safeguard the interests of adversely affected railroad employees. § 11347. In New York Dock Railway—Control—Brooklyn Eastern Dist. Terminal, 360 ICC 60, 84-90, aff'd sub nom. New York Dock Railway v United States, 609 F2d 83 (CA2 1979), the Commission announced a comprehensive set of conditions and procedures designed to meet its obligations under § 11347. Section 2 of the New York Dock conditions provides that the "rates of pay, rules, working conditions and all collective

[499 US 121]

bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements." 360 ICC, at 84. Section 4 sets forth negotiation and arbitration procedures for resolution of labor disputes arising from an approved railroad merger. Id., at 85. Under § 4, a merged or consolidated railroad which plans an operational change that may cause dismissal or displacement of any employee must provide the employee and his union 90 days' written notice. Ibid. If the carrier and union cannot agree on terms and conditions within 30 days, each party may submit the dispute for an expedited "final, binding and conclusive" determination by a neutral arbitrator. Ibid. Finally, the New York Dock conditions provide affected employees with up to six years of income protection, as well as reimbursements for moving costs and losses from the sale of a home. See id., at 86-89 (§§ 5-9, 12).

B

The two cases before us today involve separate ICC orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements.

1. In No. 89-1027, the Commission approved an application by NWS Enterprises, Inc., to acquire control of two previously separate rail carriers, petitioners Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern). See Norfolk Southern Corp.—Control—Norfolk & W.R. Co. and Southern R. Co. 366 ICC 173 (1982). In its order approving control, the Commission imposed the standard New York Dock labor-protective conditions and noted the possibility that "further displacement [of employees] may arise as additional coordinations occur." 366 ICC, at 230-231.

In September 1986, this possibility became a reality. The carriers notified the American Train Dispatchers' Association, the bargaining representative for certain N&W employees,

[499 US 122]

that they proposed to consolidate all "power distribution"—the assignment of locomotives to particular trains and facilities—for the N&W-Southern operation. To effect the efficiency move, the carriers informed the union that they would transfer work performed at the N&W power distribution center in Roanoke, Virginia, to the Southern

center in Atlanta, Georgia. The carriers proposed an implementing agreement in which affected N&W employees would be made management supervisors in Atlanta, and would receive increases in wages and benefits in addition to the relocation expenses and wage protections guaranteed by the New York Dock conditions. The union contended that this proposal involved a change in the existing collective-bargaining agreement that was subject to mandatory bargaining under the Railway Labor Act (RLA), 44 Stat 577, as amended, 45 USC § 151 et seq. [45 USCS §§ 151 et seq.]. The union also maintained that the carriers were required to preserve the affected employees' collective-bargaining rights, as well as their right to union representation under the RLA.

Pursuant to § 4 of the New York Dock procedures, the parties negotiated concerning the terms of the implementing agreement, but they failed to resolve their differences. As a result, the carriers invoked the New York Dock arbitration procedures. After a hearing, the arbitration committee ruled in the carriers' favor. The committee noted that the transfer of work to Atlanta was an incident of the control transaction approved by the ICC, and that it formed part of the "additional coordinations" the ICC predicted would be necessary to achieve "greater efficiencies." The committee also held it had the authority to abrogate the provisions of the collective-bargaining agreement and of the RLA as necessary to implement the merger. Finally, it held that because the application of the N&W bargaining agreement would impede the transfer, the transferred employees did not retain their collective-bargaining rights.

[499 US 123]

The union appealed to the Commission, which affirmed by a divided vote. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and [Railway Labor Act] provisions must give way to the Commission-mandated procedures of section 4 [of the New York Dock conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." App to Pet for Cert in No. 89-1027, p 33a. Accordingly, the Commission upheld the arbitration committee's determination that the "compulsory, binding arbitration required by Article I, section 4 of New York Dock, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." Id., at 35a. The Commission also held that because the work transfer was incident to the approved merger, it was "immunized from conflicting laws by section 11341(a)." Ibid. Noting that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function," the Commission upheld the decision to override the collective-bargaining agreement and RLA provisions. Id., at 37a.

2. In No. 89-1028, the Commission approved an application by CSX Corporation to acquire control of the Chessie System, Inc., and Seaborad Coastline Industries, Inc. CSX Corp. —Control—Chessie System, Inc., and Seaboard Coastline Industries, Inc.

363 ICC 521 (1980). Chessie was the parent of the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railway Company; Seaboard was the parent of the Seaboard Coast Line Railroad Company. In approving the control acquisition, the Commission imposed the New York Dock conditions and recognized that "additional coordinations may occur that could lead to further employee displacements." 363 ICC, at 589.

[499 US 124]

In August 1986, the consolidated carrier notified respondent Brotherhood of Railway Carmen that it planned to close Seaboard's heavy freight car repair shop at Waycross, Georgia, and transfer the Waycross employees to Chessie's similar shop in Raceland, Kentucky. The carrier informed the Brotherhood that the proposed transfer would result in a net decrease of jobs at the two shops. Pursuant to New York Dock, the carrier and the union negotiated concerning the terms of an agreement to implement the transfer. The sticking point in the negotiations involved a 1966 collective-bargaining agreement between the union and Seaboard known as the "Orange Book." The Orange Book provided that the carrier would employ each covered employee and maintain each employee's work conditions and benefits for the remainder of the employee's working life. The Brotherhood contended that the Orange Book prevented CSX from moving work or covered employees from Waycross to Raceland.

When negotiations broke down, both the union and the carrier invoked the arbitration procedures under § 4 of New York Dock. The arbitration committee ruled for the carrier. It agreed with the union that the Orange Book prohibited the proposed transfer of work and employees. It determined, however, that it could override any Orange Book or RLA provision that impeded an operational change authorized or required by the ICC's decision approving the original merger. The committee then held that the carrier could transfer the heavy repair work, which it found necessary to the original control acquisition, but could not transfer employees protected by the Orange Book, which it found would only slightly impair the original control acquisition. Both parties appealed the award to the Commission.

A divided Commission affirmed in part and reversed in part. The Commission agreed the committee possessed authority to override collective-bargaining rights and RLA rights that prevent implementation of a proposed transaction.

[499 US 125]

It reasoned, however, that "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. 4 ICC 2d 641, 650 (1988). The Commission thus affirmed the arbitration committee's order permitting the transfer of work but reversed the holding that the carriers could not transfer Orange Book employees.

3. The unions appealed both cases to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals considered the cases together and reversed and remanded to the Commission. Brotherhood of Railway Carmen v ICC, 279 US App DC 239, 880 F2d 562 (1989). The court held that § 11341(a) does not authorize the Commission to relieve a party of collective-bar-

gaining agreement obligations that impede implementation of an approved transaction. The court stated various grounds for its conclusion. First, because the court did not read the phrase "all other law" in § 11341(a) to include "all legal obstacles," it found "no support in the language of the statute" to apply the statute to obligations imposed by collective-bargaining agreements. Id., at 244, 880 F2d, at 567. Second, the court analyzed the Transportation Act of 1920, ch 91, § 407, 41 Stat 482, which contained a predecessor to § 11341(a), and found that Congress "did not intend, when it enacted the immunity provision, to override contracts." 279 US App DC, at 247, 880 F2d, at 570. The court noted that Congress had "focused nearly exclusively . . . on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract." Ibid. The court further noted that Congress had often revisited the immunity provision without making it clear that it included contracts or collective-bargaining agreements. Ibid. Finally, the court did not defer to the ICC's interpretation of the Act, presumably because it determined that the Commission's interpretation was belied by the contrary "'unambiguously

[499 US 126]

expressed intent of Congress,'" id., at 244, 880 F2d, at 567 (quoting Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc. 467 US 837, 843, 81 L Ed 2d 694, 104 S Ct 2778 (1984)).

In ruling that § 11341(a) did not apply to collective-bargaining agreements, the court "decline[d] to address the question" whether the section could operate to override provisions of the RLA. Brotherhood of Railway Carmen, supra, at 247-250, 880 F2d, at 570-573. It also declined to consider whether the labor protective conditions required by § 11347 are exclusive, or whether § 4 of the New York Dock conditions gives an arbitration committee the right to override provisions of a collective-bargaining agreement. 279 US App DC, at 250, 880 F2d, at 573. The court remanded the case to the Commission for a determination on these issues.

After the Court of Appeals denied the carriers' petitions for rehearing, the carriers in the consolidated cases filed petitions for certiorari, which we granted on March 26, 1990. 494 US 1055, 108 L Ed 2d 762, 110 S Ct 1522 (1990).[2] We now reverse.

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2. On September 9, 1989, the Commission also filed a petition for rehearing, and requested the court to refrain from ruling on the petition until the Commission could issue a comprehensive decision on remand addressing issues that the Court of Appeals left open for resolution. On September 29, 1989, the Court of Appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand." App to Pet for Cert in No. 89-1027, p 54a.

On January 4, 1990, the Commission reopened proceedings in the case remanded to it. On May 21, 1990, two months after we granted the carriers' petitions for certiorari, the Commission issued its remand decision. CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. 6 ICC 2d 715 (1990). In its decision, the Commission adhered to the Court of Appeals' ruling that § 11341(a) did not authorize it to override provisions of a collective-bargaining agreement. The Commission held, however, that § 11341(a) authorized it to foreclose resort to RLA remedies for modification and enforcement of collective-bargaining agreements "at least to the extent of [its] authority" to impose labor-protective conditions under § 11347. Id., at 754. The Commission explained that the § 11347 limit on its § 11341(a) authority "reflects the consistency of the overall statutory scheme for dealing with CBA modifications required to imple-

[499 US 127]

II

[1b] Title 49 USC § 11341(a) [49 USCS § 11341(a)] provides:

". . . A carrier, corporation, or person participating in that approved or exempted transaction is 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. . . ."

We address the narrow question whether the exemption in § 11341(a) from "all other law" includes a carrier's legal obligations under a collective-bargaining agreement.

[1c, 2a] 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 Commission 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

[499 US 128]

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.[3]

[1d, 3] As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 US, at 842-

ment Commission-approved mergers and consolidations." Id., at 722. The Commission remanded its decision to the parties for further negotiation or arbitration.

On December 4, 1990, the union respondents petitioned the Court of Appeals for review of the Commission's remand decision. The petition raises three issues: (1) whether § 11341(a) authorizes the ICC to foreclose employee resort to the RLA; (2) whether § 11347 authorizes the ICC to compel employees to arbitrate changes in collective-bargaining agreements; and (3) whether abrogation of employee contract rights effected a taking in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment.

3. [2b] On May 23, 1990, and again on September 19, 1990, the union respondents filed motions to dismiss the case as moot. They argued that in light of the alternative ground for decision offered by the ICC on remand from the Court of Appeals, see n 2, supra, the meaning and scope of § 11341(a) was no longer material to the dispute. The union respondents reassert their mootness argument in their brief on the merits. Brief for Respondent Unions 18.

We disagree. The Commission predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of § 11341(a). Thus, our definitive interpretation of § 11341(a) may affect the Commission's remand order. Agency compliance with the Court of Appeals' mandate does not moot the issue of the correctness of the court's decision. See, e.g., Cornelius v NAACP Legal Defense & Educational Fund, Inc., 473 US 788, 791, n 1, 87 L Ed 2d 567, 105 S Ct 3439 (1985); Schweiker v Gray Panthers, 453 US 34, 42, n 12, 69 L Ed 2d 460, 101 S Ct 2633 (1981); Maher v Roe, 432 US 464, 468-469, n 4, 53 L Ed 2d 484, 97 S Ct 2376 (1977). In addition, the alternative basis offered by the Commission on remand does not end the controversy between the parties. The parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the Commission's interpretation of the Act in its review of the remand order.

843, 81 L Ed 2d 694, 104 S Ct 2778. The contested language in § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history, between positive enactments and common-law rules of liability. Nor does it support the Court of Appeals' conclusion that Congress did not intend the immunity clause to apply to contractual obligations.

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[1e] By itself, the phrase "all other law" indicates no limitation. The circumstance that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth. There is a canon of statutory construction which, on first impression, might seem to dictate a different result. Under the principle of ejusdem generis, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. See Arcadia v Ohio Power Co. 498 US 73, 84-85, 112 L Ed 2d 374, 111 S Ct 415 (1990). The canon does not control, however, when the whole context dictates a different conclusion. Here, there are several reasons the immunity provision cannot be interpreted to apply only to antitrust laws and similar statutes. First, because "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," United States v Philadelphia Nat. Bank, 374 US 321, 350, 10 L Ed 2d 915, 83 S Ct 1715 (1963), Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a). Second, the otherwise general term "all other law" "includ[es]" (but is not limited to) "State and municipal law." This shows that "all other law" refers to more than laws related to antitrust. Also, the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws. In short, the immunity provision in § 11341 means what it says: A carrier is exempt from *all law* as necessary to carry out an ICC-approved transaction.

[1f, 4] The exemption is broad enough to include laws that govern the obligations imposed by contract. "The obligation of a contract is 'the law which binds the parties to perform their agreement.'" Home Building & Loan Assn. v Blaisdell, 290 US 398, 429, 78 L Ed 413, 54 S Ct 231 (1934) (quoting Sturges v Crowninshield, 4 Wheat 122, 197, 4 L Ed 529 (1819)). A contract depends on a regime

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of common and statutory law for its effectiveness and enforcement.

> "Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." Farmers and Merchants Bank of Monroe v Federal Reserve Bank of Richmond, 262 US 649, 660, 67 L Ed 1157, 43 S Ct 651, 30 ALR 635 (1923).

A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in § 11341(a) from "all other law" effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.

Schwabacher v United States, 334 US 182, 92 L Ed 1305, 68 S Ct 958 (1948), which construed the immediate precursor of § 11341(a), § 5(11) of the Transportation Act of 1940, ch 722, § 7, 54 Stat 908-909,[4] supports this conclusion. In Schwabacher, minority stockholders in a carrier involved in an ICC-approved merger complained that the terms of the merger diminished the value of their shares as guaranteed by the corporate charter

[499 US 131]

and thus "deprived [them] of contract rights under Michigan law . . . ." 334 US, at 188, 92 L Ed 1305, 68 S Ct 958. We explained that the Commission was charged under the Act with passing upon and approving all capital liabilities assumed or discharged by the merged company, and that once the Commission approved a merger in the public interest and on just and reasonable terms, the immunity provision relieved the parties to the merger of "restraints, limitations, and prohibitions of law, Federal, State, or municipal," as necessary to carry out the transaction. Id., at 194-195, 198, 92 L Ed 1305, 68 S Ct 958. We noted that before approving the merger, the Commission had a duty "to see that minority interests are protected," and emphasized that any such minority rights were, "as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." Id., at 201, 92 L Ed 1305, 68 S Ct 958. Once these interests were accounted for, however, "[i]t would be inconsistent to allow state law to apply a liquidation basis [for valuation] to what federal law designates as a basis for continued public service." Id., at 200, 92 L Ed 1305, 68 S Ct 958. Relying in part on the immunity provision, we held the contract rights protected by state law did not survive the merger agreement found by the Commission to be in the public interest. Id., at 194-195, 200-201, 92 L Ed 1305, 68 S Ct 958. Because the Commission had disclaimed jurisdiction to settle the shareholders' complaints, we remanded the case to the Commission to ensure that the terms of the merger were just and reasonable. Id., at 202, 92 L Ed 1305, 68 S Ct 958.

Just as the obligations imposed by state contract law did not survive the merger at issue in Schwabacher, the obligations imposed by the law that gives force to the carriers' collective-bargaining agreements, the

4. Section 5(11) of the Transportation Act of 1940 provided:

"[A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ."

The recodification of this language in § 11341(a) effected no substantive change. See HR Rep No. 95-1395, pp 158-160 (1978). See also ICC v Locomotive Engineers, 482 US 270, 299, n 12, 96 L Ed 2d 222, 107 S Ct 2360 (1987) (Stevens, J., concurring in judgment).

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RLA, do not survive the merger in this case. The RLA governs the formation, construction, and enforcement of the labor-management contracts in issue here. It requires carriers and employees to make reasonable efforts "to make and maintain" collective-bargaining agreements, 45 USC § 152 First [45 USCS § 152 First], and to refrain from making changes in existing agreements except in

[499 US 132]

accordance with RLA procedures, 45 USC §§ 152 Seventh, 156 [45 USCS §§ 152 Seventh, 156]. The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." Slocum v Delaware, L. & W. R. Co. 339 US 239, 242, 94 L Ed 795, 70 S Ct 577 (1950). As the law which gives "legal and binding effect to collective agreements," Detroit & T. S. L. R. Co. v United Transportation Union, 396 US 142, 156, 24 L Ed 2d 325, 90 S Ct 294 (1969), the RLA is the law that, under § 11341(a), is superseded when an ICC-approved transaction requires abrogation of collective-bargaining obligations. See ICC v Locomotive Engineers, 482 US 270, 287, 96 L Ed 2d 222, 107 S Ct 2360 (1987) (Stevens, J., concurring in judgment); Brotherhood of Locomotive Engineers v Boston & Maine Corp. 788 F2d 794, 801 (CA1 1986); Missouri Pacific R. Co. v United Transportation Union, 782 F2d 107, 111 (CA8 1986); Burlington Northern, Inc. v American Railway Supervisors Assn. 503 F2d 58, 62-63 (CA7 1974); Bundy v Penn Central Co. 455 F2d 277, 279-280 (CA6 1972); Nemitz v Norfolk & Western R. Co., 436 F2d 841, 845 (CA6), aff'd, 404 US 37, 30 L Ed 2d 198, 92 S Ct 185 (1971); Brotherhood of Locomotive Engineers v Chicago & N. W. R. Co. 314 F2d 424 (CA8 1963); Texas & N. O. R. Co. v Brotherhood of Railroad Trainmen, 307 F2d 151, 161-162 (CA5 1962); Railway Labor Executives Assn. v Guilford Transp. Industries, Inc. 667 F Supp 29, 35 (Me 1987), aff'd, 843 F2d 1383 (CA1 1988).

Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC-approved transaction makes sense of the consolidation provisions of the Act, which were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." Texas v United States, 292 US 522, 534-535, 78 L Ed 1402, 54 S Ct 819 (1934). The Act requires the Commission to approve consolidations in the public interest. 49 USC § 11343(a)(1) [49 USCS § 11343(a)(1)]. Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to

[499 US 133]

transferred employees" as well as "the loss of seniority rights," United States v Lowden, 308 US 225, 233, 84 L Ed 208, 60 S Ct 248 (1939), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. 49 USC §§ 11344(b)(1)(D), 11347 [49 USCS §§ 11344(b)(1)(D), 11347]; see also New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 ICC 60 (1979). Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If § 11341(a) did not apply to bargain-

ing agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, e.g. Burlington Northern R. Co. v Maintenance of Way Employes, 481 US 429, 444, 95 L Ed 2d 381, 107 S Ct 1841 (1987) (resolution procedures for major disputes "virtually endless"); Detroit & T. S. L. R. Co. v United Transportation Union, 396 US 142, 149, 24 L Ed 2d 325, 90 S Ct 294 (1969) (dispute resolution under RLA involves "an almost interminable process"); Railway Clerks v Florida East Coast R. Co. 384 US 238, 246, 16 L Ed 2d 501, 86 S Ct 1420 (1966) (RLA procedures are "purposely long and drawn out"). The immunity provision of § 11341(a) is designed to avoid this result.

We hold that, as necessary to carry out a transaction approved by the Commission, 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. We affirm the Commission's interpretation of § 11341(a), not out of deference in the face of an

[490 US 124]

ambiguous statute, but rather because the Commission's interpretation is the correct one.

This reading of § 11341(a) will not, as the Court of Appeals feared, lead to bizarre results. Brotherhood of Railway Carmen v ICC, 279 US App DC, at 244, 880 F2d, at 567. 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 Commission 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. 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, 96 L Ed 2d 222, 107 S Ct 2360 (Stevens, J., concurring in judgment). We express no view on these matters, as they are not before us here.

The judgment of the Court of Appeals is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice Stevens, with whom Justice Marshall joins, dissenting.

The statutory exemption that the Court construes today had its source in § 407 of the Transportation Act of 1920 (1920 Act). 41 Stat 482. Its wording was slightly changed in 1940, 54 Stat 908-909, and again in 1978, 92 Stat 1434. There is, however, no claim that either of those amendments modified the coverage

of the exemption in any way. It is therefore appropriate to begin with a consideration of the purpose and the text of the 1920 Act.

[499 US 135]

Before the First World War, the railroad industry had been the prime target of antitrust enforcement.[1] In 1920, however, Congress adopted a new national transportation policy that expressly favored the consolidation of railroads. The policy of consolidation embodied in the 1920 Act would obviously have been frustrated by the federal antitrust laws had Congress not chosen to exempt explicitly all approved mergers from these laws. Section 407 of that Act provided, in part:

> "The carriers affected by any order made under the foregoing provisions of this section . . . shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' . . . and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat 482.

Both the background and the text of § 407 make it absolutely clear that its primary focus was on federal antitrust laws. Sensibly, however, Congress wrote that section using language broad enough to cover any other federal or state law that might otherwise forbid the consummation of any approved merger or prevent the immediate operation of its properties under a new corporate owner. Not a word in the statute, or in its legislative history, contains any hint that the approval of a merger by the Interstate Commerce Commission (ICC) would impair the obligations of valid and otherwise enforceable private contracts.

Given the present plight of our Nation's railroads, it may be wise policy to give the ICC a power akin to, albeit greater

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than, that of a bankruptcy court to approve a trustee's rejection of a debtor's executory private contracts.[2] Through nothing short of a tour de force, however, can one find any such power in 49 USC § 11341 [49 USCS § 11341], or in either of its predecessors. Obviously, consolidated carriers would find it useful to have the ability to disavow disadvantageous long-term leases on obsolete car repair facilities, employment contracts with high salaried executives whose services are no longer needed, as well as collective-bargaining agreements that provide costly job security to a shrinking work force. If Congress had intended to give the ICC such broad ranging power to impair contracts, it would have done so in language much clearer than anything that can be found in the present Act.

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1. See United States v Trans-Missouri Freight Assn. 166 US 290, 41 L Ed 1007, 17 S Ct 540 (1897); United States v Joint Traffic Assn. 171 US 505, 43 L Ed 259, 19 S Ct 25 (1898); Northern Securities Co. v United States, 193 US 197, 48 L Ed 679, 24 S Ct 436 (1904); United States v Terminal Railroad Assn. of St. Louis, 224 US 383, 56 L Ed 810, 32 S Ct 507 (1912); United States v Union Pacific R. Co. 226 US 61, 57 L Ed 124, 33 S Ct 53 (1912); United States v Pacific & Arctic R. & Nav. Co. 228 US 87, 57 L Ed 742, 33 S Ct 443 (1913).

2. Section 365 of the Bankruptcy Code, 11 USC § 365 [11 USCS § 365], allows a trustee to assume or reject a debtor's executory contracts and unexpired leases subject to the *subsequent* approval of the bankruptcy court. Collective-bargaining agreements can be rejected only if the additional requirements of 11 USC § 1113 [11 USCS § 1113] are met.

The Court's contrary conclusion rests on its reading of the "plain meaning" of the present statutory text and our decision in Schwabacher v United States, 334 US 182, 92 L Ed 1305, 68 S Ct 958 (1948). Neither of these reasons is sufficient. Moreover, the Court's reading is inconsistent with other unambiguous provisions in the statute.

I

With or without the ejusdem generis canon, I believe that the normal reader would assume that the text of § 11341 encompasses the antitrust laws, as well as other federal or state laws, that would otherwise prohibit rail carriers from consummating approved mergers, and nothing more. See ante, at 128, 113 L Ed 2d, at 106-107. That text contains no suggestion that whenever a criminal law, tort law, or any regulatory measure impedes the efficient operation of a new merged carrier, the carrier can avoid such a restriction by virtue of the ICC approval of that merger. Nor does the text of § 11341 contain any suggestion

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that such an approval would impair the obligation of private contracts.[3] Rather, as both an application of the ejusdem generis canon and an examination of the legislative history show, the purpose of the exemption was to relieve the carriers "from the operation of the antitrust *and other restrictive or prohibitory laws.*" HR Conf Rep No. 650, 66th Cong, 2d Sess, 64 (1920) (emphasis added).

The Court speculates that the reason the 1920 Congress explicitly referred to the antitrust laws was simply to avoid the force of the rule that repeals of the antitrust laws by implication are not favored, citing United States v Philadelphia Nat. Bank, 374 US 321, 350, 10 L Ed 2d 915, 83 S Ct 1715 (1963). In that case, however, the rule was announced in the context of the industry's argument that federal regulatory approval of a transaction exempted the transaction from the antitrust laws even though the regulatory statute was entirely silent on the subject of exemption. Ibid. The authority cited in the Philadelphia

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decision to support this rule sheds no light on the question whether a statute creating a broad exemption for mergers would naturally be read to include all statutes that otherwise would have prohibited the consum-

3. As Judge D. H. Ginsburg, writing for the Court of Appeals, noted:

"We cannot sustain the ICC's position that this provision empowers it to override a [collective-bargaining agreement (CBA)]. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from 'the antitrust laws and from all other law' to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to CBAs. Nor has the ICC explained how we can read the term 'other law,' as it has done, to mean 'all legal obstacles.' Dispatchers, J A 207. None of the Supreme Court decisions, discussed below, authorizing the ICC to abrogate an 'other law' even suggests that the term means 'all legal obstacles.' The ICC itself, prior to its 1983 decision in DRGW, recognized as much. See Gulf, Mobile & Ohio R. R. Co.—Abandonment, 282 ICC 311, 335 (1952) ('None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.')." Brotherhood of Railway Carmen v ICC, 279 US App DC 239, 244, 880 F2d 562, 567 (1989).

mation of a merger of large rail carriers.[4]

Of greater importance, however, is the Court's rather remarkable assumption that an exemption "from 'all other

[499 US 139]

law' " should be read to encompass the restraints created by private contract.[5] Ante, at 129-130, 113 L Ed 2d, at 107-108. Even if the text of the present Act could bear that reading, it is flatly inconsistent with the text of the 1920 Act, which relieved the participating carriers "from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions by law, State or federal . . . ." 41 Stat 482. Moreover, given the respect that our legal system has always paid to the enforceability of private contracts—a respect that is evidenced by express language in the

4. All but two of the cases that the Court cited in the Philadelphia decision to support the rule against implicit repeals of the antitrust statutes arose under a regulatory framework in which there was no mention of exemption. United States v Philadelphia Nat. Bank, 374 US 321, 350, n 28, 10 L Ed 2d 915, 83 S Ct 1715 (1963). See United States v Trans-Missouri Freight Assn. 166 US, at 314-315, 41 L Ed 1007, 17 S Ct 540; United States v Joint Traffic Assn. 171 US 505, 43 L Ed 259, 19 S Ct 25 (1898); Northern Securities Co. v United States, 193 US, at 343, 374-376, 48 L Ed 679, 24 S Ct 436 (plurality and dissenting opinions); United States v Pacific & Arctic R. & Nav. Co., 228 US, at 105, 107, 57 L Ed 742, 33 S Ct 443; Keogh v Chicago & Northwestern R. Co. 260 US 156, 161-162, 67 L Ed 183, 43 S Ct 47 (1922); Central Transfer Co. v Terminal Railway Assn. of St. Louis, 288 US 469, 474-475, 77 L Ed 899, 53 S Ct 444 (1933); Terminal Warehouse Co. v Pennsylvania R. Co. 297 US 500, 513-515, 80 L Ed 827, 56 S Ct 546 (1936); United States v Borden Co. 308 US 188, 197-206, 84 L Ed 181, 60 S Ct 182 (1939); United States v Socony-Vacuum Oil Co. 310 US 150, 226-228, 84 L Ed 1129, 60 S Ct 811 (1940); Georgia v Pennsylvania R. Co. 324 US 439, 456-457, 89 L Ed 1051, 65 S Ct 716 (1945); United States Alkali Export Assn., Inc. v United States, 325 US 196, 205-206, 89 L Ed 1554, 65 S Ct 1120 (1945); Allen Bradley Co. v Electrical Workers, 325 US 797, 809-810, 89 L Ed 1939, 65 S Ct 1533 (1945); Northern Pacific R. Co. v United States, 356 US 1, 9, 2 L Ed 2d 545, 78 S Ct 514 (1958); United States v Radio Corp. of America, 358 US 334, 3 L Ed 2d 354, 79 S Ct 457 (1959); California v FPC, 369 US 482, 8 L Ed 2d 54, 82 S Ct 901 (1962); Silver v New York Stock Exchange, 373 US 341, 10 L Ed 2d 389, 83 S Ct 1246 (1963). The other two cases involve regulations with explicit exemptions from the antitrust laws, but do not support the position taken by the Court in this case. In Maryland & Virginia Milk Producers Assn., Inc. v United States, 362 US 458, 4 L Ed 2d 880, 80 S Ct 847 (1960), this Court held that § 6 of the Clayton Act's exemption of agricultural cooperatives from the antitrust law only protected the formation of those associations; once formed they could not engage in any further conduct that would violate the antitrust laws. In Pan American World Airways, Inc. v United States, 371 US 296, 9 L Ed 2d 325, 83 S Ct 476 (1963), the Court held that the exemption relieving airlines from the operation of the antitrust laws when certain transactions were approved by the Civil Aeronautics Board did not exempt the airlines from all antitrust violations, but only exempted them from violations stemming from activity explicitly governed by the regulatory scheme.

5. Again Judge Ginsburg's observation is pertinent:

"Moreover, the ICC's proposed insertion of 'all legal obstacles' into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. Cf. Gulf, Mobile & Ohio, 282 ICC at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its 'contractual obligations for the payment of rent'). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act." 279 US App DC, at 244-245, 880 F2d, at 567-568.

Constitution itself—there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the antitrust laws. Had Congress intended to convey the message the Court finds in § 11341, it surely would have said expressly that the exemption was from all restraints imposed by law or by private contract.[7]

[499 US 140]

II

In my opinion, the Court's reliance on the decision in Schwabacher v United States, 334 US 182, 92 L Ed 1305, 68 S Ct 958 (1948), is misplaced. In that case, the owners of two percent of the outstanding preferred stock of the Pere Marquette Railway brought suit in the United States District Court to set aside an ICC order approving a merger between that corporation and the Chesapeake and Ohio Railway Corporation. In approving the merger, the ICC had found that the market value of plaintiffs' preferred shares ranged, at different times, from $87 to $99 per share, and that the stock that they received in exchange pursuant to the merger agreement would have realized about $90 and $111 on the same dates. Thus, the terms of the merger, as applied to the plaintiffs' class, were just and reasonable. Plaintiffs contended, however, that the exchange value of their shares amounted to $172.50 per share because the merger was a "liquidation" as a matter of Michigan law, and the Pere Marquette Charter provided that in the event of liquidation or dissolution, the preferred shareholders were entitled to receive full payment of par value plus all accrued unpaid dividends.

The ICC order approving the merger did not resolve the Michigan law question. The ICC considered the issue too insignificant to affect the validity of the entire transaction, and left the matter for resolution by negotiation or later litigation. On appeal from the District Court's judgment sustaining the ICC order, this Court held that the ICC's finding that the exchange value was just and reasonable foreclosed any other claim that the dissenting shareholders might assert

[499 US 141]

concerning the value of their shares. Whatever Michigan law might provide for the preferred shareholders in the event of a winding-up or liquidation could not determine the just and reasonable value of shares in the continuing enterprise. The essence of the Court's holding is set forth in this passage:

"Since the federal law clearly contemplates merger as a step in

6. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." US Const, Art I, § 10, cl 1.

7. After reviewing the legislative history, Judge Ginsburg concluded:

"From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. Cf. Association of Flight Attendants v Delta Air Lines, Inc., 879 F2d 906, 917 (DC Cir 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties." 279 US App DC, at 247, 880 F2d, at 570.

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continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. . . .

. . . . . .

"We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." Id., at 200-201, 92 L Ed 1305, 68 S Ct 958.

It is true that the effect of the Schwabacher decision was to extinguish whatever contractual rights the dissenting shareholders possessed as a matter of Michigan law. But the Court did require the ICC, on remand, to consider whatever value the Michigan law claims might have in connection with its final conclusion that the merger plan was "just and reasonable." A fair reading of the entire opinion makes it clear that the holding was based more on the ICC's "complete control of the capital structure to result from a merger," id., at 195, 92 L Ed 1305, 68 S Ct 958, than on the exemption at issue in this case. Schwabacher cannot fairly be read as authorizing carriers to renounce private contracts that limit the benefits achievable through the merger.

[499 US 142]

III

There is tension between the Court's interpretation of the exemption that is now codified in 49 USC § 11341(a) [49 USCS § 11341(a)] and the labor-protection conditions set forth in 49 USC § 11347 [49 USCS § 11347]. The latter section requires an ICC order approving a railroad merger to impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat 1337, as amended, 45 USC § 565 [45 USCS § 565]. One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the New York Dock conditions described by the Court, ante, at 120-121, 113 L Ed 2d, at 102. As the Court notes, that condition provides that the benefits protected "'under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements.'" Id., at 121, 113 L Ed 2d, at 102 (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining agreements would survive any ICC approved merger.

As I noted in my separate opinion in ICC v Locomotive Engineers, 482 US 270, 298, 96 L Ed 2d 222, 107 S Ct 2360 (1987), the statutory immunity provision in § 11341 is self-executing and becomes effective at the time of the ICC approval. "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." Ibid.

(footnote omitted). In neither of the cases before the Court today did the ICC approval of the merger purport to modify or terminate any collective-bargaining agreement. The ICC approval orders were entered in 1980 and 1982 and contained no mention of either of the proposed transfers of personnel that are now at issue and about which the union was first notified several years after the ICC orders were entered.[8]

[499 US 143]

I cannot subscribe to a late-blooming interpretation of 71-year-old immunity statute that gives the Commission a roving power—exercisable years after a merger has been approved and consummated—to impair the obligations of private contracts that may "prevent the efficiencies of consolidation from being achieved." Ante, at 133, 113 L Ed 2d, at 109. The Court's decision may represent a "better" policy choice than the one Congress actually made in 1920, cf. West Virginia University Hospitals, Inc. v Casey, ante, at 100-101, 113 L Ed 2d 68, 111 S Ct 1138 (1991), but it is neither an accurate reading of the command that Congress issued in 1920, nor is it a just disposition of claims based on valid private contracts.

I respectfully dissent.

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8. In the ICC order approving the merger of Chessie System, Inc., and Seaboard Coastline Industries, Inc., the ICC discussed how the coordination of facilities would generate significant cost reductions and improved economic efficiency. CSX Corp.—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc. 363 ICC 521, 556 (1980). The ICC noted:

"These savings will spring from common-point coordination projects, mechanical and engineering department coordinations, locomotive and car utilization improvements, and internal rerouting efficiencies. Each of these projects is discussed separately below." Ibid.

In the discussion that followed, the ICC did discuss plans to expand the car production facilities at Raceland, Kentucky, in order to make cars for a member line that had been buying its cars from an independent manufacturer. The ICC found that the applicants had failed to show that the public would derive any benefit from this plan. There was no discussion of the consolidation of that facility by closing Seaboard's car repair shop in Waycross, Georgia. Nor did the ICC discuss the consolidation of locomotive works in Norfolk Southern Corp.—Control—Norfolk & W. R. Co. and Southern R. Co. 366 ICC 173 (1982).

Arbitration pursuant to Article I - Section 4 of the employee protective conditions developed in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) as provided in ICC Finance Docket No. 30,000

PARTIES TO DISPUTE	Union Pacific Railroad Company Western Pacific Railroad and American Train Dispatchers Association	GEN. 61-A-2 DECISION

QUESTIONS AT ISSUE:

1. Is the transfer of train dispatching work from Sacramento, California, to Salt Lake City, Utah, as set forth in the Union Pacific Railroad Company's letter of August 17, 1983, to the American Train Dispatchers Association subject to arbitration under Article I, Section 4 of the New York Dock Conditions?

2. If the answer to Question No. 1 is in the affirmative, what provisions shall be contained in an arbitrated implementing arrangement rendered pursuant to Article I, Section 4 of the New York Dock conditions with respect to the transfer of dispatching work as set forth in Carriers' letter of August 17, 1983?

BACKGROUND:

On September 24, 1982, the Interstate Commerce Commission (ICC) rendered its Decision in Finance Docket No. 30,000 approving the merger of the Union Pacific Railroad (UP), the Missouri Pacific Railroad (MP) and the Western Pacific Railroad (WP), 366 ICC 362. The ICC in its Decision imposed conditions for the protection of employees set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 350 I.C.C. 60 (1979) (New York Dock Conditions).

By letter of August 17, 1983, UP notified the General Chairman of the American Train Dispatchers Association (ATDA) pursuant to Article I, Section 4 of the New York Dock Condi[illegible] of UP's intent:

> . . . to transfer all train dispatching work associated with the territory between the East Switch at Burmester (approximately M.P. 897.8) and Salt Lake City (both Union Pacific North Yard and D&RGW Roper Yard), to the Union Pacific train dispatchers located at Salt Lake City.

The letter also stated that the dispatching work transferred to the UP dispatchers at Salt Lake City, Utah, would be taken from WP dispatchers at Sacramento, California. The notice stated further that although the territories for which the WP dispatchers in Sacramento are responsible might be restructured, the Carrier did not intend to transfer any WP dispatcher from Sacramento to Salt Lake City with the work, nor did the Carrier anticipate a reduction of train dispatcher positions at Sacramento or any adverse impact on any train dispatchers as a result of the transfer.

The parties met on September 6, 20, and 21, 1983, concerning the transfer of dispatching work. However, neither those meetings or substantial correspondence between the UP and ATDA concerning them produced agreement.

By letter of October 24, 1983, the Carrier requested the National Mediation Board (NMB) to appoint a referee pursuant to Article I, Section 4 of the New York Dock Conditions. ATDA opposed the Carrier's request on the ground that the dispute between the parties was not within the scope of Article I, Section 4, a position ATDA had taken consistently in its meetings and correspondence with the Carrier. However, by letter of January 23, 1984, the NMB appointed the undersigned as Referee pursuant to Article I, Section 4.

On January 25, 1984, the UP withdrew its request for appointment of a Referee for the stated purpose of conducting further negotiations with ATDA in an attempt to resolve the dispute. However, the dispute remained unresolved and the Carrier reapplied to the NMB for appointment of a Referee. On March 26, 1984, the NMB reappointed the undersigned as Referee.

On April 11, 1984, ATDA requested that this proceeding be bifurcated in order that the jurisdictional issues raised by the Organization would be heard and decided separately from the merits of the dispute. By letter of April 19, 1984, the undersigned Referee denied the Organization's request on the ground that compliance with such request would make it difficult it not impossible to comply with the time strictures of Article I, Section 4. The ruling made clear, however, that while one hearing would be conducted on all outstanding issues, the Decision resulting from the hearing would address and resolve all jurisdictional issues before addressing issues involving the merits of the dispute if such Decision was necessary.

Hearing was held in this matter in Sacramento, California, on April 27, 1984.

FINDINGS:

At issue in this proceeding is the transfer of the dispatching work of one half of one employee. Both the Carrier and the Organization agree that the transfer is desirable for organizational and operating efficiency. However, the Organization vigorously contests the right of the Carrier to make the transfer pursuant to Article I, Section 4 of the New York Dock Conditions without agreement by the Organization.

1. Jurisdiction

The threshold issue which must be resolved is whether the transfer of dispatching work from WP Dispatchers in Sacramento to UP Dispatchers in Salt Lake City is properly justiciable under Article I, Section 4 of the New York Dock Conditions. The Organization maintains that no such jurisdiction exists, even to decide the jurisdictional question. The Carrier on the other hand maintains that the proposed transfer raises issues properly within the province of a Referee acting under Article I, Section 4 and seeks an arbitrated implementing arrangement as provided in Article I, Section 4 in resolution of the parties' impasse.

a. Organization's Position

The Organization maintains that the transfer of work is excluded from Article I, Section 4 by the very terms of that provision. First, Article I, Section 4 applies only to ". . . a transaction which is subject to these (New York Dock) conditions. . . ." The Organization argues that the transfer of work is not a transaction defined in Article I, Section 1(a) of the conditions as ". . . any action taker pursuant to authorizations of this Commission on which these provisions have been imposed." The Organization contends that the Commission never authorized the transfer of work and in fact excluded the transfer from the scope of the transaction authorized in its Decision in Finance Docket 30,000. The Organization argues further that the proposed transfer of work, by the Carrier's own admission in the August 17, 1983, notice, will not

". . . cause the dismissal or displacement of any employees or rearrangement of forces, . . ." nor involve a ". . . selection of forces . . ." as provided in Article I, Section 4. In fact, emphasizes the Organization, the notice states that no employees will be affected whereas Article I, Section 4 provides that the notice shall include ". . . an estimate of the number of employees of each class affected by the intended changes."

Citing New York Dock Ry. v United States, 609 F.2d. 83 (2 Cir. 1979) and Ry. Labor Executives Assn. v United States, 339 U.S. 142 (1949) for the proposition that labor protective conditions imposed by the ICC were intended to protect the interests of employees and not the railroads, the Organization argues that the use of Article I, Section 4 to implement the transfer of work would constitute a misapplication of the New York Dock Conditions to enhance the Carrier's position at the expense of the employees. In essence, argues the Organization, UP would acquire the right to take action adversely affecting WP employees which WP did not have prior to the merger.

The Organization maintains that the proposed transfer of work pursuant to Article I, Section 4 is prohibited by Article I, Section 2 of the New York Dock Conditions which provides:

> 2. 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.

The Organization points to the Mediation Agreement of April 7, 1976, known as the Sacramento County Agreement, between the ATDA and WP which

the Organization contends prohibits the WP from transferring Sacramento dispatchers or their work without agreement by the Organization. Emphasizing that the agreement was ertered into under the Railway Labor Act, 45 U.S.C. §151, et seq., with its statutory scheme of voluntary settlement of disputes concerning the making or amending of collective bargaining agreements, the Organization contends that the implementation of the transfer of work in this case under Article I, Section 4 of the New York Dock Conditions would constitute the imposition of binding or compulsory arbitration which would violate the Mediation Agreement and contravene rights guaranteed by the Railway Labor Act. Accordingly, such action would violate Article I, Section 2 of the New York Dock Conditions.

The Organization also alleges that the transfer of work in this case would violate Article I, Section 3 of the New York Dock Conditions providing in pertinent part:

> 3. Nothing in this appendix (the New York Dock Conditions) shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employees may have under existing job security or other protective conditions or arrangements; . . .

Section 3 also provides that employees may elect the benefits of New York Dock or any superior protective agreement or arrangement applicable to them. The Organization points to the provision in the April 7, 1976, Mediation Agreement for the cancellation of the prohibitions on the transfer of employees and work in the event the Mediation Agreement of June 16, 1966, Case No. A-7460, a national job security agreement applicable to dispatchers, is amended. The Organization argues that

in view of the interrelationship of the two Mediation Agreements, the April 7 Mediation Agreement is a job security agreement or arrangement superior to New York Dock, protected by Article I, Section 3, which may not be abrogated by any proceeding under Article I, Section 4.

The Organization maintains that an Article I, Section 4 proceeding implementing transfer of the work in this case would violate Section 17 of the ICC Decision in Finance Docket 30,000, 366 ICC at 654, which provides that all authority granted by the Commission in that case is subject to the New York Dock Conditions ". . . unless an agreement is entered prior to consolidation in which case protection shall be at the negotiated level (subject to our review to assure fair and equitable treatment of affected employees)." The Organization contends that the previously negotiated Mediation Agreement of April 7, 1976, was entered into prior to the consolidation, takes precedence over the New York Dock Conditions and thus cannot be abrogated by any proceeding under Article I, Section 4.

As noted above the Organization urges that the proposed transfer of work in this case was not authorized by the Commission in its Decision in Finance Docket 30,000 and in fact was excluded by the Commission from the scope of that Decision. The Organization points to the Carrier's position taken before the Commission in that case specifically disavowing plans to transfer the work in the instant case. The Organization also points out that in its Decision the Commission denied the Organization's request for a special notice provision regarding any transfer of dispatchers' work on the ground that the record contained no evidence such transfer was

in fact planned by the Carrier. Accordingly, the Organization urges, the Commission's Decision may only be read as specifically excluding such transfer from any transaction contemplated by the Commission to which the New York Dock Conditions should apply. Thus, the transfer is not subject to implementation through an Article I, Section 4 proceeding.

The Organization urges that in the final analysis the Carrier has not sustained its burden of establishing jurisdiction under Article I, Section 4 of the New York Dock Conditions for an arbitrated arrangement implementing the proposed transfer of work from Sacramento to Salt Lake City. Accordingly, this proceeding should be dismissed.

b. Carrier's Position

The Carrier contends that the transfer of work proposed in the instant case is appropriate for implementation under Article I, Section 4 of the New York Dock Conditions notwithstanding ATDA's "jurisdictional/procedural" arguments to the contrary. The Carrier argues that while it does not anticipate any adverse effect upon employees, the transfer of work "may" result eventually in the dismissal or displacement of employees or rearrangement of forces. Accordingly, the transfer falls within the scope of Article I, Section 4. The Carrier cites ICC and court decisions which it contends reject the arguments advanced by the Organization in this case. Specifically, the Carrier alleges the ICC has affirmed that the Railway Labor Act and existing collective bargaining agreements and arrangements must give way to a transaction authorized by the Commission at least to the extent that they block or

impede implementation of the transaction. Furthermore, the Carrier contends, in its Decision of September 24, 1982, the ICC specifically refused to burden the Carrier with notice provisions concerning the transfer of work at issue in the instant case and actually authorized such transfer subject to the New York Dock Conditions.

The Carrier argues that Article I, Section 2 of the New York Dock Conditions is inapplicable to the instant case. The Carrier cites the history of that Section pointing to its inception in the Amtrak C-1 conditions. The Carrier contends that Section 2 was meant to apply to a single carrier assuming the employment, and the employment contracts, of many employees from several different carriers. The Carrier contends it was not meant to apply to transactions between two carriers such as the instant case.

With respect to Article I, Section 3 the Carrier denies that the Mediation Agreement of April 7, 1976, is an employee protective agreement because it does not specifically preserve the income or employment of the WP dispatchers. Conceding that the Mediation Agreement of June 16, 1966, is an employee protective agreement or arrangement, the Carrier contends that the April 7, 1976, Mediation Agreement, although conditioned upon continuance of the 1966 agreement unamended, does not take on the same character as the latter agreement. Furthermore, argues the Carrier, the terms of the April 7 Mediation Agreement do not prohibit or restrict the transfer of work at issue in this proceeding. Nor, urges the Carrier, does Section 17 of the ICC's Order in Finance Docket 30,000 preserve the April 7 Mediation Agreement in view of the fact it is not a protective agreement or arrangement.

Emphasizing the need for finality in merger and consolidation cases, and the need to prevent organizations from gaining veto power over such transactions, the Carrier points out that Article I, Section 4 is a clear statement by the ICC that mandatory arbitration shall be the method for resolving disputes concerning the failure to agree to procedures for implementing transactions under the New York Dock Conditions. Accordingly, the Referee must exercise jurisdiction in this case in order to facilitate the scheme of the New York Dock Conditions.

The Carrier denies that it intentionally misled either the ICC or the Organization with respect to the transfer of work from Sacramento to Salt Lake City during the proceeding which culminated in the Commission's Decision in Finance Docket 30,000. It contends that it truthfully represented no plans existed to transfer the work. However, the Carrier contends that this should not preclude future transfer of the work which is involved in this case. The Carrier contends the ICC specifically recognized this in its Decision.

The Carrier disputes the Organization's contention that the Carrier would receive powers not previously held by virtue of an Article I, Section 4 proceeding in this case. The Carrier argues that the same result could have been accomplished under the Washington Job Protection Agreement by abandonment proceedings. However, proceeding under New York Dock affords the employees a higher level of protection.

The Carrier contends that the Organization's construction of the ICC's Decision and Order in Finance Docket 30,000 renders it a static

rather than the dynamic instrument it was intended to be. The Carrier contends that the ICC recognizes not all transactions are foreseeable or contemplated at the time the Commission authorizes a merger or consolidation and accordingly Carriers are given authority to undertake a transaction in the future with the protection of the New York Dock Conditions for affected employees.

The Carrier contends that what the Organization actually seeks now and has sought from the outset of this proceeding is attrition protection for WP dispatchers which this Organization and others have sought unsuccessfully to obtain from the ICC. The Carrier states that inasmuch as the New York Dock Conditions do not provide for such level of protection, the Carrier refused to agree. Accordingly, the Carrier urges that its proposal for an implementing arrangement, which is based on New York Dock, should be adopted by the Referee in this case.

c. Discussion

Of the arguments advanced and authorities relied upon by both the Carrier and the Organization with respect to the jurisdictional question in this case, the most relevant and accordingly the most persuasive are those based upon or relating to the ICC's pronouncements. As the author of the New York Dock Conditions the Commission's interpretations of those conditions, if directly on point, are binding upon a Referee in an Article I, Section 4 proceeding. Even if not directly on point they are persuasive if relevant.

With respect to the transfer of WP dispatching work or WP dispatchers the ICC rejected ATDA's request to condition such transfer

upon prior notice, opportunity for hearing and order of the Commission saying:

> . . . there is no evidence of record that applicants have any intention of transferring the dispatchers in question. Moreover, we do not believe it would be appropriate to fetter applicants' operating capabilities by precluding it from acting in the future in ways necessary to enhance labor productivity. Imposition of a notice and hearing requirement in this context would be unduly burdensome on these carriers. Again, in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protection we have imposed here. 366 ICC at 622

Thus, while the ICC noted no record evidence that a transfer such as the one in this case was intended by the applicants, the statement immediately following that notation clearly establishes that the Commission intended that such transfers would be allowed with application of the New York Dock Conditions. The ICC's pronouncement is clear, unequivocal, directly on point and highly persuasive if not determinative that jurisdiction exists under Article I, Section 4 to resolve the impass in this case.

In another proceeding involving Finance Docket 30,000 decided October 19, 1983, the ICC also determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated. Given the Commission's ruling noted above with respect to the specific transfer of work in this case this Referee concludes that neither the Railway Labor Act or existing protective and schedule agreements, even when considered in the context of Sections 2 and 3 of the New York Dock Conditions, impair the Referee's jurisdiction under Article I, Section 4

of the New York Dock Conditions to resolve the impasse concerning transfer of the work in this case.

Accordingly, Question No. 1 is answered in the affirmative

2. Terms of Arbitrated Implementing Arrangement

There remains the question of what terms should be included in the arbitrated implementing arrangement applicable to the transfer of work.

This case involves the unique situation, as noted above, whereby no employees are anticipated to be affected by the transfer of work, nor will there be a rearrangement of forces. Accordingly, no selection of forces is involved.

The Carrier contends that the arbitrated implementing arrangement need provide only for the application of the New York Dock Conditions in the unlikely event that an employee may be affected or forces may be rearranged as a result of the transfer of work. However, the Organization argues that the arbitrated implementing arrangement should provide that no employee will be adversely affected nor will forces be rearranged as a result of the transaction.

The Organization's proposal is but another version of its position, argued in greater detail with respect to the jurisdictional issue in this case, that no work should be transferred without its agreement. The Organization's position frustrates binding or compulsory arbitration under Article I, Section 4 to resolve the impasse between the parties and thus is not proper for inclusion in the arbitrated implementing arrangement.

The Carrier's proposal is consistent with and would facilitate the purposes of Article I, Section 4. Accordingly, it will be adopted.

The attached arbitrated implementing arrangement is hereby made a part of this Decision and constitutes this Referee's determination under Article I, Section 4 of the New York Dock Conditions as to the appropriate arrangement for this particular case. The arbitrated implementing arrangement is to be treated as if signed and fully executed by the parties and their representatives. This Decision and the implementing arrangement are intended to resolve all outstanding issues in this proceeding as provided in Article I, Section 4 of the New York Dock Conditions.

William E. Fredenberger, Jr.
Referee

DATED: May 27, 1984

ARBITRATED IMPLEMENTING ARRANGEMENT

Between

UNION PACIFIC RAILROAD COMPANY
(WESTERN PACIFIC RAILROAD)

And

AMERICAN TRAIN DISPATCHERS' ASSOCIATION

- - - - - - - - - - - - - - - -

The Interstate Commerce Commission (ICC) approved, in Finance Docket No. 30000, and selected subdockets 1 through 6, the merger of Union Pacific Railroad Company (UP), Missouri Pacific Railroad Company, (MP), and Western Pacific Railroad Company (WP), effective December 22, 1982. The ICC, in its approval of the aforesaid Finance Docket, has imposed the employe protection condition set forth in New York Dock Ry. - Control - Brooklyn Eastern District Terminal 354 ICC 399 (1978), as modified at 360 ICC 60 (1979) (New York Dock Conditions).

Therefore, to effect consolidation of all train dispatching functions now being performed at Sacramento, California by WP train dispatchers for the trackage from Salt Lake City (including both UP North Yard and the D&RGW Roper Yard) to the East Switch at Burmester to UP train dispatchers at Salt Lake City:

IT IS AGREED:

ARTICLE I - PURPOSE:

All of the train dispatching now being performed by both UP and WP train dispatchers from Salt Lake City to Smelter, Utah (UP M.P. 766.4, WP M.P. 911.44) and by WP train dispatchers from Smelter, Utah to the East Switch at Burmester, Utah (WP M.P. 897.8) will be consolidated into a single combined train dispatching operation with all work being performed by UP train dispatchers at Salt Lake City, Utah.

ARTICLE II - Any re-alignment of assigned territories or change in assignments with respect to assigned hours, off days, etc., as a result of the transfer of work described herein will be accomplished in accordance with the terms of the existing collective bargaining agreement.

ARTICLE III - The transfer of work described herein will not result in the transfer of any of the train dispatchers at Sacramento, California, to Salt Lake City, Utah, nor is it anticipated that such transfer will result in any reduction of train dispatcher positions at Sacramento.

ARTICLE IV - Employes directly affected by the transfer of work described herein will be subject to the protective benefits of the New York Dock Conditions as prescribed by the Interstate Commerce Commission in Finance

Docket No. 30000. It is also understood there shall be no duplication of benefits under this Agreement and/or any other agreement or protective arrangement. A copy of the New York Dock Conditions is attached as Attachment "A".

ATTACHMENT "A"

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. *Definitions.*—(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. 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.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under

any existing job security or other protective conditions or arrangements: *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect: *provided further*, that the benefits under this appendix or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. 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 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 Mediation 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, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 9.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. *Separation allowance.*—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. *Fringe benefits.*—No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. *Moving expenses.*—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives: *provided, however,* that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section: *provided further,* that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. *Arbitration of disputes.*—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall

serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified; not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of this article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept

comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

In the Matter of Arbitration :
Between :
Brotherhood of Locomotive Engineers :
and : DECISION
Union Pacific Railroad Company :
Missouri Pacific Railroad Company :

File : Finance Docket No. 30,000

Arbitrator : Jacob Seidenberg, Esquire

Hearing : December 13, 1984

Appearances : Brotherhood of Locomotive Engineers
W.A. Hirst - Vice President
E.E. Watson - Vice President

Carriers
R.D. Meredith-Director Labor Relations - Union Pacific

R.P. Mitchell-Director Labor Relations - Missouri Pacific

Post Hearing Briefs Received : December 29, 1984

Issues : 1). Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and have transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?

2). Does the proposed transfer of work constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock transaction?

Background: The instant dispute has been precipitated as a result of the Interstate Commerce Commission approving on October 20,

1982 the petitions of the Union Pacific RR, the Missouri Pacific RR and the Western Pacific RR to consolidate and create a new railway system.

In the course of effectuating this new railroad network, the affected Carriers sought to achieve certain "common point consolidations". The parties to this dispute reached agreement on seven common points, but were unable, after six conferences, to reach agreement at the following three common points: Salina, Kansas, McPherson, Kansas; and Beloit, Kansas.

On October 30, 1984, the disputants agreed to submit the matter to arbitration, as provided for by Article I, Section 4 of the New York Dock Conditions. These Conditions had been imposed by the Interstate Commerce Commission upon the Carriers as protections for the employees of the three Carriers affected by the consolidation.

The parties selected the Undersigned to hear and decide the dispute.

On October 19, 1983, the ICC issued a Decision under Finance Docker No. 30,000 (Sub - No. 18) in response to petitions filed both by the BLE and UTU relative to the Commission's plenary jurisdiction over rail consolidation vis a vis the requirements of the Railway Labor Act.

The substantive aspects of the dispute stem from the notices served by the Carriers on the Organization pertaining to the selection and assignment of forces at the three common points, and counter proposals thereto. However, before we can deal with the

merits, we must review a procedural objection which the Organization has interposed to the Arbitrator's jurisdiction to consider the dispute.

Organization's Position (Procedural)

The Organization notes that Article I, Section 2 of the ICC prescribed New York Dock Conditions states:

> "2. 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."

The Organization maintains that the Carriers seek to avoid their statutory obligation under the Railway Labor Act, not to unilaterally change rates of pay or terms of working conditions, except in accordance with the provisions of Section 6 of the RLA. The Organization specifically protests the Carriers' efforts to get rid of the Local Agreement of August 10, 1946 in effect on the Missouri Pacific as well as other working conditions. The Organization stresses that at each of the three common points the Carriers do not propose to abandon tracks or facilities. It just seeks to substitute Union Pacific employees and Union Pacific rules for Missouri Pacific employees and Missouri Pacific rules without complying with the RLA requirements.

The Organization asserts the explicit language of Section 2 of Article I, proscribed the Carriers from utilizing Section 4 of Article I as a means to change existing agreements, except by

by mutual consent. If further asserts that it would be ironic to transmute the New York Dock Conditions from a shield designed to protect employee interests to a sword to deprive employees of their Railway Labor Act protections.

The Organization alludes to several (6) arbitration awards which have found that arbitrators acting under the mandate of Section 4 lack the authority to modify or vitiate existing collective bargaining agreements, in light of the explicit provisions of Section 2. The Organization notes that the Carriers, despite all of the cited awards, did not even request the ICC to overrule these arbitration awards. The Carriers should not be permitted in the instant case to overrule these well reasoned awards.

The Organization notes that the October 19, 1983 ICC clarification has been appealed to the Federal Courts and the appeal is still pending.

Carrier's Position (Procedural)

The Carrier states that since the ICC issued its October 19, 1983 Clarification, the jurisdictional question raised by the Organization is moot and settled. The ICC has held its authority over railroad consolidations is exclusive and plenary, and its approval of a transaction exempts such a transaction from the requirements of all laws including the Railway Labor Act. The Carriers note that the ICC Clarification states:

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payments of specified benefits, our jurisdiction to approve transactions requiring changes in the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The Carrier maintains that the arbitration awards rendered prior to October 19, 1983, must be deemed to have been superceded by the ICC's Clarification Decision. Since the ICC authored the New York Dock Conditions, its holdings as to the intent and purpose of these Conditions must be deemed superior to any arbitral decisions interpreting the Conditions. The Carriers add the ICC Clarification makes it patently clear that no existing working conditions in a collective bargaining agreement barred the execution of the ICC approved Consolidation.

The Carrier further stresses that since the ICC rendered its Clarification Decision there have been two arbitration awards which held there was jurisdiction in an Article I, Section 4 arbitration proceeding to consider changes in existing collective bargaining agreements.

The Carrier states on the basis of the present record there can be no doubt that this Arbitrator, acting under Section 4, has the jurisdiction and authority to approve the transfer of work from the Missouri Pacific to the Union Pacific and place the transferred work under the operating rules and collective bargaining agreements of the Union Pacific.

Findings: (Procedural)

On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operat-

ing under a different set of operating rules and different labor agreement than the ones under which they formerly functioned.

We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.

When we turn to the substantive aspects of the dispute dealing with the three common points, there are three separate and discrete matters which will be treated in considering the proposed implementing agreements.

Salina, Kansas

This point is currently served by both the UP and MP. Both carriers serve it by freight assignments. The UP also serves it by switch engine assignments, and the MP by a traveling switch engine.

The Carriers now propose to service Salina by a single UP traveling road switcher which will operate within a 50 miles area of Salina under the UP's operating and schedule rules. The MP traveling switcher will be abolished.

The Organization proposes that the Road Switcher shall be operated by MP employees and it will not perform any switching within the switching limits of Salina.

The Carrier also sets forth how road operations will be handled into and out of Salina and off the MP's Salina Division. These proposals are to have UP crews handle traffic routed via UP while MP crews will handle traffic routed via the MP. Employees adversely affected will receive the protection of the New York Dock Conditions.

The Organization stresses that MP engineers will only be able to exercise their seniority on their own seniority district. If they transfer to another seniority district, they would be listed after the most junior employee in that district. The Organization stresses that since the New York Dock Conditions now offer maximum protection for only six years, this does not effectively afford any meaningful protection to younger employees. It urges the work should be prorated on the basis of engine hours or road miles.

Findings:

After reviewing the detailed proposal contained in the draft implementing agreements of the parties attached to their respective Submissions, we conclude that the Carriers Implementing Agree-

ment (attachment No. 1) with its addenda, more effectively achieve the consolidation and coordination of the operations at Salina. We are not at liberty to overlook that the ICC approved the consolidation under the common control of the Union Pacific Railway System. Accordingly, we find that Carriers' Attachment No. 1, dated September 18, 1984, constitutes the appropriate arrangement for the Salina operations and it is to be the implementing agreement for the Salina operation.

McPherson-El Dorado

McPherson is serviced by both the UP and MP. The Up services McPherson by a local freight assignment operating out of Salina while the MP services it by a local freight assignment operating out of El Dorado. Salina is 35.4 miles from McPherson while El Dorado is 61.7 miles from McPherson.

The Carriers propose to serve McPherson by combining both local freight assignments into a single local to be governed by UP schedule and operating rules. The UP would man the operation for five months and the MP for seven months. The Organization's counter proposal is to apportion the work - 36% to UP and 64% to the MP. The Carriers propose Salina to be the home terminal, and the Organization counter proposes that Salina be the home terminal, when the UP engineers are manning the assignment and El Dorado will be the home terminal when MP engineers are protecting the work. The Organization further proposes that when MP engineers operate their alloted proration they will operate under MP rules and MP schedule provisions covering rates

of pay and working conditions.

Findings:

We find that the objectives of the coordination and consolidation would be facilitated by the Carriers' proposals as set forth in their Attachment NO. 2 attached to Carriers' Submission, with one exception, namely, that when the MP engineers operate the local freight assignment their home terminal should be El Dorado rather than Salina. The great bulk of MP engineers live in the vacinity of El Dorado and there is no persuasive reason why these engineers should travel approximately 90 miles to work that assignment. However, we find that in the interest of uniformity and consistency of operations that the assignment should operate under UP rules rather than shift back and forth periodically between MP and UP.

Accordingly, we find that Carriers' Attachment No. 2 with its Attachments set forth in its Submission, except as herein amended, shall constitute the implementing agreement to handle the UP and MP traffic between Salina and El Dorado.

Beloit

Beloit is serviced both by UP and MP. The Up services it with local freight assignments operating out of Salina while the MP services it with a local assignment operating out of Concordia. In addition the MP operates several local freight assignments operating west of Frankfort such as:

Atchison-Concordia Local
Concordia-Stockton Local
Down-Lenora Local

The Carriers propose to abolish these listed MP operated Local Assignments and serve Beloit with a consolidated operation to be operated by MP crews because most of the employees living near Beloit are MP employees. The consolidated assignment shall operate, however, under UP rules and schedule provisions.

The Organization contends there is no valid basis to compel MP employees to operate UP rules. The MP employees should be allowed their own rules, rates of pay and working conditions when they function under their allocated proration.

Findings:

We find the allocation of work of Beloit as proposed by the Carriers is fair and reasonable and therefore the description of work set forth in Attachment No. 3, attached to Carriers' Submission, should be governed by the Carriers' proposed implementing agreement.

Accordingly, Carriers' Attachment No. 3 with its attachments shall constitute the implementing agreement to handle operations at Beloit, including the designated territory listed in aforesaid Attachment.

In summary we are aware that any consolidation of rail properties disturbes the status quo and is unsettling to the affected Organization and employees. However, the Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement

We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiency and benefits which were the ime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

We conclude that the approved proposals, as amended, covering the three common points are an appropriate method for the selection and assignment of forces, and should be effected by the prescribed implementing agreements.

Decision:

Pursuant to Article I, Section 4 of the New York Dock Conditions, we find that the implementing agreement set forth in Carriers' Attachment No. 1 shall be the method for selecting and assigning the forces for the Salina operation.

We find further that implementing agreement, as amended, set forth in Carriers' Attachment No. 2, shall be the method for selecting and assigning the forces for the McPherson-El Dorado operation.

We also find that the implementing agreement set forth in Carriers' Attachment No. 3 shall be the method for selecting and assigning the forces in the Beloit operations.

Jacob Seidenberg

Jacob Seidenberg,
Arbitrator

January 17, 1995

IN THE MATTER OF ARBITRATION BETWEEN

UNION PACIFIC RAILROAD COMPANY and
MISSOURI PACIFIC RAILROAD COMPANY

and

UNITED TRANSPORTATION UNION (C&T)

Pursuant to Section 4 of Article I
of the New York Dock Conditions
Imposed by the Interstate Commerce
Commission in Finance Docket
Nos. 30,000, 30,396, 30,398 and 30,410

QUESTIONS AT ISSUE

1. Does this committee, in applying the New York Dock Conditions to the UP/MP merger, have jurisdiction to transfer work from the MP to the UP and place the transferred work under the operating rules and collective bargaining agreements of the UP?

2. Does a New York Dock arbitration award which provides for the transfer of work from carrier A to carrier B and places the transferred work under the operating rules and collective bargaining agreements of carrier B constitute a fair and equitable basis for the selection and assignment of forces made necessary by New York Dock transactions?

BACKGROUND

On October 20, 1982, the Interstate Commerce Commission issued its formal decision in Finance Docket 30,000 authorizing the consolidation of the Union Pacific Railroad Company, Missouri Pacific Railroad Company and the Western Pacific Railroad Company. Among its findings, the ICC held "that the protection of New York Dock is appropriate for the protection of applicants' employees affected by this proceeding without any modification" and imposed New York Dock conditions as a part of its order.

The ICC decision in Finance Docket 30,000 approving the consolidation and coordination of Union Pacific and Missouri Pacific facilities and operations included the following language:

Common Point Consolidations

> To maximize operating savings and service efficiencies, applicants propose numerous coordinations and consolidations of facilities. . . .
>
> . . . consolidations are planned at the remaining common points of . . . Salina, McPherson, Beloit and Kanapolis, KS, and Hastings . . . NE . . .
>
> The cost savings resulting from the above consolidations of facilities are due to reduced equipment needs, lower car hire and car maintenance expenses, reduced labor force, and lower terminal company charges, and amount to almost $5 million annually.

In its Finance Docket 30,398, ICC on January 29, 1984, approved Notice of Exemption as follows:

"Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) jointly filed a notice of exemption concerning the conveyance by MP to UP of a portion of MP's railroad and underlying realty known as the Hastings Subdivision, extending from milepost 574.7 near Muriel to milepost 580.3 at Hastings, in Adam County, NE. UP will operate over the trackage after conveyance of the line."

On February 3, 1984, in Docket 30,396, ICC issued its order of approval of the following:

"On January 19, 1984, Missouri Pacific Railroad Company (MP) and Union Pacific Railroad Company (UP) filed a notice of exemption pursuant to 49 C.F.R. 1180.2(d) (3) of the proposed acquisition by UP

from MP of that portion of MP's Crete Subdivision extending from milepost 467.9 near Hickman to milepost 486.8 at Crete, in Lancaster and Saline Counties, NE. The transaction involves conveyance of main track, side tracks, right of way, and other land between the right of way west of Hickman and the end of the line at Crete."

On February 24, 1984, ICC in Docket No. 30,410 authorized the following:

"Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP), wholly-owned subsidiaries of Pacific Rail Systems, Inc., have filed a notice of exemption for UP to purchase a portion of an MP rail line known as Hutchinson Subdivision between milepost 537.9 and milepost 538.5 at Kanapolis, Ellsworth County, KS. The transaction involves main and side track, right-of-way, and other land. UP will operate over the line after conveyance.

"The transaction will result in operating economies for both railroads. UP will perform switching service to each shipper presently served by both UP and MP. MP will no longer need to operate between Genesco and Kanapolis. Line haul service will be more efficient and expeditious."

Each of the ICC decisions relative to notice of exemption contained the following proviso:

"As a condition to use of this exemption, any employees affected by the transfer shall be protected pursuant to New York Dock Ry -Control-Brooklyn Eastern [illegible]

Pursuant to that portion of New York Dock Conditions, Article I, Section 4-(a), reading:

> "Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner: . . .",

carriers issued, on the indicated dates and involving the indicated location, notices as follows:

CRETE

February 27, 1984

All work between Aldo Junction and Crete (Milepost 467.9 to Milepost 486.8) will be performed by UP under applicable UP Schedule Rules. All traffic moving from and to Aldo Junction will be handled in the manner achieving maximum efficiency.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Firemen		1
Conductor	2	1
Brakemen	4	2

HASTINGS

February 1, 1984

All work now performed by either MP or UP at Hastings, Nebraska and between Milepost 574.7 and Milepost 580.3 will be performed by UP under applicable UP Schedule Rules. All

traffic moving to and from Hastings will be handled in the manner achieving maximum efficiency.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Firemen	1	1
Conductor	1	1
Brakemen	2	2

KANAPOLIS

February 13, 1984

All work now performed by either MP or UP at Kanapolis, Kansas, and between Milepost 537.9 and Milepost 538.5 will be performed by UP under applicable UP schedule rules. All traffic moving to and from Kanapolis will be handled in the manner achieving maximum efficiency.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Firemen	0	1
Conductors	0	1
Brakemen	0	2

TOPEKA

January 27, 1984

All UP and all MP traffic moving between Kansas City and Topeka and Topeka and Kansas City may be handled by UP. UP may perform any and all switching at Topeka and necessary interchange movements with other carriers.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors		1
Brakemen		2
Switchmen	21	

SALINA

March 21, 1984

All UP and all MP switching at Salina, all UP and MP switching on the east and west legs of the MP wye at Salina and all work south of Salina may be performed by UP.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors		1
Brakemen		2
Switchmen	12	

MCPHERSON

March 21, 1984

The present UP Salina-McPherson Local and the present MP McPherson-El Dorado Local may be combined into a single local operating Salina-El Dorado.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors	1	1
Brakemen	2	2

BELOIT

March 21, 1984

All work west of Concordia, Kansas now performed by MP may be performed by UP. This includes, but is not limited to, work in the following territories: Concordia-Downs, Downs-Tenora, Downs-Stockton and Jamestown-Burr Oak.

The following is an estimate of the number of employes of each class affected by this change:

	UP	MP
Conductors	1	3
Brakemen	2	6

The parties met in conference on the following dates to discuss such notices: February 8, 1984 (Crete and Hastings only), April 17-18, 1984, and June 4-5, 1984. At each conference, the carriers submitted proposed implementing agreements; however, the parties were unable to reach agreement on any notice for any location, and at the conclusion of the June 4-5 conference, UP Director of Labor Relations R. D. Meredith notified the organization's representatives of the carriers' intention to invoke arbitration to resolve the dispute.

On June 19, 1984, MP UTU(C&T) General Chairman Irving Newcomb and MP UTU(E) General Chairman R. D. Hogan wrote Mr. Meredith and MP Assistant Vice President O. B. Sayers, advising it was their position that arbitration could not alter existing MP collective bargaining agreements. Specifically, they stated:

> "Furthermore, let the record reflect from the outset our position that any arbitration proceedings lack any authority whatsoever under Article I, Section 4 of the New York Dock conditions to alter rates of pay, the working rules, and other terms and conditions of our collective bargaining agreements as those have been explicitly preserved by Article I, Section 2 of the same. See the Matter of Arbitration between Baltimore & Ohio Railroad Company, Newburgh & South Shore Railway Company and Brotherhood of Maintenance of Way Employes and United Steel Workers of America, I.C.C. Finance Docket No. 30095, August 31, 1983, Seidenberg; N&W, IT-UTU, December 29, 1981, Edwards; N&W-IT-RYA, December 30, 1981, Sickles; N&W-IT-B.L., February 1, 1982, Zumas; and Southern Ry-Ky Term., Brotherhood of Railway Signalmen, October 5, 1982, Fredenberger."

The carriers formally notified the organization on June 25, 1984 of their desire to arbitrate the disputes concerning the consolidation at Crete, Hastings and Kanapolis.

Between June 25, 1984 and July 16, 1984, Mr. Meredith and UTU Vice President H. G. Kenyon discussed this dispute. Mr. Kenyon indicated the dispute might be resolved short of arbitration, and another negotiation session was scheduled for July 25 and 26, 1984. Both UTU(E) and UTU(C&T) representatives were scheduled to attend those sessions.

At the July 25, 1984 negotiating session, the carriers and the UTU(E) representatives reached agreements concerning Crete, Hastings and Kanapolis. (Agreements relative to operations at Crete, Hastings, Kanapolis and Topeka have been reached with Brotherhood of Locomotive Engineers). However, it remained General Chairman Newcomb's position that an arbitration proceeding would lack jurisdiction to alter MP collective bargaining agreements. Thus, even though carriers' representatives and UP(C&T) General Chairman F. A. Garges were willing to negotiate, all the parties recognized arbitration was necessary. The parties agreed all seven common point consolidations would be at issue.

The undersigned referee was selected by the parties to serve as the neutral member of the Arbitration Committee. This committee met in Omaha on October 4, 1984 and the parties presented comprehensive submissions setting forth their respective positions. Thereafter,

post-hearing briefs as well as replies thereto were submitted. We consider the issues in the light of all such submissions.

ISSUE NUMBER ONE

Does this Committee, in applying the New York Dock Conditions to the UP/MP merger, have jurisdiction to transfer work from the MP to the UP and place the transferred work under the operating rules and collective bargaining agreements of the UP?

DISCUSSION

The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.

The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive. Cf. Mo. Pac. R. Co. v. UTU Gen. Com. of Adj. 580 F. Supp. 1490 and B. of L.E. v. Chicago & North Western Railway Co. 314 F. 2d at 431.

And indeed, without such authority vested in some board or entity it is not reasonable to expect that matters such as those before us

could ever be resolved, since it is clearly in the interest of one or more partisans to maintain the status quo in one or more details. In this proceeding, the UTU C&T General Committee on the UP (F. A. Garges, Chairman) concedes the jurisdiction of this committee to transfer work from the MP to its jurisdiction. As aforenoted, MP C&T General Chairman Newcomb challenges our jurisdiction to transfer work away from members of his committee. We consider the arguments advanced in support of this challenge.

The main thrust of the challenge centers on the claim that Article I, Section 2, of New York Dock Conditions preserves inviolate all existing collective bargaining rights as such apply to individual employees and to territory. The provision reads as follows:

> 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.

Standing alone, outside the context of inclusion in labor protective conditions which provide something less than it purports to promise, this clause would render impractical the majority of consolidations of carriers as not economically feasible. In truth, it would be impossible to effect a meaningful merger without some changes in "working conditions and collective bargaining . . . rights . . ." And it is just for such reason that labor protective conditions are adopted to compensate employees adversely affected by such changes.

Moreover, the clause itself does not freeze the status quo as it relates to the rights, privileges and benefits which it notices. It speaks of "future collective bargaining agreements", and in Section 4 of Article I provision is made for negotiation of individual issues with alternative compulsory arbitration, and it speaks of "applicable statutes", not "future applicable statutes", which would be an exercise of superfluity in expression.

There are two separate questions involved in this first issue. The first is whether or not we have jurisdiction to transfer work from the MP to the UP in applying the New York Dock Conditions to the UP/MP merger.

We would again stress that this arbitral committee is necessarily the arm and instrument of the ICC in accomplishing its purpose in authorizing such merger. And in its decision in Finance Docket 30,000 dated October 19, 1983 in response to the petitions of the BLE and UTU seeking clarification of its original decision therein, ICC made it clear that the Railway Labor Act as well as existing collective bargaining agreements must give way to overriding considerations necessary to implement consolidations and coordinations attending an authorized merger.

In the proceeding culminating in the ICC October 19, 1983, decision the arguments of UTU and BLE were identical to those before us now. Great reliance was placed on the five arbitral awards cited above in our qotation of Chairman Newcomb's letter of June 19, 1984. A study of such awards in the light of ICC's clarification of October

19, 1983, however, can only lead to the conclusion that ICC is telling us that each of the distinguished referees who wrote those awards misinterpreted Section 2 of Article I of New York Dock and failed to appreciate his authority derived from ICC, and it can scarcely be doubted that the remand to the parties of the most crucial issues of consolidation (i.e. selection of forces and applicability of bargaining agreement) ill-served the ultimate objective of merger.

We have earlier noted that the concluding phrase, "applicable statutes" in Section 2, Article I of NY Dock, means more than "future legislation", and we think such phrase is explicated in the following language in the ICC October 19, 1983, decision:

> "As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11317 preserve conditions and agreements in the context of the authorized transaction.(Emphasis ours)

The decision then explains the necessity which gives rise to the circumstances involved:

"Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The decision further disposed of arguments identical to those made by Chairman Newcomb's committee herein. For example,

"...A dispute...arose between the involved railroads and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that this Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize D&RGW and MKT to operate over MP lines using their own crews."

* * *

"...BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA). BLE further asserts that trackage rights operations by D&RGW and MKT using

their own crews constitute a unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation."

"UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not [illegible] as to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements."

* * *

"UTU makes further arguments regarding purported violations of the RLA, collective bargaining agreements, and the New York Dock conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, [illegible] the trackage rights operations constitute a change in the scope of the collective bargaining agreements. It further argues that [illegible] the New York Dock conditions [illegible] that MP did not, as required, negotiate with UTU [illegible] its right to participate in the [illegible] process. It asserts that MP's termination of existing trackage rights without [illegible] violates the requirements of the RLA, 11347 and the New York Dock conditions."

* * *

[illegible] argues that [illegible] unilaterally [illegible] that [illegible] and trackage rights

operations which we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the New York Dock and NW-BN conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings."

These arguments were treated with by the Interstate Commerce Commission as follows: "The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA."

and, to repeat, in the following holding:

"The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction."

(We have quoted most liberally from the ICC October 19, 1983, decision because we believe that such decision is squarely on-point and most instructive in treating with the situation herein involved.)

As aforeindicated, this arbitral committee is an instrument of the Interstate Commerce Commission. Our jurisdiction and authority are derived from the powers of such body, and our raison d'etre derives from the ICC's language contained in its prescribed New York Dock Conditions. Section 4 of Article I requires that the parties undertake negotiation of an implementing agreement relative to any proposed transaction subject to NY Dock Conditions, and it provides for compulsory arbitration of any issues which are not resolved by negotiation. (We are not impressed by semantic skirmishing over the meaning of "transaction"; using the word in its broadest sense would appear to be in the interest of common sense and justice.) The key language follows:

> 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.

The Newcomb Committee has voiced its fears that the carriers may somehow be allowed to unilaterally impose an implementing agreement upon the unions. This fear is not well-founded. The "basis accepted

as appropriate" for the selection of forces means the basis accepted by mutual agreement of the parties or accepted by the arbitrator(s) as appropriate, taking into account all the relevant facts and endeavoring to give effect to the applicable ICC decisions. Some arbitrators in the past have found at least partial justification for their unwillingness to assume responsibility for making comprehensive decisions in these cases, by classifying comprehensive disposition of the matter as interest arbitration. In fact, such is the case to some degree. It should be noted, however, that the arbitrator(s) are furnished guidelines for reaching fair decisions.

FINDING NUMBER ONE

We therefore conclude and find that this committee has jurisdiction to transfer work from the MP to the UP if such is deemed appropriate in giving effect to the ICC decisions in the several dockets herein involved. We further find that should the circumstances reflect that placing the transferred work under the UP collective bargaining agreements would be the most appropriate means for giving effect to such decisions, this committee has the jurisdiction to do so.

ISSUE NUMBER TWO

Does a New York Dock arbitration award which provides for the transfer of work from carrier A to carrier B and places the transferred work under the operating rules and collective bargaining agreements of carrier B constitute a fair and equitable basis for the selection and assignment of forces made necessary by New York Dock transactions?

DISCUSSION

This is essentially a hypothetical question which contains insufficient assumptions to justify a comprehensive answer. Whether or not it is fair and equitable to transfer work from carrier A to carrier B would depend on unknown circumstances, and whether or not placing such work under the collective agreement in effect on carrier B would depend on other unrevealed circumstances.

Arguments and submissions to this board indicate that certain of the parties desired a ruling on certain proposed agreements, with the committee adopting such agreements as proposed, or making modifications thereof. In some instances we are asked to remand issues for further negotiation. We must conclude, however, that under the present posture of this case we cannot render an award which would endeavor to finally dispose of all matters. In fact, even if the questions were more specific, under the state of the record before us we would require more evidence before we could judge whether or not several of the proposed agreements should be accepted as appropriate or be able to write an acceptable substitute agreement.

FINDING NUMBER TWO

Our finding in regard to Question Number One addresses this question and will serve as our answer to this question.

Rendered January , 1985.

DAVID H. BROWN, Neutral Member

R. D. MEREDITH, Carrier Member

HOWARD G. KENYON, Union Member

R. P. MITCHELL, Carrier Member

JAMES L. THORNTON, Union Member

In The Matter Of Arbitration Between:

Norfolk and Western Railway Company

Interstate Railroad Company, and

Southern Railway Company

and

Trainmen and Conductors Represented by the United Transportation Union

Arbitration Pursuant to Action By the National Mediation Board and Notice of the Interstate Commerce Commission in Finance Docket Number 30582 (Sub-No. 1)

Arbitration Panel:

Robert J. Ables, Neutral Referee, Washington, D. C.

David N. Ray, Carrier Member, Director, Labor Relations, Southern Railway Company

L. W. Swert, Employee Member, United Transportation Union, Vice President

Appearing For The Carriers:

Jeffrey S. Berlin, Esq., Washington, D. C.
Rusell E. Pommer, Esq., Washington, D. C.
William P. Stallsmith, Jr., Esq., Norfolk, Virginia

Also Present or Testifying for The Carriers:	T. E. Gurley, General Manager, Eastern Region, N & W Robert S. Spenski, Assistant Vice President, Labor Relations, Southern E. M. Martin, Regional Director, Labor Relations, N & W J. R. Binau, Assistant Director, Labor Relations, Southern K. J. O'Brien, Assistant Director, Labor Relations, Southern M. C. Kirchner, Director, Labor Relations, Norfolk Southern
Appearing For The Union:	Clinton J. Miller, III, Esq., United Transportation Union, Assistant General Counsel, Cleveland, Ohio
Also Present or Testifying for The Union:	A. Smith, UTU General Chairman, Southern R. F. Spivey, UTU General Chairman
Proceedings:	Neutral referee appointed by the National Mediation Board: June 13, 1985. Pre-hearing briefs received: August 26, 1985. Arbitration hearing: Atlanta, Georgia; August 28, 1985. Transcript received: September 3, 1985. Post-hearing briefs received: September 9, 1985.
Date of Decision:	September 25, 1985.

ARBITRATION AWARD

Norfolk and Western Railway Company
Interstate Railroad Company
Southern Railway Company

and

Trainmen and Conductors Represented By
The United Transportation Union

OPINION

I. JURISDICTION

This dispute between railroads and their employees is another round of an old fight fought on the same battlefield. Each side has had enough victories to encourage it to persist in the contest. Neither side seems to want to change either its strategy or tactics, and neutrals, like arbitrators and judges, have not seemed to be able to make a decision to put the issue to rest. The decision here is not likely to do more.

1. Issue

At issue is the right of railroad employees represented by their labor organization, the United Transportation Union (Union) in this case, to say to their employer railroad(s), the Norfolk and Western Railway Company (N & W), Interstate Railroad Company (Interstate) and Southern Railroad Company (Southern) (Carrier or Carriers), after consolidation authorized by the Interstate Commerce Commission (ICC or Commission), with labor protective conditions that, if pay, rules, working conditions, etc., in an existing collective bargaining agreement would be changed as a result of changes made by the Carrier authorized by the consolidation, such pay, rules, working conditions, etc., can be changed only by further collective bargaining under the provisions of the Railway Labor Act (RLA), and not under the arbitration provisions of the labor protective conditions specified by the ICC in the event the parties are not able to make an agreement to implement the consolidation.

There is respectable judicial and arbitral authority to support the Union's position that the RLA controls.

There is respectable judicial and arbitral authority to support the Carriers' position that the arbitration provisions control.

2. ICC Conditions

The dispute on this point seems to flow not from any challenge

of the right of the ICC to specify labor protective conditions upon authorizing a railroad consolidation (or exempting it from regulation), but from the kind of such conditions specified.

Despite a record of proceedings approaching those in hotly contested cases appealed to a U. S. Court of Appeals,*/ it is not clear why the ICC persists in specifying labor protective conditions that perpetuate the problem.

a. Section 2 Conditions

On the one hand, the Commission regularly specifies the following condition in labor protective conditions:

> 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 railroads' 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.

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*/ Including pre-hearing briefs, transcript, post-hearing briefs, countless references to court and arbitrators' decisions and many other exhibits.

Typically, the ICC specifies this condition in Article I, Section 2 (Section 2) of its protective conditions, like the Mendocino Coast conditions applicable here.*/

The clear implication of this condition is that the essence of an existing collective bargaining agreement (pay, rules, working conditions, pension rights, etc.), if not the agreement itself, continues after consolidation ("shall be preserved") unless changed by "future collective bargaining agreements". This latter phrase has two important implications: any new agreement must be different from the existing agreement and it has to be bargained for -- which by definition means agreement or resort to authorized statutory actions to break the deadlock.

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*/ Labor (or employee) protective conditions now authorized in the Interstate Commerce Act, resulting from railroad merger, consolidation, acquisition (including trackage rights), etc. ("consolidations"), date back, at least, to The Washington Job Protection Agreement of 1936. In the present dispute, the ICC adopted the "Mendocino" conditions (Mendocino Coast Ry. -- Lease and Operate -- California Western R.R., 354 ICC 732 (1978), modified, 360 ICC 653, (1980), aff'd. sub nom. Railway Executives' Ass'n. v. United States, 675 F.2nd 1248 (D. C. Cir. 1982), and Norfolk and Western Ry. -- Trackage Rights -- Burlington Northern, Inc., 354 ICC 605 (1978), modified sub nom. Mendocino Coast Ry. -- Lease and Operate -- California Western R.R., 360 ICC 653 (1980), aff'd. sub nom. Railway Labor Executives' Ass'n v. United States, 675 F.2nd 1248 (D. C. Cir. (1982)). "New York Dock" conditions are also specified by the ICC for similar authorized changes. They are virtually the same as the Mendocino conditions. There have been -- and there presently are -- a number of differently named conditions all having the same purpose of specifying protection of railroad employees adversely affected by consolidations. The kind or adequacy of labor protective conditions in the present dispute are not in issue.

Thus, Section 2 applicable here in the Mendocino conditions provides substantial leverage for the Union arguing that certain changes desired by the Carriers under its ICC authorization (exemption) cannot be made unless both parties agree to the changes.*/

b. Section 4 Conditions

As the Union draws comfort in this dispute from Section 2, the Carriers emphasize that Article 1, Section 4 (Section 4), of the Mendocino conditions controls.

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*/ The parties have agreed on all provisions except one. The 27 trainmen on the Interstate Railroad who are being consolidated into the N & W and Southern coal rail operations at coal sources in Southwest Virginia object to working under the N & W schedule of agreements (collective bargaining agreement or contract) and prefer to continue working under their own contract. In the alternative, the Interstate employees are willing to work under the Southern contract. According to the Interstate employees, working under the N & W contract would -- or probably would -- require a change in home base with associated problems of moving families from Andover, Virginia to Norton, Virginia, about a 45-minute drive in these mountainous, narrow, coal traffic roads. That this is a relatively small railroad has no bearing on the intensity with which each party has argued its case. The issue being the same as in much larger consolidations, each side has brought out its heavy legal artillary to argue the case.

This section provides in pertinent part that where the Carriers contemplate an authorized transaction which

> will result in a dismissal or displacement of employees or rearrangement of forces

negotiations for the purpose of reaching an implementing agreement are required. If, at the end of a 20-day period the parties fail to agree, negotiations are to terminate and either party to the dispute may submit the dispute for adjustment, in accordance with designated procedures, including designation of a neutral referee whose decision "shall be final, binding, and conclusive".*/

The clear implication of this Section 4 condition is that a "transaction", such as here contemplated, of at least rearranging forces,**/ was envisaged by the ICC when it granted the Carriers

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*/ The Carriers, here, invoked this authority by petition to the National Mediation Board. The Union opposed the petition. Such Board appointed this arbitrator to help resolve the dispute. At the arbitration hearing, the Union agreed with the Carriers to proceed on the basis of a Tri-Partite Arbitration Panel but held to its position that this panel had no authority to decide the question of applicability of contract.

**/ The Carriers contemplate consolidating Interstate employees into the N & W Pocahontas Division. Although Interstate employees will have certain priority rights to work they performed before the consolidation and certain "equity" when the work is performed by N & W employees, seniority rosters will be integrated and assignments can vary off the property before the consolidation.

the authority (exemption) to consolidate and it anticipated inability of the parties to negotiate an agreement to implement such transaction or changes from past operations*/ by prescribing an arbitration procedure to resolve the dispute.

Under the logic of this condition, it is almost inconceivable the Commission would not have known that pay, rules, working conditions, etc., under an existing contract, would not be affected by the transaction. Thus, the Commission intended to give priority to its statutory base for authorizing the consolidation with protective conditions, namely, the Interstate Commerce Act, over anything in conflict under the Railway Labor Act.

c. Section 2 and Section 4 Impasse Not Resolved by ICC

Such long-time apparent, sharp inconsistency existing in its labor protective condition between Section 2 and Section 4, it would seem the Commission would have cleared up the matter one way or the other. It has not.

Whether the Commission is skittish about taking a firm position on a question which involves administration of a statute (RLA),

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*/ Considering, among other things, that the purpose of the request to consolidate was to take advantage of the best grades of the respective railroads and to otherwise make the operation less costly and more efficient.

over which it has no responsibility, may only be speculated. It may even be that the Commission has been inattentive to the discrepancy.*/

The Commission may even have decided to defer to the courts the question of the applicability of the RLA, upon consolidation, in view of the substantial litigation and conflicting decisions on this and related points.

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A summary of the development of labor protective conditions by arbitrator Zumas -- drawing on analyses by other arbitrators -- is a basis for this speculation. In The Matter of Arbitration Between Norfolk and Western Railway Company and Illinois Terminal Railroad Company v. Brotherhood of Locomotive Engineers and United Transportation Union, decided February 1, 1982. Also, see, decision by arbitrator Seidenberg in The Matter of Arbitration Between Baltimore and Ohio R.R. Company, Newburgh and South Shore R.W.Y. Coal and Brotherhood of Maintenance of Way Employees and United Steel Workers of America, decided August 31, 1983.

In the Seidenberg award, the arbitrator reports that Section 2 of the New York Dock Conditions was newly added to the varied set of such conditions developed by the Commission since the Washington Job Protection Agreement of 1936. The New York Dock Conditions were prescribed by the Secretary of Labor (not the ICC) for those agreements whereby carriers discontinue their inter-city rail passenger service which was assumed by AMTRAK. The dissimilarity is apparent between such change in railroad operations and the instant case involving like operations in the same area and affecting only 27 employees.

Whatever the reason the Commission has not reconciled Sections 2 and 4, the question has come around again in this proceeding: Does this arbitration panel have jurisdiction to consider the content of an implementing agreement where an existing contract would be changed and, if so, what shall be the contents of that implementing agreement?

3. Arguments

The Carriers are the moving party. They argue that:

(a) It would be inappropriate for the arbitration panel to decide the jurisdictional question because Section 4 provides required authority to fashion an implementing agreement without need to regard the "extrinsic" question on jurisdiction, leaving the disappointed party to take appropriate appeal to court.

(b) In the event the arbitration panel considers the jurisdiction question posed by the UTU, the Union's argument is defective because a tentative implementing agreement was reached by the parties on April 17, 1985, in bargaining under applicable Mendocino conditions, not under the RLA, which is not required. Also, the Carriers argue that a recent decision by the Court of Appeals for the District of Columbia Circuit, on which the Union heavily relies, actually supports the Carriers' position because, implicit in the remand of the case to the ICC to make certain findings of "necessity", was the conclusion that the Commission had the authority to decide as it had, but that it had not satisfied certain preconditions. The Carriers urge reliance on an earlier decision in the Eighth Circuit Court of Appeals which is said to be more on point on the jurisdiction question.

(c) The Carriers were not precluded from going forward with preferred changes under Section 4 of Mendocino because of the Commission's finding on April 3, 1985 in the underlying case in this proceeding that "[n]o evidence has been presented to demonstrate that involved railroads intend to abrogate the contractual or statutory rights of employees". According to the Carriers, all this finding suggests is that allegations of a conflict between employees' RLA rights and a carriers' plans to effectuate an ICC authorized transaction are not to be resolved in an administrative proceeding in which the ICC passes upon the applicability or inapplicability of a blanket Section 10505 exemption.

The Union argues that:

(a) Section 2 of Mendocino precludes this arbitration panel deciding that Interstate railroad employees must operate under the N & W contract, relying in this conclusion on a series of supporting awards by arbitrators and that contrary awards by arbitrators have been eviscerated by the recent decision of the Court of Appeals for the District of Columbia Circuit.

(b) In any event, the ICC notice of April 3, 1985, concerning the absence of Carrier information on intention to abrogate contractual or statutory rights of employees shows that the Commission did not intend that there be an exemption from the requirements of the Railway Labor Act with respect to changes of pay, rules and working conditions.

4. Arbitration and Court Decisions

Arbitrators' decisions have not been dispositive of the Section 2, Section 4 impasse.*/

Decisions by experienced and respectable arbitrators Zumas and Seidenberg, supra, do not settle the matter. Each arbitrator decided against jurisdiction based on Section 2 but proceeded to require changes such as merging seniority rosters as part of an implementing agreement. Seniority rights being arguably the most important contract right for an employee, it is difficult to see a basis for deciding a Section 4 question in view of the arbitrator's decision on Section 2.

A more recent decision by arbitrator (judge) Brown on which the Carriers rely also cannot be accepted as new reasoning on the Section 2, Section 4 controversy. That arbitrator accepted jurisdiction on the strength of Section 4, adopting the argument that the ICC had plenary and exclusive authority in the field. In The Matter of Arbitration Between Union Pacific Railroad Company and United Transportation Union, decided January 1985. The difficulty with that decision is that, subsequently, the Court of Appeals for the District of Columbia Circuit, with respect to the same underlying

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*/ The parties cited a number of arbitration awards on point. The majority of awards cited favor the Union's position -- but not overwhelmingly. The arbitration decisions reported are typical of the findings.

consolidation, decided, in a split panel, that the Commission had completely failed to justify the necessity for waiving the Railway Labor Act respecting crew selection, following certain trackage rights granted to other railroads affected by such consolidation, and the court remanded the dispute to the Commission to consider whether it was necessary to waive the RLA to effectuate the transactions at issue in that consolidation. Brotherhood of Locomotive Engineers v. ICC, 761 F.2d 714 (D. C. Cir. 1985), modified -- F.2d -- (July 12, 1985), referred to hereinafter as "BLE".*/

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*/ The Carriers here urge adopting the decision of the Court of Appeals in the case of Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Company, 314 F.2d 424 (8th Cir.) Cert. denied 375 US 819 (1963). In that case, the action was by the railroad against the union for a judgment declaring rights of the parties with respect to procedures to be followed in adjusting seniority rights of employees affected by consolidation of railroad yards. The Court of Appeals affirmed the District Court (202 F.Supp.277) that statutory authority conferred upon the Interstate Commerce Commission to approve and facilitate merger of carriers includes power to authorize changes in working conditions necessary to effectuate such mergers and the Commission acted within its jurisdiction in providing for adjustment of labor disputes arising out of the approved merger. The Court of Appeals noted that, under the Railway Labor Act in a major dispute, employees cannot be compelled to accept or arbitrate as to new working rules or conditions, 45 U.S.C.A. §151 et seq., but that, as a result of the authorized merger in that case, the railroads and unions were relieved from requirements of the RLA by the Commission's authority under the Interstate Commerce Act concerning merger of carriers. Interstate Commerce Act §5 (2)(b), (c)(4).

As modified, the Court vacated the Commission's 1983 orders and remanded the case to the Commission. Supporting such decision, the Court said:

> The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

5. Arbitration Panel Has Jurisdiction To Order Implementing Agreement

Whatever arguments remain on the merits of the split decision in the BLE case, it can no longer be argued sensibly that, simply because the ICC has authority to impose protective conditions in railroad consolidations, RLA rights may be disregarded. But that is not to argue that the BLE decision puts the RLA back in the stream of things in consolidations of the kind in issue. The majority of the BLE court -- with a very strong dissent -- remanded the case to the ICC to make findings it had not previously made with respect to RLA rights. The majority decision, therefore -- as well as the minority decision -- may be taken for the conclusion

that the ICC can take all necessary action to authorize a consolidation, including labor protective conditions and procedures to resolve disputes on implementing agreements, including arbitration without deference to RLA collective bargaining rights. The only imperative is that the ICC make required findings, not that it is not authorized to make them.

As it can be accepted that the ICC has authority, i.e., jurisdiction, to effectively make a package deal on consolidations, labor protective conditions and procedures to resolve disputes on implementing agreements -- based on both the Eighth Circuit and D. C. Circuit opinions -- there is no logical reason not to accept that an arbitration panel, authorized under the ICC consolidation action, would not have jurisdiction to order changes to meet the purposes and objectives of the consolidation.

On such reasoning, this panel has jurisdiction to take Section 4 action in this case.

Such conclusion does not close the door in favor of the Carriers.

The Union argues, with some persuasion, that, by not presenting their RLA arguments to the Commission, the Carriers did not argue their case at the time and place to have accomplished their objectives.

It is most troublesome that, at the time the Railway Labor Executives' Association (RLEA), on behalf of employees in this

dispute, argued RLA rights to the ICC, the Commission not only commented that "[n]o evidence has been presented to demonstrate that the involved railroads intend to abrogate the contractual or statutory rights of employee" (ICC Notice, Finance Docket No. 30582 (Sub No. 1), April 3, 1985), but added in the same notice that, although exemptions under 49 U.S.C. 10505, do not operate to relieve carriers of applicable laws and agreements relative to labor relations

> This proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

If the Commission meant that the appropriate forum was an arbitration panel, as here, the Commission was ducking its clear responsibility to complete the package to satisfy its statutory responsibilities.

If the Commission meant that the appropriate forum was the courts, it was ducking the same responsibilities.

If the Commission meant to leave the parties to their RLA rights, it was ducking the same responsibilities.

Actually, it seems that the Commission was just ducking.

There is no need or reason for this arbitration panel to duck.

The ICC had jurisdiction to complete the action; thus, the panel has jurisdiction to complete the action.

An implementing agreement will be ordered.

II. IMPLEMENTING AGREEMENT

No responsible court would ultimately refuse to order an implementing agreement under the disputes settling provisions of Section 4. Only the 27 trainmen off the Interstate Railroad who did not ratify the tentative agreement of April 17, 1985, are holding out on working under the N & W contract. All the other unions in this case have accepted the same or similar agreement, including organizations representing firemen, engineers, clerks and maintenance of way employees.

Labor protective conditions are in place.

There is no legal, public policy, or common sense reason not to decide at this level of proceedings what will eventually be decided, i.e., an implementing agreement to accomplish the purposes of an authorized consolidation.

The proposed joint operation of the Interstate Railroad properties, which are located in the coal fields of Southwestern

Virginia, following a consolidation in 1982 of N & W, Southern and their respective subsidiaries, including Interstate, under the control of Norfolk Southern Corporation, is intended to take advantage of better grades and operating routes for traffic moving from Interstate origins to points on the N & W and Southern and to achieve certain economies and efficiencies in interstate operations.

Among changes proposed by the Carriers to realize the advantages of such joint operation are consolidating the seniority rosters of Interstate train and engine service employees with those of N & W Pocahontas Division train and engine service employees. At present, Interstate crews do not work on N & W lines or vice versa. Upon consolidation, Interstate crews will operate off the Interstate territory. They would work shifters in the area that can work both Interstate and N & W mines.

According to T. E. Gurley, General Manager, Eastern Region, N & W Railroad, who testified at the arbitration hearing, in future operations, it is not contemplated that Interstate crews will be operated separately from the crews of the N & W. Rather, it is contemplated that the crews will be combined on shifters in the Norton and Andover, Virginia area, based on their seniority on both N & W and Interstate. If the Interstate trainmen did not operate under the N & W contract but, rather, operated under their present Interstate contract, important contract problems would develop, including observance of the Hours of Service law; different reporting locations for crews operating the same

territory; differences of total hours worked each week (referred to as "gouging"); differences on opportunities to bid for and displace a junior employee on a job preferred by a senior employee; and different operation of extra boards. If, however, the N & W contract were applicable (for the 27 Interstate trainmen and the existing 816 N & W trainmen), employees, including present Interstate employees, would be able to draw assignments throughout the territory (which is considerably larger than the territory presently operated by Interstate employees). Differences between the N & W and Interstate contracts, such as deadheading, filling vacancies, meal times, selection of vacation times and arbitraries, which would create friction as between N & W and Interstate crews working the same territory if the employees worked under different contracts, would be eliminated. Also, Interstate employees would enjoy the higher basic rate of pay presently applicable in the N & W contract.

According to A. Smith, General Chairman for the trainmen and conductors on both the Interstate and Southern railroads, the Union offered to work under the Southern agreement, which would accomplish exactly what the Carriers intend under the proposed implementing agreement, including the N & W contract. According to this official, there would not be, for instance, a provision for gouging or a provision that a senior brakeman could displace a junior brakeman. There would be a deadhead rule and extra boards would not be different. And there would be no difference in meal allowances or in bidding for vacant positions. Moreover, the Interstate employees would get a raise under either the Southern or N & W agreement.

Further, to the question asked by counsel for the Union: "With the Southern Agreement being applicable, could the employees of the Interstate be required to report to Norton?" The answer was: "Yes, sir." (Transcript, page 100).

On close questioning why the trainmen on the Interstate resisted accepting the tentative implementing agreement reached by the parties on April 17, 1985, the Union representative testified that the Interstate employees had worked previously with the Southern agreement and were more comfortable with it, but that their major concern was the possibility of having to move from their home area in Andover, Virginia to another point on the consolidated operation, with all of the adverse implications for families involved in such move.

In negotiations leading to the tentative implementing agreement, upon the insistence of Union negotiators, a seniority provision was agreed to in order to keep a fair balance between bidding rights of the relatively small number of trainmen off the Interstate as compared to those rights of about 816 trainmen off the N & W.

If, as the Union now accepts, Interstate trainmen might be required to move their home base under the Southern contract (which is acceptable to the union), and there is no substantial reason not to accept the N & W contract on the other differences between the two contracts, there is no reasonable basis to reject the tentative implementing agreement of April 17, 1985. Recognizing, again, that labor protective conditions are in place and that,

on its face, provisions in the N & W contract may actually be favorable to the interstate employees, the tentative implementing agreement of April 17, 1985 is fair, equitable and reasonable and will effectuate the purposes and objectives of the transaction exempted by the Interstate Commerce Commission when it authorized the consolidation underlying the proposed joint operation of interstate properties.

AWARD

1. This arbitration panel has jurisdiction to consider an implementing agreement under Article I, Section 4 of the Mendocino Coast labor protective conditions.

2. The Carriers are authorized to put into effect the tentative implementing agreement of the parties, dated April 17, 1985.

Robert J. Ables
Neutral Referee

Dated: September 25, 1985

David N. Ray
David N. Ray
Carrier Member

Dated: September 27, 1985

L. W. Swert - Dissenting Opinion Attached
L. W. Swert
Employee Member

Dated: October 10, 1985

Dissent of Employee Member to Award in Finance Docket 30582 (Sub. No. 1)

I cannot agree with the Award in this matter not only because it is contrary to the great weight of arbitral precedent and legal authority in my view, but also because of its cavalier treatment of the facts.

It assumes the April 17, 1985 document was a "tentative implementing agreement" throughout its analysis when the record shows the matter of contract applicability was never settled. The Union parties merely agreed to submit the document to the membership as the carriers' last offer. Although the Award notes in footnote at page 5 that the parties agreed to all provisions of an implementing agreement "except one" (contract applicability), it treats the April 17, 1985 document in toto as an agreement in the remainder of its analysis.

More importantly, the Award purports to resolve collective bargaining issues that the carrier witness frankly admitted were not raised between the parties concerning the differences in the contracts at issue. Nothing could more clearly indicate this Board's usurpation of authority delegated by the Congress to the parties under the Railway Labor Act.

Finally, the Award's language itself indicates the the Board has acted far beyond the scope of its jurisdiction. The Board notes at page 7 that the ICC has not resolved over the years what the Board perceives as the inconsistency between Article I, Section 2 and Article I Section 4. Moreover, it is beyond cavil that unless the ICC justifies in its order that the Railway Labor Act be negated in a specific transaction, the requirements of that act regarding changes in contracts stand. This was noted by the Board in its citation to BLE v. ICC, 761 F.2d 714 (D.C. Cir. 1985) at pages 12 and 13. The Board then blithely ignored the ICC's

specific order concerning Railway Labor Act rights cited at page 15, and after finding the ICC "ducked" the issue, decided it nonetheless had authority to change the contract on the property. This Board has no more authority than the ICC; and where the ICC has "ducked" this issue specifically, this Board may not resurrect it without acting outside the scope of its jurisdiction. BLE v. ICC, supra.

L. W. Swert, Vice President
United Transportation Union
Employee Member

EC

FD/ECD
SERVICE DATE -
JUN 10 1987

INTERSTATE COMMERCE COMMISSION

DECISION

3.

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

NORFOLK SOUTHERN CORPORATION--CONTROL--NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

Decided: June 5, 1987

On May 29, 1987, the American Train Dispatchers Association (ATDA) filed a petition for stay pending the Commission's review of the arbitration award in the matter of Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association, Award of Referee Harris, May 19, 1987.1/ Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a reply.

The arbitration process was invoked under the provisions of the employee protective conditions we imposed in connection with our approval of the acquisition of control by Norfolk Southern Corporation (NS) of N&W and Southern in Norfolk Southern Corp.--Control--Norfolk & W. Ry. Co., 366 I.C.C. 173 (1982) (Norfolk Southern Control). The employee protective conditions imposed in that proceeding are those set forth in New York Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

At issue here is NS's coordination of the locomotive power distribution of N&W and Southern. NS will transfer N&W's locomotive power distribution supervisors, who are represented by ATDA, from N&W's Systems Operating Center at Roanoke, VA, to Southern's Control Center in Atlanta, GA, where they will work with Southern's power distribution supervisors, who have historically been considered management and not subject to a collective bargaining agreement. The arbitration award imposed an implementing agreement to effectuate this coordination of forces.

The Commission's authority to review arbitration awards was recently asserted in Chicago and North Western Transportation Company--Abandonment--Near Dubuque and Oelwein, IA, __ I.C.C. 2d ___ (1987) (Oelwein).2/ Pending our review of the arbitration award, we have been asked to stay the award's effectiveness. Assuming we have the authority to stay an arbitration award pending our review, although we are not so deciding that issue here, we conclude that a stay would not be justified.

In determining whether petitioner has demonstrated entitlement to a stay, we refer to the four factors identified in Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 1841 (D.C. Cir. 1977):

(1) that there is a strong likelihood that the movant will prevail on the merits;

(2) that the movant will suffer irreparable harm in the absence of a stay;

1/ ATDA also filed a petition for review of the arbitration award. That petition will be considered in a subsequent decision.

2/ ATDA contends that arbitration awards under the New York Dock conditions are reviewable in the courts and that the Commission can participate in such disputes solely through court referral. In light of Oelwein, ATDA submitted its petition for stay to the Commission, but it states that it does so without prejudicing its right to judicial review.

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Petitioner's showing under the last three factors is unpersuasive, and its contention that it will likely prevail on the merits is at best arguable.

In regard to prevailing on the merits, ATDA raises jurisdictional questions and a substantive question about the terms and conditions of the implementing agreement accepted by the arbitration panel. First, as to the jurisdictional issues, ATDA argues that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the Railway Labor Act (RLA), and the arbitration panel's authorization of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned in the Commission's authorization in Norfolk Southern Control.

Petitioner has not shown that it is likely to prevail on its jurisdictional arguments. The arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the transaction. The transfer is not subject to the RLA because the Commission, in Norfolk Southern Control, authorized the coordination of N&W and Southern under NS, subject to New York Dock. The mandatory arbitration provisions of New York Dock take precedence over the RLA dispute resolution procedures in transactions approved by this Commission. See Finance Docket No. 30532 Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Company--Exemption from 49 U.S.C. 11342 and 11343 (not printed), served September 13, 1985. The proposed transfer, although not specifically mentioned in Norfolk Southern Control, is one of the future coordinations expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. See arbitration decision, pp. 10-11. The arbitration panel, citing Maine Central, correctly exercised its jurisdiction over the dispute arising from the transfer.

Second, ATDA argues that the arbitration panel made a substantive error in accepting verbatim the terms and conditions of an implementing agreement proposed by the carriers. ATDA had proposed that the New York Dock conditions be imposed along with certain other conditions. Furthermore, at first the carriers had also proposed expanding the New York Dock protections with additional conditions. However, the carriers' later proposal included only New York Dock conditions. The arbitration panel found that it was not authorized to "change the terms of the New York Dock conditions" and placed into effect the later proposed implementing agreement of the carriers since the other two proposals "go beyond the terms of an implementing agreement set forth in New York Dock." This raises an interesting, and perhaps significant, issue concerning the authority of the arbitration panel to set the terms and conditions of the implementing agreement. We cannot determine at this time, however, whether petitioner's position on this issue will likely prevail. Even if we were to assume that it would, we still conclude that the other stay factors do not weigh in favor of granting a stay.

Petitioner has not demonstrated that in the absence of a stay it will suffer irreparable harm. ATDA argues that its members who are affected by the transfer will be irreparably harmed because they will be compelled to move from Roanoke to Atlanta, that those employees who transfer will lose the protections of their collective bargaining agreements while the petition for review is pending, and that those employees who choose not to transfer will, by exercising their seniority rights, displace other employees.

ATDA's arguments are not persuasive. The potential harm that they foresee is not irreparable. If employees were to suffer monetary damage attributable to the move, petitioner has not shown why it is not possible for those employees to be adequately compensated under the New York Dock conditions. Since employees transferred to Atlanta will have an opportunity to obtain representation, it has not been shown that the employees will be foreclosed from receiving protections under a new collective bargaining agreement. Furthermore, N&W and Southern have indicated that the involved employees (except for one retiring employee) have elected to transfer to Atlanta and thus no employee displacement will occur.

As to harm to other parties, the record shows that N&W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination. To stay the transfer would delay the coordination and thereby prevent the carriers from realizing these savings. In addition, the carriers indicate that they, as well as numerous N&W management employees have made certain preparations in expectation of the transfer and that additional costs would be incurred should the transfer be delayed. The N&W management employees have sold their homes or terminated their leases in Roanoke and purchased new homes or entered into leases in Atlanta. Additional costs would have to be incurred for the N&W management employees to retain residences in Roanoke. The carriers have installed computer and telephone equipment in Atlanta; if they are unable to effectuate the transfer on June 6, 1987, the carriers will incur additional computer and telephone costs to relay distribution information to Roanoke.

Petitioner has also failed to show that the public interest favors a stay. The Commission, in Norfolk Southern Control, has found that coordination of the carriers is in the public interest. The economies to be realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would delay these economies that have already been shown to be in the public interest.

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petition for stay is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)

In the Matter of Arbitration between Norfolk and Western Railway Co. Southern Railway Company and American Train Dispatchers Assn.	Pursuant to Article I Section 4, N.Y. Dock II, Conditions - ICC Finance Docket No. 29430 (366 I.C.C. 171)

DECISION AND AWARD

Appearances

For the Carriers
Jeffrey S. Berlin, Esquire
Richardson, Berlin & Morvillo

William P. Stallsmith, Jr., Esquire
Norfolk Southern Corporation

For the Organization
William G. Mahoney, Esquire
Highsaw & Mahoney, P.C.

Appointment

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of Norfolk Southern (N.S.) to obtain control of the separate railroad systems of Norfolk & Western (N&W) and Southern Railroad (Southern) under Finance Docket No 29430 (Sub.-No. 1). Included in the approval order was the requirement that New York Dock II Conditions apply.

On September 12, 1986, pursuant to New York Dock II Conditions and the ICC order, N&W notified the American Train Dispatchers Association (ATDA) that it intended to transfer the work of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia. Thereafter, the parties engaged in negotiations on October 7, 27, 28, and November 10 and 11, 1986, and were unable to reach agreement upon an implementing agreement. Unable to reach agreement upon a neutral referee, on December 4, 1986, N&W requested the National Mediation Board to appoint a neutral and by letter dated December 9, 1986, Robert O. Harris was nominated to sit as the neutral. The Carriers named R. S. Spenski, Assistant Vice President - Labor Relations, as its member of the panel and the Organization designated H. E. Mullinax, Vice President, as its member. On May 13, 1987, the neutral and Carrier members of the panel were informed by R. J. Irvin, President of the American Train Dispatchers Association that due

to the unavailability of Vice President Mullinax on the scheduled date for an executive session of the panel, "I am appointing Mr. W. G. Mahoney to replace Mr. Mullinax as our member of the arbitration board."

The parties submitted pre-hearing briefs, a hearing was held on February 26, 1987, in Roanoke, Virginia, and the parties then submitted post-hearing briefs. The panel has met twice in executive session and the matter is now ready for decision.

Background

The N&W was itself formed as the result of several mergers in the 1960's. ATDA had agreements with each of the railroads which had merged into N&W. The agreements contained scope language which stated that the Assistant Chief Train Dispatcher would "supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work." Accordingly, the Assistant Chief Train Dispatchers issued instructions to mechanical department personnel regarding the number and identity of locomotives to be used on trains originating at their respective terminals. ATDA did not represent Train Dispatchers on the original N&W. Following the merger the N&W "power bureau" assumed responsibility for all of the merger carriers and the ATDA represented dispatchers were no longer assigned the work in question. ATDA appealed this assignment and the Third Division of the National Railroad

Adjustment Board issued an award which sustained the position of ATDA. Thereafter, an agreement was reached between N&W and ATDA that the supervisors who worked out of the "power bureau" would be represented by ATDA.

The Southern, which controls its distribution of power out of Atlanta, utilizes Superintendents of Transportation, who are nonagreement officers. It has done so for at least 22 years with such personnel.

Facts

After the merger, Norfolk Southern determined to consolidate all of the control functions for the entire system in one location. Mr. J.R. Martin, Senior Assistant Vice President, Transportation Planning, of the Southern testified that Atlanta was chosen and that all of the control functions involved in the movement of cars and the assignment of costs when other railroads utilize NS tracks already have been transferred to the control center there. The only remaining consolidation is the one involved in this dispute, the assignment of locomotive power Mr. Martin indicated that a single control center would effect efficiencies in the utilization of motive power of about one per cent. With 2,200 locomotives, this would mean 22 less locomotives would be needed, a saving of $26 million in capital investment and a saving of $2 million a year in operating expenses. This does not include savings in labor cost which

would be realized. Mr. Martin further testified that because the two systems were operated separately the accounting functions were carried in the same manner as if they were independent companies and locomotives were only transferred between the railroads in large batches rather than singly.

Mr. H. H. Bradley, Assistant Vice President of Transportation of the Southern, testified that he was in charge of the Control Center in Atlanta. He described the job of Superintendent of Transportation - Locomotive (STL) as follows:

> The STL when he comes on duty would discuss with the off-going STL anything unusual that has occurred during the prior eight hours of an exceptional type nature.
>
> He would then start pulling up his screens on the CRT looking at inventories of locomotives at the major hump yards where the majority of the engines are located. These are electronic hump yards. They look at the inventory and see if there is anything unusual. The STL would know the schedules of the trains for which he has to provide locomotives.
>
> We have an operating plan over the system, and in a normal situation the locomotives cyclicly move from one train to another train to another trait and then complete the cycle. And he would have to look for exceptions, if he had a mechanical failure. And then he would have to supply another locomotive.
>
> Then he looks and starts talking with the Chiefs in addition to a tonnage report he has available to see if we have any unusual amount of traffic. He looks to see if there have been any trains annulled that are not to be operated, that have provided extra power, or there may be a problem where there is no power at the end of a normal run, if the train has been canceled.
>
> Looking at these by division, knowing his inventory and knowing the train schedules, he will actually assign locomotives by number into the CRT in many cases. But that is done generally with discussion with the Shop Foreman who knows which engines have been serviced,

which engines are on the fuel rack. He has some of this conversation to make sure that he minimizes his switching.

Mr. Bradley further indicated that at the present time the NS system is operated with two regions -- Northern (N&W) and Southern (Southern). When consolidation takes place it will be possible to change this system and there is consideration being given to not only rationalizing the system between North and South -- they are now generally divided but there are some anomalies because of the trackage of the two railroads -- but also to having the system configured into East and West regions instead. He also indicated that he believes that each of the STL jobs should be interchangeable and that an individual should be able to shift from one region to another.

Mr. Bradley noted that the differences between the STLs and the System Operations Center (SOC) Supervisors are in the tools which the STL uses. Because the STL utilizes the CRT, he has the ability to communicate with other members of the railroad, while the SOC board is an informational system that is available only to the people standing in the SOC.

The pay of STL's is about ten percent higher than that of SOC Supervisors although it cannot be exactly compared because the benefit packages are different and each STL has his salary set by his manager. It may be different from any other STL's salary.

Contentions of the Parties

It is the position of the Organization that it has represented the SOC Supervisors who perform power distribution duties on the N&W under an agreement entered into April 1, 1971, and that the transfer of work involved in this proceeding was not included within the list of jobs which the merged carrier intended to "abolish, create or transfer as a result of ICC approval of its application for joint control" in Finance Docket No. 29430 (Sub.-No. 1). It is the organization's position that the transfer of these jobs is not allowable under the ICC order and that the ICC and this Arbitration Panel have no authority to change wages, rules, or working conditions of employees which are protected by the Railway Labor Act and Section 11347 of the Interstate Commerce Act (49 USC 11347).

It is the Organization's second contention that even if its first contention is not agreed to, the ICC "has never claimed for itself the extraordinary statutory power to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees." It further contends that even if the ICC has such power, it could only be exercised where necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval.

Finally, the Organization contends that this Arbitration Panel, created under the ICC's New York Dock II decision,

"explicitly commands preservation of Railway Labor Act and collective bargaining agreement rights. Section 2 of Appendix I states:

> 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 a 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.

The Organization states that even if one were to assume otherwise and also assume that the proposed SOC transfer had been presented to and approved by the ICC, that those assumptions could not be used as a basis for the elimination of collective bargaining and Railway Labor Act rights because the continued existence of those rights does not subject the proposed SOC transfer "to the risk of nonconsummation as a result of the inability of the parties to agree on a new collective bargaining agreement" as required by the ICC decision in the Maine Central decision.

The Carriers contend that the Organization's procedural arguments are without merit. They state that the Arbitration Panel has authority under Section 4 of New York Dock II to fashion an implementing agreement. The Carriers further contend that the argument regarding Section 2 is without merit since recent ICC decisions have refuted the Organization's contention and decisions have been issued by various referees under the authority contained in the ICC decisions. The Carriers also contend that the rearrangement of forces which is the subject of

this dispute is an appropriate rearrangement under the authority granted the Carriers by the ICC decision allowing their joint control.

Finally, the Carriers contend that the Implementing Agreement which they proposed is an appropriate basis for this rearrangement of forces.

Discussion

I

As noted by the Organization, this is an unusual rearrangement of forces since it combines employees who have chosen to be represented for the purposes of collective bargaining with other employees who are not so represented. However, like all other New York Dock cases, the Panel must first look to its own authority to act.

As noted above, this proceeding is the result of a request by the Carriers in accordance with the ICC decision which allowed joint control of the Carriers. In its decision, the ICC (366 ICC 171, 230) stated:

> We find that the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions.

It noted further (366 ICC 171, 231):

> We find that the minimum statutory protection of New

York Dock is appropriate for the protection of applicants' employees affected by this proceeding without any of the suggested modifications.

The basic questions, then, are whether the type of consolidation desired by the Carriers was authorized by the ICC in its decision and if it was, what are the protections afforded by New York Dock.

The Organization has contended that the consolidation of the Roanoke SOC with the Atlanta Control Center was not part of the original submission of the Carriers in which they listed the expected consolidations which would be made if the joint control was approved by the ICC. The Organization believes that only the actual consolidations specifically approved by the ICC were authorized; any other consolidation is outside the scope of the ICC decision. The language quoted above seems to belie that contention since it specifically states: "It is possible that further displacement may arise as additional coordinations occur." Had the ICC not believed that there would be additional coordinations, beyond those which had been listed in the submissions to it, it would not have needed to put that sentence into its decision. And having put it in, it must have had a reason -- the general approval of coordinations which would meet the goal of greater efficiencies upon which the rationale of the decision was based. At the hearing, testimony was received which indicates that there will be a substantial saving to the combined carrier through the planned coordination, both in capital costs

since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system. This Panel concludes that the instant coordination was authorized by the ICC and that the question before the Panel is the application of New York Dock standards to that coordination.

The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix I to New York Dock. As noted earlier, Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of Section 4, and its authority derives from that section.

Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules, or working conditions, or of representation under the Railway Labor Act occur through

arbitration under Section 4 of the New York Dock conditions. [1]/

On August 23, 1985, the ICC in the Maine Central Railroad Co. case (Finance Docket No. 30532) issued a decision in which it discussed the interrelationship of the ICC orders in consolidation cases and the Railway Labor Act. In that decision, the ICC stated:

> In Southern Control, the Commission observed that section 6 of RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. Southern Control was the Commission's response to a Supreme Court directive in Railway Labor Executives' Association v. U.S., 379 U.S. 199 (1964), that the Commission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.
>
> Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration.

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[1]/ N&W, Illinois Terminal RR. Co. and Railroad Yardmasters of America and UTU (Sickles, 12/10/81); N&W, Ill. Term. RR and BLE and UTU (Zumas, 2/1/82); N&W, Ill. Term. RR. Co and [illegible] (Edwards, 2/11/82); B&O, Newburgh & So. Sh. Ry. Co. and B[illegible] USW (Seidenberg, 8/31/83); B&O, Newb. & S. Sh. Ry. Co. and [illegible] BLE (Fredenberger, 9/15/83).

> See REA Express, Inc. v. B.R.A.C., 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and with Section 7 of the RLA which provides that arbitration awards thereunder may not diminish or extinguish any of our powers under the Interstate Commerce Act. */
>
> */ For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supercede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

Prior to, at the time of, and subsequent to this ICC decision, various arbitrators ruled that Section 4 effectively superceded the Section 2 protection contained in New York Dock and that new conditions could be imposed pursuant to such a Section 4 arbitration award. 2/ It should be noted that in at least two cases arbitrators who had made earlier decisions regarding the interrelationship between sections 2 and 4 have changed their position.

In the Union Pacific et al. and UTU case, Arbitrator Brown opens his discussion of the case with the following:

> The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives

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2/ N&W et al. and UTU (Ables, 9/25/85); Union Pacific R.R. et al. and UTU (Brown, 1/85); C&O, Seaboard System RR and Brotherhood of Railway Carmen (Marx, 12/15/84); Union Pacific et al. and American Train Dispatchers Association (Fredenberger, 5/27/84); BLE and Union Pacific et al. (Seidenberg, 1/17/85)

> its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.
>
> The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive.

The panel hearing the instant dispute has exactly the same authority as that noted by Arbitrator Brown, quoted above. Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supercedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly evolved reconciliation of the conflict between the two sections.

The Organization has raised another point which is worthy of discussion. It states that the ICC cannot take away the collective bargaining rights of the employees involved in the coordination and that the effect of this coordination is exactly

to do that. This argument bears analysis. It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along; however this does not change the rights of individual employees. Nor does it eliminate a class of employees, since that class was never recognized through an election under the auspices of the National Mediation Board. If, as the ATDA claims, the Superintendents of Transportation are employees or subordinate officials within the meaning of the Railway Labor Act, they, as individuals, will have the right to petition the National Mediation Board for the selection of a representative for the purposes of collective bargaining. What is lost by the transfer is the incumbency status of the ATDA, a status arrived at through recognition, not through election. The protections afforded by New York Dock are to individual employees, not to their collective bargaining representatives. Whatever rights the ATDA may have under the Railway Labor Act as an "incumbent" bargaining representative are for determination by the National Mediation Board, not this panel. The NMB has exclusive jurisdiction over representation matters. See the Order by Justice O'Connor (A-716) of April 2, 1987 in Western Airlines, Inc. and Delta Air Lines, Inc. v. International Brotherhood of Teamsters and Air Transport Employees, U.S. (1987). Motion to vacate the stay orders was denied by the full Supreme Court on April 6, 1987.

II

The Carriers offered a proposed implementing agreement on October 7, 1986. They offered a second proposed implementing agreement on November 11, 1986, and have submitted the latter as the agreement to be found appropriate by this panel.

The original Carrier agreement indicated that the new positions created in the SR Control Center would be offered first to N&W employees currently holding SOC positions in Roanoke. Those positions not filled would then be offered to other qualified N&W employees holding SOC seniority. It further indicated that N&W employees accepting positions would be relocated at the expense of the Carriers. Finally, it indicated that an employee who declines an offer of employment in the SR Control Center may exercise his seniority under applicable rules and agreements.

The second Carrier agreement proposes "NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta." It would also encompass all protections afforded by New York Dock conditions.

The basic difference in the two agreements is that the first agreement gives the first right to the new positions in Atlanta to SOC employees and the second only allows them to request consideration for employment in that city.

The Organization offered a proposed implementing agreement which would have continued the Organization as the representative of the transferred employees and any employees subsequently hired or promoted to the SR Control Center. It also contained provisions regarding the movement of household goods and the sale of homes of transfered employees

This panel may not change the terms of the New York Dock Conditions. Only the parties may by mutual agreement modify such conditions. Since the first Carrier proposal, that of October 7, 1986, and the Organization proposal both go beyond the terms of an implementing agreement set forth in New York Dock, the second proposed Implementing Agreement of the Carriers, that of November 11, 1986, will be placed in effect.

Award

The parties shall adhere to the Implementing Agreement as proposed by the Carriers on November 11, 1986, subject only to the following:

Within a period of 14 days following the date of this Award, the parties shall meet to determine if there are any mutually agreeable revisions of the November 11, 1986, proposal. If no agreement is reached on any such changes during the above specified 14-day period, the Implementing Agreement shall be as

proposed by the Carriers on November 11, 1986.

Robert O. Harris
Chairman and Neutral Member

R.S. Spenski
Carrier Member
[Concur / ~~Dissent~~]

W. G. Mahoney
Organization Member
[~~Concur~~ / Dissent]

May 19, 1987

Rec'd 5/28/87 JSB

DISSENT OF ORGANIZATION MEMBER

I must dissent from the Decision and Award (Decision) dated May 19, 1987, which was drafted by the Chairman and Neutral Member and concurred in by the Carriers' Member.

The Decision sanctions the unilateral transfer of work from Norfolk and Western Railroad SOC Supervisors and Assistant Chief Dispatchers to non-agreement personnel on the Southern Railway. The subject work is exclusively reserved to N&W employees under numerous longstanding agreements between the American Train Dispatchers Association ("ATDA" or "Organization") and the railroads which now constitute the N&W system through merger. N&W employees' exclusive right to this work was confirmed by the National Railroad Adjustment Board, Third Division in Award No. 16556 (ATDA Exhibit No. 1). The transfer of the work creates a major dispute under the Railway Labor Act.

The Decision mischaracterizes the position of the ATDA; it is replete with factual and legal errors; it renders conclusions without attempting to justify them; and, it reaches contradictory conclusions regarding the jurisdiction of the National Mediation Board, for it usurps that jurisdiction by stripping from the SOC Supervisors their representation rights while holding that the National Mediation Board "has exclusive jurisdiction over representation rights" of the ATDA.

Indeed, if this be a valid award, all future arbitrations under Section 4 of the New York Dock conditions have been rendered futile for it has laid a foundation upon which the railroads can erect corporate edifices unburdened by rules of law or statutory or contractual provisions; all will be superseded by the "automatic exemption" provisions of Section 11341(a) of the Interstate Commerce Act.

On the issue of the employees' representation rights, the Decision is a gaggle of contradictions and unsupported conclusions. At page 9 the Decision identifies the SOC Supervisors as "employees who have chosen to be represented for the purpose of collective bargaining". At pages 14 and 15, it reaches a contrary conclusion in holding that the employees' loss of their representation rights and their collective bargaining agreement is no loss at all because their right to representation "was never recognized through an election under the auspices of the National Mediation Board." The distinction between "election" and "recognition" in the latter statement is itself contradictory of the historical rulings of the National Mediation Board, including those contained in its very recent decision in TWA/Ozark Airlines, 14 N.M.B. 215 (April 10, 1987).

The Decision first concludes at page 15 that the "present collective bargaining agreement [sic] between N&W and ATDA may not be carried along [when the work is transferred to Southern]

but gives no reason for that conclusion 1/: and, then proceeds to the incredible conclusion, again unsupported, that the employees' loss of their agreements and their statutory representation "does not change the rights of the individual employees." The Decision finally concludes its discussion of the rights of the N&W employees by saying that those employees can, in effect, retrieve the rights they did not lose by petitioning the National Mediation Board for an election after they get to Southern, provided they can demonstrate the Southern work is that of "employees or subordinate officials within the meaning of the Railway Labor Act." (Decision, p. 15.)

The same paragraph concludes that the only loss occasioned by the transfer "is the incumbency status of the ATDA" (Decision, p. 15) and since that is not protected by New York Dock it need not be addressed. But if ATDA has any rights as an "incumbent baragaining representative" they "are f determination by the National Mediation Board, not this panel." The Decision, having stripped the N&W employees of their representation and Railway Labor Act rights, then reaches its final, incongruous conclusion that with regard to the Organization "the NMB has exclusive jurisdiction over representation matters."

1/ Perhaps no supporting reason is offered because this conclusion would seem clearly contrary to established law. BN, Inc. v. ARSA, (7th Cir. 1974) 503 F.2d 58, 63.

The Decision errs in its confusion of the several contentions of the Organization and its failure to mention others.

At page 7, the Decision inaccurately characterizes the Organization's position as follows:

> "It further contends that even if the ICC has such power [to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees], it could only be exercised when necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval."

The position of the Organization was, and remains:

1. The ICC has no authority, and therefore a New York Dock arbitrator has no authority to extinguish the Railway Labor Act and collective bargaining agreement rights of employees. (ATDA Subm., pp. 12-14, 19-21; ATDA Brief, pp. 1, 7, 9-13.)

2. Even if the ICC might have such rights, it has never claimed the statutory authority to eliminate the Railway Labor Act and collective bargaining rights of entire classes of employees; in this case the entire class of SOC Supervisors on the N&W. (ATDA Subm., pp. 17-19, 21; ATDA Post-Hearing Brief, pp. 1-2, 4.)

3. If such authority existed it could be exercised only if necessary to carry out the transaction approved. (ATDA Subm., p. 19-20; ATDA Brief, p. 2, 5-6, 6 n3, 7, 14, 17.)

4. The "approved transaction" was fully consummated or "carried out" when NS achieved control of N&W and Southern in 1982, therefore, no exemption authority could now be triggered or activated. (ATDA Subm., p. 18, 20.)

5. If the "approved transaction" was not simply approval of NS control of N&W and Southern but extended to particular changes in operations, services or facilities, the change involving the SOC Supervisors could not have been "approved" because it was never presented to the Commission and, in any event, the Interstate Commerce Act does not provide the I.C.C. with jurisdiction to approve such changes. (ATDA Subm., pp. 14-17, 19; ATDA Brief, pp. 2, 4-5.)

6. The Arbitration Panel and the parties are governed by the orders issued in the NS Control case which explicitly preserve the Railway Labor Act and collective bargaining rights of the employees in Section 2 of New York Dock and contain no contrary provisions or later orders from which the Organization could have appealed. (ATDA Brief, pp. 2,4,8.)

7. Assuming such authority to exist in the I.C.C. and the arbitrator, such superseding authority could not be exercised unless "necessary" to "carry out the transaction" and the implementing agreement submitted by ATDA demonstrated it was not "necessary" to strip SOC Supervisors of their rights in order to accomplish the transfer desired by NS. (ATDA Subm., pp. 19-20, 21-28; ATDA Brief. pp. 2, 3 n1, 5-6, 6 n3, 7, 14, 14 n7; Transcript of Hearing, pp. 191, 192, 203-204.)

This last argument of ATDA was rejected by the simple device of ignoring it.

Regarding the elimination of employee rights in the face of Section 2 of New York Dock which specifically preserves such rights and in the absence of any language in the orders governing the NS control case to indicate otherwise, the

Decision concludes at page 11 that the "central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix [sic] I to New York Dock." It then finds, after quoting extensively from the Commission's 1985 Maine Central decision and an arbitration decision reached thereafter, that Section 2 is now wholly meaningless. (See, Decision, p. 14.)

The Decision quotes from a 1985 decision of an Arbitrator Brown in which he states that arbitrators under New York Dock "are commissioned to exercise . . .[the] full authority [of the ICC] to achieve a fair and equitable solution of the dispute before us"2/, but then reaches a result which is clearly unfair and inequitable. The Decision justifies this result by engaging in hypertechnical reasoning which defies even a cursory scrutiny. For example, the Decision determines that the employees have lost no rights because their representation on N&W resulted from "recognition, not election" and their "present collective bargaining agreement [sic] [which] . . . may not be carried along," involve rights of the Organization and not the individual employees. Another example is the Decision's conclusion that ATDA's proposed implementing agreement and the first of the two proposals submitted by NS have gone "beyond the terms of the New York Dock Conditions" presumably because they would give "the first right to the new positions in Atlanta to

2/ Emphasis supplied. See also ATDA Brief, pp. 15-19 for analysis of authorities on "fair and equitable" requirements.

SOC employees". 3/ Therefore, the Decision would impose the Carriers' second proposed implementing agreement which "only allows them [SOC Supervisors] to request consideration for employment in that city [of Atlanta]". (Decision, pp. 16-17.)

Article I, Section 4 of New York Dock requires the "transaction . . . [to] provide for the selection of forces from all employees involved on a basis accepted as appropriate . . . 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." (Emphasis supplied.) Section 9 of New York Dock requires the carrier to pay the affected employee's moving expenses. There is nothing in New York Dock, any decision of the Commission, or any arbitration decision prior to this one which holds an arbitrator cannot impose a "fair and equitable" agreement or that he must accept a provision which violates Section 4 by merely "considering" employees for work taken from them. (Decision, p. 16.)

If one compares the explicit, simple English in which Sections 4 and 9 are couched with the statements on pages 16 and 17 of the Decision and follows that comparison with a review of

3/ No reason was given as to how the ATDA proposal exceeded New York Dock limitations.

the entire Decision and the record in this case, one is compelled to conclude that the Decision has fallen victim to egregious errors and would visit the bitter consequences of those errors only upon the N&W employees.

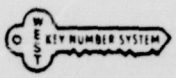
Wm. G. Mahoney

WM. G. MAHONEY
Organization Member of Arbitration Panel

May 19, 1987

ment objective and that, in the circumstances of this case, striking and picketing for recognition and bargaining did not constitute a § 8(b)(1)(B) violation. The petition for review is

Denied.



RAILWAY LABOR EXECUTIVES' ASSOCIATION, Petitioner,

v.

UNITED STATES of America and the Interstate Commerce Commission, Respondents,

Boston & Maine Corporation, et al., Intervenors.

Nos. 90-1484, 91-1024, 91-1066, 91-1185, 91-1261, 91-1272 and 91-1420.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 29, 1992.

Decided March 12, 1993.

Parties petitioned for review of Interstate Commerce Commission (ICC) decisions regarding arbitrator's awards and other decisions with respect to rail corporation's efforts to lease rail lines and trackage rights of four of its subsidiaries to fifth subsidiary. The Court of Appeals held that: (1) Commission employed proper standard of review of arbitrator's awards in treating arbitrator's judgments about matters of evidence and causation with deference while subjecting arbitrator's interpretations of Commission regulations and views regarding transportation policy to more searching review; (2) remand was required to determine whether modification of collective bargaining agreement was necessary to effectuate purpose of covered transaction; (3) takings claims arising from Commission's modification of terms of collective bargaining agreements were within original jurisdiction of United States Court of Federal Claims; (4) Commission did not err in determining that benefits periods under hybrid *New York Dock*/Mendocino Coast conditions could not be extended; and (5) railroad employees did not forfeit their rights to protective benefits under Mendocino Coast and arbitration awards by virtue of their strike prior to commencement of benefits period

Affirmed in part; remanded.

1. Federal Courts ⇐757

Prudential considerations precluded consideration of complex issue of standing of voluntary, unincorporated association of chief executive officers of major rail labor unions to petition or intervene in labor dispute arising out of lease of rail lines and trackage rights from certain subsidiaries of rail corporation to another subsidiary; standing question would not be decided where issues raised by association were also raised or implicit in issues raised by labor union that clearly had standing, with the exception of one additional issue, which could be concisely rejected on merits.

2. Commerce ⇐85.8

Interstate Commerce Commission (ICC) has authority to review arbitrator's award rendered after "final and binding" arbitration of dispute concerning labor protective conditions.

3. Commerce ⇐85.8

Interstate Commerce Commission (ICC) applied proper standard of review in examining arbitrator's decision in labor dispute arising from lease of rail lines and trackage rights from certain subsidiaries to another subsidiary by treating arbitrator's judgments about matters of evidence and causation with deference, while treating arbitrator's interpretations of ICC regulations and transportation policy to more searching review.

4. Commerce ⇐85.8

ICC had authority to modify collective bargaining agreement under statute requiring carrier to provide "fair arrangement"

to employees if necessary to effectuate purpose of covered transaction; however, modification had to be necessary to secure to the public some transportation benefit flowing from underlying transaction itself as opposed to benefits flowing merely from reducing labor costs. 49 U.S.C.A. § 11347.

5. Federal Courts ⇐1073

Claim that ICC engaged in uncompensated taking of private property in violation of Fifth Amendment by modifying terms of collective bargaining agreement in connection with approval of lease of rail lines and trackage rights from certain rail line subsidiaries to another subsidiary was matter within original jurisdiction of the United States Court of Federal Claims under Tucker Act. 49 U.S.C.A. § 11347; U.S.C.A. Const.Amend 5.

6. Commerce ⇐85.7

Although parties were free to agree among themselves about commencement dates of 75-day "make-whole" period and six-year "benefit protective" period, which were hybrid *New York Dock* Mendocino Coast conditions imposed on lease transaction under which certain rail subsidiaries leased rail lines and trackage rights to another subsidiary, total length of protective periods could not exceed 6 years and 75 days, regardless of fact that under existing agreed-to commencement dates there was three-year gap between expiration of workers' make-whole period and commencement of six-year benefit protective period. 49 U.S.C.A. § 11347.

7. Administrative Law and Procedure ⇐413

8. Commerce ⇐164, 170

Interstate Commerce Commission (ICC) is entitled to considerable deference when it has interpreted terms of its own decrees or regulations.

Administrative Law and Procedure ⇐413

Reviewing court should defer to agency's interpretation of its own regulations unless it is plainly erroneous or inconsistent with the regulation.

9. Commerce ⇐85.8

Union's claim that Mendocino Coast benefits periods should have been contiguous was waived on basis of its earlier litigation position in arbitration and before ICC. 49 U.S.C.A. § 11347.

10. Commerce ⇐85.8

Condition imposed on provision of protective benefits under Mendocino Coast that protective benefits would cease prior to "expiration of the protective period in the event of the * * * employee's resignation" could be interpreted by Interstate Commerce Commission (ICC) as applying only after protective period commenced so that actions prior to commencement period could not result in forfeiture.

11. Commerce ⇐85.7

Railroad employees did not forfeit their right to protective benefits under Mendocino Coast and arbitration awards arising out of lease of rail lines and trackage rights by virtue of their strike prior to commencement of protective benefits period. 49 U.S.C.A. § 11347.

On Petitions for Review of Orders of the Interstate Commerce Commission.

John O'B. Clarke, Jr., with whom *Elizabeth A. Nadeau*, Washington, DC, was on the brief, for petitioner Railway Labor Executives' Ass'n.

Clinton J. Miller, III, Cleveland, OH, for petitioner United Transp. Union.

John O'B. Clarke, Jr., Washington, DC, *Clinton J. Miller, III*, Cleveland, OH, and *Elizabeth A. Nadeau*, Washington, DC, were on the joint brief, for petitioners Railway Labor Executives Ass'n and United Transp. Union.

John P. Cronin, North Billerica, MA, *John H. Broadley*, and *Roger W. Pincus*, Washington, DC, were on the brief, for petitioners Boston & Maine Corp., et al.

Clyde J. Hart, Atty., I.C.C. (ICC), with whom *Robert S. Burk*, Gen. Counsel, *Henri F. Rush*, Deputy Gen. Counsel, *John J. McCarthy, Jr.*, Associate Gen. Counsel, and *Virginia Strasser*, Atty., ICC, Washington, DC, were on the brief, for respon-

dents. *John J. Powers, III* and *Robert J. Wiggers*, Attys., Dept. of Justice, Washington, DC, also entered appearances for respondents.

Before: MIKVA, Chief Judge, and D.H. GINSBURG and RANDOLPH, Circuit Judges.

Per Curiam:

These consolidated cases represent a broad range of chalienges to decisions of the Interstate Commerce Commission surrounding the efforts of Guilford Transportation Industries to lease rail lines and trackage rights from four of its subsidiaries to a fifth subsidiary. For the reasons that follow, we remand to the ICC its decision affirming an arbitrator's award that modified the collective bargaining agreements of certain employees. We affirm all of the other challenged decisions of the ICC.

I. Background

In 1986, Guilford Transportation Industries ("GTI") began implementing a plan to lease rail lines and related trackage rights from four of its subsidiaries—the Delaware and Hudson Railway Company ("D & H"), the Boston & Maine Corporation ("B & M"), the Maine Central Railroad Company ("MEC"), and the Portland Terminal Company ("PT")—to a fifth subsidiary, the Springfield Terminal Railway Company ("ST"). From late 1986 through late 1987, the five subsidiaries filed notices of the transactions with the Interstate Commerce Commission ("ICC" or "Commission") under the procedures set out in 49 C.F.R. § 1180.4. The Commission's regulations permit the use of these procedures, instead of the prior approval requirements of 49 U.S.C. § 11343, for "transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family." 49 C.F.R. § 1180.-2(d)(3).

These transactions were of great concern to rail labor, for they would make ST the *de facto* operator of the entire GTI system and subject the labor forces of the other subsidiaries to ST's less favorable rates of pay, rules, and working conditions. Consequently, rail labor (the Railway Labor Executives' Association ("RLEA") and the United Transportation Union ("UTU")) sought the maximum possible protection under the Interstate Commerce Act ("ICA"), which imposes labor protective conditions on such transactions in order to protect affected employees. 49 U.S.C. § 11347.

In order to comply with the requirements of § 11347, the Commission has developed a series of protective conditions appropriate to lease and trackage rights transactions, known as "*Mendocino* conditions" because of their origin in *Mendocino Coast Ry. Inc.—Lease and Operate—California Western R.R.*, 354 I.C.C. 732 (1978), as well as in *Norfolk and Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605, 611 (1978), *both modified, Mendocino Coast Ry. Inc.—Lease and Operate—California Western R.R.* 360 I.C.C. 653 (1980), *both aff'd sub nom., RLEA v. United States*, 675 F.2d 1248 (D.C.Cir. 1982). Labor challenged the application of the *Mendocino* conditions to these transactions, arguing that the leases had the cumulative impact of a merger or consolidation of carriers, which warranted the heightened procedural protections of the conditions set forth in *New York Dock Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). In its *February 17, 1988 Decision*, the Commission imposed a hybrid set of protective conditions on the transactions, including the substantive provisions of the *Mendocino* conditions and the increased procedural safeguards of the *New York Dock* conditions. *Delaware and Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, 4 I.C.C.2d 322. These elevated procedural safeguards prohibited the railroads from implementing any unconsummated transactions until the parties reached an implementing agreement through negotiation or arbitration.

The parties were unable to reach an implementing agreement, primarily because they were unable to agree whether the

employees of the lessor carriers should be allowed to follow their work to ST with their collective bargaining agreements ("CBAs") intact. They submitted the case to arbitration. On June 12, 1988, Arbitrator Richard Kasher issued an award setting forth the implementing agreement. The Kasher Award required ST, in operating the leased lines, to apply the rates of pay, rules, and working conditions contained in the lessor carriers' CBAs.

In response to ST's petition, the Commission stayed the Kasher award pending review. In its *January 10, 1989 Decision*, the Commission partially overturned the award, holding that the preservation of the lessor carriers' rates of pay and work rules would effectively foreclose the authorized transactions, since the purpose of the transactions was to achieve greater efficiency by applying the more economical ST collective bargaining agreements to the entire GTI system. The Commission returned the unsettled issues to the parties for negotiation and, if necessary, arbitration.

The parties were again unable to reach an agreement. On March 13, 1990, the second arbitrator, Robert O. Harris, issued his report and award. Under the Harris Award, the lessor carriers' collective bargaining agreements were modified to allow ST to create a single seniority system, to employ smaller crews than those used by the lessor carriers, and to require its employees to perform incidental work outside the scope of their duties as defined by their craft. Arbitrator Harris stated, however, that if "[I] were not bound by the ICC determination that Section 3 of the Kasher Implementing Award could not be approved, [I] too would have reconciled the competing interests involved in the approved transaction by imposing the lessor carriers' collective bargaining agreements." In its *October 4, 1990 Decision*, the Commission affirmed the Harris Award. UTU challenges the adoption of the Harris Award. RLEA instead disputes the previous partial override of the Kasher Award.

Another issue arose concerning a work stoppage by ST employees that commenced just as the leasing process began in November, 1987 and ended in June, 1988. UTU alleges that it called the strike because of safety hazards in the operation of the railroad, and that the strike was thus protected activity under the Federal Railroad Safety Act ("FRSA"), 45 U.S. 441(a). ST contends that the striking employees were not engaged in a protected activity, and that they therefore constructively resigned their positions and thereby forfeited their rights to protective benefits under *Mendocino Coast* and the two arbitration awards. In its *December 11, 1* *Decision*, the Commission concluded that the employees who participated in the strike did not, by virtue of their participation, forfeit entitlement to these benefits. The carriers challenge that decision.

Still another dispute arose over the lack of continuity between two periods of benefit protection guaranteed by the protective conditions. Under the hybrid *New York Dock/Mendocino Coast* conditions imposed by the Commission, employees affected by the lease transactions are entitled to both a 75–day "make-whole" period and a six-year "benefit protective" period. The 75–day period commenced on the date the lease transactions began to affect the employees. Until 1991, all the parties agreed that the six-year period would not start until the effective date of the implementing agreement. Usually, these periods of protection are contiguous. Because of the drawn-out nature of the disputes in this case, however, it became apparent that there would be a "gap" between the two protective periods unless the 75–day make-whole period were expanded to cover the entire time until the date of implementation or the six-year "benefit protective" period were started before the completion of an implementation agreement.

Both the Kasher and Harris Awards provided that the six-year benefit protective period would commence on the effective date of the implementing agreement. RLEA asserted that the make-whole period should extend to the effective date of the implementing agreement to fill the result-

ing gap. In its *April 2, 1991 Decision*, the Commission rejected RLEA's claim. It limited the make-whole period to 75 days and the overall protective period to six years and 75 days. RLEA challenges this decision.

After the April 2 decision, UTU, which until that point had agreed that the six-year benefit protective period should commence on the effective date of the implementing agreement, argued instead that the start of the benefits period should be pushed back to 1988 so that the make-whole and benefits periods would be contiguous. The Commission rejected this claim in its *July 5, 1991 Decision*. UTU contests that decision.

This court faces the daunting task of addressing the intricate web of claims brought by the many parties involved in this litigation. In sum: RLEA challenges the Commission's reversal of the Kasher Award, claiming that the reversal was violative of the protection of labor interests mandated by the Interstate Commerce Act, at 49 U.S.C. § 11347. RLEA also argues that the Commission acted in an arbitrary and capricious manner by subjecting the Kasher decision to inappropriately broad review. In addition, RLEA asserts that the Commission violated the Due Process and Just Compensation Clauses of the Fifth Amendment to the Constitution of the United States by modifying the terms of the lessor carriers' collective bargaining agreements. Finally, RLEA claims that the 75-day make-whole period should have been extended until the effective date of the implementation agreement in order to avoid a gap in protection.

UTU challenges the Commission's upholding of the Harris Award, rather than its overturning of the Kasher Award. It does so on statutory and constitutional grounds similar to those advanced by RLEA. In addition, UTU claims that the start of the six-year benefit protective period should be pushed back to an earlier date to make it contiguous with the 75-day make-whole period.

The railroads challenge the Commission's decision that the railroad employees did not surrender their right to protective benefits by striking between 1987 and 1988. They also challenge RLEA's standing to petition or intervene in this matter.

II. RLEA's Standing

[1] The carriers dispute the standing of RLEA, a voluntary, unincorporated association of the chief executive officers of the major rail labor unions, to petition or intervene in this case. We do not believe it is necessary to resolve the complex question of RLEA's standing, and we therefore pretermit the issue.

It is a longstanding principle that courts should avoid passing on constitutional issues unless the resolution of these issues is necessary to the disposition of the case. *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 482–483, 80 L.Ed. 688 (1936) (Cardozo, J., concurring). In accordance with this principle, the Supreme Court has repeatedly held that if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case. *See Doe v. Bolton*, 410 U.S. 179, 189, 93 S.Ct. 739, 746, 35 L.Ed.2d 201 (1973) ("[W]e need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the [other appellants]."). *Cf. Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 n. 16, 98 S.Ct. 2620, 2629 n. 16, 57 L.Ed.2d 595 (1978) ("We need not resolve the question of whether Duke Power is a proper party since jurisdiction over appellees' claims against the NRC is established and Duke's presence or absence makes no material difference to either our consideration of the merits of the controversy or our authority to award the requested relief.").

In the present case, RLEA's presence or absence is of little consequence. Admittedly, RLEA challenges the Commission's rejection of portions of the Kasher Award, whereas UTU disputes the Commission's adoption of the Harris Award. These dif-

ferent strategies are, however, based primarily on the same substantive arguments concerning the Fifth Amendment and the labor-protection language of 49 U.S.C. § 11347, and they are designed to achieve the same result—a remand to the Commission with instructions to preserve fully the employees' collective bargaining agreements. Our disposition of the main issue of this case is therefore unaffected by RLEA's presence.

Moreover, the different approaches of UTU and RLEA do not affect our analysis of the six-year benefit protective period's start date. All of the parties initially agreed that the labor protective provisions would become effective when an implementing agreement was in place. RLEA, by challenging the Commission's rejection of the earlier Kasher Award, implies that an implementing agreement should have been in place in 1988, at the time of that rejection. UTU, on the other hand, disputes only the adoption of the Harris Award, and thus does not directly assert that the implementation agreement should have taken effect in 1988.

This distinction is not relevant to the start date of the six-year period, however. The parties originally agreed that the benefit protective period would commence only when an implementing agreement was *in fact* in place. Whether an implementing agreement *should* have been in place earlier than it was, as RLEA suggests, therefore does not affect the date that labor protection properly began. Consequently, even if the Commission were, on remand, to vacate its reversal of the Kasher Award, the start date of the labor protective conditions would remain November 4, 1990, the date when the implementation agreement actually went into effect by virtue of the Commission's approval of the Harris Award.

There are only two issues that RLEA raises that UTU arguably does not. One is the proper standard of review of an arbitrator's decision by the Commission. RLEA disputes the non-deferential standard of review employed by the Commission in vacating portions of the Kasher Award. UTU, on the other hand, does not challenge the standard of review used by the Commission in upholding the Harris Award. Nevertheless, a consideration of the proper standard is implicit in our evaluation of the Commission's approval of the Harris Award. Simply by challenging the result of the Commission's review of the Harris arbitration, UTU necessarily raises the standard of review issue, and RLEA need not be present for us to consider it.

The other issue that RLEA alone raises is the length of the make-whole period. Whereas UTU argues that commencement of the six-year protective period should retroactively be pushed to an earlier date so that the period will run consecutively with the 75-day make-whole period, RLEA urges that the 75-day period be expanded to fill the "gap" between the two periods. UTU does not proffer this latter argument, and, indeed, it concedes that the Commission was correct in limiting the make-whole period to 75 days.

We will not, however, enter into a complex and lengthy inquiry concerning RLEA's standing merely because RLEA is the only party to raise one particular argument in this enormous and multifarious case—an argument that we confidently and concisely reject on the merits later in this opinion. *See infra* pp. 816–19. "Although standing is usually a threshold inquiry, both the Supreme Court and this Circuit have long recognized the propriety of avoiding difficult, constitutionally-based justiciability issues when a case is more simply resolved on another basis." *Coker v. Sullivan*, 902 F.2d 84 (D.C.Cir.1990). Accordingly, "[p]rudential considerations ... restrain us from deciding [a] difficult and unquestionably far-reaching standing question when the merits of the case readily provide a fair, clear resolution of the appeal." *Chinese American Civic Council v. Atty. Gen. of United States*, 566 F.2d 321 (D.C.Cir.1977). We therefore pretermit the matter of RLEA's standing and proceed directly to the merits.

III. Standard of Review of Arbitrator Kasher's Decision

[2] The Commission has authority to review an arbitrator's award rendered after

"final and binding" arbitration of a dispute concerning labor protective conditions. *International Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 335 (D.C.Cir.1988) ("*IBEW*"). *See also United Transp. Union v. United States*, 905 F.2d 463, 467 n. 5 (D.C.Cir. 1990). In this case the Commission's order leading to the Kasher arbitration stated expressly that the arbitrator's decision would remain subject to Commission review. *See February 19, 1988 Decision* at 10, 4 I.C.C.2d 322, 332. RLEA's quarrel is not with the Commission's assertion of authority, but with the standard of review the Commission applied in considering Kasher's award. *See January 10, 1989 Decision*.

[3] The Commission first announced its power to review the decisions of arbitrators in *Lace Curtain*. *See Chicago & North W. Transp. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) ("*Lace Curtain*"), *aff'd sub nom. IBEW*, 862 F.2d 330 (D.C.Cir.1988). It is true, as RLEA points out, that the Commission there relied extensively on the *Steelworkers Trilogy*,[1] which narrowly confined the judiciary's role in ordering arbitration of labor disputes under collective bargaining agreements and in reviewing the resulting arbitration awards. 3 I.C.C.2d at 733–36. But *Lace Curtain* also cited *Wallace v. Civil Aeronautics Board*, 755 F.2d 861, 864–65 (11th Cir.1985), which upheld an agency's "searching scrutiny" of an arbitration decision. The *Wallace* court explained that, for reasons of relative expertise, it was appropriate for an agency to display less deference to a labor arbitration decision than a court would under *Steelworkers*. *See* 755 F.2d at 865. The Commission in *Lace Curtain* concluded that its review of arbitration awards would be consistent with both *Steelworkers Trilogy* and *Wallace*. *See* 3 I.C.C.2d at 736.

Since then the Commission has employed a sliding scale of deference. An arbitrator's judgments about matters of evidence and causation are treated with deference. An arbitrator's interpretations of Commission regulations and views regarding transportation policy are subject to more searching review. *See, e.g., CSX Corp.—Control*, 4 I.C.C.2d 641, 648 (1988); *Lace Curtain*, 3 I.C.C.2d at 736. *See also Brotherhood of Maintenance of Way Employees v. ICC*, 920 F.2d 40, 44–45 (D.C.Cir.1990); *Employees of the Butte, Anaconda & Pacific Ry. v. United States*, 938 F.2d 1009, 1013–14 (9th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1474, 117 L.Ed.2d 618 (1992). The Commission's approach to the Kasher Award adhered to these standards. The Commission focused not on narrow factual issues, but on the perceived failure of the decision to fulfill the agency's broad mandate. *See January 10, 1989 Decision* at 6.

IV. Scope of Mandatory Labor Protective Conditions

[4] The union petitioners challenge the Commission's affirmance of Arbitrator Harris' modifications to the collective bargaining agreements governing certain employees prior to the lease transaction. The petitioners argue that these modifications are barred by § 11347 of the Interstate Commerce Act, and moreover that the Commission lacks the authority to modify the rail carriers' contractual obligations under the CBAs.

The Commission contends that the Act authorizes it to modify a CBA as necessary to allow a lease transaction to go forward, and that the particular modifications made in this case were proper. The authority of the Commission to resolve labor disputes relating to consolidations, mergers and leases of railroads is delineated in several sections of the Interstate Commerce Act. *See* 49 U.S.C. §§ 11341, 11343–47.

In *Norfolk and Western v. American Train Dispatchers*, — U.S. —, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991), the Supreme Court held that the provision of § 11341(a) that exempts a carrier "from all other law

1. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

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... as necessary to let that person carry out the transaction" empowers the ICC to modify a CBA. The Court reasoned that "all other law" includes a labor contract. That decision is not applicable here, however, because § 11341(a) applies only to transactions exempted under subchapter III, of which it is a part. The Commission exempted the transaction at issue here under § 10505, which is in subchapter I. *See D & M Ry.—Lease and Trackage Rights Exempt—Springfield Term.*, 4 I.C.C.2d 822 (1988).

The Commission concedes that § 11341(a) does not authorize the modifications at issue, but contends that § 11347 does so. That section provides:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or [under] section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

At first blush, § 11347 might not appear even to apply to this transaction; it applies only "when a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or [under] section 11346 of this title." It has previously been held, however, that § 11347 applies to § 10505 transactions, *see Brotherhood of Locomotive Engineers v. ICC*, 909 F.2d 909, 912 (6th Cir.1990); *see also RLEA v. ICC*, 914 F.2d 276, 279 (D.C.Cir. 1990), and because neither party disputes the matter we have no occasion to question the application of § 11347 to this case.

Thus arise the questions (1) whether, as the ICC maintains, § 11347 is an independent source of authority for the agency to modify a CBA where its authority under § 11341(a) to exempt a transaction from "all other law" does not apply, and (2) whether, as the RLEA argues, § 11347 limits the ICC's power to modify a CBA. The latter question was expressly reserved by the Court in *Norfolk and Western*, — U.S. —, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991).

The Commission interprets § 11347 as authorizing it to modify a CBA whenever necessary to effectuate a covered transaction. If Congress has not "directly spoken to the precise question at issue," and the Commission's interpretation of the statute it administers is a permissible one then we must defer to it. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Section 11347 does not directly address the question whether the ICC is authorized to change a CBA, but it does incorporate by reference certain extrinsic labor protective provisions that reflect upon that question. We shall look through § 11347 to those underlying provisions, therefore, in order to apply the standards of *Chevron*.

First, the Commission must provide terms of employment "at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976." The pre-1976 terms were themselves based upon the Washington Job Protection Agreement of 1936. Although the record relating to the implementation of that agreement is somewhat murky, it appears that arbitrators were authorized under the WJPA to make certain changes to CBAs. *See CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715, 734–35 (1990) (recounting testimony of Referee Bernstein as to changes permissible under the WJPA). In view of that practice, it was reasonable for the Commission to interpret the reference in § 11347 to the pre-1976 terms as carrying forward into the present version of § 11347 its authority to change CBAs. Accordingly, pursuant to Step II of the *Chevron* analysis, we defer to the agency's judgment in this regard.

Second, § 11347 incorporates the protections afforded under the Rail Passenger Service [Amtrak] Act, 45 U.S.C. § 565, which provides that:

the protective arrangements shall include ... such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits ... to such [rail] employees under existing collective bargaining agreements; (2) the continuation of collective bargaining rights; [and] (3) the protection of such employees against a worsening of their positions with respect to their employment.... Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act [§ 11347].

The statute clearly mandates that "rights, privileges, and benefits" afforded employees under existing CBAs be preserved.[2] Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor—an obviously absurd proposition—§ 565 (and hence § 11347) does seem to contemplate that the ICC may modify a CBA.[3]

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

Regardless of how the ICC may read the above provision, however, it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary" to effectuate a covered transaction. *CSX*, 6 I.C.C.2d 715 (1990) ("We assume that any changes in CBAs will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute"). We agree that whatever else a "fair arrangement" entails, the modification of a CBA must at a minimum be necessary to effectuate a transaction. The necessity limitation is explicit in § 11341(a), and we have no reason to believe that the Congress meant to give the Commission any wider latitude to modify the provisions of a CBA where § 11341(a) does not apply; § 11347 on its face provides more, not less, generous labor protection than does § 11341(a). We are also cognizant of the perhaps unan-

2. Section 11347 of the ICA states that the "arrangement and the order approving the transaction must require that the employees of the affected rail carrier not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission." Section 565(b)(3), as qualified by the next sentence of § 565(b), thus embodies the protection afforded by the labor protective conditions implemented under the ICA, which are not at issue here. Accordingly, § 565(b)(3) does not operate as an independent substantive limit on the Commission's authority to modify a CBA.

3. Subsections 565(b)(1)–(3) were taken verbatim from § 13(c) of the Urban Mass Transit Act, 49 U.S.C.App. § 1601 et seq. We addressed the scope of the labor protection afforded under that Act in *Amalgamated Transit U.I., AFL–CIO v. Donovan*, 767 F.2d 939, 953 (D.C.Cir.1985). We held there that the certification of a transit authority's labor protective conditions was improper under the UMTA where, under state law, the labor agreement did not provide for the continuation of collective bargaining rights, as mandated by the Act. In so holding, we noted that the

> requirement that collective bargaining rights be continued does not in any way dictate the substantive provisions of a collective bargaining agreement. Section 13(c) does not perpetuate the *substantive* terms of pre-acquisition bargaining agreements, but rather protects the *process* of collective bargaining. The substantive provisions of collective bargaining agreements may change, but section 13(c) requires that the changes may be brought about through collective bargaining, not by state fiat.

(Emphases in original.) We are not certain as to precisely what to make of this passage. The ICC relies upon and quotes only the first two sentences, while the RLEA and the UTU argue persuasively that they are made largely irrelevant by the last sentence. Given this state of internal conflict, we do not undertake to say what is the teaching of the earlier case relevant to the present case.

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

Transportation benefits include the promotion of "safe, adequate, economical, and efficient transportation," and the encouragement of "sound economic conditions ... among carriers." 49 U.S.C. § 10101. In this case, the Commission did not specifically identify any transportation benefits to be had by reason of the lease transaction only if the CBAs are modified, but it did make a vague reference to certain "public interest factors" weighing in favor of the transaction. Piecing together various observations in the ICC's decision, we can discern that these factors include the "benefits that flow from the creation of a more competitive and efficient rail carrier," in light of the possibility that "rail service can fail and its cessation can harm the public." We cannot determine from these generalities, however, whether the Commission anticipated that the transportation benefits would arise solely from modifying the CBAs—in which case they would not be cognizable, per the analysis above—or rather found that the underlying leases would give rise to transportation benefits that could not be realized except by modifying the CBAs. Insofar as Arbitrator Kasher touched upon the subject, moreover, he appears to have contemplated only the former:

> In the opinion of [the carrier], these lease transactions confirmed its view that operations conducted under the ST collective bargaining agreement resulted in lower operating costs and enhanced service levels. Specifically, [the carrier] concluded that reduced train and engine service manning levels, lower rates of pay and non-payment of arbitraries, permitted by the ST-UTU collective bargaining agreement were responsible for the reduced operating costs.

J.A. 228. *See also* J.A. 54-57 (Commissioners Lamboley and Simmons, dissenting in part) (noting that no showing of necessity had been made by Commission in authorizing changes to CBAs).

It is impossible to tell from this statement whether enhanced service levels would result solely from the reduced labor cost stemming from the modifications to the CBAs—when a producer's marginal cost declines it increases its output, i.e. service—or whether the leases themselves yield increased efficiencies. We shall thus remand this matter for the Commission 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.

V. Fifth Amendment Claims

[5] RLEA and UTU argue that the Commission's modification of the terms of the collective bargaining agreements constituted an uncompensated taking of private property in violation of the Fifth Amendment. Whatever the merits of the argument, this is not the forum in which it can be decided. The Fifth Amendment guarantees that when the government takes private property, it will provide just compensation. Under the Tucker Act, 28 U.S.C. § 1491(a), the United States Court of Federal Claims has original jurisdiction

over suits seeking compensation from the United States under the Constitution. Except for cases in which the amount in controversy is less than $10,000, in which event jurisdiction is concurrent with the federal district courts, *see* 28 U.S.C. § 1346(a)(2), the Federal Claims Court's jurisdiction in such actions is exclusive. "[T]akings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985).

It is no answer for RLEA and UTU to say that they are seeking not compensation but a judgment setting aside the Commission's decision. The Taking Clause does not prohibit the government from taking private property. The Clause requires only that the government accomplish the taking in a particular way, namely, by paying for the property. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314–15, 107 S.Ct. 2378, 2385, 96 L.Ed.2d 250 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815 (1984). There is no constitutional necessity for payment to be made in advance, at least so long as the government provides a way for the property owner to recover just compensation after the taking is completed. *See Ruckelshaus*, 467 U.S. at 1016, 104 S.Ct. at 2879. As we have said, those adversely affected by the Commission's action may pursue their claims in the Federal Claims Court or, depending on the amount at stake, in the federal district courts.

There is nothing to petitioners' further point that, at the least, we ought to construe § 11347 to avoid the possibility that the Commission has effectuated a taking in this case. The argument may rest on the familiar canon that if one permissible interpretation of statute would render it unconstitutional and another permissible interpretation would make it constitutional, the latter should prevail because the judiciary should not assume Congress meant to violate the Constitution. *Blodgett v. Holden*, 275 U.S. 142, 147–49, 48 S.Ct. 105, 106, 72 L.Ed. 206 (1927) (opinion of Holmes, J.). Or the argument may rely on the more debatable canon of construing statutes to avoid constitutional doubts. *Compare Johnson v. Robison*, 415 U.S. 361, 366–67, 94 S.Ct. 1160, 1165, 39 L.Ed.2d 389 (1974), *with Rust v. Sullivan*, — U.S. —, —, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991). But these canons do not fit. Because just compensation is presumptively available under the Tucker Act, there is neither an unconstitutional result nor a constitutional doubt to be averted by interpretation. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127–28, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985). Although the Supreme Court has suggested that concerns about takings might influence statutory construction when "there is an identifiable class of cases in which application of a statute will necessarily constitute a taking" (*id.* at 128 n. 5, 106 S.Ct. at 459 n. 5, distinguishing *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982)), this is not such a case. The complaint is only that the Commission's specific application of the terms of § 11347 to this transaction results in a taking. In such circumstances, "adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation." *Riverside Bayview Homes*, 474 U.S. at 128, 106 S.Ct. at 459 (citation omitted). We therefore decline to consider the takings issue in our construction of § 11347.[4]

VI. Creation of Benefits "Gap"

[6] Pursuant to the hybrid *New York Dock/Mendocino Coast* conditions the

4. Both UTU and RLEA also make vague allegations about the deprivation of due process. Whether substantive or procedural due process they do not reveal. A substantive due process challenge to a clearly rational statutory scheme goes nowhere. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). The Commission's extensive arbitration procedures employed here refute any notion that procedural due process was absent.

Commission imposed on this transaction, the affected employees were entitled to two distinct periods of benefit protection. First, under Section Four of the *Mendocino Coast* provisions, each worker enjoyed a 75-day "make-whole" period commencing on the date the lease transactions affected him. *See Norfolk & Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605, 611 (1978) ("*Mendocino Coast*"), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C.Cir.1982). Second, under Section One of *Mendocino*, and tracing ultimately to the "Appendix C–1" provisions, the workers possessed a six-year "benefit protective" period. 354 I.C.C. at 610.[5] Although the parties agree that these periods typically will be contiguous (*i.e.*, the benefit protective period will commence upon the expiration of the make-whole period), here there was a three-year gap between the expiration of each worker's make-whole period (sometime in late 1987) and the commencement of the benefit protective period on the effective date of the implementing agreement in November 1990. RLEA and UTU raise separate challenges to the Commission's decisions creating this gap. RLEA claims that the make-whole period should have extended until the commencement of the implementing agreement, a scheme which would result in a total of nine years of benefit protection. By contrast, UTU argues that the periods should have been contiguous, providing six years and 75 days of continuous protection from the effective dates of the rail leases.

Like nearly every question in this dispute, this issue has a tortuous procedural history. Pursuant ostensibly to the agreement of the parties, both the Kasher and Harris Awards provided that the benefit protective period would commence on the effective date of the implementing agreement. Section Seven of the Kasher Award explicitly provided that the make-whole periods would extend from the date each worker was first affected by the lease transactions until the effective date of the implementing agreement. The Commission, in its initial review of the Kasher Award, *see January 10, 1989 Decision*, apparently affirmed Kasher's interpretation of the make-whole provision. *See id.* at 6–7. In response to a request by RLEA for clarification, however, the Commission later specified that although the parties were free to agree among themselves about the effective dates of the various protective periods, the total length of protection in any event could not exceed six years. *See October 26, 1989 Decision* at 9–10.[6] The Commission finally resolved the confusion in its *April 2, 1991 Decision* where it concluded that the make-whole period would run only for 75 days. *See id.* at 10.

RLEA argues that the last sentence of Section Four of the *Mendocino* provisions means that the make-whole period should extend until the effective date of the implementing agreement.[7] In its April 2, 1991 ruling, the Commission instead interpreted the sentence to mean that if the final implementing agreement provided for a larger

5. For the history of the origin and incorporation of the "Appendix C–1" conditions, *see Railway Labor Executives' Ass'n*, 675 F.2d at 1250–51.

6. The Commission later made clear that the overall limit it envisioned was actually six years and 75 days. *See January 5, 1990 Decision* at 5 n. 8.

7. The relevant portion of Section Four of *Mendocino* provides as follows:

> Notwithstanding any of the foregoing provisions of this section, at the completion of the twenty- (20-) day notice period the railroads may proceed with the transaction, provided that all employees affected (displaced, dismissed, rearranged, et cetera) shall be provided with all of the rights and benefits of this appendix *from the time they are affected* through to expiration of the seventy-fifth (75th) day following the date of notice of the intended transaction. This protection shall be in addition to the protection period defined in article I, paragraph (d) [i.e. the "benefit protective" period]. If the above proceeding results in displacement, dismissal, rearrangement, et cetera other than as provided by the railroads at the time of the transaction pending the outcome of such proceedings, all employees affected by the transaction during the pendency of such proceedings shall be made whole.

354 I.C.C. at 611.

package of benefits than the "Commission-mandated minimum," the employees would be retroactively made whole for "the difference between the minimum benefits already received and the allowances ultimately provided for in the agreement for the 75 day period provided." *Id.* at 12. The ruling emphasized the importance of maintaining the overall six-year, 75–day limitation on the benefits period. *Id.* at 13.

[7, 8] The Commission is entitled to considerable deference when it has interpreted the terms of its own decrees or regulations. *See, e.g., Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986); *Sandstone Resources, Inc. v. FERC*, 973 F.2d 956, 959 (D.C.Cir.1992); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1299–300 (D.C.Cir.1992); *Regular Common Carrier Conf. v. United States*, 803 F.2d 1186, 1197 n. 14 (D.C.Cir.1986). While the Commission's view of Section Four is not the only one possible, it seems to us plausible. RLEA's reading would vitiate the 75–day limit specified by the earlier part of the provision. Moreover, that reading would create a total of nine years of benefit protection in this case. The Commission consistently has stated—in this proceeding and others—that the total period of protection need not exceed six years and 75 days. Reviewing courts should defer to an agency's interpretation of its own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945). The Commission's reading of *Mendocino*'s make-whole provision certainly crosses this low threshold.

In reaching this conclusion we do not rely on the Commission's reasoning, *see April 2, 1991 Decision* at 12–13, that a contrary reading would provide rail labor with incentives to drag the bargaining process out as long as possible in order to extend the cumulative length of benefit protection. The converse argument seems to us to apply with equal force to the Commission's rendition of the provision. Under that version, it may be that rail management has every incentive to draw out the process and thereby diminish the value of the protective benefits to the employees. Because the leases had already been approved, and the railroads were operating through their new structure, there would seem to be little reason here for rail management to push for the speedy resolution of the terms of the implementing agreement. Therefore, we wish to make clear that we affirm the Commission's reading of *Mendocino* based on the overall six-year and 75–day limit it enforces, without making any judgment about competing incentives for procrastination.

[9] UTU's claim in this regard is that the benefits periods should have been contiguous. We agree with the Commission that UTU waived this argument. As noted above, the Commission consistently stated in this proceeding that it would defer to the agreement of the parties about the starting date of the benefit protective period. Until after the Harris Award was affirmed, all parties apparently had agreed at each stage that the protective period would commence on the effective date of the implementing agreement. UTU advocated this timetable not only during the Kasher arbitration, at which point it appeared that an implementing agreement would be enforced relatively soon after the expiration of the 75–day make-whole period, but also during the Harris arbitration, when it had become clear that such a schedule, absent a prolongation of the make-whole period, would create a "gap" of at least two years. See *Harris Award* at 36.

UTU did argue, after the Commission's *April 2, 1991 Decision* had established that the make-whole period would be limited to 75 days, that the start of the benefit protective period should be pushed back to sometime in 1988. But the Commission rejected this argument and suggested that while UTU had been free to adopt the litigation strategy of pushing for delay in the start of the six-year period while the length of the make-whole period was in dispute, it could not change course once its gambit had failed. *See July 5, 1991 Decision* at 4–5. We agree with UTU that the Commission's intentions with regard to the

length of the make-whole period were not entirely clear until its April 1991 ruling. However, we do not think it would have been reasonable for the union, prior to that decision, to rely on the assumption that the Commission would resolve that uncertainty in favor of a make-whole period that stretched from the effectuation of the leases to the date of the implementing agreement. Absent such reliance, we agree with the Commission that it is not unfair to hold that the union had assumed the attendant risks of its litigating position.

The situation would be different, of course, if the regulatory scheme itself mandated that the two benefit protection periods be contiguous. Both RLEA and UTU argue that the benefits gap causes the protections provided in this transaction to fall below the minimum mandated by § 11347. We reject these claims. This court has held that the *Mendocino Coast* provisions satisfy the dictates of § 11347, *see Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248, 1256 (D.C.Cir.1982), and there is no indication in *Mendocino Coast* itself that the periods must be contiguous. Section 11347 explicitly requires that the Commission ensure that railroad employees not be "in a worse position related to their employment as a result of the transaction" for a period of four years "following the effective date of the final action of the Commission." 49 U.S.C. § 11347. The phrase "final action" refers here to the Commission's approval of the Harris Award and institution of the implementing agreement. This interpretation is consistent with the relevant jurisdictional statute, *see* 28 U.S.C. § 2342(5), and with the language of the former 49 U.S.C. § 5(2)(f), recodified in 1978 as § 11347, which had required that the four years of protection under a Commission-authorized implementing agreement extend from "the effective date of such order." 49 U.S.C. § 5(2)(f) (1976). The recodification was not intended to produce any substantive changes in the meaning of § 5(2)(f). *See New York Dock Ry. v. United States*, 609 F.2d 83, 90 n. 3 (2d Cir.1979). Since the protective benefits period here extends for six years from the date of the Commission's final action, it fully satisfies the statutory mandate. We therefore hold that the Commission properly determined the dates and lengths of the protective periods.[8]

VII. Implications of November 1987 Strike

[10, 11] The railroads challenge the Commission's decision that the railroad employees did not forfeit their rights to protective benefits under *Mendocino Coast* and the two arbitration awards by virtue of their strike between November 1987 and June 1988. *See December 11, 1990 Decision.* Although the precise basis for the Commission's order is not easy to discern, our analysis reveals a Commission rationale that is sufficiently clear and cogent to warrant sustaining the order.

The railroads viewed the work stoppage as an illegal attempt to force them to renegotiate ST's collective bargaining agreement, and treated the employees' refusal to work as equivalent to resignation. When ST subsequently rehired the workers pursuant to the Kasher Award, it indicated that it was treating them as new hires.[9] Before the Commission the railroads claimed that the workers had forfeited their rights to *Mendocino Coast* labor protective benefits by virtue of their constructive resignation. This argument rested on the parallel Sections 5(c) and 6(d) of *Mendocino*, which dictate in relevant part that the provision of protective benefits "shall cease

8. RLEA's other challenges to the Commission's administration of the benefit protection scheme do not merit discussion, and we summarily affirm those Commission actions.

9. By contrast, the employees claimed that the strike was motivated by legitimate safety concerns. The legality of the strike is the subject of an entirely separate proceeding in Maine. An arbitration decision in favor of the employees was vacated by a district court in June 1991. *See Springfield Terminal Ry. v. United Transp. Union*, 767 F.Supp. 333 (D.Me.1991). The parties inform us that a new arbitration is pending. In view of our disposition of this issue, we need not concern ourselves with the factual disputes surrounding the actual motivation for the strike and the legal status of the rehired employees.

prior to the expiration of the protective period in the event of the ... employee's resignation...." 354 I.C.C. at 612.[10]

The Commission rejected this argument in an opinion opaque in places and muddied by scattered references to special equities and unique factual circumstances. As we read the opinion, the decision actually rested on the resolution of two related questions of law. First, the Commission held that the forfeiture provisions in Sections 5(c) and 6(d) applied only after the protective period had commenced. The Commission separately held (and we affirm today in Section VI) that the protective period did not commence here until November 4, 1990, the effective date of the implementing agreement. This is several years after the resolution of the job dispute at issue. Therefore, even if the workers had resigned in November 1987 as a result of their job action, that event could have no effect on their eligibility for protective benefits under *Mendocino*. *See December 11, 1990 Decision* at 12 & nn. 24–26. Second, the Commission relied on a provision from its *February 19, 1988 Decision*, which first imposed the *Mendocino* conditions on this transaction, directing that any implementing agreement reached through arbitration:

> shall provide that the employees of the several GTI railroads as of the date of the first such transaction under 49 U.S.C. 1180.2(d)(3) shall not be deemed to have forfeited any rights or benefits as a consequence of decisions made prior to the development of such an implementing plan.

February 19, 1988 Decision at 10, 4 I.C.C.2d 322, 332. Both the Kasher and the Harris Awards echoed this provision in Section 4 of their respective decrees. The Commission concluded in its December 11, 1990, ruling that the strike was an "employment choice" made prior to the execution of the implementing agreement, and thus could not affect the workers' rights to protective benefits under the agreement. *See December 11, 1990 Decision* at 13–14.[11]

The Commission's resolution of these two legal questions was well within bounds. The question of the applicability of Sections 5(c) and 6(d) of *Mendocino* is apparently an issue of first impression. While the forfeiture provisions might be read to apply to any resignation after the execution of a disputed transaction, the Commission's determination that they are effective only after the protective period has begun is entirely plausible. This interpretation ensures that the time during which the protective benefits are subject to forfeiture is congruent with the period of protection itself. Conversely, the reading urged by the railroads would produce the odd result that the workers were at risk of forfeiture during a period when their rights to the benefits—and the magnitude of those benefits—had not yet been fixed. When we extend substantial deference to the Commission's interpretations of the *Mendocino* provisions, as we must, we see enough to sustain the Commission's reading of Sections 5(c) and 6(d).

Likewise, the Commission's interpretation of the language of one of its previous orders in this proceeding is entitled to respect. Under the terms of the *February 19, 1988 Decision*, all affected employees were entitled to a new offer of employment once the implementing agreement became effective. Counsel for the railroads conceded at oral argument that this provision meant that the railroads were required to renew offers of employment—accompanied by the full panoply of labor protection benefits—to any employee who had voluntarily resigned between the time the leases were implemented and the effective date of the implementing agreement. Yet the railroads' argument for forfeiture is based on their contention that the striking workers

10. Section Five of the *Mendocino* provisions deals with displacement allowances; Section Six covers dismissal allowances. To the extent relevant to this appeal, subsections (c) and (d), respectively, contain identical forfeiture provisions.

11. We note that this interpretation of the December 11, 1990, decision comports with the Commission's oft-stated intention to resolve the strike issue solely on legal grounds, without the need for any additional factual inquiry or findings. *See December 11, 1990 Decision* at 6 n. 11, 9–10.

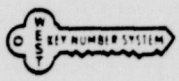
had constructively resigned. Even the railroads' own logic, therefore, suggests that the pre-agreement strike could not affect the workers' rights to employment and benefits under the implementing agreement. The railroads' fall-back position is that it is bad public policy to reward participants in an unlawful strike. This may be so (assuming, for the moment, that the strike was in fact unlawful), but we think that the Commission's contrary interpretation of the language of its February 19, 1988, decision was permissible.

Together, these two legal conclusions dictate the Commission's holding that the striking workers did not thereby forfeit their rights to labor protection benefits. The workers' rights to the protective benefits arose from the Commission's imposition of *Mendocino* provisions on this transaction and from the arbitrated implementing agreements adopted pursuant to those provisions. The legal conclusions upheld above mean that the express terms of each of those sources provided that the benefits conferred thereunder could not be forfeited by any employment action taken prior to the effective date of the implementing agreement. Because the strike was settled long before an implementing agreement finally took effect in this transaction, participation in the strike could not—as a matter of law—affect the workers' rights to protective benefits.

VIII. Conclusion

We remand for the Commission to reconsider its *October 4, 1990* order affirming the Harris Award and related rulings in light of the principles announced above. We do not, however, vacate the *October 4, 1990* order. While we do not address the Commission's rejection of the Kasher Award, we do not mean to suggest that the Commission could not adopt the Kasher Award on remand. Rather, the Commission is free on remand to adopt any award meeting the requirements set forth in this opinion.[12] The Commission's *December 11, 1990* order holding that railway employees did not forfeit their right to protective benefits under *Mendocino Coast* by virtue of the work stoppage from November 1987 to June 1988 is affirmed.

So ordered.



ATLANTA COLLEGE OF MEDICAL AND DENTAL CAREERS, INC., et al., Appellee,

v.

Richard W. RILEY, Secretary of Education, in his Official Capacity, Appellant.

WILFRED AMERICAN EDUCATIONAL CORPORATION, doing business as Wilfred Academy of Hair and Beauty Culture, Plaintiff-Appellee,

v.

Richard W. RILEY, Secretary of Education, in his Official Capacity, Defendant-Appellant.

Nos. 92-5251, 92-5291.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 16, 1992.

Decided March 12, 1993.

Colleges participating in federal family education loan program sought review of ruling by Secretary of Department of Education that they were no longer eligible. The United States District Court for the District of Columbia, Louis F. Oberdorfer,

[12] Our decision that certain terms of the Harris Award must be reconsidered should not be read to create any new "gap" in the six-year protective period under *Mendocino Coast*. While UTU agreed that the protective period would commence when an implementing agreement was finally in place, UTU could not reasonably have foreseen that the validity of the implementing agreement would be in doubt at this late date. Accordingly, the Commission's order on remand ought not affect the duration or dates of the benefits protective period.

obviously intended to strike a delicate balance between the rights of management to eliminate poor performers and the rights of affected employees to procedural protections.

The Union's attempt to add to the procedural side of this equation in this case impermissibly frustrates the "dominant intent of [Congress] . . . 'to simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level within a comprehensive framework for performance evaluation.'" *Lisiecki*, 769 F.2d at 1564 (quoting S.REP. No. 969, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 2732). Indeed, proposal 45 would represent a large step back toward the problems inherent in performance-based actions arising under Chapter 75, and would substantially hamper management's ability to deal with unsatisfactory performers within the Agency. This is best illustrated by the proposal's requirement that only "reasonably attainable" performance improvements serve as a basis for performance-based discipline. As the Authority itself found, such a standard would interfere with management's rights by "protecting from discipline those employees who are performing unacceptably if their performance improves to a 'reasonably attainable' level under a performance improvement plan. . . ." Negotiability Order, J.A. 477. Finally, we agree with the Agency that requiring it to provide a written performance improvement plan any time it wishes to demote or dismiss an employee, impermissibly curtails its discretion to discipline employees through either Chapter 75 or Chapter 43. The Agency should be free to take such actions through Chapter 75, which does not require a performance improvement plan, and accept as a consequence the procedural obstacles and heightened burden of proof attendant to actions under that Chapter. For the reasons discussed, we hold that proposals 43 and 45 (in its entirety) are nonnegotiable.

III. CONCLUSION

For the foregoing reasons, we grant PTO's petition for review, reversing in part and affirming in part the Authority's negotiability decision. We reject POPA's petition for review with respect to the issues raised therein.

So ordered.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and United States of America, Respondents,

CSX Transportation, Inc., Intervenor.

No. 92-1397.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 6, 1993.

Decided June 28, 1994.

Union of railroad employees petitioned for review of order of Interstate Commerce Commission exempting employer from provisions of collective bargaining agreement between union and employer. The Court of Appeals, Buckley, Circuit Judge, held that: (1) Commission had authority to approve transfer of locomotive dispatch work of four

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance,

(B) be represented by an attorney or other representative,

(C) a reasonable time to answer orally and in writing, and

(D) a written decision which—

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

union workers to nonunionized location, and (2) work transfer was necessary and incident to employer's approved acquisition of several railroads.

Ordered accordingly.

1. Commerce ⇐158

Association of officers of rail labor unions was permitted to intervene in review of order of Interstate Commerce Commission (ICC) exempting employer from provisions of collective bargaining agreement with regard to transfer of locomotive dispatch work following employer's approved acquisition of several railroads, where decision in action had strong precedential impact on three cases before ICC in which association submitted comments.

2. Commerce ⇐85.7

Transfer of locomotive dispatch work performed by four union employee's to different nonunionized location following employer's approved acquisition of several railroads did not infringe on "rights, privileges or benefits" under collective bargaining agreement and, therefore, satisfied conditions of statute regarding protection of workers involved in approved transaction, in view of evidence that employees did not have right under agreement to bid on new positions. 49 U.S.C.A. § 11347.

3. Administrative Law and Procedure ⇐817.1

Commerce ⇐181

Remand on petition for review of order of Interstate Commerce Commission (ICC) is unnecessary where outcome of new administrative proceeding is preordained.

4. Commerce ⇐85.7

Interstate Commerce Commission (ICC) had authority to determine whether work transfer was "necessary" for employer to carry out approved acquisition of several railroads. 49 U.S.C.A. § 11341(a).

5. Commerce ⇐85.7

Work transfer of locomotive dispatch work of four union workers to nonunionized location was "necessary" to employer's approved acquisition of several railroads for purposes of statute exempting transaction from certain laws, in view of evidence that it yielded transportation efficiencies and was not aimed solely at abrogating collective bargaining provision. 49 U.S.C.A. § 11341(a).

6. Commerce ⇐85.7

Transfer of locomotive dispatch work of four union workers to nonunionized location was "incident" to employer's approved acquisition of several railroads for purposes of statute exempting transaction from certain laws, in view of evidence that Interstate Commerce Commission's (ICC) approval of acquisition contemplated possibility of future worker dislocations. 49 U.S.C.A. § 11341(a).

Petition for Review of an Order of the Interstate Commerce Commission.

Michael S. Wolly, Washington, DC, argued the cause, and filed the briefs, for petitioner. Erick J. Genser and Thomas A. Woodley entered appearances, for petitioner.

John J. McCarthy, Jr., Associate Gen. Counsel, Interstate Commerce Commission ("ICC"), Washington, DC, argued the cause, for respondents. With him on the brief, were Robert S. Burk, Gen. Counsel, and Henri F. Rush, Deputy Gen. Counsel, ICC, Washington, DC. Robert J. Wiggers, Atty., U.S. Dept. of Justice, Washington, DC, entered an appearance, for respondents.

William G. Mahoney, argued the cause, for movant-intervenor Railway Labor Executives' Ass'n. With him on the briefs, was John O'B. Clarke, Jr., Washington, DC.

James S. Whitehead, Chicago, IL, argued the cause, for intervenor CSX Transp., Inc. and amicus curiae National Ry. Labor Conference. With him on the brief, were Richard T. Conway, Ralph J. Moore, Jr., Washington, DC, and James D. Tomola, Jacksonville, FL.

Before WALD, BUCKLEY, and WILLIAMS, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

The American Train Dispatchers Association ("Union"), a union of railroad employees, petitions for review of an order of the Interstate Commerce Commission exempting CSX Transportation, Inc. ("CSXT") from provisions of the collective bargaining agreement ("CBA") between the Union and CSXT. Under its authority to oversee railway consolidations, the ICC granted the exemption as a follow-up to its 1980 approval of CSXT's acquisition of several railroads. The exemption allows CSXT to transfer train dispatching work performed by four employees at its Corbin, Kentucky, property to its facility in Jacksonville, Florida, where non-union management employees will absorb the work. The Union claims that the four union employees were entitled to follow their jobs to Jacksonville and that the work transfer was unnecessary and beyond the scope of the 1980 approval of CSXT's acquisitions.

We affirm the ICC's decision but rely on different grounds. The ICC failed to inquire whether the work transfer deprives the four employees of any "rights," "privileges," or "benefits" in the CBA, an inquiry required by our recent decision in *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C.Cir.1993) ("*Executives*"). Because the Union has conceded that no rights, privileges, or benefits were infringed, however, we see no reason to remand. In addition, we agree with the Commission's determination that the work transfer stemmed from the 1980 approval of CSXT's acquisitions and was necessary to effectuate them.

I. Background

A. Statutory Scheme

The railroad industry emerged from World War I in a precarious condition. *Norfolk & Western Ry. Co. v. Am. Train Dispatchers*, 499 U.S. 117, 118, 111 S.Ct. 1156, 1158, 113 L.Ed.2d 95 (1991). As a consequence, in 1920 Congress passed legislation to encourage railway consolidations that would enhance economy and efficiency in the industry. *Id.* at 118–21, 111 S.Ct. at 1158–59. In its current form, this policy appears in Chapter 113 of the Interstate Commerce Act ("ICA"), which authorizes the ICC to examine, condition, and approve railway mergers and consolidations. 49 U.S.C. § 11301 *et seq.*

ICC approval of a consolidation frees railroad companies from various legal constraints. In particular, section 11341(a) of the ICA provides, in pertinent part:

> A carrier, corporation, or person participating in that approved or exempted transaction is 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 [sic] franchises acquired through the transaction.

49 U.S.C. § 11341(a) (emphasis added). In *Norfolk & Western*, the Court held that "the term 'all other law' in § 11341(a) includes any obstacle imposed by law," including "the substantive and remedial laws respecting enforcement of collective-bargaining agreements." 499 U.S. at 133, 111 S.Ct. at 1166. The Court declined to decide, however, the issue whether "the scope of the immunity provision [i.e., section 11341(a)] is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions." *Id.* It is this issue that confronts us here.

Section 11347 is intended to insulate railroad workers from the jolts of the corporate restructuring sanctioned by the ICC. It provides:

> When a rail carrier is involved in a transaction for which approval is sought . . . the [ICC] shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. [§] 565).

49 U.S.C. § 11347. This provision incorporates by reference two sets of standards. The first is "the terms imposed under this section before February 5, 1976." Before that date, the Washington Job Protection Agreement of 1936 ("WJPA") governed labor-management negotiations over workers' rights in railway consolidations. *CSX*

Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C.2d 715, 732–33 (1990). In *Executives*, where section 11341(a) did not apply, we adopted the ICC's view that the history of negotiations under the WJPA shows "that arbitrators were authorized ... to make certain changes to CBAs." 987 F.2d at 813. Thus, we found that "it was reasonable for the Commission to interpret the reference in § 11347 to the pre–1976 terms as carrying forward into the present version of § 11347 its authority to change CBAs." *Id.*

We went on to note, however, that the second set of standards incorporated by reference in section 11347, section 405 of the Rail Passenger Service Act, limits the power to override CBAs. *Id.* at 813–14. Section 405 provides, in pertinent part:

> (a) A railroad shall provide fair and equitable arrangements to protect the interests of employees....
>
> (b) Such protective arrangements shall include ... such provisions as may be necessary for ... the preservation of *rights, privileges, and benefits* ... to such employees under existing collective-bargaining agreements....

45 U.S.C. § 565(a), (b) (emphasis added). Construing this language, we commented:

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

Executives, 987 F.2d at 814 (footnotes omitted).

To implement section 11347, the ICC has devised a package of arbitration procedures and employee benefits, known as the *New York Dock* conditions, *see New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, 84–90 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir.1979), that apply to most types of railway transactions. Among other things, the *New York Dock* conditions require the rail carrier to compensate dislocated employees who cannot find other work or whose replacement jobs pay lower wages. 360 I.C.C. at 86–89.

In addition, section 4 of the conditions 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 there is a failure to agree, either party to the dispute may submit it [to arbitration].

360 I.C.C. at 85.

B. Factual and Procedural History

In 1980, the ICC approved the first of a series of mergers and acquisitions that enabled CSXT to expand its rail capacity. *See CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521 (1980), *aff'd sub nom. Bhd. of Maintenance of Way Employees v. ICC*, 698 F.2d 315 (7th Cir.1983). Among others, CSXT acquired the Louisville & Nashville Railroad, including its property in Corbin, Kentucky. Twenty-two train dispatchers worked at the Corbin facility, all members of the Union. CSXT was bound by the CBA between the Union and the Louisville & Nashville Railroad.

In 1987, CSXT proposed to centralize all train dispatching activities for locomotives, known as "power distribution," at its property in Jacksonville, Florida. On January 9, 1988, CSXT and the Union agreed on the details for shifting dispatching operations from Corbin to Jacksonville. In accordance with *New York Dock*, the agreement provided for compensation and other benefits for the affected Corbin employees.

The agreement, however, did not cover four employees who held the rank of "Assistant Chief/Power." The CBA's "scope" provision defined the duties of these four employees to include

> the movement of trains on a Division or other assigned territory, involving the su-

pervision of train dispatchers and other similar employees; to supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work.

Petitioner's Appendix at 13. In the railroad industry, "scope provisions . . . commonly are regarded as defining jurisdiction and job 'ownership' which prohibit the transfer of work from employees under one agreement to employees—even in the same craft—under another rules agreement." *Southern Ry. Sys. and Am. Ry. Supervisors Ass'n*, WJPA Docket No. 141 (1966), *quoted in CSX Corp.—Control—Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc.*, 6 I.C.C.2d at 734.

On February 12, 1988, CSXT notified the Union that it would abolish the four Assistant Chief/Power positions and that non-union, management personnel in Jacksonville would assume the dispatching work. The Union objected and claimed that the CBA entitled the four employees to follow their jobs to Jacksonville. Pursuant to section 4 of *New York Dock*, the parties submitted their dispute to arbitration.

The arbitrator approved CSXT's transfer of the dispatching work of the four Assistant Chiefs/Power to Jacksonville and ruled that the four employees were limited to the same *New York Dock* benefits that the other Corbin dispatchers had received. On September 15, 1989, the ICC affirmed. *CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 23).

The ICC rejected the Union's argument that the arbitrator lacked the power to modify the CBA between the Union and CSXT in order to permit the work transfer. *Id.* at 4. Relying implicitly on its authority to fashion labor-protective conditions under section 11347, the ICC asserted that the history of arbitration under *New York Dock* and its precursor, the WJPA, showed that arbitrators could override CBA provisions to the extent necessary to allow the rail company to carry out an approved transaction. *Id.* at 5–6.

The Union petitioned for review in this court; but before briefing, the Supreme Court handed down the *Norfolk & Western* decision, which ruled that section 11341(a) empowers the ICC to override CBA provisions. Because the *Norfolk & Western* Court reserved several questions, including whether section 11347 limited the ICC's override authority, we remanded the petition, along with three other cases, to let the ICC address the issues remaining after the Supreme Court's decision.

The three other cases, in which public comments have been solicited, are still before the ICC. *See CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 1992 WL 336045, 1992 I.C.C. LEXIS 233 (Nov. 3, 1992). In the instant case, however, the ICC did not invite comments from the public or further submissions from the parties; and on August 13, 1992, the Commission reaffirmed its 1989 decision approving CSXT's transfer of the dispatching work to Jacksonville. *CSX Corp.—Control—Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc.*, 8 I.C.C.2d 715 (1992). Instead of invoking section 11347 and the history of *New York Dock* arbitration, however, the 1992 ruling rests solely on the ICC's authority to modify CBAs under section 11341(a). *Id.* at 718. For example, the decision notes:

> While the arbitrator ruled against the union, he did not specify whether he was doing so because: (1) there was no impediment preventing the transfer of work or (2) there was an existing impediment (due to an existing contract or the [Railway Labor Act] or both) but that it was necessary to override the obstacle(s) . . . . We will assume that either the existing contract or the RLA or both, would have barred the transfer unless some other provision of law overrode the barrier(s).
>
> In light of *[Norfolk & Western]*, there is no longer any dispute that under § 11341(a) the Commission may exempt approved transactions from certain laws, such as the RLA and collective bargaining agreements . . . that would prevent the transactions from being carried out.

Id. at 720.

II. Discussion

We must first dispose of a motion to intervene in support of the petition to review filed

by the Railway Labor Executives' Association ("RLEA"), a voluntary, unincorporated association of the chief executive officers of the major rail labor unions. CSXT urges us to deny the motion because RLEA did not participate in the proceeding before the ICC. The statute that governs our review of ICC orders provides, in pertinent part:

> The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right.... Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order.

28 U.S.C. § 2348 (1988). This provision, which was enacted in 1966, Pub.L. No. 89-554, 80 Stat. 623 (1966), is virtually identical to its predecessor in the Judicial Review Act of 1950.

[1] We construed the predecessor provision in *Montship Lines, Ltd. v. Fed. Maritime Bd.*, 295 F.2d 147 (D.C.Cir.1961), where we held that "'parties in interest in the proceeding before the agency'" could intervene as a matter of right and that, in addition, we had discretion to permit intervention by "parties 'whose interests are affected by the agency's order.'" *Id.* at 152 (quoting 5 U.S.C. § 1038 (repealed)). Thus, even assuming that RLEA is not entitled to intervene as of right here, we may allow it to intervene as a discretionary matter. We choose to do so in this case because of RLEA's undisputed assertion that our decision will have strong precedential impact on three cases pending before the Commission in which it has submitted comments. If RLEA is not permitted to intervene here, its ability to protect its interests in the underlying proceeding may be impaired. *Cf. Nuesse v. Camp*, 385 F.2d 694, 701 (D.C.Cir.1967) (noting that under Fed.R.Civ.Proc. 24(a), "*stare decisis* principles may in some cases supply the practical disadvantage that warrants intervention as of right" and permitting state banking commissioner to intervene in case of first impression, because "the first judicial treatment of this question[ ] would receive great weight"); *see also Auto Workers v. Scofield*, 382 U.S. 205, 217 n. 10, 86 S.Ct. 373, 381 n. 10, 15 L.Ed.2d 272 (1965) ("The Federal Rules of Civil Procedure, of course, apply only to the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts.").

CSXT also contends that RLEA lacks Article III standing to intervene. We need not address this argument because RLEA raises the same issues as the Union, which plainly has standing to champion the interests of the four Corbin employees who are all Union members. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342-43, 97 S.Ct. 2434, 2440-41, 53 L.Ed.2d 383 (1977). "[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Executives*, 987 F.2d at 810 (likewise pretermitting issue of RLEA's standing where all but one of its arguments matched those of petitioner who had standing); *see also Railway Labor Executives' Ass'n v. ICC*, 999 F.2d 574, 577 n. 5 (D.C.Cir.1993) (same). Accordingly, we grant RLEA's motion to intervene without deciding whether it has Article III standing.

Turning to the merits, we confront the issue reserved by the Supreme Court in *Norfolk & Western*: What restraints, if any, does section 11347 impose on the ICC's authority under section 11341(a) to override CBA provisions? In *Executives*, we held that section 11347 shields those CBA provisions that create "rights, privileges, and benefits" from the ICC's override power. Although section 11341(a) did not apply to the transaction before us in that case—a lease of rail lines and trackage rights—, 987 F.2d at 813, we did not restrict our interpretation of section 11347 to that particular type of transaction. Indeed, section 11347 does not admit of any such limitation: it applies to leases, consolidations, mergers, acquisitions, and various other types of railway transactions, including the work transfer in this case. *See* 49 U.S.C. §§ 11347, 11344, 11345, 11346; *see also* 987 F.2d at 813. Thus, our holding in *Executives*

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applies with full force where, as here, sections 11341(a) and 11347 overlap.

In *Executives*, we remanded to let the ICC define the "rights, privileges, and benefits" language of section 405 of the Rail Passenger Service Act and determine if the CBA provisions involved in that case—rates of pay, rules, and working conditions—came under the protection of that statutory rubric. 987 F.2d at 814. The ICC has not yet rendered a ruling in the remanded proceeding. In the instant case, the ICC's 1992 decision issued seven months before *Executives* and does not address whether the transfer of dispatching work treads upon any rights, privileges, or benefits in the CBA. Indeed, the decision relies exclusively on section 11341(a) for override authority and declines even to consider whether there are any specific CBA impediments to the work transfer. 8 I.C.C.2d at 720. Nor can the ICC fall back on its discussion of section 11347 in the 1989 decision because that decision concludes that arbitrators may annul *any* CBA provision that blocks a rail consolidation, a view that conflicts with the *Executives* holding that certain contractual provisions are immutable. 987 F.2d at 814.

[2, 3] Unlike the *Executives* court, however, we need not remand because it is clear that the work transfer infringes no "rights, privileges, [or] benefits" in the CBA. A remand is unnecessary where, as here, the outcome of a new administrative proceeding is preordained. *See NLRB v. Wyman–Gordon*, 394 U.S. 759, 766–67 n. 6, 89 S.Ct. 1426, 1429–30, 22 L.Ed.2d 709 (1969) ("[i]t would be meaningless to remand" where "[t]here is not the slightest uncertainty as to the outcome of a[n] [agency] proceeding"); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1247 n. 84 (D.C.Cir.1972) ("we agree that a remand would be academic if the agency would inevitably arrive at the same result").

At oral argument, the Union's counsel conceded that *New York Dock* empowers arbitrators to override scope provisions in CBAs; by implication, he admitted that the scope clause assigning power distribution work at Corbin to the Assistant Chiefs/Power did not create any "rights, privileges [or] benefits." He insisted, however, that the arbitrator exceeded his authority by stripping the employees of a contractual "right" to bid on the work in Jacksonville.

But in a brief filed after oral argument, CSXT denied that the four employees had a right under the CBA to bid on vacant positions in Jacksonville and asserted that the only CBA provision overridden by the arbitrator was the scope clause. Although the Union filed a brief responding to CSXT's post-argument submission, it does not challenge these statements. Instead, the Union argues that section 4 of the *New York Dock* conditions entitles the four employees to follow their work to Jacksonville. Section 4 requires that "[e]ach transaction which may result in a dismissal or displacement of employees . . . provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case . . . ." 360 I.C.C. at 85. The Union charges that the arbitrator violated this provision by failing to select employees from both Jacksonville and Corbin to perform the transferred work.

We disagree. **Section 4 does not provide a formula for apportioning the "selection of forces." Instead, it frees the hand of the arbitrator to fashion a solution that is "appropriate for application in the particular case."** In this case, existing management employees will absorb the transferred work; CSXT does not need additional workers. We thus cannot say that the arbitrator abused his discretion by selecting forces solely from Jacksonville. *See, Chicago & North Western Transp. Co.—Abandonment*, 3 I.C.C.2d 729, 736 (1987) (ICC accords substantial deference to arbitrators' decisions on issues of causation, calculation of benefits, and factual questions), *aff'd sub. nom. Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C.Cir.1988). As the work transfer impinges on no "rights, privileges, [or] benefits" in the CBA, it satisfies section 11347.

We turn next to the ICC's application of section 11341(a). Section 11341(a) exempts "approved . . . transaction[s] . . . from the antitrust laws and from all other law . . . as necessary to let [the railway] carry out the transaction." 49 U.S.C. § 11341(a). In *Norfolk & Western*, the Supreme Court reserved

the questions whether the action challenged in that case—the carrier's proposed consolidation of locomotive dispatching functions in the wake of an acquisition approved by the ICC—was "necessary" to implement the acquisition and whether it was part of the original "approved transaction." 499 U.S. at 125, 134, 111 S.Ct. at 1162–63, 1166.

Continuing where *Norfolk & Western* left off, the ICC in its 1992 decision focused on the "necessity" and "approved transaction" predicates of section 11341(a). It decided that "the 'necessity' predicate is satisfied by a finding that some 'law' (whether antitrust, [the Railway Labor Act], or a collective bargaining agreement formed pursuant to the [Railway Labor Act]) is an impediment to the approved transaction." *CSX Corp.—Control—Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc.*, 8 I.C.C.2d at 721. Thus, it ruled, CSXT was "exempted from any provisions of the collective bargaining agreements ... that might bar the immediate consummation of the transfer of dispatching functions." *Id.* at 723. Addressing the "approved transaction" language, it concluded that "[t]he approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to and fulfill the purposes of the principal transaction," *id.* at 722, and thus that the transfer of power distribution work flowed from the 1980 approval of CSXT's acquisitions. *Id.* at 720.

In its opening salvo against these findings, the Union contends that the ICC lacks jurisdiction to determine whether a transaction is "necessary" or whether it is incident to the original "approved transaction." The Union's only real ammunition, however, is a single sentence in a footnote in Justice Stevens' concurrence in *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs.*, 482 U.S. 270, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987): "The idea of having parties repeatedly return to the ICC for decisions on the necessity of an exemption is without basis in the statutory scheme, and would clearly not mitigate the delay and confusion surrounding consolidations." *Id.* at 300 n. 14, 107 S.Ct. at 2377 n. 14.

This sentence is somewhat ambiguous because Justice Stevens also notes that "[a]ny tribunal that is faced with a claim that a party is violating some 'other law' has the responsibility of determining whether an exemption is 'necessary ....'" *id.* at 300 n. 13, 107 S.Ct. at 2377 n. 13, and because his main point is that the ICC is not *required* to make a "necessity" finding when it approves the *original* transaction. *Id.* at 295–98, 107 S.Ct. at 2374–76.

[4] In any event, we made clear in *Railway Labor Executives' Ass'n v. ICC*, 888 F.2d 1079 (D.C.Cir.1989), *modified on other grounds and reh'g denied*, 929 F.2d 742 (D.C.Cir.1991), that "the ICC may consider a question of exemption, and make the 'necessity' determination [under section 11341(a)], when the issue is properly before it." *Id.* at 1082. We can discern no reason why the ICC should not have equal authority to make the "approved transaction" determination. A recent Ninth Circuit decision supports our view that the ICC has jurisdiction to make such findings. *See Railway Labor Executives' Ass'n v. Southern Pac. Transp. Co.*, 7 F.3d 902, 906 (9th Cir.1993) (ICC has exclusive authority to clarify scope of merger approvals and determine necessity under section 11341(a)), *cert. denied*, — U.S. —, 114 S.Ct. 1298, 127 L.Ed.2d 650 (1994).

The Union next attacks the ICC's necessity finding on the merits, arguing that the four Corbin employees were capable of performing the work in Jacksonville and that there was thus no need to give it to non-union employees. The argument misapprehends the standard for necessity. In *Executives*, we held that to satisfy the "necessity" predicate for overriding a CBA, the ICC must find that the underlying transaction yields a transportation benefit to the public, "not merely [a] transfer [of] wealth from employees to their employer." 987 F.2d at 815. In other words, the 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.

Technically, *Executives* articulated the necessity standard for section 11347 rather than section 11341(a), which did not apply in

that case. Both provisions apply here, however, and because section 11347 "on its face provides more, not less, generous labor protection than does § 11341(a)," 987 F.2d at 814, we need not decide if a different standard would suit a case where section 11341(a) applied but section 11347 did not.

[5] In light of *Executives*, the ICC's assertion in its 1992 decision that "the 'necessity' predicate is satisfied" whenever a CBA is "an impediment" to a transaction clearly misstates the necessity standard. Nonetheless, the record reveals transportation benefits from CSXT's proposed work consolidation sufficient to pass the *Executives* test; thus a remand is unnecessary. *See Wyman–Gordon*, 394 U.S. at 766–67 n. 6, 89 S.Ct. at 1429–30 n. 6. As the ICC's decision notes, the arbitrator found that centralizing power distribution functions at a single location would facilitate power allocation decisions for CSXT's far-flung rail network. The arbitrator also found that CSXT had employed non-union power distribution dispatchers in Jacksonville "for a long time," which belied any suggestion that CSXT was seeking the transfer to usurp union work; indeed, he dismissed the specter that CSXT was engaging in "union busting." Thus, the work transfer was "necessary," for it yielded transportation efficiencies and was not aimed solely at abrogating a CBA provision.

Finally, the Union assails the ICC's ruling that the work transfer was incident to the "approved transaction"—CSXT's 1980 acquisitions—under section 11341(a). The Union contends that the ICC's definition of "approved transaction" is overbroad and that the Commission never envisioned a transfer of work from union to non-union employees when it approved CSXT's acquisitions in 1980.

[6] We find reasonable the ICC's view that the section 11341(a) exemption for "approved . . . transaction[s]" extends to subsidiary transactions that fulfill the purposes of the main control transaction. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–45, 104 S.Ct. 2778, 2781–83, 81 L.Ed.2d 694 (1984) (court may not substitute its own construction of ambiguous statutory provision for reasonable interpretation by agency where agency is entrusted to administer statute). The *New York Dock* conditions define "transaction" as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. at 84 (Art. I, § 1(a)). The ICC adopted this definition at the urging of labor unions, who insisted that labor protections must extend not only to workers displaced by the main control transaction but also to those displaced by later, related restructurings. *Id.* at 65. Heeding this plea, the ICC noted: "[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. . . ." *Id.* at 70. The ICC's elastic construction of "approved transaction" in this case mirrors this settled understanding.

Moreover, the ICC's 1980 approval of CSXT's acquisitions contemplated the possibility of future worker dislocations: "It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." *CSX Corp.—Control—Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. at 589. Despite these potential disruptions, the ICC approved the deal, noting that "[w]e believe that [the *New York Dock* 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." *Id.*

We have no reason to believe that the work transfer in this case is anything but one of the "additional coordinations" the ICC had in mind. Indeed, as the ICC's 1992 decision notes, "coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the [1980] control transaction." *CSX Corp.—Control—Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc.*, 8 I.C.C.2d at 724 (internal quotation marks omitted), because the very point of many mergers is to capture efficiencies from centralization of function. Finally, con-

sistent with its 1980 approval, the ICC granted *New York Dock* benefits to the four Assistant Chiefs/Power in both its 1989 and 1992 decisions.

III. Conclusion

Although *Executives* has superseded some of the language in the ICC's decision, we deny the petition for review because the ICC clearly had the authority to approve the work transfer and because the transfer was necessary and incident to CSXT's 1980 acquisitions.

So ordered.

Hugo PRINCZ, Appellee,

v.

FEDERAL REPUBLIC OF GERMANY, Appellant.

Nos. 92-7247, 93-7006.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 5, 1993.

Decided July 1, 1994.

As Amended July 1, 1994.

American citizen who survived Holocaust sued Federal Republic of Germany, seeking to recover money damages for injuries he suffered and slave labor he performed while prisoner in Nazi concentration camps. United States District Court for the District of Columbia, Stanley Sporkin, J., 813 F.Supp. 22, asserted subject matter jurisdiction over survivor's claim. Germany appealed. The Court of Appeals, Ginsburg, Circuit Judge, held that, assuming that Federal Sovereign Immunities Act (FSIA) applied retroactively to events occurring in 1942-1945, no exception to general grant of sovereign immunity in that statute applied.

Judgment reversed, case dismissed.

Wald, Circuit Judge, issued dissenting opinion.

1. Federal Courts ⇐776

All questions concerning foreign government's entitlement to sovereign immunity are matters of law for Court of Appeals to consider de novo. 28 U.S.C.A. §§ 1330, 1602-1611.

2. International Law ⇐10.30

Under Foreign Sovereign Immunities Act (FSIA), general rule is that of sovereign immunity, subject to various statutory exceptions. 28 U.S.C.A. §§ 1330, 1602-1611.

3. International Law ⇐10.38

It is burden of foreign sovereign in each case to establish its immunity by demonstrating that none of exceptions to Foreign Sovereign Immunities Act (FSIA) is applicable. 28 U.S.C.A. § 1605.

4. International Law ⇐10.33

Work that Jewish American was required to perform as slave for Nazi Germany had no "direct effect in the United States," for purposes of Foreign Sovereign Immunities Act (FSIA) section providing that foreign governments are not immune from jurisdiction of United States Court based upon acts outside United States in connection with commercial activity that causes direct effect in United States; many events and actors necessarily intervened between any work that he performed as brick layer or as laborer in aircraft works and any effect felt in United States. 28 U.S.C.A. § 1605(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

5. International Law ⇐10.33

Current German government's alleged use of mail, wire, and banking systems of United States to administer pension and other reparation programs for victims of Third Reich did not provide requisite "direct effect in the United States" to give federal court jurisdiction over Foreign Sovereign Immunities Act (FSIA) claim by Holocaust survivor

FD/ECD/8

SERVICE DATE

AUG 10 1995

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 32035 (Sub-Nos. 2-6)

FOX VALLEY & WESTERN LTD.
--EXEMPTION ACQUISITION AND OPERATION--
CERTAIN LINES OF GREEN BAY AND WESTERN RAILROAD COMPANY, FOX RIVER VALLEY RAILROAD CORPORATION, AND THE ANNAPEE & WESTERN RAILWAY COMPANY
--ARBITRATION REVIEW--

Decided: July 31, 1995

This decision denies several appeals of arbitral awards resolving questions related to implementation of labor protection conditions we imposed in connection with a transaction under 49 U.S.C. 11343.

BACKGROUND

In Finance Docket No. 32035, we exempted the acquisition by Fox Valley and Western Railroad Company (FVW) of the Fox River Valley Railroad Corporation (FRVR) and the Green Bay and Western Railroad Company (GBW) from the requirements of 49 U.S.C. 11343(a)(4), and imposed our standard New York Dock[1] labor protection conditions on the transaction.[2] On January 27, 1993, the carriers gave notice to all affected employees and unions of their intention to consummate the transaction, and the process of negotiating implementing agreements began.[3] Implementing agreements were reached between the carriers and two of the unions, the Brotherhood of Locomotive Engineers and the International Brotherhood of Firemen and Oilers, but other implementing arrangements had to be resolved by arbitration.

Six administrative appeals of the arbitration awards were filed. The appeals (each involving a different craft) were docketed as Sub-Nos. 1-6. The carriers filed the appeal in Sub-No. 1, which we have previously decided,[4] and the United

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[1] See New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

[2] FVW is a subsidiary of the Wisconsin Central Transportation Corporation (WCTC), a noncarrier holding company controlling the Wisconsin Central, Ltd. (WCL), and the Sault Ste. Marie Bridge Company. WCTC incorporated FVW as a noncarrier to acquire the assets of these carriers.

[3] WCL employees were not part of that transaction, and thus were not represented in the negotiations.

[4] By decision served December 19, 1994, we upheld the Moore award for maintenance of way employees. Specifically, we upheld his decision that FVW cannot apply its own selection standards for initial selection of forces, but must observe a single "dovetailed" seniority list. Concerning FVW's assignment of employees after their initial selection, we upheld the arbitrator's decision not to assign those employees according to a single, dovetailed seniority list but to require the carrier to observe the employees' "prior rights" to work on the track of their prior employer. We upheld the arbitrator's statement that pre-transaction rates of pay, rules, and working conditions are preserved. Finally, we found that the arbitrator did not intend

(continued...)

Transportation Union (UTU) filed appeals in Sub-Nos. 2-6, which we will decide here.

DISCUSSION

Our standard of review for appeals from labor arbitrators is set forth in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987)(Lace Curtain). Under the Lace Curtain standard, we do not review "issues of causation, the calculation of benefits, or the resolution of other factual questions." Id. at 736. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993) (Springfield Terminal), we elaborated on the Lace Curtain standard:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

As a starting point, arbitrators should recognize that Article I, section 2 of New York Dock, 360 I.C.C. at 84, permits, and may even require, the preservation of rates of pay, rules, and working conditions. Indeed, the literal language of that section calls for preservation of collective bargaining agreements (CBAs), although [redacted] have recognized that CSX [redacted] carry out and obtain the full benefits of [redacted] we have approved in the public interest.[4]

This "necessity" finding is not optional; pre-transaction labor arrangements cannot be modified without it. As the court held in Springfield Terminal, 987 F.2d at 814-815:

> . . . it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary" to effectuate a covered transaction. [Citation omitted.]
>
> . . . We look therefore to the purpose for which the ICC has been given this authority [to approve consolidations]. [redacted] merely to transfer wealth from employees to their employer.

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[4](...continued)
to award BMWE representation rights on FVW, and that such an award would have been beyond his authority.

[5] Where modification is necessary, we can act under either section 11347 or section 11341(a). CSX Corp.--Control--Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988) (Carmen I), modified 6 I.C.C.2d 715, 754 (1990) (Carmen II); Brandywine Valley R. Co.--Pur.--CSX Transp., Inc., 5 I.C.C.2d 764 (1989); Springfield Terminal, supra; and Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991).

Arbitrators should also be aware that in Springfield Terminal 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. 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.[8] 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.

In this proceeding, we will evaluate each appeal separately under the Lace Curtain standard of review, and in light of the above considerations. Similar arguments are raised in each appeal. UTU argues that the arbitrators erred "in letting FVW set its own rates of pay and practices without regard to existing GBW and FRVR agreements." According to UTU, the arbitrators should have included a provision similar to that in the Sub-No. 1 award, where arbitrator Moore, copying the language of Article I, section 2 of New York Dock, required preservation of pre-transaction rates of pay, rules, and working conditions. UTU cites Springfield Terminal, supra, where the court remanded a decision upholding arbitrator Harris' award involving a lease of properties by the Springfield Terminal Railway Company.

The carriers' consolidated reply repeats the legal arguments made earlier in their appeal in the Sub-No. 1 case. These arguments are summarized and discussed in that decision. [redacted] discussed below.

[8] In overturning arbitrator Kasher's award in Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 et al. (ICC served Jan. 10, 1989), we held (at 7):

> The purpose of labor protective conditions is to cushion the effect on employees of transactions approved or exempted by us as in the public interest by providing up to 6 years' protection for affected employees. The conditions were not intended to foreclose change, streamlining, and modernization of the rail industry, but rather were intended to ensure that the economies and efficiencies sought by the industry through consolidations were not achieved at the sole expense of rail employees. [Citations omitted.]

Finance Docket No. 32035 (Sub-No. 2)

The Sub-No. 2 appeal concerns the FRVR machinists and electricians represented by UTU.[7] On August 3, 1993, arbitrator Hugh G. Duffy rendered an arbitral award establishing an implementing agreement for these employees. As an initial matter, Duffy correctly found that New York Dock applied because this was a consolidation subject to section 11343. Duffy then rejected the union's claim that section 2 of New York Dock requires preservation of all prior rates of pay, rules, and working conditions. We read this part of the award as simply rejecting labor's position that arbitrators have no authority to modify CBA terms under any circumstances. [redacted] Thus, the arbitral award, as far as it goes, is correct.

By the same token, it is also true that section 2 does preserve CBA terms unless they are modified as necessary to carry out a transaction. This preservation occurs even where the arbitrator's decision is silent on this issue. Here, the arbitrator did not purport to modify CBA terms, except those concerning prior assignment rights, to carry out this particular transaction. Thus, CBA terms continue in force unless they are modified through collective bargaining or through a further arbitration.

The only terms that have been modified here relate to assignment of forces. Duffy's award rejected UTU's contention that employees must be allowed to carry-over the "prior rights" to be assigned to work on the same lines they did before the transaction. No reason has been presented to disturb Duffy's expert determination in this regard, which allows these employees to be deployed efficiently throughout this rail system.

Finance Docket No. 32035 (Sub-No. 3)

The Sub-No. 3 appeal concerns the FRVR engineers represented by the UTU.[8] On July 31, 1993, arbitrator I.M. Lieberman issued a decision establishing an implementing arrangement between the carriers and UTU. The arbitrator rejected UTU's request for preservation of rates of pay, rules and working conditions. [redacted] arbitrator found that (1) the restrictions in prior collective bargaining agreements would deprive the carriers of the benefits of the transaction and (2) "there is nothing in the ICC's decision in this case, which indicates that there should be any restriction whatever, via an Implementing Agreement, of FVW's rights to determine the appropriate use of its future work force."

As to the initial selection of forces, the arbitrator held as follows (p.6):

> While the Arbitrator agrees with much of what the Carrier has set forth with respect to the selection process, it cannot agree with the aspect of the selection process dealing with physical examinations. It would appear to be consistent with the ICC's findings and order, that the employees to be hired by

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[7] The International Association of Machinists and Aerospace Workers (IAM) on the GBW reached an implementing agreement with the carriers voluntarily.

[8] On March 22, 1993, the carriers and BLE, which represents GBW engineers, entered into an implementing agreement.

the new entity, have a priority right to the work. It would appear to be inconsistent with that priority right, for such employees to be subjected to physical examinations when they have been working in the very jobs which are to be filled immediately prior to their selection by the new Carrier. Therefore, that provision of the Carrier's Implementing Agreement is rejected.

The parties' arguments do not differ from those raised in the other appeals, except that UTU also argues that Lieberman should have followed Moore by directing that the initial assignment of forces be based on the employee's home territory. In addition, [redacted] replied to UTU in support of the carriers' position that the arbitrator was not required to preserve rates of pay, rules, or working conditions. [redacted] that, even if preservation is required, prior practices can be modified when modification is necessary to effect the goals of the transaction. According to BLE, the arbitrator's system-wide, dovetailed seniority list (no preservation of pre-transaction work locations) is proper. BLE asserts that, under the system sought by UTU here, junior engineers would displace senior engineers. BLE cites a 1982 arbitration decision where an arbitrator allegedly rejected a similar departure from seniority proposed by UTU. In addition, BLE disputes UTU's contention that the arbitrator adopted a "pick-and-choose" system of initial employee selection.

Arbitrator Lieberman's finding as to the initial selection of forces was correct. He did not grant the carrier discretion to depart from the dovetailed seniority roster in hiring these employees as UTU alleges. In our decision in Sub-No. 1, we explained that the employees are entitled to be hired based on a single, dovetailed, seniority list, rather than based on the carrier's own standards, and Lieberman followed that approach here.

We uphold the arbitrator's rejection of UTU's request for preservation of pre-transaction rates of pay, rules, and working conditions. On pages 7-8 of his decision, the arbitrator determined that this would undermine efficient operation of the merged entity. The arbitrator further noted that FVW's pay schedules were in some instances superior to those of the prior carriers, and this was sufficient to explain his failure to preserve rates of pay. By making these findings, arbitrator Lieberman's decision met the Springfield Terminal court's requirement that prior labor arrangements not be modified unless necessary.

UTU has provided insufficient basis for us to disturb Lieberman's determination that the work force assignment restrictions requested by UTU would undermine efficient operation of the merged entity. [redacted] exhibits show that the [redacted] GBW was to effect the operational economies of joint operation.[9] The carriers described the specific changes in locomotive operation that would effect these operational economies.[10] It seems unreasonable to us to require that former FWVR engineers

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[9] Arbitration exhibit 15, submitted in attachment 2 of Part I of the extracts filed by the carriers on Sep. 28, 1993.

[10] Specifically, the number of existing jobs will be reduced from 48 to 44; train and yard operations will be relocated; and current distinctions between train and yard crews and other operational restrictions formerly applying on the GBW are to disappear.

could be assigned only to the parts of the FVW system that were formerly FRVR lines, and that GBW engineers could be assigned only to former GBW lines. While this sort of division of labor may have made some sense for assignment of maintenance-of-way employees (see Sub-No. 1), it makes no sense as a way to assign engineers to serve a system of this size. Overall, permitting the carriers to depart from prior rules and rates of pay should promote the sort of economies discussed by the court in Springfield Terminal because they reduce railroad operating costs, which, in turn affect the rates that FVW will be able to charge in competition with other modes of transport. Indeed, precluding changes such as these due to labor protective conditions would have a chilling effect on transactions that are in the public interest.

Finance Docket No. 32035 (Sub-No. 4)

The Sub-No. 4 appeal concerns the FRVR signalmen represented by UTU. The parties failed to reach an implementing agreement, and the issues were submitted to arbitration. On August 13, 1993, arbitrator Herbert L. Marx, Jr., rendered a decision establishing an implementing arrangement. He rejected UTU's request for preservation of rates of pay, rules and working conditions, and determined that preservation would thwart the transaction by blocking the creation of a "single, coordinated work force."

We will uphold Marx's award in Sub-No. 4 in its entirety. Marx's determinations as to preservation of rates of pay, rules, and working conditions in Sub-No. 4 were appropriate under our Lace Curtain standard of review. Marx found (arbitration decision, p. 8) that FVW "convincingly argues that FV&W will have a single integrated work force covering the entire system and determination of which assignments are GBW or FRVR positions would not be feasible or efficient." Marx's decision also specifically incorporated arbitrator Lieberman's decision in Sub-No. 3.

Marx's determination that the work force assignment restrictions requested by UTU would undermine efficient operation of the merged entity was amply supported. From WCL's annual report, the arbitrator cited WCL's description of the purpose of the transaction, that is, to effect the operational economies of joint operation. The carriers described the specific changes in the signaling operation that would effect these operational economies.[11] As we noted above in connection with Sub-No. 3, these economies are the type of public benefits contemplated by the court in Springfield Terminal. These changes in prior practices are required to attain the operational economies that the transaction was intended to produce.

Finance Docket No. 32035 (Sub-No. 5)

The Sub-No. 5 appeal concerns the FRVR clerks and carmen represented by UTU. The carriers did not reach an implementing agreement with UTU or with Transportation Communications Union (TCU), which represented GBW workers,[12] and the issues were submitted to arbitration.

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[11] Specifically: the number of active jobs will be unchanged at 10; and these jobs will move to two facilities on the Wisconsin Central and three facilities on the former FRVR, with no work to be performed on former GBW facilities.

[12] TCU reached an agreement patterned after the agreements reached with other craft unions and submitted the agreement to

On August 13, 1993, arbitrator Joseph A. Sickles rendered two separate awards, one establishing an implementing arrangement for the carmen and the other for the clerks. Sickles explained the awards in a common decision. Although he noted (pp. 5-6) that the parties extensively discussed the question of preservation of rates, rules, and working conditions, he refused to make a determination concerning this issue due to time limitations. He explained that he would confine his findings to the issues concerning the initial selection of forces, and those issues have not been appealed. Although Sickles' decision may have been incomplete (in that it did not deal with the issue of preservation of pre-transaction labor arrangements) it was not erroneous. Thus, there is no reason to disturb the arbitrator's decision in Sub-No. 5.

There may ultimately be unresolved issues as to which pre-transaction labor arrangements (rates of pay, rules, and working conditions) can or must be modified to effect the goals of the transaction. The parties may be able to resolve these issues by agreement, or further arbitration may be required. Any additional arbitration concerning the carry-over of pre-transaction arrangements should be guided by the principles discussed above.

Finance Docket No. 32033 (Sub-No. 6)

The Sub-No. 6 appeal concerns the conductors, and the trainmen and yard employees, who were represented by the UTU on both railroads. The carriers did not reach an implementing agreement with either union, and the issues were submitted to arbitration. On August 26, 1993, arbitrator Robert O. Harris rendered a decision establishing an implementing agreement. The arbitrator declined UTU's request to make a specific finding, reflecting section 2 of New York Dock, indicating that rates of pay, rules, and working conditions are preserved. He found (pp. 12-13) that this was an issue for the Commission and that the transaction should not be delayed pending its resolution:

> It would not serve the interest of any of the parties to this proceeding for the terms of this award to hold up the consummation of the transaction because of a dispute of this type. It is the job of the ICC, to attempt to resolve the conflict between what the Court of Appeals for the District of Columbia has indicated as its view of the resolution of the potential conflict between Article 1, Section 2 and Article I, Section 4 of the New York Dock decision should be by the ICC, and what the ICC had previously written. Like Arbitrator Sickles I will leave that for others to decide.

Harris followed the same approach as Sickles did in Sub-No. 5, and the appeal of his award will be disposed of in the same way. Harris' decision was incomplete, in that it did not deal with the issue of preservation of pre-transaction labor arrangements, but it was not erroneous. To the extent that his decision dealt with the basic issue of initial selection of forces that must be determined in the pre-consummation

It is ordered:

1. The appeals are denied.

2. This decision is effective on August 10, 1995.

3. This decision will be served on the parties listed in the service list and on the National Mediation Board:

National Mediation Board
Washington, D.C. 20572

Re: Interstate Commerce Commission Finance Docket No. 32035 (Sub-Nos. 2-6)

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioners Simmons and McDonald.

Vernon A. Williams
Secretary

(SEAL)

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4, OF THE NEW YORK DOCK CONDITIONS

In the matter of arbitration between

United Transportation Union and Brotherhood of Locomotive Engineers

-and-

CSX Transportation, Inc.

Background

CSX Transportation, Inc. (hereinafter referred to as CSXT or the Carrier) is a Class I railroad that has evolved from the merger and acquisition of some eleven (11) railroads and their subsidiaries pursuant to the authorization of the Interstate Commerce Commission (hereinafter referred to as the ICC). Since 1962, the Baltimore & Ohio Railroad (hereinafter referred to as the B&O) and the Chesapeake & Ohio Railroad (hereinafter referred to as the C&O) have been commonly controlled and managed. These railroads and some subsidiaries comprised the Chessie System, Inc. The Chessie System, Inc. also controlled the Western Maryland Railway Company (hereinafter referred to as the WM).

In 1980, the Chessie System, Inc. and the Seaboard Family Lines, Inc. were merged to form CSX Transportation, Inc. The ICC approved this merger in Finance Docket No. 28905. In this same Finance Docket, the ICC also authorized the CSX Corporation to control the Richmond, Fredericksburg & Potomac Railroad (hereinafter referred to as the RF&P) through stock ownership.

In 1983, through a Notice of Exemption, the ICC authorized the B&O to operate the railroad properties of WM as part of the B&O system. (Finance Docket No. 30160). In 1987, the ICC issued another Notice of Exemption in Finance Docket No. 31033 merging the B&O into the C&O. As a result of this merger, the B&O ceased to exist as a separate corporate entity. In 1987, the ICC also authorized the merger of the C&O into CSX in Finance Docket No. 31106. In 1988, the ICC authorized the merger of the WM into CSXT (Finance Docket No. 31296). In 1992, the ICC authorized CSXT to operate the properties of the RF&P in the name and for the account of CSXT (Finance Docket No. 32020).

It should be noted that with the exception of the seminal 1980 merger between the Chessie System, Inc. and the Seaboard Coast Line Industries, Inc., all these other mergers were exempt from prior ICC approval. In all of these Finance Dockets, the ICC imposed the labor protective conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 ICC 60, (1979) (hereinafter referred to as the New York Dock Conditions).

This arbitration under Article I, Section 4, of the New York Dock Conditions emanates from a January 10, 1994 notice that the Carrier served on four (4) United Transportation Union (UTU) General Committees of Adjustment and three (3) Brotherhood of Locomotive Engineers (BLE) General Committees of Adjustment. The Carrier claims that this notice was served in accordance with Article I, Section 4, of the New York Dock Conditions. The

Carrier contends that this New York Dock notice was served pursuant to ICC Finance Dockets 28905, 30160, 31033, 31106, 31296, 31954 and 32020.

The January 10, 1994, notice advised the affected UTU and BLE General Committees of Adjustment that CSXT intended to fully transfer, consolidate and merge the train operations and associated work force on the former WM, RF&P and a portion of the former C&O in the area between Philadelphia, PA., Richmond, VA., Charlottesville, VA., Lurgan, PA., Connellsville, PA., Huntington, W. VA. and Bergoo, W. VA. This proposed consolidation would include all terminals, mainlines, intersecting branches and subdivisions located in this territory between southern Pennsylvania and southern Virginia. This territory would be known as the Eastern B&O Consolidated District. It would encompass seven (7) existing seniority districts for train service employees and five (5) existing seniority districts for engine service employees.

The January 10, 1994, notice also advised the UTU and BLE General Committees of Adjustment that the aforementioned operations on the C&O, WM and RF&P would be merged into operations on the former Baltimore and Ohio Railroad and the affected train and engine service employees would be governed by the existing collective bargaining agreements on the former B&O applicable to train and engine service employees. Additionally, CSXT proposed that the working lists of the separate districts protecting service in this territory would be merged, including

establishment of common extra boards to protect service out of the respective supply points that would be maintained.

The notice outlined six (6) initial operational changes that the Carrier intended to make in order to facilitate the proposed transfer, consolidation and merger. However, CSXT subsequently withdrew its proposal requiring the Keystone Subdivision to protect certain service west of Cumberland. The Carrier suggested that a meeting be held on January 20, 1994, to commence negotiations for an implementing agreement pursuant to Article I, Section 4, of the New York Dock Conditions.

CSXT estimates that forty-five (45) train and engine positions would be abolished and forty-three (43) new positions would be created as a result of this consolidation. Some positions will be established at new locations. The Carrier asserts that no train or engine service employees will be furloughed as a result of the coordination. However, the Carrier's proposal will result in the closing of a number of supply points on the former C&O, B&O and WM. Reporting points would also change for some train and engine service employees. One seniority district would be created for the proposed Eastern B&O Consolidated District.

On February 10, 1994, the parties met to discuss the Carrier's January 10, 1994, notice. The UTU and the BLE took the position that the notice was improper for a myriad of reasons. They claimed that the proposal was improper because it would cause changes in the rates of pay, rules and working conditions

in existing collective bargaining agreements without compliance with the Railway Labor Act. They further asserted that the proposal did not involve a "transaction" under the New York Dock Conditions. Moreover, the UTU and BLE complained that the notice failed to specifically relate any of the proposed changes to the individual Finance Dockets cited by the Carrier. They also claimed that the proposal was not permitted by the Interstate Commerce Act and had no relation to the merger dating back to 1980 between the Chessie System, Inc. and the Seaboard Coast Line Industries, Inc. because no properties of the former Seaboard Coast Line were involved in the proposed changes. The Unions asked the Carrier to withdraw its January 10, 1994, notice but it refused to do so.

On February 25, 1994, CSXT submitted a proposed implementing agreement to the BLE and UTU involving the properties of the former B&O, C&O, RF&P, and WM it wished to merge. The Unions reiterated their objections to the notice and declined to meet to discuss the Carrier's proposed implementing agreement. On March 25, 1995, CSXT insisted that its notice was proper and legal and suggested that the parties proceed to arbitration pursuant to Article I, Section 4, of the New York Dock Conditions.

The BLE and UTU General Committees of Adjustment agreed to participate in the arbitration requested by CSXT while reserving their rights to challenge the January 10, 1994, notice as improper and procedurally infirm; and that there was no legal basis or authority for the changes proposed in the notice. The

Unions maintained that these arguments, among others, would be presented to the New York Dock arbitrator.

On September 23, 1994, the National Mediation Board designated the undersigned as Arbitrator of this dispute. The parties submitted extensive Submissions and a plethora of evidence in support of their respective positions. A hearing was held on March 28, 1995, in Washington, D.C. Based on the extensive evidence and arguments advanced by the Unions and CSXT, this Arbitrator hereby addresses the issues submitted to him.

Findings and Opinion

The ultimate question before this Arbitrator is whether the Carrier's proposed implementing agreements with the United Transportation Union and the Brotherhood of Locomotive Engineers comport with Article I, Section 4, of the New York Dock labor protective conditions. However, before reaching that paramount question, the Unions have presented several threshold issues that must be addressed. As noted heretofore, when the Unions agreed to CSXT's invocation of arbitration, they specifically reserved their right to submit these issues to the Arbitrator appointed pursuant to Article I, Section 4, of the New York Dock Conditions.

It is a universally accepted principle that Arbitrators appointed pursuant to Article I, Section 4, of the New York Dock Conditions serve as an extension of the ICC. Since these Arbitrators derive their authority from the ICC, they are duty

bound to follow decisions and rulings promulgated by the ICC. The ICC has suggested that New York Dock Arbitrators should initially decide all issues submitted to them, including issues that might not otherwise be arbitrable, subject, of course, to ICC review. Consistent with that mission, the undersigned Arbitrator hereinafter addresses the issues advanced by the UTU and BLE.

I. Has CSXT presented a "transaction" as defined in Article I, Section 1(a) of the New York Dock Conditions?

A "transaction" is defined as any action taken pursuant to a Commission authorization upon which New York Dock Conditions have been imposed. The Unions stress that CSXT is the moving party in this arbitration. Therefore, according to the Unions, CSXT must prove that there is a causal nexus between an ICC approved transaction and the operational changes it wished to make on the C&O, B&O, WM and RF&P railroads.

Rather than demonstrate this requisite causal relationship, the Unions contend that the Carrier merely listed seven Finance Dockets in its purported January 10, 1994, notice and explained eight (now seven) changes it wished to implement without identifying whether any of the particular Finance Dockets bear any relationship to any of the proposed changes. For these reasons, among others, the Union submits that CSXT has not submitted a proper and valid New York Dock notice for this Arbitrator's consideration.

In CSX Corp. - Control - Chessie System, Inc. and Seaboard Coast Line Indus., Inc., 8 I.C.C. 2d 715 (1992), the ICC set

forth guidelines to determine when a proposed coordination constitutes a "transaction" under New York Dock. In that proceeding, CSXT proposed to abolish four dispatcher positions at Corbin, Kentucky and transfer this work to management positions in Jacksonville, Florida. CSXT served this notice under the authority of Finance Docket No. 28905 which the ICC had approved in 1980, eight (8) years prior to the proposed transfer of these dispatcher positions. The American Train Dispatchers Association (ATDA) refused to agree to an implementing agreement and one was imposed by a New York Dock Arbitrator. The ATDA appealed the Arbitrator's Award to the ICC arguing that the change proposed in 1988 occurred too long after imposition of New York Dock conditions in 1980 to qualify as a "transaction."

The ICC rejected the ATDA's argument and found that the eight (8) year lapse between its imposition of New York Dock labor protective conditions in Finance Docket No. 28905 and the proposed transfer of dispatching functions in 1988 did not, by itself, render the proposal improper. The ICC explained that the relevant inquiry is not the passage of time but whether the coordination "reasonably flowed" from the control transaction that had been approved in 1980. The ICC declared that approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to and fulfill the purposes of the principal transaction. The ICC did caution, however, that there must be a direct causal connection between the earlier merger transaction and the subsequent operational

changes sought to be implemented by a carrier.

It is instructive to note that in 1980, the ICC authorized the CSX Corporation to control the RF&P in Finance Docket No. 28905. In 1987, the ICC approved the merger of the B&O into the C&O in Finance Docket No. 31033. and the merger of the C&O into CSX (Finance Docket No. 31106). In 1988, the ICC sanctioned the merger of the WM into CSXT which had been formed in 1987 (Finance Docket No. 31296). And in 1992, the ICC authorized CSXT to operate the properties of the RF&P (Finance Docket No. 32020). All these Finance Dockets were cited by the Carrier in its January 10, 1994, notice to the UTU and BLE.

In this Arbitrator's opinion, the operational changes proposed by the Carrier in its January 10, 1994 notice directly related to and flowed from the aforementioned transactions that were authorized by the ICC. Were it not for the ICC permission in those Finance Dockets, CSXT would have no authority to merge the B&O, C&O, WM and RF&P territories into a single, discrete rail freight operation. To this Arbitrator, there is a direct causal relation between the mergers and coordinations sanctioned by the ICC in the Finance Dockets cited in the Carrier's January 10, 1994, notice and the operational changes it sought to implement on the former B&O, C&O, WM and RF&P properties. Accordingly, that proposal constituted a "transaction" as defined in Article I, Section 1(a), of the New York Dock Conditions.

II. **Does the Arbitrator lack authority to grant CSXT's request for modification or relief from existing collective bargaining agreements because Article 1, Section 2, of the New York Dock conditions mandates the preservative of rates of pay, rules, working conditions and rights, privileges and benefits under existing agreements?**

Article I, Section 2, of New York Dock provides as follows:

> 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 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.

In Railway Labor Executives' Association v. United States of America and the Interstate Commerce Commission, 982 F.2d 806 (1993), the United States Court of Appeals for the District of Columbia Circuit ruled that Section 11347 of the Interstate Commerce Act (49 U.S.C. 11347) mandates that rights, privileges and benefits afforded employees under existing collective bargaining agreements must be preserved. The Court remanded the case to the ICC to define "rights, privileges and benefits." The ICC has not yet rendered a ruling in that remanded proceeding.

The Unions argue that until the ICC defines what is meant by the "rights, privileges and benefits" language of Section 405 of the Rail Passenger Service Act, which has been incorporated into Section 11347 of the Interstate Commerce Act, this Arbitrator lacks authority to grant CSXT the right to modify or eliminate any existing collective bargaining agreements.

Although the ICC has suggested that New York Dock arbitrators address all issues submitted to them, subject to its review, clearly it would be inappropriate for this Arbitrator to determine what was intended by the statutory language "rights, privileges and benefits" in Section 405 of the Rail Passenger Service Act. In *Executives*, the Court of Appeals for the D.C. Circuit specifically remanded this determination to the ICC. Therefore, it would be totally inappropriate for this Arbitrator to offer an opinion on the scope of this statutory language and I expressly decline to do so.

Addressing the facts extant in this particular proceeding, it appears that there would be several significant changes in the working conditions of train and engine service employees affected by the Carrier's proposal. For instance, their current seniority districts will be expanded to include all of the C&O, B&O, WM and RF&P territory to be coordinated. Also, the crew reporting points will be expanded to include all reporting points in this combined seniority district. Many present supply points will be eliminated for these employees. And those employees now working under the C&O, WM and RF&P schedule agreements will be placed under B&O schedule agreements. Additionally, some employees will have their representation changed from the UTU to the BLE.

While these are indeed not insignificant changes for many train and engine service employees in the territory to be coordinated, nevertheless similar changes are not uncommon in many New York Dock implementing agreements. Several New York Dock

Arbitrators have imposed implementing agreements placing employees under a different collective bargaining agreement. Moreover, numerous CSXT employees have been transferred to other railroads with different agreements pursuant to ICC implementing agreements. It should be noted that representation changed for many employees when the B&O Central District was created. Moreover, crew reporting points and seniority districts have been changed and expanded as a result of ICC authorized mergers and consolidations. CSXT's current proposed coordination is not markedly different from other mergers and coordinations approved by the ICC or by Arbitrators acting under the authority of the ICC.

III. Does Section 11341 (a) of the Interstate Commerce Act apply to proceedings exempted from prior review and approval by the ICC?

Section 11341(a) of the Interstate Commerce Act (49 U.S.C. 11341[a]) exempts a carrier from the antitrust laws and all other law, including State and municipal law, as necessary to let it carry out a transaction approved by the ICC under Chapter 113 of the Interstate Commerce Act (*49 U.S.C. section 11301 et seq.*) In Norfolk & Western Railway Co. et al. v. American Train Dispatchers et al., 499 U.S. 117 (1991), the United States Supreme Court ruled that the Section 11341(a) exemption "from all other law" includes a carrier's legal obligation under a collective bargaining agreement when necessary to carry out an ICC-approved transaction. The Supreme Court concluded that obligations imposed by laws, such as the Railway Labor Act, will

not prevent the efficiencies of rail consolidations from being achieved.

The Unions contend that this exemption applies only when it is necessary to carry out a transaction approved by the ICC. They maintain that the exemption does not apply when the ICC exempts a railroad from review and approval pursuant to Section 10505 of the Interstate Commerce Act (49 U.S.C. 10505). All of the transactions cited by CSXT in its January 10, 1994, notice, with the exception of the 1980 seminal transaction in Finance Docket No. 28905, involved exemptions under Section 10505 rather than approvals under Chapter 113. Therefore, the Unions assert that the Section 11341(a) exemption from "all other law" is inapplicable to these transactions.

In the light of the Supreme Court's unambiguous decision in *Train Dispatchers*, it cannot be gainsaid that the ICC may exempt transactions approved under Section 11341(a) from the RLA, and collective bargaining agreements entered into thereunder, when this is necessary to carry out a transaction approved by the ICC. The ICC has ruled that this authority extends to Arbitrators when they are working under the delegated authority of the ICC (See CSX Corporation - Control - Chessie System, Inc. and Seaboard Coast Line Industries, 8 I.C.C.2d 715 [1992]). Moreover, several Arbitrators under Article I, Section 4, of New York Dock have concluded that they have the authority to override existing collective bargaining agreements if they are an impediment to carrying out an approved transaction.

At issue here is whether the Section 11341(a) exemption from the RLA and collective bargaining agreements subject to the RLA also applies to transactions exempt from ICC review and approval under Section 10505 of the Interstate Commerce Act. A literal reading of Section 11341(a) would seem to support the Unions' argument that the exemption from other laws does not apply to transactions exempt from ICC approval. However, the ICC has concluded that it has the authority under both Section 11341(a) and Section 11347 of the Interstate Commerce Act to modify collective bargaining agreements under the RLA when they are an impediment to a merger. (See CSX Corporation -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 ICC 2d 715 [1990]). This is the so-called ICC "Carmen II" decision. The Court of Appeal for the D.C. Circuit deferred to the ICC's judgment in *Executives*.

As noted at the outset of this proceeding, Arbitrators acting under the authority of the ICC must adhere to ICC rulings and decisions. In the aforementioned Carmen II decision, the ICC expressly stated that Arbitrators appointed under the New York Dock conditions have the authority to modify collective bargaining agreements when necessary to permit mergers. Thus, this Arbitrator has the authority under both Section 11341(a) and 11347 to modify existing collective bargaining agreements if this is necessary to carry out the coordination proposed by CSXT in its January 10, 1994, notice.

IV. Are the provisions of Section 11341(a) inapplicable to combinations of multiple approved or exempted transactions?

When the CSXT served its January 10, 1994, notice on the UTU and BLE, it cited seven (7) Finance Dockets that the ICC had either approved or exempted from prior approval and regulation. The Unions contend that there is no statutory or other legal basis or precedent for combinations of multiple approved or exempt transactions. This Arbitrator must respectfully disagree with the Unions' contention, however.

It is true that Section 11341(a) of the Interstate Commerce Act refers to "the transaction" in the singular. Nevertheless, the Carrier's reference to multiple Finance Dockets does not appear to be barred by the Interstate Commerce Act, ICC decisions, or the New York Dock Conditions. It is noteworthy that all of the cited Finance Dockets apply to CSXT's control of the four (4) properties it now wishes to consolidate. Moreover, the ICC imposed the same labor protective conditions in each of those transactions. Also, for many years, CSXT and its predecessor railroads have served notices under New York Dock and other ICC labor protective conditions listing multiple Finance Dockets. Evidently, neither the affected rail labor organizations nor the ICC took any exception to this practice.

For all the foregoing reasons, this Arbitrator finds that it was not improper for CSXT to reference a combination of seven (7) Finance Dockets in its January 10, 1994, notices to the UTU and BLE.

V. **Is the Section 11341(a) exemption necessary to carry out the Carrier's proposed coordination?**

In *Dispatchers*, the Supreme Court declared that the Section 11341(a) exemption is applicable only when it is necessary to carry out an approved transaction. The Court ruled that the exemption can be no broader than the barrier which would otherwise stand in the way of implementation. The ICC advocated a similar limitation in *Carmen II*. The ICC assumed that any change in collective bargaining agreements will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute.

The Unions argue that the changes now proposed by CSXT are not necessary to carry out the Finance Dockets cited in the Carrier's January 10, 1994 notices in view of the actual transactions involved in those Finance Dockets; the lack of any relationship between the proposed changes; and the years that have passed since those ICC decisions.

CSXT has convinced this Arbitrator that it is necessary to change the seniority districts of the train and engine service employees affected by its proposal if the territory of the erstwhile C&O, B&O, WM and RF&P to be coordinated is to be run as a distinct and unified rail freight operation. Were the Carrier required to continue operating this territory as four separate railroads each with its own work force and seniority district the operating efficiencies contemplated by the coordination would be illusory. According to the Carrier, the proposed consolidation of

the present four seniority districts into a single seniority district will eliminate some train delays and will promote more efficient manpower utilization. To achieve this enhanced efficiency it is necessary to eliminate the current seniority districts on the affected territory and create a single seniority district.

CSXT also contends that to achieve the enhanced operating efficiency intended by its proposed consolidation some crew supply points will have to be closed, such as Hanover, PA, Charlottesville, VA and Haggerstown, MD for freight train operations. These changes, in conjunction with the establishment of Richmond as a common supply point for train service crews, will improve manpower utilization, according to the Carrier, since excess RF&P train and engine service employees at Richmond will be able to supplement the B&O, WM and C&O crews who now operate there. Again, it appears that it will be necessary to close some former crew supply points in order to achieve the efficiencies contemplated by the proposed consolidation.

It must be stressed that employees working in the consolidated territory will continue to receive the same wage rates and benefits that they currently receive. Except for the elimination of their current seniority districts and the closing of some supply points for crews, the present collective bargaining agreements on the B&O, C&O, WM and RF&P will be continued unchanged. This transaction therefore will not result in a mere "transfer of wealth" from these employees to CSXT which

the D.C. Court of Appeals found impermissible in *Executives*. Rather, the savings will be achieved from better utilization of equipment, facilities and manpower. Also, CSXT will not be obligated to hire additional train and engine service employees due to its more efficient use of employees on the combined territory. Moreover, CSXT estimates that train delays will be greatly reduced. Thus, in this Arbitrator's opinion, the transaction itself will yield enhanced efficiency independent of any modifications in the present collective bargaining agreements on the B&O, C&O, WM and RF&P.

VI. **Is it permissible for the Carrier to coordinate all or part of properties that are already subject to earlier implementing agreements?**

In 1983, the UTU and the BLE executed implementing agreements after the B&O received permission to operate the properties of the Western Maryland in Finance Docket No. 30160. In 1992, the UTU and the BLE executed implementing agreements after the CSXT acquired the rail assets and operations of the RF&P in Finance Docket No. 31954. Those implementing agreements provided that "they shall remain in full force and effect until revised or modified in accordance with the Railway Labor Act."

According to the Unions, those implementing agreements are still in effect since they were never revised or modified pursuant to the RLA. The Unions maintain that the Carrier has no right to re-coordinate the properties that were involved in those implementing agreements.

The Unions cite a 1994 award rendered by Neutral Robert O. Harris in a case between the UTU and CSXT involving Carrier's notice to coordinate work performed on the C&O and the Louisville and Nashville Railroad Company in support of its contention. Arbitrator Harris found that because of an earlier implementing agreement involving the same properties, CSXT was precluded from asking for *de novo* arbitration to coordinate property subject to an implementing agreement which, by its express terms, may only be changed pursuant to the RLA. The Carrier has appealed the Harris Award to the ICC.

It appears that Arbitrator Harris concluded that an implementing agreement may not be changed in a second coordination of the same properties except in accordance with the terms of the implementing agreement. However, CSXT and or its predecessors agreed to implementing agreements involving the WM and the RF&P. Evidently, there were no implementing agreements involving the B&O and C&O. Since over 80% of the territory the Carrier now proposes to coordinate involves former B&O and C&O property the Carrier is not now seeking coordination of "the same properties" which were subject to earlier implementing agreements, in this Arbitrator's judgment.

This would seem to distinguish the Harris Award. In any event, this Arbitrator finds nothing in the Interstate Commerce Act, ICC decisions or the New York Dock Conditions which preclude coordination of property previously coordinated and subject to an implementing agreement which may only be revised or modified

pursuant to the RLA. Any tension between this Award and the Harris Award must be resolved by the ICC.

In this Arbitrator's view, when the drafters agreed that an implementing agreement could only be changed in accordance with the RLA they intended this prohibition to apply to matters subject to bargaining under the RLA. They could not have intended it to affect the jurisdiction of the ICC. Nor did they have the right to preclude the ICC from reviewing mergers and coordinations subject to its jurisdiction. A new transaction would be governed by the Interstate Commerce Act, not the Railway Labor Act.

It is also noteworthy that CSXT and its predecessors have negotiated several implementing agreements containing language similar to that involved in the Harris Award. Many of those properties were subsequently coordinated without resort to the RLA. Rather, they were coordinated in accordance with ICC procedures. The ICC has made it clear that labor disputes arising from transactions which it has approved are resolved through labor protective conditions it has imposed, such as New York Dock, not through the Railway Labor Act.

For all the foregoing reasons, this Arbitrator finds that it was permissible for CSXT to propose a subsequent coordination of property that had been coordinated previously which was subject to an implementing agreement which could only be modified or revised pursuant to the Railway Labor Act.

VII. **Is there a public transportation benefit flowing from the Carrier's proposal?**

In *Executives* the Court of Appeals for the D.C. Circuit held that to override a collective bargaining agreement, the ICC must find that the underlying transaction yields a transportation benefit to the public, not merely a transfer of wealth from employees to their employer. Although the Court of Appeals remanded that proceeding to the ICC to clarify whether there were, in fact, transportation benefits to be had from the lease transaction involved there, it suggested that "transportation benefits" could include the promotion of safe, adequate and efficient transportation; the encouragement of sound economic conditions among carriers; and enhanced service levels.

The Carrier anticipates that its proposed changes will promote more economical and efficient transportation in the territory now served by the B&O, C&O, WM and RF&P which it wished to coordinate. According to the D. C. Court of Appeals, there would thus be some transportation benefit flowing to the public from the underlying transaction proposed by CSXT in its January 10, 1994, notices to the UTU and BLE.

Conclusion

As observed heretofore, the ICC must decide whether changes in the B&O, C&O, WM and RF&P collective bargaining agreements that are necessary to implement the transaction proposed by the Carrier involve "rights, privileges and benefits" of train and

engine employees affected by the transaction which must be preserved. If the ICC determines that their "rights, privileges and benefits" have been preserved, an issue on which this Arbitrator makes no finding, then the implementing agreements proposed by CSXT on February 25, 1994, meet the requirements of Article I, Section 4, of the New York Dock Conditions. Any employees adversely affected by this transaction will be entitled to New York Dock labor protective benefits.

The Carrier's January 10, 1994, notice to the UTU and BLE comported with the requirements of the New York Dock Conditions. The notices were in writing; were posted and served on the UTU and BLE ninety (90) days in advance; contained a full and adequate statement of the proposed changes; and included an estimate of the number of employees in each craft who would be affected by the proposed changes. The notices were therefore proper New York Dock notices.

Respectfully submitted,

Robert M. O'Brien

Robert M. O'Brien, Arbitrator

April 24, 1995

1ST CASE of Level 1 printed in FULL format.

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC., ET AL. (Arbitration Review)

Finance Docket No. 28905 (Sub-No. 27)

INTERSTATE COMMERCE COMMISSION

1995 ICC LEXIS 308

SERVICE DATE: December 7, 1995

November 22, 1995

SYLLABUS:
(#1)

The Commission finds that employment changes proposed by the petitioning railroad may be effected pursuant to arbitration under the agency's standard New York Dock conditions for protecting employees adversely affected by agency-approved consolidations

PANEL:
By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioner Simmons.

OPINION:
BY THE COMMISSION:

We uphold the findings of fact and conclusions of law in the award of Arbitrator Robert M. O'Brien concerning the implementing agreements proposed by CSX Transportation, Inc. ("CSXT") to effect that carrier's coordination of operations in a new operating district. Because the proposed implementing agreements are necessary to effect the proposed transaction and would not override any "rights, privileges and benefits" that must be preserved under our New York Dock labor protection conditions, we conclude that those agreements satisfy the requirements of our labor protection conditions. The agreements should therefore be adopted.

BACKGROUND

CSXT in its present form was created by a series of transactions approved by this agency. In our 1980 decision in Finance Docket No. 28905 (Sub-No. 1) et al., n1 we allowed CSX Corporation, a noncarrier (#2) holding company, to control as subsidiary corporations the Chessie System, Inc. ("Chessie"), Seaboard Coast Line Industries, Inc. ("SCLI"), and, indirectly through stock ownership, the Richmond, Fredericksburg & Potomac Railroad Company ("RF&P Railroad"). n2 The railroads controlled by Chessie included the Chesapeake & Ohio Railway Company ("C&O"), the Baltimore & Ohio Railroad Company ("B&O"), and the Western Maryland Railway Company ("WM"). The railroads controlled by SCLI included the Seaboard Coast Line Railroad (Seaboard), the Louisville and Nashville Railroad Company (L&N), the Clinchfield Railroad, and several smaller carriers.

n1 CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980) (CSXT--Control--Chessie and Seaboard).

n2 At that time, RF&P Railroad was controlled (65.9%) by the Richmond-Washington Co. any, which, in turn, w[illegible] owned by Chessie (40%) and SCLI (40%).

In a subsequent series of decisions, we approved the consolidation of the railroad corporate entities controlled by CSX Corporation into its subsidiary CSXT. n3 The last steps in this process involved the RF&P Railroad. In 1991, CSXT spun off RF&P Railroad's (*3) non-rail assets and created the Richmond, Fredericksburg & Potomac Railway Company ("RF&P Railway") to acquire and to operate RF&P Railroad's rail assets. CSXT invoked our class exemption for corporate families to obtain approval for the acquisition and control. n4 In 1992, CSXT again invoked our corporate family class exemption to operate RF&P Railway directly and to assume all of its rights and obligations. n5

n3 In CSXT--Control--Chessie and Seaboard, the Commission authorized the CSX Corporation ("CSX") to acquire control of the 6 subsidiary rail carriers of Chessie and the 10 subsidiary rail carriers (the so-called "Family Lines") of SCLI, through the merger of Chessie and SCLI into CSX. Two years later, in Seaboard Coast Line R.R.--Merger Exemption--Louisville & N. R.R., Finance Docket No. 30053 (ICC served Nov. 8, 1982), the Seaboard and the L&N (both of which were subsidiaries of SCLI in 1980) merged to form the Seaboard System, Inc. Subsequently, in Baltimore & O. R.R. and Chesapeake & O. Ry.--Merger Exemption, Finance Docket No. 31033 (ICC served May 22, 1987), the B&O merged into the C&O. Later that year, C&O merged into the recently created CSXT. See Chesapeake & O. R.R. and CSX Transp., Inc.--Merger Exemption, Finance Docket No. 31106 (ICC served Sept. 18, 1987). (*4)

n4 See the notice of exemption in CSX Corporation, et al.--Corporate Family Transaction Exemption--Richmond, Fredericksburg and Potomac Railroad Company, Finance Docket No. 31954 (ICC served Oct. 31, 1991).

n5 CSX Transportation, Inc.--Operation Exemption--Richmond, Fredericksburg and Potomac Railway Company, Finance Docket No. 32020 (ICC served Apr. 15, 1992).

The decisions creating present-day CSXT were approved subject to our standard labor protection conditions. These conditions were adopted in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock) to implement our mandate to provide such protection under 49 U.S.C. 11347. Under New York Dock, labor changes that are related to commission-approved transactions are established by implementing agreements negotiated before the changes occur. If the parties cannot reach an implementing agreement, the issues are resolved by arbitration. Arbitration awards may be appealed to the Commission under our Lace Curtain standard of review. n6

n6 Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987), popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Commission does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." Id. at 735-736. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), we elaborated on the Lace Curtain standard as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. (Citations omitted.)
(*5)

This agency (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction. n7 Those contesting proposals that we exercise our authority to override collective bargaining agreements argue that: (1) New York Dock requires the preservation of pre-transaction bargaining agreements; or (2) the changes may not be made because they are not (perhaps due to the passage of time) related to, or necessary for effectuating the purposes of, the proposed transaction. Under New York Dock, employees affected when a collective bargaining agreement is overridden must be compensated pursuant to the formula established therein, which provides comprehensive displacement and termination benefits for up to 6 years.

n7 Where modification is necessary, we may act under either section 11347 or section 11341(a). CSX Corp.--Control--Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988), modified 6 I.C.C.2d 715 (1990); Brandywine Valley R. Co.--Pur.--CSX Transp., Inc., 5 I.C.C.2d 764 (1989); Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993) (RLEA); Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991); and American Train Dispatchers Association v. I.C.C., 26 F.3d 1157 (D.C. Cir. 1994) (ATDA). (*6)

This proceeding has arisen because of CSXT's efforts to make operational changes that are allegedly related to, and necessary to realize the operational benefits from, certain mergers that helped to create the present-day CSXT. On January 10, 1994, CSXT served a notice on the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) (jointly, "the unions") of its intention to invoke the authority of New York Dock to make operational changes and related employee assignments in order to effectuate the public benefits of the transactions.

Briefly, CSXT is proposing to coordinate train operations in a portion of its system, its new "Eastern B&O Consolidated District" (the "Eastern District"), by transferring work, abolishing and creating positions, and merging seniority rosters. All engineers and trainmen working in the new district would be placed under CSXT's collective bargaining agreements with UTU and BLE covering the former B&O lines. The notice reveals a net loss of 5 positions (47 abolished minus 42 established). CSXT made minor alterations and proposed further details as to the implementation of these coordinations in draft implementing agreements (*7) (one for each union) transmitted to the unions on February 25, 1994. In the Appendix to this decision, we have reproduced the major operational changes that were proposed in Article I of CSXT's draft implementing agreements. n8

n8 The notices and letters of transmittal to the unions appear in attachments 1 and 2 of volume I of the Appendix to CSXT's petition filed June 9, 1995. The specific changes announced for each union were the same.

The unions refused to participate in the negotiation of an implementing agreement, objecting that: (1) the changes may not be made under New York Dock because they violate existing collective bargaining agreements; (2) CSXT

improperly related the changes to the whole group of Commission decisions n9 rather than specified individual decisions; and (3) the changes cannot be related to any of the transactions approved in the decisions because the decisions are too old. CSXT then invoked arbitration under New York Dock. Unable to negotiate, the parties selected Robert M. O'Brien as the arbitrator. An arbitration hearing was held on March 28, 1995. Arbitrator O'Brien issued his award on April 24, 1995.

n9 See note 3, supra, for a statement of the decisions. (*8)

The Arbitrator's findings of fact and law favored CSXT. He found that the operational changes were subject to New York Dock because they "directly related to and flowed from" the merger authorizations by which CSXT was created. (Award at 9.) The Arbitrator rejected the unions' arguments that: (1) the changes were not subject to New York Dock because they were not related to specific decisions imposing New York Dock protection (but, rather, a whole group of decisions); and (2) the changes cannot be related to any of the transactions approved in the decisions because the decisions are stale. The Arbitrator also held that, acting under our precedent, he had "the authority under both Section 11341(a) and 11347 to modify existing collective bargaining agreements" when they frustrate attainment of the public benefits of transactions approved by this agency. (Award at 14.) Concerning such benefits, the Arbitrator found that CSXT had in fact shown that the changes were necessary to attain the public transportation benefits of the transactions. (Award at 16-18.)

Although his findings of fact and law favored CSXT, the Arbitrator stopped short of adopting the implementing agreements proposed (*9) by CSXT. He cited Article I, section 2 of New York Dock, which provides in pertinent part,

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 a 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.

Arbitrator O'Brien noted that, in RLEA, the court ruled that section 11347 of the Interstate Commerce Act (49 U.S.C. 11347) mandates that rights, privileges and benefits afforded employees under existing collective bargaining agreements must be preserved. n10 The court remanded the case to the Commission to define "rights, privileges and benefits." As the Arbitrator noted, we have not yet rendered a ruling in that proceeding. Because we have not yet ruled on the court's remand, the Arbitrator declined to rule on the issue. The Arbitrator left it to the Commission to determine whether the changes proposed by CSXT would be contrary to any such "rights, privileges and benefits." (Award at 21-22.)

n10 The court noted, RLEA at 813-814, that section 11347 incorporates the protections afforded under the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U.S.C. 565, which provides, inter alia, that "rights, privileges and benefits" afforded employees under existing collective bargaining agreements be preserved. (*10)

On June 9, 1995, CSXT and the unions filed petitions for review of the Arbitrator's award. On June 29, 1995, CSXT and the unions filed replies. On

July 28, 1995, CSXT filed a petition for leave to file a reply to the reply filed on June 29, 1995, by the unions. By decision served August 22, 1995, we granted CSXT's petition and allowed the unions to file a reply to the substantive arguments raised therein. The unions filed a reply on September 6, 1995.

ARGUMENTS OF THE PARTIES

The parties raise four main issues: (1) whether we should hear the appeal under our Lace Curtain standard; (2) whether the operational changes proposed by CSXT are linked to, or caused by, a prior approved transaction subject to New York Dock, i.e., whether they were properly before the Arbitrator; (3) whether the changes would improperly reopen prior implementing agreements by contravening provisions in them that allegedly require that such changes be accomplished through bargaining under the RLA; and (4) whether the changes are the type of changes that may justify our overriding collective bargaining agreements or, alternately, involve "rights, privileges and benefits" that must be preserved under section (*11) 2 of New York Dock.

1. Whether the appeal should be heard

In its reply filed June 29, 1995, CSXT argues that the Arbitrator's findings of fact should not be reviewed under our deferential Lace Curtain standard of review (see n. 6, supra), under which we do not review arbitrators' findings as to issues of causation, the calculation of benefits, or the resolution of other factual questions. In this category of unreviewable issues, according to CSXT, are the Arbitrator's findings that (1) the operational changes proposed by CSXT grow out of the prior control and merger transactions and that (2) CSXT demonstrated a need to modify collective bargaining agreements to realize the benefits of the merger.

In their June 29, 1995 reply to CSXT, the unions argue that the Arbitrator's award is fully reviewable under our Lace Curtain standard on the grounds that the Arbitrator made egregious errors of fact and law.

2. Whether the changes proposed are linked to or caused by a prior approved transaction

In their petition for review filed June 9, 1995, the unions argue that the Arbitrator lacked jurisdiction under New York Dock to consider the changes sought by CSXT pursuant to our authority (*12) to approve operational changes that are necessary to effectuate mergers. That is so, according to the unions, because the changes cannot be linked to, or were not caused by, any of the merger transactions cited by CSXT. The unions maintain that the changes sought here are due to pre-1980 control proceedings not cited by the carrier and involving the property at issue. According to the unions, the changes cannot be linked to the 1980 decision that put Chessie and SCLI under common control because they do not involve SCLI property. n11

n11 The unions sometimes discuss this issue of linkage or causation in terms of whether "the consolidation of seniority rosters and seniority districts" (reply filed June 29, 1995 at 6) or an attempt to realize "efficiencies" (petition filed June 9, 1995 at 19) can be considered to be "transactions" under New York Dock. Although the unions' choice of words sometimes differs, the underlying issue is the same-- whether CSXT is attempting to implement a

transaction or transactions that are subject to New York Dock.

In its reply, CSXT advances various arguments to show that the labor changes proposed by CSXT grow out of the prior control and merger transactions. (*13) CSXT cites various decisions where this agency or arbitrators acting under its authority assertedly allowed changes under New York Dock. Responding to the unions' argument that, because the changes do not involve SCLI property, they cannot be linked to Finance Docket No. 28905 (Sub-No. 27), CSXT notes that the changes involve property of the RF&P, the last carrier to come under the complete control of CSXT. CSXT responds to the unions' argument that our 1980 decision in Finance Docket No. 28905 (Sub-No. 27) cannot be the source of the changes allegedly because it is too old by (1) pointing to decisions where we have assertedly held that causality is not diminished by time and (2) arguing that CSXT was not able to integrate the operations of its subsidiaries until the subsidiaries were actually merged into CSXT, a lengthy process that was not concluded until 1992.

3. RLA bargaining requirement in prior decisions

In their petition for review, the unions argue that the merger transactions have already been covered by implementing arrangements and that the coordination sought here would improperly reopen these prior agreements. n12 The unions maintain that the prior implementing agreements (*14) require that the changes proposed here be accomplished through bargaining under the Railway Labor Act (RLA) rather than arbitrations under New York Dock. n13

n12 The prior agreements alleged by the unions to bar the instant coordination due to language requiring modification pursuant to RLA procedures are: (1) the two 1983 coordination agreements between (a) the B&O and WM and BLE and (b) B&O and WM and UTU, both of which involved lesser included territory (see Exh. 9 to the unions' Appendix of Exhibits); and (2) the two 1992 coordination agreements between (a) CSXT, RF&P, and UTU (see Exh. 10 to the unions' Appendix of Exhibits) and (b) CSXT, RF&P, and BLE (see Exh. 11 to the unions' Appendix of Exhibits), both of which involved lesser included territory.

n13 The language in question typically provides that "This agreement ... shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended." See, e.g., the 1979 implementing agreement reached between the B&O, WM, and several unions, in CSXT's petition filed June 9, 1995, Appendix volume II, exhibit 36, page 6.

In its reply, CSXT responds that the language in question (*15) is old boilerplate language going back as far as 1959 that provides merely that matters touched upon in implementing agreements can be changed pursuant to transactions that do not require our approval without going through New York Dock procedures. CSXT cites five implementing agreements where representatives of labor allegedly did not argue that the language required bargaining under the RLA to implement transactions requiring Commission approval. The carrier also argues that it cannot credibly be found to have agreed to a one-sided bargain that would have permanently waived its ability to accomplish future coordinations through the New York Dock procedures. Finally, CSXT argues that it had no authority to waive its statutory right to have these issues governed by Commission procedures under section 11347 and New York Dock rather than RLA procedures.

4. Ability to override prior agreements

Both parties tacitly assume that CSXT's changes would in fact contravene collective bargaining agreements. As in prior cases where our authority under New York Dock was at issue, neither party systematically discusses how the collective bargaining agreements would bar the changes sought by management (*16) in the absence of action by this agency. Instead, the parties restrict their argument to whether we may compel the changes under New York Dock. The Arbitrator did not resolve this issue.

In its petition for review filed June 9, 1995, CSXT asks us to decide the issue that the Arbitrator declined to decide, i.e., whether the changes proposed by CSXT would fail to preserve the "rights, privileges and benefits" of existing collective bargaining agreements. Briefly, CSXT argues that the changes do not alter prior rights, privileges, or benefits because: (1) the pay, benefits, and other "key terms" of the prior agreements will not change; (2) all employees will continue to be covered by collective bargaining agreements (the B&O agreements); and (3) our labor protection obligations have never been interpreted as giving employees of a merged carrier like CSXT the "right" or "privilege" of working only on the lines of their former employers.

The unions argue that, under RLEA, the changes must be necessary to secure the public benefits of the merger and that the changes at issue fail this test. CSXT responds that its changes will effectuate the cited transactions by merging operations on (*17) lines where train operations are allegedly being conducted as though they continued to belong to separate railroads. The unions dispute CSXT's statement (that operations in the proposed district are being conducted as though they continued to belong to separate railroads) on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts. n14

n14 See Appendices A and B of the unions' reply filed June 29, 1995.

CSXT argues that the changes meet the standard imposed in RLEA for changing prior practices that interfere with attainment of the public benefits of the transaction. CSXT argues that: (1) the changes will improve operational efficiency; (2) this improvement is a public benefit under RLEA; and (3) the cost savings from this improvement satisfy RLEA by not creating merely a transfer of wealth from labor to CSXT. n15 Concerning this last point, CSXT contrasts the operational changes proposed here with changes in pay and pension benefits (not proposed here) and other changes that, according to CSXT, can directly transfer wealth from labor to carriers. CSXT accuses the unions of interpreting RLEA as disallowing any changes (*18) to collective bargaining agreements, not just changes that are designed to transfer wealth from labor to carriers.

n15 The parties sometimes argue in terms of whether the changes "flow solely from modification to labor agreements" or use similar terms. When they do this, they seem to be disputing whether we would be contravening RLEA by mandating changes that are designed less to secure the public benefits of transactions than to transfer wealth from labor to the carrier.

The parties dispute the broader implications of section 2 of New York Dock. CSXT views the "rights, privileges and benefits" language of section 2 as merely creating a savings clause that preserves the collective bargaining agreement

provisions that are not required to be modified in order to effectuate Commission-authorized transactions. The unions respond that RLEA precludes CSXT's argument.

The unions dispute CSXT's position that the changes are not important enough to constitute changes in "rights, privileges and benefits." In particular, the unions argue that changes in the location where employees work must be considered in any evaluation of whether "rights, privileges and benefits" are changed and that (*19) we may not consider only pay and benefits. The unions also argue that union representation is a right that must be preserved.

The parties dispute the relevance of section 11341(a). The unions question the Arbitrator's premise that modifications of collective bargaining agreements may be ordered pursuant to 49 U.S.C. 11341(a), on the grounds that section 11341(a) does not apply to transactions that are approved under our section 10505 exemption authority. n16 In response, CSXT argues that, first, the Arbitrator did not rely exclusively on section 11341(a) but also relied on section 11347, and, second, that the Arbitrator related the changes to Finance Docket No. 28905 (the common control proceeding), which was not approved via an exemption under section 10505.

n16 We have asserted two statutory grounds for modification of collective bargaining agreements: section 11347, the statutory basis of New York Dock; and section 11341(a).

DISCUSSION

As noted, the parties raise four main issues. The threshold issue is whether we may hear the appeal on its merits.

1. Whether the appeal should be heard. We will hear the appeal. Under our Lace Curtain standard of review, we do not review (*20) issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error. Here, the Commission must decide the issue of whether the changes involve "rights, privileges and benefits" that must be preserved under section 2 of New York Dock because the arbitrator deferred resolution of it to us. The Arbitrator's decision on the issue of whether the proposed changes are linked to a prior transaction is a factual issue. That decision should not be set aside except for egregious error. The third issue raised on appeal, whether the railroad has bound itself to follow RLA procedures in undertaking the changes at issue here, involves factual determinations by the arbitrator which merit our deference. However, because it goes beyond mere factual questions, it warrants our review under the Lace Curtain standards.

2. Whether the changes proposed are linked to or caused by a prior approved transaction. The parties dispute whether the labor changes proposed by CSXT are linked to, or caused by, a prior approved transaction subject to New York Dock, i.e., whether they were properly before the Arbitrator. We find that the changes were properly (*21) before the Arbitrator under New York Dock.

The Arbitrator's finding on linkage is a factual finding as to causation, and, as such, is entitled to deference under our Lace Curtain standard of review. Such findings are reversed only upon a showing of egregious error.

The Arbitrator's finding of linkage was not egregious error. The purpose of the changes is to ensure that CSXT ceases to operate as a collection of separate railroads and fully enjoys the operational economies of being a unified system. n17 The

n17 The unions dispute CSXT's statement, that operations in the proposed district are being conducted as though they continued to belong to separate railroads, on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts. See the statements of UTU General Chairmen Robert J. Will and John T. Reed, attached to the unions' reply filed June 29, 1995. We find, however, that operations in the proposed district have not been merged, based on the statement CSXT's Director of Employee Relations Michael D. Rogers, attached to CSXT's response filed July 28,1995. opportunity to make these changes was created by an entire (*22) series of decisions. These began with the 1963 and 1967 decisions that brought the B&O, C&O, and WM under common control and ended with the 1992 decision that formally merged the RF&P into the CSXT system. n18 All of these decisions played a role in creating the opportunity for CSXT to coordinate operations in the proposed Eastern District by use of a single pool of employees. This opportunity cannot be attributed solely to any individual decision in this series of decisions.

n17 The unions dispute CSXT's statement, that operations in the proposed district are being conducted as though they continued to belong to separate railroads, on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts. See the statements of UTU General Chairmen Robert J. Will and John T. Reed, attached to the unions' reply filed June 29, 1995. We find, however, that operations in the proposed district have not been merged, based on the statement of CSXT's Director of Employee Relations Michael D. Rogers, attached to CSXT's response filed July 28, 1995.

n18 The Arbitrator's failure to include the pre-1980 transactions as grounds for his jurisdiction did not affect his jurisdiction because this agency, like courts operating under modern rules of pleading and practice, may uphold its jurisdiction for any valid legal reason, regardless of whether that reason is pleaded or argued. (*23)

The relevant inquiry is whether the action at issue is linked to prior Commission action in which we imposed New York Dock conditions. As long as the actions at issue are rooted in transactions subject to New York Dock, it does not matter whether these conditions were imposed in one transaction or several. The conditions do not vary from case to case. The only question is whether they are applicable. The unions do not dispute that they are. Neither logic nor precedent supports the unions' contention that the basis for a carrier's action must be found in a single, Commission-approved transaction, rather than in a series of them.

The unions' position is based on an assumption that CSXT had a duty to implement whatever New York Dock-related coordinations involving C&O, B&O, and WM track when these carriers first came under common control or soon thereafter. If CSXT had been under such a duty, the instant coordination arguably could have been criticized as too late to be accomplished under New York Dock.

But we have never imposed a deadline on making merger-related operational changes. In fact, in CSX Corporation--Control--Chessie System, Inc., and Seaboard Coast Line Industries, 8 (*24) I.C.C.2d 715, 724 n. 14 (1992), we held that causality is not diminished with the passage of time:

Causality, however, is not per se diminished by a lengthy delay in exercising authority previously granted. This is not analogous to laches. There could be any number of reasons why an entity formed as a result of a Commission-approved transaction might wish to postpone a coordination which could have been undertaken earlier.

We have been given no reason to depart from this holding here. CSXT merged its operations gradually, delaying many changes until the corporate entities were merged. This approach does not appear to be unreasonable on its face, and no showing has been made that it is unreasonable. Nor has any showing been made that CSXT's gradual merger of its operations prejudiced the rights of employees under New York Dock. If anything, the gradual nature of the merger would have been more likely to benefit employees by providing for a smoother integration of personnel into the merged system.

The unions note that the order of Presidential Emergency Board 219 increasing the basic mileage of train and engine service employees influenced the benefits of the coordination. (*25) See the statements of Don M. Menefee and John T. Reed, attached to the unions' Appendix of Exhibits filed with its petition on June 9, 1995. Without the merger decisions, however, there could have been no coordination at all, notwithstanding Presidential Emergency Board 219. Without Presidential Emergency Board 219, the new district would most likely have been smaller (due to a smaller range of crew travel), but some coordination would still have been possible. The connection between the merger decisions and the coordination was not severed by the action of the Emergency Board. A reasonably direct causal connection remains between our decisions and the coordination. Our standard of 'reasonably direct connection' was applied in: (1) Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Railway Company (Petition for Review of Arbitral Award), Finance Docket No. 28583 (Sub-No. 24) (ICC served June 23, 1986); and (2) Maine Central Railroad Company--Lease (Arbitration Review), Finance Docket No. 29720 (Sub-No. 1A) (ICC served Dec. 8, 1988), aff'd Brotherhood of Maintenance of Way Emp. v. I.C.C., 920 F.2d 40 (D.C. Cir. 1990). Thus, the Arbitrator did not commit egregious (*26) error by finding a connection.

3. RLA bargaining requirements in prior agreements. The parties dispute whether the coordination sought by CSXT would contravene provisions in prior implementing agreements that allegedly require that subsequent coordinations be accomplished through bargaining under the RLA.

We uphold the Arbitrator's decision that these provisions impose no such requirement. The intent of the provisions requiring RLA bargaining was not to bar this type of coordination under New York Dock. The lack of intent was manifested in two ways: (1) differences in the territories involved; and (2) past dealings.

(a) Territorial differences. The Arbitrator found that the changes proposed by CSXT here do not involve the same territory or property involved in the prior agreements. n19 We have no reason to question this finding, much less to find it egregiously wrong. n20

n19 In making this finding, the Arbitrator distinguished an earlier arbitration award where Arbitrator Harris found to the contrary (Award at 19):

The Unions cite a 1994 award rendered by Neutral Robert O. Harris in a case between the UTU and CSXT (involving Carrier's notice to coordinate work performed on the C&O and the Louisville and Nashville Railroad Company) in support of its contention. Arbitrator Harris found that because of an earlier implementing agreement involving the same properties, CSXT was precluded from asking for de novo arbitration to coordinate property subject to an implementing agreement which, by its express terms, may only be changed pursuant to the RLA. The Carrier has appealed the Harris award to the ICC.

It appears that Arbitrator Harris concluded that an implementing agreement may not be changed in a second coordination of the same properties except in accordance with the terms of the implementing agreement. However, CSXT and or its predecessors agreed to implementing agreements involving the WM and the RF&P. Evidently, there were no implementing agreements involving the B&O and the C&O. Since over 80% of the territory the Carrier now proposes to coordinate involves former B&O and C&O property the Carrier is not now seeking coordination of 'the same properties' which were subject to earlier implementing agreements, in this Arbitrator's judgment.
(*27)

n20 The Arbitrator's finding that different territory was involved was not egregiously wrong. An inspection of the track involved in the prior agreements (see the agreements and diagrams cited in note 11, above) indicates that much of the track and the scope of the coordination differs:

1. The WM trackage involved in the two 1983 agreements coordinating operations on the WM and the B&O only partially overlaps the WM trackage at issue here. Part of the WM trackage involved in the 1983 agreements seems to have been abandoned.

2. The B&O track involved in the 1992 agreements coordinating operations on the RF&P and the B&O ran from Potomac Yard to Baltimore and Philadelphia and from Potomac Yard west to Brunswick and east again to Baltimore, a small subsegment of the B&O track involved here. Unlike the agreements at issue here, the 1992 agreements did not involve C&O track.

Nor do we find egregious error in the Arbitrator's premise that the prior agreements were not intended to cover future coordinations involving different track and territories. While it can be argued that CSXT bound itself to RLA procedures as a condition for changing the coordinations involving the lesser included (*28) track at issue in the prior agreements, the carrier cannot reasonably be found to have intended these agreements as perpetually waiving New York Dock procedures for future coordinations involving territories of substantially greater extent and differing scope. Such a waiver would have barred the carrier from any future New York Dock coordination between the track involved in the prior agreements and the remainder of the CSXT system, thereby creating an "island" of unintegrated operations in its system. We cannot plausibly find that the carrier intended to use the minor and routine 1983 and 1992 agreements to bind itself to such a significant restriction, at least in the absence of specific language in those agreements or other credible evidence of such intent.

(b) Past dealings. The Arbitrator also implied that past dealings show that the RLA requirement was not intended to bar the instant coordination. n21 Under general contract law, the intent of parties to an agreement can be ascertained from a course of dealing or usage of the trade. Custom and usage, as reflected in the arbitration agreements cited by CSXT, contravenes the contention that RLA procedures are required for subsequent (*29) coordination efforts under New York Dock. n22 The awards cited by CSXT, going back over 30 years, show that neither party had any reason to view this language as restricting CSXT's ability to invoke New York Dock to implement future operational changes, an ability that CSXT would not have readily given up. This usage history is consistent with CSXT's position that the language is boilerplate language that provides merely that matters touched upon in implementing agreements can be changed pursuant to transactions that do not require our approval without going through New York Dock procedures.

n21 The Arbitrator stated (Award at 20):

It is also noteworthy that CSXT and its predecessors have negotiated several implementing agreements containing language similar to that involved in the Harris award. Many of those properties were subsequently coordinated without resort to the RLA. Rather, they were coordinated in accordance with ICC procedures.

n22 The agreements are discussed on pages 29-30 of CSXT's reply filed June 29, 1995 and appear in exhibits 36, 38, 39, 40, 41, 42, and 43. In each of the five implementing agreements cited by CSXT, the union did not object to the expansion of the coordination of operations under New York Dock, notwithstanding the presence of similar language referring to the RLA in the prior implementing agreements establishing the coordinations that were expanded. The unions do not dispute CSXT's position that they did not raise the RLA language as an objection to subsequent expansion. (*30)

Because we are upholding the Arbitrator's finding that the intent of the language requiring RLA procedures was not to bar future coordinations under New York Dock, we do not have to reach CSXT's argument that carriers have no authority to waive their statutory right to have such issues governed by Commission procedures under section 11347 and New York Dock rather than RLA procedures.

4. Ability to override prior agreements. It is well settled that we have the authority to modify collective bargaining agreements when modification is necessary to obtain the benefits of a transaction that we have approved in the public interest. See the cases cited in note 7, supra. At issue here are the limits of that authority. In particular, the issue is whether the changes sought by CSXT comport with the court's decision in RLEA.

The court in RLEA did not intend to make every change an impermissible change in rights, privileges, or benefits. As the court stated (987 F.2d at 814), "Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor— an obviously absurd position—@ 565 (of the Rail Passenger Service Act, 45 U.S.C. 565) (and hence @ 11347) (*31) does seem to contemplate that the ICC may modify a CBA." (Citation omitted.) Nor did the court hold that changes in work location or the switching of employees from work under one collective bargaining agreement to another involved impermissible changes in rights, privileges, or benefits.

To determine which changes are permissible, the court in RLEA established the following standard (987 F.2d at 814-815):

. . . it is clear that the Commission may not modify a CBA willy-nilly: @ 11347 requires that the Commission provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under @ 11347 only as "necessary" to effectuate a covered transaction. (Citation omitted.) . . . We look therefore to the purpose for which the ICC has been given this authority (to approve consolidations). That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer . . . .

In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely (*32) a transfer of wealth from employees to their employer.

This standard has been met here. The Arbitrator did not commit error (much less egregious error) in finding that the changes sought by CSXT would improve efficiency, n23 a factual finding entitled to deference under our Lace Curtain standard. CSXT has supported its claims that merging the separate seniority rosters into one will produce real efficiency benefits: see volume III of the Appendix of Exhibits to the Petition of CSXT, Tab B at 8-12. Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that cost decreases are reflected in rate decreases. Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad (*33) thereby benefits from these lower costs, so does the public.

n23 See note 16, above.

The changes sought by CSXT do not appear to be a device merely to transfer wealth from employees to the railroad. Indeed, there does not appear to be a significant diminution of the wealth of the employees. The extent of unionization will not change. The reduction in labor costs will occur through more efficient use of employees and equipment, not by any reduction in current hourly wages and benefits. n24 In order to use employees more efficiently, CSXT will require some employees to work different territories and report to different staging areas. Some employees may have to move. Moving expenses are a benefit under our New York Dock compensation formula.

n24 Certain WM employees may experience minor changes in compensation due to minor differences between the B&O and WM collective bargaining agreements. But the differences apply only to small numbers of employees and in atypical situations. Any changes in compensation would be compensable under New York Dock.

The one adverse effect on employees from the proposed consolidation of seniority districts apparent from the record is that some (*34) employees

may have to travel to protect their seniority rights. A specific instance cited was that terminal reporting points for engineers working out of Cumberland, MD, would be 100 miles away. No reduction in wages or change in working conditions would exist, except the minor changes noted. Employees subject to these changes would be compensated under New York Dock. For that reason, the criteria of RLEA have been met.

In considering whether the actions taken by CSXT comport with RLEA, we need to consider the court's decision in ATDA, which adopted the RLEA standard, adding (26 F.3d at 1164, emphasis supplied):

In other words, the 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.

The Arbitrator found that the consolidation of the seniority districts would lead to lower costs, hence resulting in transportation benefits. But the unions have asserted that these benefits arise merely from the modification of the CBA, thereby contravening the court's holding in ATDA.

We disagree. On page 16 of his decision, Arbitrator O'Brien states:

CSXT has convinced (*35) this arbitrator that it is necessary to change the seniority districts of the train and engine service affected by its proposal if the territory of the erstwhile C&O, B&O, WM and RF&P to be coordinated is to be run as a distinct and unified rail freight operation. Were the Carrier required to continue operating this territory as four separate railroads each with its own work force and seniority districts the operating efficiencies contemplated by the coordination would be illusory. (Emphasis added.)

Here, the "transaction" is not, as labor contends, the modification of the collective bargaining agreements but rather the mergers of four previously separate railroads into a single entity. The merging of the seniority districts does not have its genesis in the modification of the collective bargaining agreements. As long as the C&O, B&O, WM and RF&P remained separate railroads, the employees of each must of necessity have worked independently of each other. Approval of the merger was the action that permitted these four groups of employees to be melded into one. Once the merger had taken place, the consolidation of the employees--and the modification of the collective bargaining (*36) agreements--became necessary if the efficiencies of the single work force, made possible by the merger, were to be realized.

We must also determine whether the CBA provisions to be changed--(1) "scope" provisions governing "ownership" of work; n25 and (2) seniority provisions--are "rights, privileges, and benefits" that must be preserved. The D.C. Circuit Court remanded RLEA to permit the Commission to define the meaning and scope of the phrase "rights, privileges, and benefits" in section 405 of the Amtrack Act as incorporated into 49 U.S.C. 11347. 987 F.2d at 814.

n25 See ATDA, 26 F.3d at 1160-61 for discussion of scope provisions.

The history of the phrase "rights, privileges, and benefits" indicates that it has traditionally meant what it implies--the incidents of employment.

ancillary emoluments or fringe benefits--as opposed to the more central aspects of the work itself--pay, rules and working conditions. The genesis of section 405 of the Amtrak Act was the Urban Mass Transit Act of 1962 (UMTA), which authorized federal financial assistance to state and local governments for the improvement of urban mass transit systems. Section 13(c) of that Act (now codified as 49 (*37) U.S.C. 5333(b)) required the Secretary of Labor to certify as "fair and equitable" arrangements to protect affected employees. The first requirement of section 13(c) for a "fair and equitable" arrangement was "the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise."

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

(10) No employee receiving a dismissal or displacement allowance shall be deprived during his protection period, of any rights, privileges, or benefits attaching to his employment, including without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation (*38) under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions so long as such benefits continue to be accorded to other employees of the bargaining unit, inactive service or furloughed as the case may be.

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

In any event, the particular provisions at issue here do not come within "rights, privileges, or benefits" because they have consistently been modified in the past in connection within consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions. The ATDA court looked to past conduct in (*39) consolidations when it ruled that scope rules were not among those provisions protected as "rights, privileges, and benefits." 26 F.3d at 1163. The court relied, in part, on CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 I.C.C.2d 715, 736, 742 (1990) (Carmen II), and its recitation of the power of arbitrators under the Washington Job Protection Agreement of 1936 and pre-1976 labor conditions.

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

eligible for protection as "rights, privileges, and benefits."

The unions argue that section 2 of New York Dock gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the B&O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction (*40) of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd.--Exemption Acquisition and Operation--Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), slip op. at 7. Therefore, we find that the issue of which union is to represent WM engineers or receive them as dues-paying members does not involve a right that must be preserved under section 2 of New York Dock.

As noted, the parties dispute whether section 2 of New York Dock is merely a savings clause that preserves the collective bargaining agreement provisions that are not required to be modified in order to effectuate Commission-authorized transactions. We need not resolve that issue here. The decisions upholding our authority to change collective bargaining agreements are not premised on section 2 being merely a savings clause.

The unions have not even alleged that the consolidation of agreements in any way impairs the ability of CSXT employees to bargain collectively with the railroad. Nor are the rights, benefits, and privileges granted by (*41) past negotiations impaired. CSXT is proposing action that is made possible by transactions that we have authorized. Employees affected by those transactions are entitled to the benefit of New York Dock conditions, which have been imposed here.

CONCLUSIONS

We conclude that the implementing agreements proposed by CSXT satisfy the requirements of our labor protection conditions and should be adopted. The coordination proposed by CSXT is linked to transactions subject to New York Dock and was thus properly before the Arbitrator. By pursuing arbitration under New York Dock, CSXT did not contravene language in prior implementing agreements requiring that future changes must be made under the RLA because those agreements were not intended to apply to the changes sought here. Finally, we find that the changes may be made even if they are inconsistent with existing collective bargaining agreements and that our authority to require these changes is consistent with the requirement of section 2 of New York Dock that "rights, privileges and benefits" of existing collective bargaining agreements be preserved.

This decision will not significantly affect either the quality of the human environment (*42) or the conservation of energy resources.

It is ordered:

1. The findings of fact and conclusions of law in the Arbitrator's award are upheld, as supplemented in this decision, and the implementing agreements proposed by CSXT are adopted.

2. This proceeding is discontinued.

APPENDIX: APPENDIX

CSXT's Statement of Changes Under Section 4 of New York Dock n1

n1 Source: Pages 1-3 of CSXT's proposed implementing agreement with UTU transmitted to the unions on Feb. 25, 1994, reproduced in Attachment 1 of volume I of the Appendix of Exhibits to CSXT's petition filed June 9, 1995. The same provisions appear in CSXT's proposed implementing agreement with BLE in Attachment 2.

Article I

A. Effective upon ten (10) days advance notice, all train operations and the associated work forces of the former WM, RF&P, and a portion of the former C&O, will be transferred, consolidated and merged into the train operations and associated work force on the former Baltimore and Ohio in the territory hereinafter described:

Philadelphia, Pa. - Cumberland, Md. (former B&O)

Cherry Run, Md. - Baltimore, Md. (former WM)

Hagerstown, Md. - Lurgan, Pa. (former WM)

Baltimore, Md. - Potomac Yard, Va. (former B&O) (*43)

Brunswick, Md. - Potomac Yard, Va. (former B&O)

Potomac Yard, Va. - Richmond, Va. (former RF&P)

Charlottesville, Va. - Richmond, Va. (former C&O)

Brunswick, Md. - Winchester, Va. (former B&O)

Cumberland, Md. - Brooklyn Jct. W. Va. (former B&O)

Grafton, W. Va. - Huddlety, W. Va. (former B&O)

Benwood, W. Va. - Huntington W.Va. (former B&O)

Tygart Jct. W. Va. - Bergoo, W. Va. (former B&O and WM)

which areas comprise the territory shown on the sketch designated as Attachment "A."

NOTE: All branches and industrial tracks intersecting the above listed lines and all pre-existing territorial rights of the involved districts are included in the coordinated territory.

B. The following initial operational changes will be placed into effect upon implementation of the Consolidation:

1. Charlottesville, Va. will be closed as a supply point and terminal for other than outlying point assignments, transferring all other work to Richmond, Va. Charlottesville will thereafter be an outlying point for the Richmond supply point. The Piedmont-Washington Subdivision will be added to the working limits of the Richmond-Potomac Yard Pool.

2. Hanover, Pa. will be closed as a supply point and terminal (*44) for other than outlying point assignments, transferring all other work to Baltimore, Maryland. The territory between Baltimore and Hanover will be added to the working limits of the Baltimore-Brunswick Pool. Hanover will thereafter be an outlying point for the Baltimore supply point.

3. Hagerstown, Md. will be closed as a supply point and terminal for other than outlying point assignments, transferring the protection of service to and from Harrisburg to a through freight pool out of Cumberland (operating through Hagerstown). The territory between Cherry run and Hanover will be added to the working limits of the Baltimore-Brunswick pool. Hagerstown will thereafter be an outlying point for the Brunswick supply pool.

4. The protection of certain service west of Cumberland will be transferred to Brunswick by adding the territory west of Cumberland on the Mountain Subdivision and former WM lines intersecting the Mountain Subdivision to the working limits of the Brunswick-Cumberland Pool with Brunswick remaining the home terminal and Cumberland the away from home terminal.

5. The working limits of the Henry Pool will be combined with the working limits of the Cumberland-Grafton Pool. (*45) Cumberland will remain as the home terminal. Grafton will remain as the away from home terminal.

6. Elkins, W. Va. will be closed as a supply point and terminal for other than outlying point assignments, transferring the protection of service between Tygart Junction and Bergoo to the supply point of Grafton by adding that territory to the working limits of the Grafton-Cowan Pool. Laurel Bank will be added as an away from home terminal for that pool. Elkins and Laurel Bank will thereafter be an outlying point for the Cumberland supply point.

NOTE: Notwithstanding any other provisions of this Agreement, to foster an efficient and economic environment for the retention and growth of business on this marginal line, when service is needed on the Tygart-Bergoo line, qualified employees in the Grafton-Cowan Pool will be called ahead of unqualified employees. When there are no qualified employees available in the pool, the Carrier may call qualified extra employees ahead of unqualified pool employees.

C. Employees may be required to perform service throughout the coordinated territory in accordance with the B&O schedule agreement in the same manner as though such coordinated territory (*46) was included within their original seniority district.

ARBITRATION UNDER SECTION 4

NEW YORK DOCK II, APPENDIX III

THE CHESAPEAKE AND OHIO RAILWAY COMPANY and SEABOARD SYSTEM RAILROAD vs. BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (South Louisville Shop, Louisville, Kentucky) vs. BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA (Raceland Car Shop, Raceland, Kentucky)	ICC FINANCE DOCKET NO. 28905 (Sub. No. 1)

OPINION AND AWARD

HERBERT L. MARX, JR., ARBITRATOR

APPEARANCES

For the Organization:

William G. Fairchild, General Vice President

Gerald Gray, General Chairman, Seaboard

Robin T. Utter, General Chairman, C&O

For the Carrier:

L. W. Evans, Senior Manager, Labor Relations

Patricia A. Madden, Assistant Manager, Labor Relations

OPINION

This is an arbitration proceeding pursuant to the provisions of the New York Dock Labor Protective Conditions (under Article I, Section 4), imposed by the Interstate Commerce Commission in Finance Docket Number 28905.

The dispute involves the announced intention of the Seaboard System Railroad (formerly L & N Railroad Company) to discontinue performing certain freight car air brake work at South Louisville Shops, Louisville, Kentucky, under an L & N Agreement and to transfer and coordinate such work with that now being performed by the Chesapeake and Ohio Railway Company at Raceland Car Shop, Raceland, Kentucky. Specifically, the work involves duties performed by Triple Valve Repairmen, represented by the Brotherhood Railway Carmen of the United States and Canada.

A conference was held on June 12, 1984 at Jacksonville, Florida, to determine conditions under which such work would be performed. Discussions were continued on August 6-7, 1984, but no accord on an implementing agreement was reached. As a result, the Carriers served notice on August 27, 1984 of their intent to arbitrate the dispute pursuant to New York Dock Conditions. While arrangements for such arbitration were going forward, the parties again met, without success, to reach agreement on matters in dispute.

As a result the Arbitrator was selected by the parties to hear and resolve the dispute as provided in New York Dock, Article I, Section 4. Hearing was held in Baltimore, Maryland on November 1, 1984. The parties were given full opportunity

to present oral and written argument at that hearing.

In brief, the dispute concerns the elimination of 24 positions at South Louisville and the establishment of 17 new positions at Raceland for the performance of freight car air brake work on a coordinated basis with employees already at Raceland.

While there is accord in general as to the work transfer, there remains in dispute two specific matters: (1) the seniority conditions under which Triple Valve Repairmen from South Louisville shall be integrated into the C&O shop at Raceland; and (2) the question of the right of the employees from South Louisville to retain the terms of their L&N agreement upon such transfer, as contrasted with their inclusion under the C&O Agreement covering other employees at Raceland. In particular as to the second question, the transferring L&N employees seek to retain long-standing negotiated separate seniority rights as Triple Valve Repairmen.

In this dispute, there are three contending views for the Arbitrator's consideration.

South Louisville Carmen Position

The Triple Valve Repairmen at South Louisville ("Louisville Carmen") seek to carry forward to Raceland the special seniority status established by agreement as of February 1, 1938, reading as follows:

> The repairing of air brake equipment for cars and locomotives has been discontinued at all shops on the system and a new subdepartment has been established at South Louisville Shope for the purpose of making repairs and returning such equipment to the outlying points. With the establishment of the new air brake repair shop it is essential that it be made a sub-department of the car department (the same as that of the Cabinet Shop, Planing Mill, Paint Shop, Coach Shop and all others in the Car Department) with the employes assigned to this work retaining seniority only in the air brake sub-department. To create this sub-department and thus end the numerous complaints arising from filling positions of passenger and freight car air brake equipment replacement, the following agreement has been reached and will govern the handling of this question:
>
> 1. A separate seniority roster will be provided for the new air brake sub-department. the carmen who are transferred to this sub-department, not later than January 31, 1938, will be listed on the seniority roster in the order of their dating as shown on the rosters for shops 13 and 14.
>
> 2. Carmen who accept positions in the air brake sub-department will forfeit all rights, including their helpers seniority rights, in shops 13 and 14. . . .

This is now encompassed in the L&N Agreement, Rule 29, which provides in pertinent part as follows:

> At South Louisville Shops the Air Brake Room, Coach Carpenters, Painters, Engine Carpenters, Planning Mill, Cabinet Shop and Plating Shop; and Louisville Terminal Car Department, Roundhouse and Union Passenger Station seniority rosters will be maintained separately as heretofore.

The Louisville Carmen seek continuation of this special status as a means to preserve their pre-existing rights. To insure this, they rely on Article I, Section 2 of the New York Dock Conditions, which reads as follows:

> 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.

It is the Louisville Carmen's contention that such provision prohibits the Arbitrator from disturbing this special condition.

Raceland Carmen Position

The Carmen at the C&O Shop at Raceland ("Raceland Carmen") propose that the Triple Valve Repairmen transferred from South Louisville should be dovetailed onto the Carmen's seniority roster at Raceland. This implies, of course, no continuation of the special seniority status enjoyed up to now by the Louisville Carmen. The Raceland Carmen argue that only by dovetailing Carmen on a single seniority roster can the coordinated work be assigned "in a fair and efficient manner".

Carriers' Position

The Carriers initially proposed a straightforward dovetailing of seniority for the L&N employees onto the C&O Carmen roster which, as noted above, meets no objection from the Raceland Carmen. The Carriers point out that the purpose of coordinating freight car air brake work at Raceland

is to "realize the efficiencies possible in having the work performed at a centralized location". Were the Louisville Carmen to retain their special seniority status, they could be used, according to the Carriers, only for air brake work, thus limiting the effectiveness of such employees and indeed barring them from other work opportunities. The Carriers state that only by dovetailing seniority and having all Carmen at Raceland under a common seniority roster can the maximum effectiveness be achieved.

In the course of negotiating with the Organization, the Carriers later proposed a modification of their initial stance. This would include dovetailing of seniority but would also give to the Louisville Carmen "prior rights" to Triple Valve Repairmen positions at Raceland. This would give such employees "a preferential right to such . . . positions for the duration of their individual protective period so long as they voluntarily remain on such positions".

Since this variation also did not lead to agreement, the Carriers now take the position that the Arbitrator should adopt the original dovetailing-only proposal (endorsed by the Raceland Carmen).

* * * * *

Before choosing among the alternatives set forth by the parties, the Arbitrator must first address the underlying question raised by the Louisville Carmen. Does Section 2

of New York Dock Conditions, quoted above, require the continuation of the L&N Agreement concerning Triple Valve Repairmen (unless they voluntarily agree otherwise)? There can be no doubt that Section 2 is clear in requiring the continuation of such seniority provisions as part of "pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits". The Arbitrator, however, does not read this provision as broadly as would the Louisville Carmen. The Arbitrator is not called upon to eliminate or alter collective bargaining agreements as they apply to C&O employees or to L&N employees at their present locations. The specific problem under review here concerns only seniority status of Louisville Triple Valve Repairmen as they move into coordinated activity with C&O employees at Raceland. This, however, is directly involved in the sanction given to the Arbitrator by Article I, Section 4 of New York Dock, which states in 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.

Put another way, the "rearrangement of forces" cannot avoid consideration of the special seniority status which the Louisville Carmen seek to save harmless. This point is

addressed in the decision of Arbitrator Joseph A. Sickles in Norfolk and Western, Illinois Terminal-Railroad Yardmasters of America-United Transportation Uion, ICC Finance Docket 29455. In that award concerning "consolidation of rosters", Arbitrator Sickles stated:

> Turning to the specific transaction involved, the parties are required under Section 4 to negotiate or arbitrate the system for the selection of forces after the closing of the two terminals. The consolidation of rosters based on seniority is one manner of selection, but there is some question as to whether that method is appropriate. The UTU believes it to be inequitable since few of their members have longevity as Yardmasters and would be dismissed or displaced by such an award. The RYA, on the other hand, argues that its contract does not permit the entry of UTU Yardmasters onto its roster and, further, that Section 2 of New York Dock does not permit any changes in the operation of the seniority provisions of its contract, even through the use of Section 4 procedures.
>
> Just as the carriers read Section 4 too broadly, RYA reads it too narrowly. Section 4 speaks very specifically to the efficacy of "an agreement or decision under this section" covering the "assignment of employment made necessary by the transaction." This provision, it seems clear, gives an Arbitrator the authority to design a selection system which may lead to deviations from the systems used prior to the ICC Order. At the same time, the language of Section 4 makes it clear that each system should be designed to fit the facts of the particular case. This standard suggests that the past practices of the parties should be taken into account, but that solutions in other settings should not be followed merely as a matter of course. Although the UTU and RYA have submitted a number of implementing agreements, none involve the issues and problems encountered in this proceeding. Thus, the system fashioned in the Award below has not followed either union's model, but represents the closest approximation to an equitable solution under the circumstances.

The Arbitrator has reviewed the awards cited by the parties concerning the guarantees involved in Article 7, Section 2. Many of these concerned efforts by one party (usually a carrier) to eliminate entirely one collective bargaining agreement in favor of another, where two groups of employees are combined; other awards concern more limited circumstances. In this instance, however, the only point of contention as to the L&N Agreement is clearly concerned with force arrangement. As discussed above, this is within the Arbitrator's jurisdiction.

Having found that seniority provisions of L&N Triple Valve Repairmen may properly be considered, the Arbitrator nevertheless is aware of certain special considerations to which the L&N Carmen are entitled. The dovetailing of seniority of the two groups of employees, found to be fully equitable in other circumstances, requires a second look here. L&N Triple Valve Repairmen, as will be seen from their 1938 agreement, not only acquire special rights to freight car air brake repair work; in addition, they <u>give up</u> general Carmen seniority. Thus, employees with long service may, in fact, have only short seniority as Triple Valve Repairmen. Since such is not the case with C&O employees, straightforward dovetailing seniority would have obvious adverse affects on Louisville Carmen.

This was perceived during the negotiations preceding this arbitration, when the Carriers proposed to provide

"prior rights" for Louisville Carmen to triple valve repair work. This may, at first glance, be considered to work adversely to the Raceland Carmen. However, since work is being transferred for the 17 Louisville Carmen from South Louisville, the Raceland Carmen will not necessarily be in a worse position than if such work transfer had not occurred.

The transaction here under review calls for a coordination of identical functions now being performed at two different points. The logic of integrating the work forces into a single seniority group is unavoidable. Use of the dovetailing procedure, with the special "prior rights" provision, follows equitably.

The Arbitrator thus concludes that the most "appropriate" arrangement of forces is not to be found in any of the three positions set before him, but rather is found in that proposal made (and later withdrawn) by the Carriers to include "prior rights". The Award will therefore direct the parties to effectuate the implementing agreement proposed by the Carriers to the Organization on September 26, 1984, subject to the conditions stated in the Award.

A final note: Again during negotiations, certain additional side agreements were offered by the Carriers to cover, on a reassurance basis, certain specific issues. Since these did not lead to a negotiated settlement, the Carriers are correct in stating that they should not be held to such additional provisions. The parties are, however,

ways to review these proposed agreement letters to determine if any may or should, by mutual agreement, be included in the Implementing Agreement.

Based on all the evidence and argument, the Arbitrator therefore makes the following

A W A R D

The parties shall adhere to the Implementing Agreement as proposed by the Carriers on September 26, 1984, subject only to the following:

Within a period of 30 days following the date of this Award, the parties shall meet to determine if there are any mutually agreeable revisions to the September 26, 1984 proposal, including but not limited to the "side agreements" tentatively proposed during the earlier negotiations. If no agreement is reached on any such changes during the above specified 30-day period, the Implementing Agreement shall be as proposed by the Carriers on September 26, 1984.

Herbert L. Marx

HERBERT L. MARX, JR., Arbitrator

New York, N.Y.

Dated: December 5, 1984

EC

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30965[1]

DELAWARE AND HUDSON RAILWAY COMPANY--LEASE AND TRACKAGE RIGHTS EXEMPTION--SPRINGFIELD TERMINAL RAILWAY COMPANY

Finance Docket No. 30965 (Sub-No. 1)

DELAWARE AND HUDSON RAILWAY COMPANY--LEASE AND TRACKAGE RIGHTS EXEMPTION--SPRINGFIELD TERMINAL RAILWAY COMPANY REVIEW OF ARBITRAL AWARD

Decided: January 5, 1989

~~LCB~~
RBB
MAK
JDA
~~JBR~~

In this decision, we are denying petitions to revoke the exemptions in these proceedings and affirming Arbitrator Richard R. Kasher's decision as to claims procedures, allowance benefits, and the election of benefits by employees adversely affected by the lease transactions. We are also requiring the Springfield Terminal Railway Company (ST) immediately to revise its current seniority and workforce selection mechanism to honor seniority rights earned by employees on the lessors' lines. Finally, we have decided not to affirm the arbitrator as to the rates of pay and work rules that apply to operations on the ST, but rather to return the matter to the arbitrator for fact-finding on the questions of: (1) the scope of the existing ST collective bargaining agreement; and (2) the practices currently in place on the ST. The arbitrator is also requested to undertake mediation of the remaining dispute between the affected parties, and, failing mediated agreement, to fashion an arbitrated resolution, as further discussed below.

BACKGROUND

Between October 22, 1986, and November 17, 1987, the five rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), filed notices under the class exemption procedures for transactions within a corporate family.[2] 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). The transactions, taken together, would allow ST to operate virtually the entire properties of the GTI rail system.

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[1] Finance Docket No. 30965 embraces Finance Docket Nos. 30925, 30951, 30955, 30966, 30967, 30972, 30981, 30993, 31002, 31003, 31015, 31023, 31086, 31103, 31115, 31125, and 31161.

[2] The GTI transactions involved leases and trackage rights subject to 49 U.S.C. 11343. The GTI carriers are members of the same corporate family, and the Commission has exempted, from the prior approval requirements of 49 U.S.C. 11343, transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. 49 CFR 1180.2(d)(3). Instead of filing an application under 49 U.S.C. 11344, rail carriers file under 49 CFR 1180.4(g) a verified notice with the Commission at least one week before the transaction is to be consummated. The GTI carriers filed notices of their transactions, and the exemptions became effective pursuant to the regulations. For the most part, the B&M, MEC, and PT transactions have been implemented; by order of the Commission however, the D&H transactions (and any unimplemented B&M transactions) were not to be implemented pending resolution of the consolidated proceedings.

Lease and trackage rights transactions are subject to 49 U.S.C. 11343. As such, transactions undertaken pursuant to applications filed under that provision and exemptions from it are subject to mandatory labor protection under 49 U.S.C. 11347. The labor protective conditions typically imposed as the minimum protection in lease and trackage rights transactions are set forth in Mendocino Coast Ry., Inc.--Lease and Operate, 354 I.C.C. 732 (1978) and 360 I.C.C. 653 (1980),[2] and Norfolk and Western Ry. Co.--Trackage Rights--BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast, supra, 360 I.C.C. 653 (1980).[4] These conditions guarantee up to a 6-year period of income protection for employees whose jobs are lost or adversely affected through the lease of lines. Unlike the conditions that would apply in merger proceedings, the lease conditions do not require a prior agreement between management and labor as to the mechanics of implementation.[5]

Responding to petitions filed by various labor parties, we instituted an investigation into Guilford's use of the exemption process. We determined that the leases, although meeting the requirements of the class exemption, had nevertheless substantially injured GTI's employees. Consequently, we found that Mendocino Coast conditions were not sufficient. In response to this unique situation, the Commission fashioned the extraordinary labor protective conditions set forth in Finance Docket No. 30965, D&H Ry.--Lease & Trackage Rights Exempt. Springfield Term., 4 I.C.C.2d 322 (1988) (Springfield Terminal).[3]

Under the employee protective conditions we imposed in Springfield Terminal, we gave the parties 90 days to reach an implementing agreement for the lease transactions. We indicated that the implementing agreement should provide for the protection of seniority, allow employees to "follow their jobs" to the extent consistent with the new operational structure, and protect employees against the consequences of management's initial failure to provide accurate and fair information regarding the employees' options. If the parties failed to reach agreement, they were to submit the matter to arbitration. The parties' failed to negotiate an implementing agreement, and the issue was submitted to arbitration. The neutral arbitrator, Richard R. Kasher, issued an award on June 12, 1988, entitled In the Matter of an Implementing Agreement Arbitration (Springfield Terminal Railway Company and Guilford Transportation Industries, Inc., and the Railway Labor Executives' Association and the United Transportation Union) (herein referred to as the Kasher award, the arbitral award, or the arbitration decision).

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[3] Aff'd sub nom. Railway Labor Executives' Association v. United States, 675 F.2d 1248 (1982). See Finance Docket No. 30532, Maine Central R.R., et al. - Exemption (not printed), served September 13, 1985, aff'd sub nom. Railway Labor Executives' Association v. ICC, No. 85-1636 (D.C. Cir. March 16, 1987).

[4] These conditions adequately protect the interests of rail employees in normal lease and trackage rights situations and have been found to satisfy the statutory requirements of 49 U.S.C. 11347 that carriers involved in transactions under 49 U.S.C. 11344 provide fair arrangements for protection of their employees.

[5] The labor interests had suggested that the labor protective conditions developed by the Commission for merger transactions and set forth in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), are more appropriate for these transactions and should be imposed in lieu of the Mendocino Coast and Norfolk and Western conditions. The substantive benefits of the various conditions are virtually identical, but the New York Dock conditions provide labor certain procedural advantages. The differences between the New York Dock conditions and the Mendocino Coast and Norfolk and Western conditions are described in Springfield Terminal, at footnote 4. The Springfield Terminal conditions combine procedural aspects of the different conditions.

The Kasher award proposed an implementing arrangement providing that: (1) no employee shall be deemed to have forfeited any rights or benefits arising from labor protections as a result of any decision made during the period commencing with the first lease up to the time of the arbitrator's award; (2) seniority on the ST shall be governed by the seniority of employees on the leased lines over which ST seeks to operate; and (3) that the ST workforce, in operating the leased lines, should operate under the rates of pay, rules, and working conditions required by collective bargaining agreements between the four lessor carriers and their employees.

ST, B&M, MEC, and PT filed a petition for administrative review of the arbitrator's decision on July 25, 1988.[6]

In Finance Docket No. 30965 (Sub-No. 1), Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company Review of Arbitral Award (not printed), served July 15, 1988, we stayed the effectiveness of the Kasher award pending our consideration of the GTI carriers' petition for review. RLEA filed a petition on March 10, 1988, asking us to reopen the exemption proceeding (Finance Docket No. 30965, et al.) and to revoke the class exemption. In addition, Monsanto, a shipper located on a B&M line leased to ST, filed a petition asking us to revoke the class exemptions.

We will discuss the petitions to revoke and reopen and the petition for review of the Kasher award in turn.

I. PETITIONS FOR REVOCATION

1. The RLEA Petition. RLEA, alleging material error in our February 1988 decision, asks that the Springfield Terminal proceeding be reopened and the exemptions revoked. RLEA contends that GTI used the exemption procedures solely to avoid restrictive collective bargaining agreements between rail labor

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[6] D&H filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1988, and has not joined in the appeal.

RLEA and UTU filed replies to GTI carriers' petition for administrative review; the carriers filed a motion for leave to file a reply to the labor replies, together with the reply that the carriers asked us to consider. The reply is essentially a rebuttal to the arguments raised by RLEA and UTU. Although the reply constitutes an unauthorized reply to a reply, neither RLEA nor UTU has objected to it.

The GTI carriers also filed a motion to supplement the record with several verified statements, including a newly devised alternative implementing plan. In support of its motion, GTI contends that the D&H's petition for reorganization constitutes changed circumstances that require consideration of the proffered statements. In addition, the carriers contend that the unexpected nature of the arbitrator's implementing plan justifies its submission of its alternative implementing plan.

In response, RLEA argues that the carriers' motion to supplement the record should be denied because the D&H reorganization proceeding does not constitute changed circumstances. RLEA also argues that the carriers should not be allowed to bypass the negotiation and arbitration process (including the hearing process of our protective conditions) by appealing directly to this Commission with an entirely new implementing plan that was never proposed to labor.

In the interest of a more complete record, these filings will be accepted.

and the GTI carriers (other than ST) as well as the collective bargaining requirements of the Railway Labor Act (RLA). RLEA argues that the transfer to ST of the right to operate the lines of the other GTI carriers constitutes a contract with another entity under Section 151, et seq., of the RLA. As such, RLEA alleges, the GTI carriers ordinarily must comply with the RLA's major dispute resolution procedures.

We have consistently held that our primary jurisdiction over matters of transportation in interstate commerce acts as a general preemption of laws which would impede transactions we have approved. Finance Docket No. 31205, XRVR Corporation--Exemption Acquisition and Operation--Certain Lines of Chicago & North Western Transportation Co.--Petition for Clarification (not printed), served January 29, 1988. In addition, the agency has always held that the exemption of these transactions under the Interstate Commerce Act (ICA) precludes application of the RLA under 49 U.S.C. 11341(a) to the extent necessary to permit implementation of the approved or exempted transaction and therefore obviates the need for GTI to comply with those procedures.[1]

RLEA suggests that preemption of the RLA dispute resolution procedures is not warranted here because, it is alleged, there is no transportation benefit to be derived from these transactions. In making this argument, RLEA is urging a new non-statutory basis for revocation that cannot withstand scrutiny. Our statutory authority to review and approve carrier activities and impose protection is not limited or circumscribed by carrier motives. The Commission approves or exempts proposed transactions, with or without conditions, depending on whether the proposals meet statutory criteria.

In Springfield Terminal, we found that the transactions qualified for the class exemption at 49 CFR 1180.2(d)(3). In doing so, and consistent with those rules, we noted that

> [A]bsent labor controversy, the transactions should not adversely affect service levels or cause significant operational change that would do damage to any shipper or to the pre-existing balance of rail competition in the Mid-Atlantic States or New England.

Nevertheless, considering the overall impact of the transactions on affected employees, we determined that special conditions should be imposed to ameliorate the impact on labor. We thus carried out the full range of our statutory responsibilities regarding both the transportation and labor communities. See Springfield Terminal at 336.

Contrary to RLEA's claim, the Commission here found transportation benefits from the transactions. RLEA's argument ignores the benefits that flow from the creation of a more competitive and efficient carrier. In this case, each transaction constituted a proper use of the class exemption. GTI is seeking, through these transactions, to become more cost efficient and to improve its service, thereby enhancing its intramodal and intermodal competitive posture. See Springfield Terminal at 335. In order to cushion the impact of the transactions, the Commission created a procedure for protection of the GTI employees. Although this procedure was not the RLA procedure requested by RLEA, it too provided a dispute resolution

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[1] Railway Labor Executives' Ass'n. v. Chicago & North Western Transp. Co., 848 F.2d 102 (8th Cir. 1988), pet. for cert. filed, June 14, 1988 (No. 87-2049); and Burlington N. R.R. Co. v. United Transportation Union, 848 F. 2d 856 (8th Cir. 1988), cert. denied, Nov. 28, 1988, (No. 88-711). But see, Railway Labor Executives' Ass'n. v. Pittsburgh & Lake Erie R.R. Co., 831 F.2d 1231 (3rd Cir. 1987), cert. granted, Nov. 18, 1988 (No. 87-1589); and Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n, 845 F. 2d 420 (3rd Cir. 1988), cert. granted, Nov. 28, 1988 (No. 87-1888).

mechanism. The labor protective conditions that we imposed included the requirement that all of the carriers and all of their employees negotiate their differences or submit them to arbitration.

Accordingly, the petition to reopen the Springfield Terminal decision and to revoke the class exemption will be denied.

2. The Monsanto Petition. Monsanto alleges in its petition to revoke that we had focused on labor-related issues to the exclusion of the concerns of shippers. It seeks revocation to correct service difficulties being experienced prior to our February decision and a return to the status quo prior to the transfers to ST. Monsanto argues that the transactions must be reviewed as a whole, and that, as such, they have an adverse effect on the rail transportation policy (RTP) set forth at 49 U.S.C. 10101a. While Monsanto has not directly argued the statutory grounds for revocation, i.e., that regulation (as opposed to exemption) is necessary to carry out the RTP (49 U.S.C. 10505(d)), that is the essence of its argument.

In reaching our February decision, we reviewed and considered the situation faced by shippers on ST-operated lines. As noted above in connection with RLEA's arguments, we studied the transaction in light of the overall public interest and the RTP goals. We stated (Springfield Terminal at 336):

> Full revocation is not justified and, in any event, return to the status quo ante at this time would risk paralyzing the process of resolving an exceedingly complex series of problems.

The labor conditions we imposed were intended to promote quick and fair resolution of the labor dispute and, therefore, a return to normalcy for all, including shippers. In view of our extensive review (and other factors) we saw no purpose in revoking the exemptions and requiring the filing of applications. See Springfield Terminal at 334. Present conditions do not warrant a different result. Indeed, on September 15, 1988, Monsanto filed a petition to withdraw an earlier request for directed service over the line serving its plant. The petition indicates that service has improved and the existing situation on these lines is far better than 1 year ago. Given these circumstances, the petition to revoke will be denied.

II. REVIEW OF ARBITRATOR KASHER'S DECISION

The Scope of Review. The decisions of arbitrators who resolve disputes arising out of labor protective conditions imposed by this Commission are treated as decisions of the Commission. See United Transp. Union v. Norfolk & Western Ry., 822 F.2d 1114 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 700 (1988). Arbitrators' decisions are not final orders and are subject to administrative review by this agency. See Chicago & North Western Transportation Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd, IBEW v. ICC (No. 87-1629) (D.C. Cir., Nov. 25, 1988).

RLEA and UTU argue that the Kasher award is not within the scope of our review. In the event that we assert jurisdiction, RLEA asks that we treat the arbitrator's decision with great deference and not apply our brand of "industrial justice." RLEA suggests that our authority to review is comparable to that of Federal courts to review arbitration decisions and, therefore, is extremely narrow.

Conversely, the GTI shippers ask that we apply a "searching scrutiny" standard of review to this arbitration decision that purports to impose involuntary labor protective conditions on behalf of the Commission. GTI contends that the use of the searching scrutiny standard is appropriate because the arbitrator

resolved important matters of policy and the arbitrated issue is committed by statute to us.

In Lace Curtain, we determined that our statutory mandate to impose labor protective conditions authorizes us to review an arbitrator's decision applying conditions it has imposed. The decision followed precedent established by the former Civil Aeronautics Board (CAB) in reviewing arbitration decisions under labor protection conditions it developed for airline mergers. See Wallace v. Civil Aeronautics Bd., 755 F.2d 861 (11th Cir. 1985), reh'g en banc den. 762 F.2d 1023 (1985). The standards we adopted to review arbitration decisions are based on those established by the CAB for reviewing arbitration decisions under the labor protective conditions it imposed, the criteria set forth in the so-called Steelworkers Trilogy.[6] Under these standards, review of an arbitration decision is limited to determining whether the award was procedurally fair and impartial. Awards are not vacated because of substantive mistake, except when there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority. Loyaless v. Eastern Airlines, Inc., 681 F.2d 1272, 1275-1276 (11th Cir. 1982). Wallace, supra. Following CAB precedent, the Commission also adopted the limited scope of review in the Steelworkers Trilogy. See Lace Curtain, supra, at 735-736.

The Commission's deference to an arbitrator's decision will vary with the nature of the issues involved, ranging from the most deferential treatment in the case of evidentiary issues such as causation, Lace Curtain at 736, and Finance Docket No. 28490 (Sub-No. 1), Atlantic Richfield Company and Anaconda Company--Control--Butte, Anaconda & Pacific Railroad Company (not printed), served March 2, 1988 (ARCA), to significantly less deference when reviewing interpretations of Commission regulations or orders and matters of transportation policy. See CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, 4 I.C.C.2d 641 (1988), pet. for review pending.

Applying the foregoing principles, we clearly have authority to review the award; in Springfield Terminal we stated our intention to do so. And we find that review is justified by Lace Curtain, as recently affirmed. As we will discuss in the next section, the arbitrator's award, to the extent it requires application of existing rates of pay and work rules of the lessor railroads to the restructured GTI system, is based upon a faulty presumption of the scope and purpose of the arbitration ordered by the Commission.

The arbitral decision. The arbitrator's award may be broken down into three components: (1) the "make whole" provisions; (2) the rates of pay and work rule issues; and (3) the selection of forces issues. We will address each of these components in turn.

1. The make whole provisions. Sections 4, 6, and 7 of the arbitrator's award set out his view as to "make whole" provisions. The issues here involve the dismissal and displacement allowances that workers receive when adversely affected. As noted above, our February 19 decision reflected our strong dissatisfaction with the information that Guilford had provided its employees and insistence that one aspect of an implementing agreement should be a provision allowing for a second, informed, decision by the affected workers. Section 4 of the award provides for such a choice. Section 6 deals specifically with the procedures to be followed regarding separation allowances. It provides a second opportunity to review decisions regarding continued employment with the GTI system. Section 7 provides make whole allowances for loss of

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

earnings and work-related expenses as provided in the Mendocino Coast labor protection provisions.

We affirm the arbitrator's decision to impose these make whole provisions. They reflect the clear intent of our February 19 decision that employees should have been treated more fairly from the outset and that the full benefit of the standard dismissal and displacement allowances should be provided. The arbitrator has recommended (Section 5) a detailed procedure for handling individual claims that arise from these provisions, which we also affirm.

2. Rates of pay and work rules. In the February 19 decision we required renewed negotiation (with the possibility of arbitration) on these issues. Arbitrator Kasher found that, in the absence of an unequivocal statement from this Commission, he would not "mandate that the ST-UTU agreement apply to the lessor carrier's employees." He noted that both the GTI carriers and RLEA argued that he did not have the authority to "amend or modify existing collective bargaining agreements", Kasher at 55, and he described his attempt to do so as futile. He decided, therefore, that the collective bargaining agreements that were in place on the properties of the MEC, the D&H, the PT, and the B&M should continue to be the collective bargaining agreements in force on the ST when employees are offered comparable employment. As noted above, this would have the effect of transferring to the ST (which is organized exclusively by the UTU) agreements with several unions representing crafts not found on the ST. It would preserve pre-existing rates of pay and work rules, vitiating one major purpose of the underlying leases.

We believe that in so doing, the arbitrator proceeded from a flawed premise regarding the nature of our labor protective conditions and the scope and purpose of arbitration ordered by the Commission. The purpose of labor protective conditions is to cushion the effect on employees of transactions approved or exempted by us as in the public interest by providing up to 6 years' protection for affected employees. The conditions were not intended to foreclose change, streamlining, and modernization of the rail industry, but rather were intended to ensure that the economies and efficiencies sought by the industry through consolidations were not achieved at the sole expense of rail employees. Finance Docket No. 31088, Southern Railway Company and Norfolk Southern Corporation -- Purchase -- Illinois Central Trackage Rights -- Illinois Central Railroad Company Line Between United States v. Lowden, 308 U.S. 225, 238-39 (1939); Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F.2d 424, 430-31 (8th Cir.) cert. denied, 375 U.S. 819 (1963).

Our labor protective conditions, to be sure, provide generally that working conditions and collective bargaining agreements are to be preserved. However, the terms of these conditions must be read in conjunction with our decision authorizing the transaction and the public interest factors upon which it is based. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to its implementation. See Finance Docket No. 30,000 (Sub-No. 18), Denver & R. G. W. RR Co. - Trackage Rights - Missouri Pac. RR between Pueblo, CO. and Kansas City, MO (not printed), served October 25, 1983.

The labor protective conditions that we impose uniformly require the development of an agreement to implement the transaction, which is to be arrived at by a mutual agreement between labor and management, or in the absence of a negotiated agreement, by binding arbitration. The arbitrator's duty, simply stated, is to fashion an implementing arrangement that will reconcile worker protections with the terms and the objectives of the transaction that we approved. If those terms and objectives cannot be achieved without modification of existing work rules and collective bargaining arrangements, he clearly has the authority to modify such arrangements to the extent necessary to

carry out his mandate. On the other hand, it may not be possible for the arbitrator to reconcile completely labor's legitimate interests with all features of the carrier's initial plan. Railroads seeking approval of transactions to which mandatory labor protection applies, are on notice that they must negotiate an implementing agreement or submit to arbitration, and their transactions are subject to some degree of modification. What is essential is that the implementing arrangement be consistent with the essential terms of the transaction and the objectives sought to be obtained.

An important objective to be achieved by the GTI restructuring is the economies afforded by application of the more flexible ST work rules to the entire GTI system. By imposing the lessor's collective bargaining agreements, the arbitrator effectively foreclosed the transactions we authorized. Consequently, we will not affirm the arbitrator's decision to impose the rates of pay and work rules of the lesser carriers.

We are left, however, with the question of whether the ST work rules should apply to ST's operation of the GTI system. There is much disagreement among the parties as to the scope and nature of those rules. GTI argues that we have already approved its use of the ST work rules, and that these rules are the essence of its plan for modernization and competitive service. Labor argues that evidence has demonstrated that ST can operate the GTI properties using the collective bargaining agreements of the lessor lines and that the Commission's understanding of the so-called "railroader" concept is mistaken. Labor believes the ST work rules are incompatible with maintaining seniority and job entitlement for the employees of the B&M, D&H, and MEC because of over-broad prerogatives of management in reassignment.

As to the specifics of implementation of the ST/UTU agreement, certain facts are known. The ST is operating under a collective bargaining agreement that offers considerable discretion to management in work assignment. That management discretion has produced considerable flexibility in work rules compared to agreements characterized by strict craft lines. Yet, the agreement is a generalized one and we recognize the possibility that, without further interpretation, it might not serve as a satisfactory basis for stable, long term operations. Accordingly, a more comprehensive understanding of the existing rules and the current implementation is crucial to long term resolution that protects the legitimate interests of all sides. Consequently, we will return these issues to the arbitrator with instruction to undertake a fact finding determination of:
(1) the elements of the existing UTU/Springfield agreements; and
(2) the methods and practices by which it is presently implemented.

The arbitrator is also requested to offer his services as mediator to assist the parties affected by the lease transaction in reaching an implementing agreement. Failing mediation, the arbitrator is directed to undertake further binding arbitration. Review of this arbitration will be confined to the issue of consistency with the Commission's instructions and other such matters as permitted under IBEW v. ICC, supra. The arbitrator is requested to fashion a reasonable schedule for this undertaking and to inform the Commission of the proposed date for completion.

3. Seniority and work force selection. In our February 19 decision, we emphasized the need to protect seniority and to respect the practice that employees be permitted to follow their jobs to the extent practicable given the operational structure of the Springfield/UTU environment. These two issues have been highly contentious, in part because of the actions of the GTI and in part because of the high value placed on seniority in railroading. We are not satisfied that ST has heeded our call to protect the seniority of affected employees. As we noted in Springfield Terminal, at 331, both the order in which ST hired employees of the other GTI carriers to work on ST and the method used by ST to establish seniority for its operations have

resulted in an inversion of seniority that is unacceptable. ST's alternative proposals presented during arbitration (involving a combination of "bottoming out and dovetailing"), also would result in inequities.

In contrast, the approach followed by the arbitrator in establishing seniority on ST is generally consistent with our stated intention in Springfield Terminal that seniority on the lessor lines be respected.[1] The most recent alternative presented to us by GTI with its appeal and the UTU's prehearing submission to the arbitrator are very similar approaches that offer an avenue for resolution of this issue. Further delay on the seniority issue is unacceptable, and we consequently order GTI to implement immediately its proposal as submitted to us, subject to such modifications as may be agreed to.

We also approve in general the arbitrator's efforts to allow, to the extent possible, GTI employees to "follow their jobs" to the new positions on the ST. The method used by the arbitrator for work force selection, however, was based on his imposition on ST of the collective bargaining agreements and the work rules and job classifications formerly on the lessor lines. We have asked the arbitrator to revisit and report on the work rules issue. Resolution of that issue in light of our opinion here will provide guidance to the arbitrator in determining the manner in which and the extent to which employees will be able to follow their jobs.

III. COVERAGE UNDER LABOR PROTECTION

In order to inform itself of the operation of the labor protection provisions imposed by statute and decision in this proceeding, the Commission directs GTI to report within 15 days of service of this decision an accounting of the funds paid out in severance, dismissal, and displacement allowances, and the guidelines and procedures it has been following to determine eligibility and amounts for such payment. The Commission's Bureau of Accounts will provide direction covering the form and manner of this reporting.

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

It is ordered:

1. The supplemental materials submitted by RLEA and GTI are accepted into the record.

2. The petitions to reopen and revoke are denied.

3. The arbitration decision is affirmed to the extent discussed above. In other respects, as discussed above, the arbitration decision is vacated.

4. The proceeding is returned to the arbitrator for further proceedings to the extent discussed in this decision.

5. This decision is effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissions Simmons, Lamboley, and Phillips. Commissioners Simmons and Lamboley concurred in part and dissented in part, and will submit separate expressions at a later date.

(SEAL)

Noreta R. McGee
Secretary

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[1] The arbitrator found that employees of the lessor carriers should not lose any seniority in transferring to ST and that seniority on ST should be determined on the basis of the seniority rosters of the lessor carriers.

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SURFACE TRANSPORTATION BOARD[1]

DECISION

FD/ECD 10

Finance Docket No. 30000 (Sub-No. 48)

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY--CONTROL--MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY
(Arbitration Review)

Decided: July 17, 1996

This proceeding is an appeal of an arbitrator's decision holding that the Union Pacific Railroad Company (UP) may not invoke New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), to arbitrate the merger of two seniority districts applicable to signalmen represented by the Brotherhood of Railroad Signalmen (BRS). We will grant the appeal and remand the matter to the parties for further action consistent with this decision.

BACKGROUND

In Union Pacific--Control--Missouri Pacific: Western Pacific, 366 I.C.C. 459 (1982)(Union Pacific--Control), docketed as Finance Docket No. 30000, the ICC authorized the Union Pacific Corporation to control the Missouri Pacific Corporation, the Missouri Pacific Railroad Company (MP), and the Western Pacific Railroad Company (WP). The authority granted in Union Pacific--Control was subject to the employee protective conditions set forth in New York Dock, which implemented the ICC's mandate to provide such protection under former 49 U.S.C. 11347.

Under New York Dock, employment changes that are related to ICC-approved transactions are established by implementing agreements negotiated before the changes occur. If the parties cannot reach an implementing agreement, the issues are resolved by arbitration. Arbitration awards may be appealed to the Board under the Lace Curtain standard of review adopted by the ICC.[2]

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA 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 by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Trsp. Co.--Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988), popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Board (1) does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error" and (2) limits its review to

(continued...)

The Board (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction. The changes for which an override is sought must be a necessary part of, or casually linked to, a New York Dock-conditioned transaction.[3] This qualification allows parties contesting requests that we exercise our authority to override collective bargaining agreements to argue that a particular change is not related to, or necessary for effectuating the purposes of, the New York Dock-conditioned transaction. Under New York Dock, employees adversely affected when a collective bargaining agreement is overridden must be compensated pursuant to the formula established therein, which provides comprehensive displacement and termination benefits for up to 6 years.

This proceeding has arisen because of UP's attempt to make an employment change that the railroad says is related to, and necessary to realize the operational benefits from, the 1982 acquisition by UP of MP in Union Pacific--Control. UP proposes to consolidate two signal maintainer seniority districts, one now covering UP's line from Menoken Junction, KS, to Denver, CO, and the other covering MP's line from Council Grove, KS, to Pueblo, CO. UP's line closely parallels the MP line, and, in some areas, the lines are only about 15 miles apart. The Menoken Junction line is covered by a collective bargaining agreement between UP and BRS. The Council Grove line is also covered by a collective bargaining agreement between MP and BRS.

In a letter dated April 6, 1993, UP formally proposed the seniority district consolidation to the respective BRS general chairmen representing employees under the agreement between the UP and the BRS and the agreement between the MP and the BRS. The parties discussed UP's proposal. The union did not accept it. On May 13, 1993, UP served notice on BRS, pursuant to Article I, section 4(a) of New York Dock, that the signal maintainers headquartered at Salina, Ellsworth, and Oakley, KS, and Limon and St. Marys, CO, would be incorporated into the MP/BRS collective bargaining agreement. The affected employees would be placed at

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[1](...continued)
"recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Id. at 735-36. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), the ICC elaborated on the Lace Curtain standard as follows:

> Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

[3] Where modification is necessary, we may act under either section 11347 or section 11341(a). CSX Corp.--Control--Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988), modified 6 I.C.C.2d 715 (1990); Brandywine Valley R. Co.--Pur.--CSX Transp., Inc., 5 I.C.C.2d 764 (1989); Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993); Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991); and American Train Dispatchers Ass'n v. I.C.C., 26 F.3d 1157 (D.C. Cir. 1994).

the bottom of the applicable MP seniority roster but would be guaranteed prior rights to the positions they currently occupied.

While maintaining its position that the proposed consolidation could not be mandated under New York Dock, the BRS met with UP on several occasions to discuss UP's proposal. In August 1993, UP presented BRS with a draft implementing agreement, which the union did not sign. Discussions broke off in November 1993, when BRS notified UP that the proposed consolidation should proceed, if at all, by bargaining under section 6 of the Railway Labor Act, rather than by the procedure established under New York Dock. Subsequently, the parties agreed to seek arbitration pursuant to Article I, section 4 of New York Dock to determine two issues: (1) whether the matter covered by UP's May 13, 1993 notice to consolidate two seniority districts was an appropriate subject for consideration under Article I, section 4 of New York Dock; and (2) if so, what conditions would be appropriate for an implementing arrangement.

By decision entered December 9, 1994, the arbitrator, Dana Edward Eischen, held that he lacked jurisdiction to arbitrate UP's proposed consolidation under New York Dock. He dismissed the proceeding without establishing an implementing arrangement. The arbitrator held that a carrier has the burden of proving a causal connection between the proposed employment action and the Commission's authorization in Union Pacific--Control. Relying upon two prior arbitration decisions,[4] the arbitrator found that, while merger of the two seniority districts would arguably result in efficiencies and economies, the carrier had failed to show that the consolidation was either pursuant to, or a necessary consequence of, the ICC authorization granted in Union Pacific--Control. The arbitrator concluded that jurisdiction under New York Dock was lacking because "there is no showing on this record that the merger of these seniority districts is either pursuant to or a necessary consequence of the ICC authorization granted in 1982." (Decision at 15.)

By petition filed January 18, 1995,[5] UP sought review of the arbitrator's decision. On February 7, 1995, BRS filed its reply in opposition to the petition. On the same day, the Railway Labor Executives' Association (RLEA) filed a "Notice of Intervention" and a tendered statement opposing the relief sought by UP. On February 25, 1995, UP requested leave to file a tendered rebuttal to the arguments of BRS and RLEA (herein collectively, Rail Labor).

PRELIMINARY MATTERS

In addition to its petition for review, UP also filed, on February 1, 1995, a motion to exceed the 30-page limit governing the length of appeals (49 CFR 1115.2(d) and 1115.8), in order to include in the record some 90 pages of appendices, including the arbitration award. In its February 7, 1995 reply to UP's petition, BRS also sought leave to exceed the page limitation in

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[4] Matter of the Arbitration between Missouri Pacific Railroad Company and American Train Dispatchers Association (Arbitrator Zumas, July 31, 1981) (MOPAC/ATDA); and Matter of Arbitration between Seaboard System Railroad and BMWE (Arbitrator Zumas, August 20, 1983) (Seaboard/BMWE).

[5] By decision served January 4, 1995, UP was granted a 30-day extension of time (until January 18, 1995) in which to file its appeal.

order to submit 25 pages of appendices. In support of their requested waivers, both parties argue that to provide a more complete and balanced record, the documents contained in the appendices must be considered. We find that acceptance of the appendices and arbitral award is necessary for a full understanding of the issues involved in this proceeding. We grant the parties' requests.

Because RLEA's intervention will neither disrupt this proceeding nor unduly broaden the issues, we will permit RLEA to intervene. See 49 CFR 1112.4.

Attached to UP's petition as Appendix B is the Verified Statement of Wayne E. Naro. Both BRS and RLEA have moved to strike the statement, all supporting exhibits and all references to Mr. Naro's testimony in the appeal.[6] The unions contend that neither the statement nor the related exhibits were presented to the arbitrator and that UP is seeking a trial de novo.[7] This, the unions argue, contravenes Lace Curtain and other cited cases.[8] In its reply to BRS's and RLEA's motions to strike, UP argues that the testimony in Mr. Naro's verified statement was, in fact, made available to the arbitrator, both in evidence filed with him and during a hearing which took place on August 19, 1994, and that it is not new evidence.

We will grant the motions to strike. Naro's testimony relates chiefly to the issue of the efficiencies that UP and MP would assertedly realize from the merger of the seniority districts. Arbitrator Eischen's award did not turn on this issue. He held that, conceding that the merger would produce increased efficiencies, it nevertheless did not come within the scope of New York Dock because the merger was not a transaction within the meaning of that decision. UP will not be prejudiced by the exclusion of this testimony.

Consistent with ICC precedent, we will grant UP's request to file the tendered rebuttal. See CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905 (Sub-No. 25) (ICC served Jan. 11, 1994), at 1 n.3; The Baltimore and Ohio Railroad Company--Exemption--Abandonment in Harrison, Doddridge, Ritchie and Wood Counties, WV, Finance Docket No. 31566 (Sub-No. 1) (ICC served Jan. 13,

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[6] BRS' motion to strike appears in its Union's Reply to Carrier's Appeal, and RLEA's in its Opposition of Railway Labor Executives' Association to Appeal by Union Pacific Railroad Company of Arbitration Opinion and Award, both filed February 7, 1995.

[7] Naro's verified statement sets out the background of this arbitration appeal, and discusses UP's reasons for seeking to consolidate the subject seniority districts. Mr. Naro argues that (1) the consolidation is consistent with and pursuant to ICC authorization in Union Pacific--Control and (2) the proposed action is the kind of increased operating efficiency contemplated by the ICC's decision. The verified statement also contains legal argument in support of UP's position. The testimony and evidence contained in the verified statement appear, in different form, in the arbitration report attached to UP's petition as Appendix A.

[8] The unions cite: Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960); and Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960).

1995) (rebuttal filed by UTU accepted without supporting request for leave to file); and Burlington Northern, Inc.--Control and Merger--St. Louis - San Francisco Railway Company, Finance Docket No. 28583 (Sub-No. 24) (ICC served June 23, 1988).

By motion filed May 3, 1995, UP requests that we accept tendered supplemental legal argument supporting its position. RLEA opposes UP's motion to supplement, arguing that: (1) UP's request is improperly filed as a letter, rather than as a petition as required by 49 CFR 1117.1; (2) the request is, in effect, a reply to a reply and should be barred under 49 CFR 1104.13(c); (3) as a "supplemental argument" to UP's reply, the request is time-barred, because the authority cited is not a relevant decision issued by the Commission after the filing of UP's reply but is the New York Dock decision issued nearly 16 years ago; and (4) UP's reliance on the quoted New York Dock language is misplaced, because the arbitrator in this case did not hold that a consolidation of seniority districts could never result from an approved transaction. Rather, he held that no causal nexus existed between UP's control transaction and its proposed consolidation of rosters.

BRS also opposes UP's motion to supplement,[1] contending that there is no justification for supplementing the record with quotations from New York Dock which could have been included in UP's original petition or its rebuttal. According to BRS, the citation is nothing more than an afterthought, made irrelevant by the fact that the arbitrator found no causal nexus between UP's proposed consolidation and the 1982 Union Pacific--Control decision. Therefore, according to BRS, UP's supplemental argument should be excluded from the record.

We will grant UP's request to supplement. UP's motion simply enlarges upon arguments previously made in its earlier filings by citing language from New York Dock. BRS will not be prejudiced by our receipt of the minimal argument contained in the motion. See Wilmington Term. RR, Inc.--Pur. & Lease--CSX Transp., Inc., 7 I.C.C.2d 60, 61 at n.2 (1990).

POSITIONS OF THE PARTIES

The parties differ over (1) the standard of review under Lace Curtain and (2) the proper way to establish a link between a New York Dock-protected transaction and a related employment change.

UP contends that its appeal is reviewable under Lace Curtain because it concerns a recurring and significant issue of general importance regarding the interpretation and application of the New York Dock conditions.

BRS replies that the appeal should not be heard on its merits because it challenges the arbitrator's factual finding regarding causation. The union states that the crux of UP's appeal--its contention that the proposed consolidation of seniority districts flows directly from the Union Pacific--Control transaction--is a factual question which is not subject to [Board] review under Lace Curtain. The union argues that the arbitrator's finding that there is "no showing on this record that the merger of these seniority districts is either pursuant

[1] See BRS' document styled, "Opposition of Brotherhood of Railroad Signalmen to Request to Supplement Appeal," filed May 15, 1995.

to or a necessary consequence of the ICC authorization granted in 1982" (Decision at 15) gives the Board no basis on which to review the arbitral decision.

In addition, according to BRS and RLEA, the arbitrator applied the appropriate standard of review, and UP made no attempt to show, or even to claim, that the arbitrator committed egregious error, issued an award that failed to draw its essence from the labor protective conditions, or exceeded the limits of his authority. Moreover, according to Rail Labor, the appeal does not involve a "recurring and significant issue of general importance", but, rather, the micromanagement of one craft's forces on a tiny fraction of the UP system. Therefore, BRS and RLEA argue, the arbitral award should not be reviewed.

In rebuttal, UP reiterates that its appeal goes beyond a mere question of causation, involving instead a significant issue regarding the interpretation of New York Dock conditions. Specifically, UP asserts, the issue is whether there must be an actual change in railroad operations, services or facilities as a prerequisite to the application of New York Dock protection, as contended by Rail Labor, or whether a change in the status of employees of two consolidated railroads--such as the proposed consolidation of seniority districts--which results in operating efficiencies is a "transaction" under New York Dock.

The arbitrator, according to UP, fundamentally misinterpreted the applicable New York Dock provisions. UP argues that a "transaction" under New York Dock includes any action taken pursuant to Commission authorization upon which labor protective provisions have been imposed, and is not limited to changes in operations, services or facilities. UP's rearrangement of its work forces, argues the railroad, must be treated as just the sort of transportation benefit contemplated by the ICC to flow from a railroad consolidation.

UP concludes that its proposed seniority district consolidation is a "transaction", as defined in New York Dock; that it is an action undertaken pursuant to ICC authorization in Union Pacific--Control; that the "efficiencies and economies" which will result from the consolidation clearly fall within the categories of benefits which could be reasonably expected to result from the ICC's approval in Union Pacific--Control; and that there is a causal nexus between the 1982 UP/MP consolidation and its proposed seniority district consolidation.

DISCUSSION AND CONCLUSIONS

Lace Curtain review. We will hear and grant the appeal under our Lace Curtain standard of review. BRS argues that the appeal is one of causation and therefore lies outside the scope of Lace Curtain review. The railroad claims that the question here is a mixed one of fact and law, and that the issue justifies review.

BRS (as opposed to RLEA) has characterized Arbitrator Fischen's decision as limited to an issue of causation, which, BRS asserts, lies outside the ambit of ICC (and now Board) review under Lace Curtain. RLEA does not advance this argument, but, in support of its motion for intervention, states that "any order of this Commission interpreting the New York Dock conditions and the jurisdiction of arbitrators will affect every railroad in the United States to which the New York Dock conditions apply." UP, in rebuttal at 4, argues that the Arbitrator's decision raises the broad issue, "whether there must be an actual change in operations, service or facilities as a prerequisite to New York

Dock protection (as contended by BRS and RLEA), or whether a change in the status of employees of two consolidated railroads--such as the consolidation of seniority districts--which results in operating efficiencies and economics is a 'transaction' under the New York Dock conditions."

The BRS characterization of the issue involved in this appeal as being one of causation is not supported by the arbitrator's decision. Causation presupposes a purely factual analysis. Eischen's decision embodies no discussion of the causal nexus, or lack thereof, between Union Pacific--Control and the merger of the two seniority districts. Rather, Eischen relies on the precedent of Arbitrator Zumas in another case with different facts. Thus, we can only conclude that Eischen viewed his findings as expressing a conclusion of law--or at least mixed findings of law and fact--that he found in the Zumas precedent and applied here.

Because the Eischen Award thus involves legal conclusions rather than merely factual findings, we will review the award.

The merits of the case. Eischen held that the merger of the two seniority districts is not a transaction within the meaning of New York Dock. He based this conclusion on his finding that "there is no showing on this record that the merger of those seniority districts is either pursuant to or a necessary consequence of the ICC authorization granted in 1982." Eischen rested this finding on an arbitral precedent by Arbitrator Nicholas H. Zumas in Seaboard/BMWE, which Eischen found to be "persuasive and dispositive of the issue".[*]

In Seaboard/BMWE, Zumas found that modification of a collective bargaining agreement (CBA) could only be undertaken pursuant to New York Dock when it is the necessary and inevitable consequence of a transaction. Zumas found that Seaboard/BMWE did not involve such a transaction because it was "a purely corporate restructuring that did not mandate the rearrangement of forces as a necessary consequence."

While it is clear that Eischen found Seaboard/BMWE to be "dispositive" of this case, it is not apparent why the arbitrator found it to be so. Eischen cannot have limited his holding to a comparison of the facts in Seaboard/BMWE with those in the instant case, because Union Pacific--Control is no mere corporate restructuring. Instead, it involved the acquisition of control of two large Class I railroads by a third.

Specifically, the record shows that UP acquired the MP in 1982. Since then, the two carriers have integrated their operations, including the operations of the parallel Menoken Junction and Council Grove lines. Formerly operated separately by the UP and MP, respectively, the lines are now run as part of a single system. The continuation of separate labor pools to maintain the signals on each line means that a signal on the Menoken Junction line may not be repaired by a signalman who

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[*] Eischen cites another decision (MOPAC/ATDA) by Arbitrator Zumas as "persuasively and authoritatively" setting forth "the general guiding principles" of whether a causal nexus exists between a proposed action and an ICC-approved transaction. In that decision, Zumas stated that "[T]he Commission has viewed the imposition of protective benefits as requiring a proximate nexus between the actual merger and the Carrier action at issue . . . . There must be A causal connection."

belongs to the MP seniority district, notwithstanding that he may be located only 15 miles away. UP argues that the integration of operations on the two lines has obviated any reason for maintaining separate labor pools to maintain the signals on the two lines and prevents the realization of efficiencies that would be achieved if the signals on both lines were maintained by employees drawn from a single pool of employees.

The facts of Seaboard/BMWE differ so significantly from those here that the Zumas decision cannot be viewed as disposing of the merits of this case. In fact, Eischen makes no attempt to find that the facts in this case are similar to those in Seaboard/BMWE.

Rail Labor argues that this case involves no transaction under New York Dock because it involves no change in railroad operations, service or facilities. Rail Labor also argues that the merger of seniority districts will yield no efficiencies or economies. However, Arbitrator Eischen does not directly address these issues in his decision but rather merely cites the Seaboard/BMWE case as dispositive.

With regard to these arguments, the Board notes that the evidence on the record does indicate an integration of operations by UP and MP on the Menoken Junction and Council Grove lines. There is also evidence on the record that the merger will yield efficiencies: the merger of the two labor pools will allow the present signal maintenance functions on those lines to be undertaken with at least one fewer employee.

Also, the Board notes that in approving the UP/MP merger, the ICC discussed at length the transportation benefits of UP's acquisition of MP and the Western Pacific Railroad Company (WP) in its decision in Union Pacific--Control at 487-500. The ICC noted that "(t)he proposed consolidation provides single system service on complementary east-west and north-south routes . . . ." Id. at 493. The ICC noted that "(t)he consolidated system will be able to achieve significant cost reductions through more effective use of the applicant's mechanical and repair facilities and through coordination of maintenance-of-way activities (emphasis added), Id. at 498. The ICC concluded that "the proposed consolidation of UP-MP-WP will result in substantial public benefits. Shippers and the general public will benefit by the improved efficiency and reliability of single system service . . . ." Id. at 501."

However, Eischen's decision did not address in any detail any of this evidence directly or in relation to his conclusion as to causation. Thus, we find that Eischen's conclusion that there is no transaction here is flawed because: (1) the basis for his finding, the Zumas award in Seaboard/BMWE, involves a different factual situation; (2) he has undertaken no analysis of the facts of this case to support his conclusion; and (3) available facts

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" The efficiencies resulting from UP's acquisition of MP, cited by the ICC in Union Pacific--Control, also make clear that Rail Labor's reliance on Railway Labor Executives Ass'n v. U.S., 987 F.2d 806 (D.C. Cir. 1993) (Springfield Terminal) is misplaced. These efficiencies represent the sort of "transportation benefits" that the court in Springfield Terminal cited as a predicate to overriding a collective bargaining agreement. The court of appeals cited those benefits in its decision upholding Union Pacific--Control. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708, 720 (D.C. Cir. 1984).

tend to show that the integration of operations by the UP and MP over the two lines constitutes the sort of efficiency improvement that caused the ICC to approve the underlying merger transaction and Arbitrator Eischen's decision does not address those facts. Given these flaws, we find that his decision fails to draw its essence from New York Dock, and we will vacate his decision. Furthermore, we are not persuaded by the arguments either offered by Rail Labor as independent grounds for affirming the result reached by Eischen or offered by UP as grounds for finding here that the proposed consolidation does constitute a transaction flowing from Union Pacific--Control and properly the subject of implementation under New York Dock.

We hope that the parties will be able to negotiate an agreement. If they cannot, they may submit the issue to an arbitrator. If they do submit the matter to an arbitrator, a couple of issues should be addressed. It is not clear as to why UP waited 11 years before merging the seniority districts and what implication that delay has for its argument that this merger of seniority districts is a "necessary consequence" of the consolidation in Union Pacific--Control. Rail Labor should support its argument that the merger of seniority districts is due to a supervening cause other than the original New York Dock-conditioned consolidation.

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

It is ordered:

1. The decision of Arbitrator Dana Edward Eischen is vacated. The proceeding is remanded to the parties for further proceedings consistent with our findings.

2. This decision is effective on July 31, 1996.

3. A copy of this decision will be served on Arbitrator Eischen at the following address:

Mr. Dana Edward Eischen
20 Thornwood Drive
Suite 107
Ithaca, NY 14850

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Chairman Morgan commented with a separate expression.

CHAIRMAN MORGAN, commenting:

This case, and a related case,[1] involve appeals from arbitral awards arguably stemming from ICC-approved transactions subject to New York Dock implementing conditions. While I have respected and continue to respect the deference due such awards by voting not to overturn arbitral awards in most instances, I cannot vote to uphold either of these awards as they now stand.

First of all, the decision in Finance Docket No. 30000 (Sub-No. 48) is based on a case whose facts were very different from those in this proceeding. In addition, arguments concerning the type of transaction involved, the efficiencies and benefits

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[1] Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Missouri-Kansas-Texas Railroad Company, et al., Finance Docket No. 30800 (Sub-No. 30).

associated with the transaction, and the causal connection between the underlying UP/MP merger and the action at issue have not been addressed in the decision. In order to determine whether the instant transaction is subject to New York Dock and whether the arbitral award draws its essence from New York Dock, the decision should have more specifically addressed these issues. As the award in the accompanying case was based entirely on the decision in Finance Docket No. 30000 (Sub-No. 46), it likewise cannot withstand scrutiny.

The Board must take seriously its role in considering appeals from arbitral awards. To ensure that the Board can exercise its role responsibly, arbitrators and parties must make certain that arbitral decisions clearly present the factual and legal basis for particular awards. Neither of these decisions presents such a record, and thus neither can be upheld.

Vernon A. Williams
Secretary

EC

SERVICE DATE

OCT 4 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30965 (Sub-No. 1)[1/]

DELAWARE AND HUDSON RAILWAY COMPANY[2/]--LEASE AND TRACKAGE RIGHTS EXEMPTION--SPRINGFIELD TERMINAL RAILWAY COMPANY

Decided: September 24, 1990

In this decision, which represents a second review of an arbitral award imposing an implementing agreement upon a series of railroad line lease transactions within a corporate family, the Commission declines to vacate the decision of the arbitrator, based on findings that: (1) the arbitrator had jurisdiction to enter the award; (2) no party has shown that the arbitrator exceeded the authority vested in him by the labor conditions imposed on these transactions or otherwise acted unlawfully with respect to any of the matters raised by the appeals; and (3) the award, as a whole effects a reasonable and equitable accommodation of the various conflicting and competing interests necessary to permit the series of transactions authorized by the Commission to be carried out.

BACKGRO[illegible]

These consolidated proceedings involve a series of lease and trackage rights transactions exempted under the provisions of 49 CFR 1180.2(d)(3) and the procedures of 49 CFR 1180.4(g). Through these transactions, all of the rail service operations previously conducted by Boston & Maine Corporation (B&M), Maine Central Railroad Company (MEC), and Portland Terminal Company (PT), all subsidiaries of Guilford Transportation Industries, Inc. (GTI), were to be performed by the Springfield Terminal Railway Company (ST). Initially we imposed standard lease and trackage rights labor protective conditions developed in Mendocino Coast Ry., Inc. -- Lease and Operate, 354 I.C.C. 732 (1978), and Norfolk and Western Ry. Co. -- Trackage Rights -- BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.--Lease and Operate, 360 I.C.C. 653 (1980) (collectively Mendocino Coast). These conditions guarantee up to six years of income protection for employees whose jobs are lost or adversely affected by a lease or trackage rights transaction, but do not require that an implementing agreement be reached before consummation of the transactions.

1/ This proceeding embraces Finance Docket Nos. 30925, 30951, 30966, 30967, 30972, 30981, 30993, 31002, 31003, 31015, 31023, 31086, 31103, 31115, 31125 and 31161.

2/ The Delaware and Hudson Railway Company (D&H), a subsidiary of Guilford Transportation Industries, Inc. (GTI) and a party to the Springfield Terminal proceeding, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1988. Since that date D&H has not joined in any of the pleadings filed on behalf of GTI by counsel nor has the trustee filed either in his own right or by way of reaffirmation or adoption of the previously filed pleadings. Since it is clear that D&H has long since abandoned participation in these proceedings, although it has never formally withdrawn, we will dismiss it as a party for non prosecution. However, for the sake of consistency, these proceedings will continue to be styled "Delaware and Hudson Railway Company. . . ."

When it became apparent that, through a series of individual transactions, GTI was undertaking what amounted to a consolidation of the operations of its various subsidiaries into a single operation to be performed by ST, we developed conditions unique to this proceeding. We did so by combining the protections usually afforded in lease and trackage rights transactions with the procedural aspects of the labor protective conditions developed for consolidation transactions set forth in New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979) (New York Dock). We ordered that, contrary to the normal situation in a single lease or trackage rights transaction, all parties to these multiple transactions be involved in the bargaining leading to an agreement implementing these transactions. We also ordered that transactions that had not already been consummated be stayed until an implementing agreement was in place. See D&H Ry.-- Lease and Trackage Rights Exempt. -- Springfield Term., 4 I.C.C.2d 322, 323-26 (1988) (Springfield Terminal).[2/]

In requiring an implementing agreement we provided for a period of negotiations to be followed by arbitration, if necessary, to be used in arriving at an implementing agreement applicable to previously consummated transactions and to transactions whose implementation the Commission had delayed. After negotiations failed the matter was submitted to an arbitrator with all parties represented.

Arbitrator Richard R. Kasher issued an award adopting an implementing agreement on June 12, 1988 (Kasher Award).[3/] In a decision served January 10, 1989, we denied petitions to revoke the class exemptions in these proceedings and granted administrative review of the Kasher Award.

We affirmed all of the provisions of the Kasher Award except for the rates of pay, work rules and the selection of forces provisions (Sections 1, 2 and 3 of the award) that would apply to the ST's operation of the other carriers' lines. Specifically, we disapproved the Kasher Award determination that the collective bargaining agreements (CBAs) that were in place on the properties of the MEC, the D&H, the PT, and the B&M should continue to be the CBAs in force on the ST as to all "prior rights" employees.[4/] We determined that preserving all of the pre-existing provisions contained in the CBAs of each of the separate entities involved would vitiate one major purpose for the underlying leases. It would eliminate any possibility of achieving the economies and

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2/ In October 1987, the Commission ordered the carriers not to implement any of the transactions involving the Delaware and Hudson Railway Company (D&H), nor any unimplemented B&M transactions, pending resolution of these consolidated proceedings.

3/ The Kasher Award proposed an implementing agreement which provided that: (1) no employee would be deemed to have forfeited any rights or benefits arising from labor protections as a result of any decision made during the period commencing with the first lease up to the time of the arbitrator's award; (2) seniority on the ST would be governed by the seniority of employees on the leased lines over which ST sought to operate; and (3) the ST workforce, in operating the leased lines, would operate under the rates of pay, rules and working conditions required by the collective bargaining agreements between each of the four lessor carriers and their employees.

4/ "Prior rights" employees refers to all employees in active service of one of the four lessor carriers at the time of the lease transactions who were (or are entitled to be) offered employment on the ST.

efficiencies afforded by application of the more flexible ST work rules to the entire GTI system. January 10, 1989 Decision, at 7.

Thus we vacated Sections 1-3 of the Kasher Award. We considered imposing ST's agreement with the United Transportation Union (UTU) upon all operations being undertaken by them over leased lines. However, there was insufficient information before the Commission to determine whether the agreement would be compatible with maintaining seniority and job entitlement for the former employees of the lessor carriers, or as to how the ST/UTU agreement was, in fact, being implemented. We returned for further negotiation and/or fact-finding arbitration the questions of: (1) the elements of the existing ST/UTU agreement and (2) the methods and practices by which it was being implemented. Id at 8.

Shortly thereafter, ST entered into negotiations with the UTU and, on February 14, 1989, ST and UTU signed a new agreement. That agreement which covered the issues which had been returned to the parties for further negotiation or, in the event of their inability to agree, arbitration, i.e., rates of pay, work rules and the selection of forces. In a decision served October 26, 1989, we held that the ST/UTU Agreement of February 14, 1989, was not an implementing agreement for the authorized lease and trackage rights transactions because all parties had not been represented in the negotiating process. However, we commented that the ST/UTU agreement did have the elements necessary so that it might serve as a starting point in the fashioning of an implementing agreement. October 26, 1989 Decision at 6. We again directed all parties to participate in negotiation or arbitration of an implementing agreement and imposed a schedule for doing so designed to arrive at an implementing agreement by January 24, 1990. October 26, 1989 Decision at Schedule A.

Immediately thereafter a dispute broke out as to whether arbitration was to continue under the auspices of arbitrator Kasher. RLEA contended that arbitration, if required, must be continued under the original arbitrator. GTI, for its part, argued that it could not obtain a fair result utilizing Kasher's services. The Commission noted GTI's argument but did not rule on it. Rather we stated (December 20, 1989 Decision at 4):

> Guilford has presented nothing which gives us cause to doubt the impartiality of the original arbitrator. At the same time, we do not know whether the original arbitrator will be able or willing to undertake a complete examination of the issues remaining between the parties and arrive at an arbitrated agreement by January 24, 1990.

To avoid any slippage in the schedule and because of the National Mediation Board's (NMB or Board) expertise in the arbitral process the Commission referred the issue of the identity of the arbitrator and related issues concerning further arbitration to that agency. The Commission referred the matter to the NMB despite GTI's objection based on its assertion that the Board also was biased. Id. The NMB selected arbitrator Robert O. Harris to continue the proceeding in an order served December 27, 1989 and proceedings commenced before arbitrator Harris despite rail labor's assertion that Harris lacked authority to arbitrate this matter. RLEA stated that Harris could serve as a fact-finder but lacked any jurisdiction to craft an implementing agreement. Harris submitted his report (Harris Award) to the Commission on March 13, 1990. We have attached a copy of the implementing agreement adopted in the Harris Award to this

decision. Each of the parties[6/] to this proceeding petitioned the Commission for administrative review of the Harris Award and, by decision served May 22, 1990, we agreed to review it. This decision is the culmination of that review.

THE HARRIS AWARD

In fashioning the Award under review, Harris first discussed his understanding of his authority to arrive at an implementing agreement. Harris Award at 44-45, 57. Harris determined that he was authorized under 49 U.S.C. 11347 and the Washington Job Protection Agreement (WJPA) to modify existing collective bargaining agreements as necessary to effectuate the transaction to the extent that the modifications concerned the selection of forces or the assignment of employees (interpreted by Harris as "questions involving scope rules and seniority rosters," Award at 45). Harris grounded his conclusion on this issue based on the vote taken in the voting conference that led to our recent decision in CSX Corp. - Control - Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990) ("Carmen"). Award at 43-45.

After examining the breadth of his authority, the scope of the ST/UTU agreement, and the operating practices of ST, Harris decided not to impose the ST/UTU agreement upon system wide operations but determined that certain modifications to the lessor carriers' CBAs were necessary to effectuate the transaction (Award at 60-61). These modifications are:

1. Agreements between the MEC and the PT and their employees would be modified so that there will be a combined single seniority district on the MEC/PT.

2. The various incidental work rules contained in the lessor carriers' CBAs would be modified to allow incidental work, regardless of the location of the work, provided that it not comprise 50% of the total work of an individual employee in any single day.

3. The lessor carriers' CBAs would be modified so that a conductor could be utilized without a brakeman in through-freight service, on local freights, and in yard work (provided that such usage complies with applicable Federal Railroad Authority safety standards).

As additional rights necessary to fashion an implementing agreement, Harris required (section 2 of the proposed implementing agreement, pp. 1-2; Award at 55) that:

1. "Prior rights" employees would be defined as all individuals listed on the lessor carriers' seniority rosters, including not only those actually employed on the dates of the leases, but also those on leave of absence for official reasons or for job-related injury.

6/ The parties are: B&M, MEC, PT, and ST, UTU and the Railway Labor Executives' Association (RLEA).

2. Employees in furloughed or inactive status on the dates of the leases, who were unaffected by the transactions, would have "preferential hiring" rights to newly established ST positions.[7/]

3. ST employees who have performed work for the ST (on or in connection with a leased line or an ST line to which they had no seniority rights prior to the leases) shall have their names added to the bottom of the appropriate [lessors'] seniority roster(s) which describes the work they primarily perform. The ST employee's seniority date shall be the date of hire.[8/]

Of these six provisions to the implementing agreement proposed by arbitrator Harris, five are objected to, in whole or in part, by the various parties.[9/]

GTI contests only the provision that "after hired" employees (which it refers to as "new hires") be placed at the bottom of the lessors' seniority rosters. UTU appeals only the crew consist requirement which eliminated the brakeman position. RLEA opposes every aspect of the Harris Award, including Harris' jurisdiction, and seeks reinstatement of the Kasher Award.

To facilitate our review of the Award, we asked the parties to address certain issues which might have a bearing on any decision. May 22, 1990 Decision at 4. These issues are as follows:

1. (a) The extent of the authority of an arbitrator, acting pursuant to conditions imposed by the Commission under 49 U.S.C. 11347, to require modifications of collective bargaining agreement[s] and

   (b) Whether modifications are, in fact, necessary to implement the transaction approved by the Commission.

2. Whether and to what extent did each of the following elements of the Harris Award exceed the stated scope of an arbitrator's authority:

   a) the seniority treatment of furloughed employees;

   b) the merging of the PT/MEC seniority districts;

   c) the 50% incidental work rule;

   d) the conductor without a brakeman crew consist rule;

7/ This additional right is one in which GTI expressly acquiesced. Neither RLEA nor UTU opposed it in their briefs to Harris. Harris Award at 51.

8/ We asked the parties (see infra, p. 8) to address which employees should be defined as "after hired" employees, with the intent that they address who should be considered to be covered by this provision. For the sake of further discussion, we now define "after hired" employees as those employees which ST has hired after the dates of the lease transactions and up to the effective date of the implementing agreement. We also now define "new hires" as those employees hired by ST after the implementing agreement is in place. By these definitions, we construe this provision of the Harris Award as applying only to "after hired" employees.

9/ The redefinition of the "prior rights" employees in item 1, supra, does not appear to be challenged by any party.

3. Who does GTI define as an "after hired" employee, and what effect would vacating the Harris Award decision to place "after hired" employees on the lessors' seniority rosters have on GTI's ability to assign such employees to modified seniority rosters without bargaining over such modifications under the Railway Labor Act.

4. Should the Commission address the issue of the effective date of the implementing agreement for labor protection and make whole payment purposes, even though no party has appealed this aspect of the Kasher and Harris Awards.

We will set forth the parties' responses to each of these issues and our disposition with respect to them in the order they appear here after an initial examination of our jurisdiction.

1. RLEA's and UTU's Objections To Harris Exercising Jurisdiction To Impose An Implementing Agreement

RLEA contends, as it has throughout the proceeding, that the Commission exceeded its authority and the proper scope of review in vacating Sections 1, 2 and 3 of the Kasher Award. Under this view, the Commission was obligated to permit the Kasher Award to take effect and hence there was nothing to remand.

Alternatively, RLEA contends that because arbitrator Kasher was selected by agreement between the various rail labor organizations and GTI and because the agreement was entered into under the Railway Labor Act (45 U.S.C. 151 et seq.) (RLA) all remanded arbitration proceedings must be conducted by Kasher. RLEA also contends that the Commission lacks authority to override this agreement or otherwise remove Kasher. Further, RLEA, joined by UTU, avers that since the Commission's employee protective conditions rely upon RLA processes, the Interstate Commerce Act (49 U.S.C. 10101 et seq.) (ICA) also requires that remand arbitration be held before Kasher.

Finally, RLEA argues that the Commission never purported to remove Kasher or otherwise sought appointment of another arbitrator. Harris Award at 38.[10/] As support for this view, RLEA referred to the Commission's January 10, 1989 and October 26, 1989 decisions in which the Commission spoke of returning this matter to "the" arbitrator and to the "remand" of his award as demonstrating that the Commission did not remove arbitrator Kasher. Id.

RLEA and UTU did not object to arbitrator Harris's finding the facts as to the "existing methods and practices by which the parties implemented that [ST/UTU] agreement," but asked the arbitrator to rule that in all other respects he was without jurisdiction to decide the matter. Harris Award at 39.

2. Parties Positions With Respect to Authority Of Arbitrator To Modify CBAs

RLEA opposes the assertion of jurisdiction by the arbitrator to modify CBAs. RLEA contends that neither the Commission nor any arbitrator acting under the Commission's authority may modify CBAs. In its view, any resolution of conflicts between lessors' and lessees' CBAs may only be achieved through the mechanisms provided in the RLA.

10/ RLEA also contends that NMB was without authority to remove arbitrator Kasher or even to decide whether he would continue as the arbitrator for the remanded proceedings.

RLEA also argues that the language and legislative history of section 11347 "specifically precludes" the Commission, or its arbitrator, from imposing an implementing agreement which abrogates existing CBAs. RLEA at 4-5. Finally, it contends that, whatever the practice was prior to 1976, the requirements of Article I, sections 2 and 3 of the Mendocino conditions that CBAs and prior protective arrangements be preserved are not in any way qualified by the relevant language of Article I, section 4, which authorizes the making of necessary changes in CBAs. RLEA at 4.

UTU contends that the Harris Award provision altering the crew consist requirements of the lessor carriers' CBAs is violative of 49 U.S.C. 11347 because it is a "deprivation of the very rights required to be protected by 11347." UTU at 4. UTU submits that, absent a voluntary agreement, the parties can only eliminate a brakeman from rules governing crew consists for various types of operations through resort to RLA procedures. UTU at 5.

3. Elements of the Implementing Agreement

In our order accepting review we asked the parties to address the four provisions of the lessors' CBAs that were modified by the Harris Award. Those provisions are: the seniority treatment of furloughed employees giving them preferential hiring rights to new ST positions; the merging of the PT/MEC seniority districts; the 50% incidental work rule; and the conductor and engineer only crew consist rule. The views of the parties on the necessity for these changes, and the arbitrator's authority to effect each of them, are as follows.

As to the necessity of these modifications to implementation of the transaction, rail labor argues generally that none of the provisions were necessary to the implementing agreement. Specifically, it is RLEA that presses the argument that these modifications are not required for the consummation of the transactions. UTU, while contending generally that Harris' modifications are not necessary to the transactions, does not oppose any provision except the crew consist rule. GTI supports the necessity of all of the provisions to the transaction with the exception of the portion of the award that deals with the "after hired" employees.

a. Preferential Hiring for Furloughed Employees

GTI asserts that this provision is not a modification of the lessors' CBAs (and, consequently, is not in conflict with them), but rather an additional right to which it acquiesced in order to resolve the issue. GTI at 50. Because, GTI claims, the furloughed employees were not adversely affected by the transaction, this provision was not legally required (i.e., not necessary to effectuate the transaction). Nevertheless, because GTI consented to it, GTI submits that there is no reason to vacate it. GTI at 60; GTI reply at 21. Arbitrator Harris modified GTI's offer to preferentially hire furloughed employees and place them at the bottom of the ST seniority roster. He has required, instead, that preferentially hired, furloughed employees be placed at the bottom of the seniority rosters of the individual lessors. GTI does not appear to object to this modification.

RLEA counters that, although furloughed employees are not adversely affected for purposes of entitlement to compensation, the transaction adversely affected their seniority rights by giving them seniority dates on the lessor carriers' rosters later than the seniority dates of the so-called "after hired" employees. It asserts that re-employing experienced furloughed

employees, with priority on the seniority rosters over after hires, would facilitate the transaction. Therefore, RLEA contends, by placing furloughed employees at the bottom of the lessors' seniority rosters, the Harris Award irrationally abrogates their seniority rights as embodied in the lessors' CBAs.[11] RLEA at 15; RLEA reply at 21-22.

b. Merging of the PT/MEC Seniority Districts

GTI supports the necessity of merging the PT/MEC seniority districts, a provision which was contained in the ST/UTU agreement. It explains that the six mile radius served by PT limited employment opportunities and reduced the effectiveness of PT employees' seniority. Thus, according to GTI, by merging the districts, the employees are able to bid for job opportunities in a larger territory, and ST could expand its utilization of their job skills. Because, GTI argues, maximizing ST's managerial flexibility was a central purpose of the transaction, this change was necessary, and well within the arbitrator's authority. GTI suggests that it is a "common practice" for arbitrators to adjust seniority arrangements, including merging rosters, in formulating implementing agreements as part of selecting forces from different carriers for a consolidated operation. GTI at 49, 57-58; GTI reply at 20.

UTU disagrees with the merger of the rosters "since MEC and PT employees of the lessor carriers could stand for work from their rosters for work under such roster's jurisdiction on the ST." Nonetheless, UTU does not oppose this element of the Award. UTU at 5. RLEA believes that, even if the merger of rosters is beneficial, as GTI contends, it should not be upheld. RLEA at 12-13.

c. The 50% Incidental Work Rule

GTI views this element as a "critical provision of the compromise fashioned by the Arbitrator [which] substantially achieves the central objective of this transaction." GTI at 43. Permitting employees to perform "substantial ancillary work where dictated by efficiency considerations" provides ST with a more "flexible and efficient" operation. GTI at 46. GTI contends that the arbitrator's decision to include this rule rests on the kind of factual arbitral determination which is entitled to considerable deference by the Commission. GTI at 47. GTI offers, by analogy, a number of arbitral decisions holding that employees who are offered work outside their traditional class or craft lines have been offered comparable employment. GTI at 55.

UTU argues that the Harris Award is not as broad as it seems because the rule only modifies the various incidental work rules already contained in existing lessor CBAs, and does not apply to all organizations or those lessor CBAs which did not contain an incidental work rule. UTU at 5-6.

RLEA submits that Harris' factual findings -- that the ST does not cross-utilize employees other than in "narrow, readily understandable assignments" -- countermands a determination that inclusion of this rule in the proposed implementing agreement is

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11/ RLEA chiefly complains that the furloughed employees should have been offered work between the dates of the lease transactions and the implementing agreement's imposition, in accordance with their seniority on the lessor carriers' seniority rosters, before ST brought on "after hired" employees, who had no railroad experience. RLEA urges that the furloughed employees would have been more productive and efficient, and required no training, thus facilitating the transaction. RLEA reply at 20-21.

necessary. RLEA at 7-8. Moreover, RLEA questions whether ST's design to assign employees to perform any job truly enhances the flexibility and efficiency of operations. RLEA at 9-10. The incidental work rules contained in the lessors' CBAs, RLEA argues, provide sufficient flexibility to the carrier. RLEA at 11.

Along with UTU, RLEA believes that the 50% incidental work rule only modifies the incidental work rules contained in the lessor agreements. Because only the shop craft agreements contain incidental work rules, RLEA submits that the Harris Award does not apply to impose the 50% incidental work rule on operations as well. RLEA at 11-12.

GTI responds to rail labor's criticisms by emphasizing that arbitrator Harris did find that the compromise incidental work rule was necessary to effect the transactions.[12/] GTI reply at 17. GTI explains that the cost efficiency the rule would generate, if successful, would enable GTI to "avoid financial distress" and would provide a better chance for expanding its operations, "preserving existing jobs and creating new ones." GTI reply at 17.

GTI also rejects rail labor's contention that Harris only modified the application of the incidental work rule to shops and not to operations. It cites section 3(b) of the proposed implementing agreement to demonstrate that the work rule is modified to allow incidental work "regardless of the location of the work," i.e., regardless of whether the work is being performed at shops or at operation sites, or of the location of the particular shop or operation. GTI reply at 19.

d. The Crew Consist Rule

GTI believes that this rule provides significant operating efficiencies, an important purpose of the lease transactions. GTI explains that antiquated and obsolete work rules, carried over from the era of the steam engine (which required a five man crew generally including an engineer, fireman, conductor and two brakemen), are retained in some of the lessors' CBAs, even though use of modern diesel locomotives has made two or three of these positions unnecessary. GTI at 41. Harris found, GTI points out, that ST operates through freights with just a conductor and an engineer, while using an additional crew member, a brakeman, occasionally on local freights, without creating any operating difficulties. GTI at 42; Harris Award at 29, 48.

Moreover, GTI submits that this rule was well within the scope of the arbitrator's authority and is consistent with arbitral precedent. GTI at 52. GTI contends that the arbitral decisions it cites support the proposition that the ordinary meaning of "selection of forces" and "assignment of employees" should include "not only who will be assigned to fill positions, but also which and how many positions will be filled and the definition and scope of those positions." GTI at 54.

UTU vehemently opposes the crew consist rule. It summarizes the history of crew sizes on the MEC, PT, and B&M, and contends that there was no evidence adduced in the Harris arbitration to

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12/ RLEA challenges, in general, all of Harris' "necessity findings" on the ground that Harris stated first that he would impose the lessor carrier agreements without modification on the lease transactions, if the Commission had not rejected that portion of the Kasher Award, and only then said that the proposed modifications were "deemed" necessary. RLEA reply at 17.

support the need for further reduction of crew consists.[13] UTU at 6-8. UTU maintains that the crew consist rules which exist on the B&M and on the MEC/PT are already a flexible arrangement, which permit for a profitable operation, and that, therefore, no change in such rules is required to implement the ICC-approved leases.[14] UTU reply at 3. UTU also claims that the ST/UTU agreement does not even contain a crew consist rule, and that it is fallacious for GTI to suggest that the Harris Award decided to incorporate such a rule in lieu of the lessor carriers' CBA rules on crew consist size.[15] UTU reply at 5. RLEA does not address this rule.

e. After-Hired Employees

GTI submits that this portion of the Harris Award should be vacated. GTI argues that any persons hired after the date of the lease transaction have no entitlement to labor protection.[16] Therefore, the arbitrator exceeded his authority in requiring placement of after hired employees onto the lessors' seniority rosters. Placing the after hireds on these lists, GTI claims, imposes "a significant restraint on ST's flexibility in assigning new hires." GTI at 61. By extending the implementing agreement to "future employees," GTI argues, the arbitrator imposed on the ST "his own view of the manner in which the ST should be structured and operated in the future," and "displaced entirely" the ST/UTU agreement otherwise applicable to after hired employees. Id.; GTI reply at 23-24.

GTI believes that the term "after hired" applies to any employee hired after the lease transactions who, thus, is not entitled to labor protection. GTI at 62. It provides, as an example, an employee hired by ST today who had no prior railroad experience. GTI at 63. GTI believes that such employees are entitled only to those rights and benefits provided for in the ST/UTU agreement. GTI at 66. Extending to members of this group some of the terms of the lessors' CBAs vitiates their contractual relationship with ST and modifies the ST agreement without bargaining. GTI at 68, 70. Such a modification of the ST/UTU

13/ UTU explains that the crew size on the B&M was already reduced once as a result of arbitration in 1981. UTU at 7. It apparently opposes any further reduction on the grounds that the former change created sufficient efficiency. UTU at 8.

14/ UTU explains that the MEC/PT rule calls for full train crews of an engineer, a conductor and two brakemen. The B&M rule requires an engineer, a conductor, and "in most circumstances" a single brakeman. On low density lines, the crew is further reduced to a conductor and engineer only. UTU reply at 6. GTI responds that "the essence" of Harris' crew consist rule was to "permit management to build on the success of B&M's experience with reduced crew sizes by reducing crew sizes on all the rail lines in accordance with the ST crew consist rule." GTI reply at 13.

15/ UTU asserts that, prior to the lease transactions, the carriers served section 6 notices under the RLA, 29 U.S.C. 156, to effectuate an abolishment of the crew size agreements on the B&M and the MEC/PT. UTU alleges that the parties are still in mediation on these notices, and asserts that any change in train crew size (pursuant to an implementing agreement), prior to completion of RLA procedures, would be unlawful. UTU reply at 4.

16/ This argument does not recognize the distinction between what we have defined herein as "after hireds" and "new hires." See supra footnote 6. Clearly, GTI seeks to have the Commission interpret this provision as applying to both categories.

agreement is not necessary either to permit the transaction or for the protection of prior rights employees. GTI reply at 29.

GTI states that no adverse consequences would flow from vacating this portion of the Award. Under the ST/UTU agreement, after hired employees will receive an ST system seniority date based on their initial date of ST service and will have no prior rights on any part of the system. GTI at 70. GTI submits that prior rights employees can be assigned and can bid on jobs consistent with their seniority rights under the lessors' CBAs in harmony with the application of the ST/UTU agreement on behalf of after hired employees, since after hired employees would have lower priority than prior rights employees. Thus, there would be no conflict in the operation of both agreements. GTI at 71. Moreover, GTI asserts that no assignment of after hired employees to modified seniority rosters without bargaining over such modifications would occur, if this portion of the Harris Award is vacated. GTI reply at 24.

UTU addresses this provision briefly. It contends, without explanation, that, even if this element of the Award is vacated, such employees' names would be placed at the bottom of the lessors' seniority rosters. UTU at 8.

RLEA, on the other hand, contends that if the after hireds are not placed on the lessors' seniority rosters, then GTI cannot assign them to perform any work covered by the lessor CBAs' scope rules. RLEA at 16-17. Any such assignment would violate the scope rules, constitute a change in working conditions, and require bargaining under the RLA. RLEA at 17. In essence, RLEA maintains that "without a scope rule, seniority is 'irrelevant.'" RLEA at 18.[17]

GTI responds that this argument is "tautological." GTI reply at 25. It asserts that both the ST/UTU agreement, and the earlier seniority dates of prior rights employees over after hires, will assure that all prior rights employees will have the opportunity to fill jobs within the scope of the lessor CBAs before any ST after hired employee can successfully bid on any such position. Thus, GTI claims, it is not lawful to incorporate the lessor CBA scope rules into the implementing agreement as a way to preclude ST's after hired employees from performing tasks covered by the lessors' scope rules. GTI reply at 26-27, 30.

4. The Effective Date For Labor Protective And Make Whole Conditions

a. Protective Period

GTI points out that Harris adopted the same language as Kasher in establishing when the protective period begins to run: "[it] shall not begin to run until the effective date of this implementing arrangement, or when the employee is adversely affected, whichever shall occur last." GTI at 73. GTI interprets this allegedly ambiguous determination to mean that the protective period begins to run on the date on which an employee is first adversely affected by the transaction and is available for service. This definition rests on the proposition that employees must accept offers of employment or lose their protective benefits. Id.

17/ RLEA complains that prior rights employees have not been able to follow their jobs because ST has, for instance, converted the scope of some jobs into managerial positions, for which the prior rights employee did not qualify, and then assigned a new hire to them. RLEA 18-20.

Thus, employees who initially accepted ST employment at the time of the transaction (first offer), or employees who accepted GTI's offer of employment based on the February, 1988 ST/UTU agreement (second offer), are protected from the date that they began that employment. Any employee who accepts a third offer, after the implementation agreement is in place, will be protected from that date. GTI at 76. GTI explains that it would be erroneous to allow the period to begin to run from the date that an employee's job was first abolished, even though that employee did not accept one of GTI's offers, since GTI would then be made to subsidize an employee who had voluntarily refrained from working for some period of time. GTI at 77.

GTI identifies three discrete classes of employees to whom special attention must be directed on this issue: (1) those who received and then declined job offers from ST; (2) those who accepted an ST offer, but then retired or resigned; and (3) those who participated in the work stoppage against the company which began November 12, 1987.[18/] As to the first category, GTI submits that once the implementing agreement is in place, it will extend a new offer, and, if the employee accepts it, his protective period begins to run from that date.[19/] GTI at 80.

GTI contends that employees who accepted offers with ST and were then discharged for cause are not entitled to a new offer after implementation of the implementing agreement. However, it recognizes that any employee who accepted a job and then either resigned or retired is entitled to a new offer of employment. If they accept it, employees in the later category will be entitled to payments from the date of service, less any period during which they already were entitled to benefits prior to their resignation or retirement.[20/] GTI at 81.

18/ On November 12, 1987, a work stoppage occurred on the ST that lasted until June, 1988. The railroad has taken the position that the employees of ST who participated in the work stoppage resigned their positions, an action which, according to GTI, ends the employees' eligibility for labor protection under the Mendocino conditions. UTU contends that the work stoppage was a protected activity under the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. 441(c), and the failure of the carrier to take back the striking employees after the end of the work stoppage except as "new hires" was illegal. GTI resists this characterization of the work stoppage. In the carrier's view the strike was the result of its resistance to union demands wholly unrelated to safety. UTU initiated arbitration through the National Mediation Board to resolve this issue. This arbitration led to a finding that the employees were covered by the FRSA and that they were in compliance with the FRSA when they began the work stoppage (the "Quinn Award"). The Quinn Award provided reinstatement with pay for all the involved employees. GTI has initiated an action in the federal district court to have the Quinn Award set aside.

19/ GTI correctly points out that the Commission has already determined that no employee can be deemed to have forfeited entitlement to labor protection as a consequence of rejecting GTI's first or second offers of employment, since until an implementing agreement is in place, there has been no valid election of remedies. Therefore, GTI will extend a new offer to any such employees when the implementing agreement becomes effective. GTI at 79.

20/ GTI acknowledges that such employees would receive benefits for the period in which they worked for ST prior to retiring or resigning. GTI at 80, n.41.

As to work stoppage participants, GTI's official position is that such employees resigned as of the date they failed to report for work, and have thus forfeited any future benefits. GTI contends, however, that it is treating as prior rights employees any participants who returned to ST after the Quinn Award decision. GTI also recognizes that those participants are entitled to exercise pre-work stoppage seniority and to the selection and assignment of forces provisions of the implementing agreement. But, GTI states, if the Quinn Award is set aside by the court, it will treat those employees as new hires (by our definition "after hires") entitled only to ST system seniority from the date of their hire after the Quinn Award. As for employees who participated in the work stoppage, and did not return to work following the Quinn Award, GTI proposes that it will treat them in the same manner as those who did return. GTI at 82.

UTU contends that the protective period begins to run after the effective date of the implementing agreement and continues for six years. UTU at 9. RLEA maintains that the six-year period begins to run from the effective date of the implementing agreement, or when an employee is adversely affected, whichever occurs last, and that this definition presented by Kasher and Harris comports with Article I, section (d) of the Mendocino Coast conditions. RLEA at 21.

b. Make-Whole Period

GTI suggests that both the Commission and RLEA have recognized that the make-whole allowance is designed to compensate for "any loss of earnings suffered from the date when an employee is first affected until the implementing arrangement is implemented, less any time that employee is not available for service due to strike, job action or other cause." GTI at 74. In particular, GTI asserts that a make-whole allowance is not warranted for any period during which the employee has declined an offer of employment and has indicated thereby that he is not available for service. GTI at 75.

UTU believes that make-whole payments begin when an employee is adversely affected by a transaction and continue until the effective date of the implementing agreement. UTU at 8. It asserts that employees are entitled to this allowance in addition to receiving payments during a protective period of up to six years.

RLEA urges that it would be improper to equate a make-whole award with a displacement or dismissal allowance. It asserts that under Article I, section 4 of Mendocino Coast conditions, the make-whole allowance is in addition to the 6-year protective period, and that the employee is to be made whole for the full time during the pendency of the implementing agreement process. RLEA at 22.

GTI responds, pointing out that the Commission has already rejected rail labor's argument for make-whole provisions covering the period between the lease transaction and the implementing agreement's imposition, in addition to a 6 year protective period following resolution of the implementing agreement. GTI reply at 32 (see Oct. 26, 1989 Decision at 9-10). Citing the full language of Article I, section 4(d) of Mendocino Coast, GTI submits that, at most, the affected employees would be entitled to a 75-day period of make-whole protection tacked on to the 6

year protective period, commencing on the effective date of the implementing agreement. GTI reply at 35-36.

DISCUSSION AND CONCLUSIONS

In summary, we decline to vacate the Award of Arbitrator Harris. We conclude that the arbitrator had jurisdiction to formulate the implementing agreement. Furthermore, we conclude that no party has shown that Harris exceeded the authority vested in him or otherwise acted unlawfully with respect to any of the matters raised on appeal. Viewed individually or collectively, the matters appealed do not require us to vacate the Award. Finally, we conclude that the implementing agreement as a whole is a reasonable and equitable accommodation of the various conflicting and competing interests necessary to permit the consummation of the authorized transactions. Accordingly, we decline to vacate the Harris Award and require the parties to commence its implementation pursuant to its terms.

1. Preliminary Matters, Determination of Jurisdiction and Scope of Review

a. Preliminary Matters

Prior to addressing the issues set forth above there is one preliminary issue that must be resolved. In its reply brief RLEA raised the issue that ST and the lessor carriers are a single corporate entity and alter egos, and that the transactions were a sham to evade GTI's obligations under the lessors' CBAs (RLEA reply, p. 14). As relief RLEA asks for an order forbidding any changes in the lessors' CBAs (RLEA reply, p. 15). GTI has moved to strike this portion of RLEA's reply (and, alternatively, for an opportunity to reply further). The question of the carriers' status as a single entity was resolved when we imposed extraordinary labor conditions on the transactions in our February, 1988 decision. That decision treated all of the involved carriers as participating in a single corporate transaction for labor protection purposes. Likewise, the question of whether the transaction was a sham was previously resolved in our January 10, 1989 decision, declining to revoke the exemptions at issue. Nothing has been presented in RLEA's pleadings that warrants our reopening these questions. Although we have considered the material in RLEA's pleadings to which GTI's motion is addressed, GTI has not been prejudiced thereby. Accordingly, the motion to strike or permit further response is denied.

b. Jurisdictional Issues

RLEA has consistently argued that the Commission exceeded its jurisdiction in overturning the Kasher Award and that, therefore, the Commission and, in turn, Harris lacks jurisdiction to impose an implementing agreement. We, however, are convinced that we had jurisdiction both to review the Kasher Award (a proposition not previously contested by RLEA) and to set aside portions of it as exceeding the authority vested in the arbitrator by the ICA and the labor conditions we imposed on these transactions.

As to our jurisdiction to review and set aside portions of the Kasher Award, Arbitrator Harris correctly recognized that both his appointment and the appointment of Arbitrator Kasher in this proceeding was done under the authority of the ICA, particularly, 49 U.S.C. 11347 (Award at 39). As Harris stated (Award at 39-40):

> It is clear that the authority for the appointment came from the ICC determination