> might never be realized. Moreover, 49 U.S.C. § 11341(a) exempts from other law a carrier participating in a § 11343 transaction as necessary to carry out the transaction.

Dispatchers I, 4 I.C.C.2d at 1083 (footnote omitted).

At The Court Of Appeals. In Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989) (Carmen), the court of appeals, ruling that the section 11341(a) immunity provision did not empower the ICC to override a CBA, reversed the ICC's decisions in Carmen I and Dispatchers I and remanded the records to the ICC in order that the ICC might determine whether further proceedings were necessary. The ICC accepted the remand, and, on June 21, 1990, it served its decision on remand, CSX Corp.-Control-Chessie and Seaboard C.L.I., 6 I.C.C.2d 715 (1990) (Carmen II). CSX and NS, however, did not agree with the decision of the court of appeals; instead, they sought certiorari; and, on March 19, 1991, the Supreme Court issued its decision on certiorari, reversing the D.C. Circuit. Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991) (N&W).

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

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

The ICC indicated in Carmen II that the enactment of section 5(2)(f) in the Transportation Act of 1940 codified the legal framework that had been agreed upon by the negotiators of the WJPA in 1936, and set the stage for a 40-year era of labor peace

with regard to mergers and consolidations. Upon approving a post-1940 merger or consolidation proposed by two or more railroads, the ICC would impose WJPA-based protective conditions. Rail management and rail labor would then negotiate implementing agreements to permit smooth implementation of the transaction, and, in the event of impasse, arbitrators were empowered to modify CBAs when necessary to implement the transaction. Prior to 1936, these negotiations would have been conducted under the interminable RLA dispute resolution procedures applicable to major disputes, and deadlock might well have been the result. After 1940, the mechanism for an RLA bypass having been put in place, these negotiations would have been conducted under the WJPA, under comparable procedures negotiated in connection with the particular transaction, or under the comparable section 5(2)(f)-mandated procedures contained in the ICC's labor conditions. These various procedures, all of which were substantially the same and provided for mandatory binding arbitration, were designed to resolve covered disputes with a certain measure of dispatch and to overcome the obstacle of CBA provisions that might otherwise have prevented consummation of an approved transaction.

Carmen II indicates that the 40-year era of labor peace ushered in by the 1940 enactment of section 5(2)(f) ended about 1980 arguably due in part to a change mandated by the Railroad Revitalization and Regulatory Reform Act of 1976: the addition of the requirement that the ICC impose labor protection at least as protective of the interests of employees as the terms established under section 405 of the Rail Passenger Service Act (RPSA). This gave birth to Article I, section 2 of the New York Dock conditions which provide for the preservation of collective bargaining rights. Rail labor contended for a literal reading of Article I, section 2 so as to prevent any modifications of CBA provisions in approved consolidations except through resort to RLA procedures.[6] The carriers, on the other hand, responded with a reading of Article I, section 4 of the New York Dock conditions which would permit an arbitrator to change any provision of a CBA deemed an impediment to the approved consolidation. In Carmen I and Dispatchers I, the ICC applied the interpretation of Article

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

I, section 4 of New York Dock and the section 11341(a) immunity provision commonly associated with its 1983 DRGW decision and its 1985 Maine Central decision (hereinafter referred to collectively as the DRGW doctrine). The DRGW doctrine asserted that, as a result of section 11341(a), the ICC approval of a transaction operated automatically to override all laws, including the RLA, as necessary to carry out an approved transaction, and that CBAs conflicting with an approved transaction had to give way. Under the DRGW doctrine, it was understood that the Article I, section 4 binding arbitration rule trumped the Article I, section 2 "preservation of contracts" rule. It was further understood that, by virtue of section 11341(a), a New York Dock arbitrator acting under Article I, section 4 was authorized to override any term of a CBA that impeded the effectuation of a merger.

In Carmen II the ICC made three refinements to the DRGW doctrine. *First*, the ICC substituted section 11347, which provides for the imposition of labor protective conditions in connection with an approved transaction, for section 11341(a) as the authority for modifying CBAs while foreclosing resort to RLA remedies. *Second*, the ICC set forth a more balanced interpretation of Article I, section 2 of New York Dock. Article I, section 2, the ICC indicated, cannot realistically be interpreted as bearing its literal meaning, i.e., that CBAs shall be preserved without any qualification whatsoever. What Article I, section 2 means, the ICC found, is that contract rights shall be respected and not overridden unless necessary to permit an approved transaction to proceed.[7] *Third*, the ICC tempered what it had said in DRGW and Maine Central. It was still true, the ICC stated in Carmen II, that CBAs and the RLA had to yield to allow implementation of an approved transaction. However, section 11347, and the protective conditions imposed thereunder, only required CBAs and the RLA to yield to permit modifications of the type traditionally made by arbitrators under the WJPA and the ICC's conditions from 1940 to 1980; and section 11341(a) reinforced 11347 by requiring the RLA to yield so as not to block the sort of changes permitted under section 11347. The ICC did not attempt to define what changes should be considered to be necessary but stated in Carmen II that CBAs and the RLA should not be overridden simply to facilitate a transaction, but

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

should be required to yield only when and to the extent necessary to permit the approved transaction to proceed.

The ICC did not attempt, in Carmen II, to apply its section 11347 analysis to the facts of the two proceedings then before the ICC (and now before the Board). Rather, in recognition of the central role accorded negotiation and arbitration in the fashioning of an implementing agreement, these two proceedings were "remanded to the parties to continue the implementing process in accordance with Article I, section 4 of the New York Dock conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 757. The two outstanding arbitration awards were vacated, because the arbitrators in the two cases had "based their decisions on pronouncements [in DRGW and Maine Central] that the Carmen court found to be incorrect statements of the law and that we modify in this decision," Carmen II, 6 I.C.C.2d at 721.[8]

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

> We hold that, as necessary to carry out a transaction approved by the ICC, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our

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

> construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers.

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

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

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

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

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

> The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the ICC held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n. 2, *supra*.[9] It also might be true that "[t]he breadth

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[9] In its notes 2 and 3, the Supreme Court took note of (continued...)

> of the exemption [in § 11341(a)] is defined by the scope of the approved transaction . . . ." *ICC v. Locomotive Engineers*, *supra*, at 298 (STEVENS, J. concurring in judgment).[10] We express no view on these matters, as they are not before us here.

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

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

Comments Solicited. By decision served November 13, 1992, the ICC invited the parties to the Carmen case and the Dispatchers case, and other interested persons as well, to submit, with regard to any issues in these cases that remained open for reconsideration in light of the Supreme Court's N&W decision, comments and replies. In due course, comments and replies were submitted by CSX, BRC, NS, RLEA,[11] NRLC, UP, and Conrail.[12]

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[9](...continued)
Carmen II, and certain statements with respect to the interplay of sections 11341(a) and 11347. See N&W, 499 U.S. at 126 n.2 and at 128 n.3.

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

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

[12] NRLC is the acronym for the National Railway Labor Conference. UP is the acronym for Union Pacific Railroad Company
(continued...)

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

DISCUSSION AND CONCLUSIONS

Analytical Framework

United States Code. The analytical framework within which these proceedings arose and under which they must be decided rests primarily upon 49 U.S.C. 11343, 11344, 11347, and 11341.[13]

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

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

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[12](...continued)
and Missouri Pacific Railroad Company. Conrail is the acronym for Consolidated Rail Corporation.

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

Control transaction were filed with the ICC by CSX Corporation and NS Corporation, respectively; the ICC approved such transactions upon finding that each was consistent with the public interest, CSX Control, 363 I.C.C. at 597-98, and NS Control, 366 I.C.C. at 249; and, because each such transaction involved the control of at least two Class I railroads, the ICC considered, with respect to each transaction, the interests of the carrier employees affected by the proposed transaction, CSX Control, 363 I.C.C. at 588-92, and NS Control, 366 I.C.C. at 229-31.

Section 11347 directed the ICC, when approving a rail carrier transaction under 49 U.S.C. 11344, to require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who were affected by the transaction as "the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." In response to the addition, in 1976, of the reference to the terms established under section 565 of title 45 (i.e., the terms established under section 405 of the RPSA), the ICC developed the New York Dock[14] conditions which were imposed upon the primary transactions at issue in CSX Control and NS Control. CSX Control, 363 I.C.C. at 604; NS Control, 366 I.C.C. at 253.

Section 11341(a) provided that a carrier, corporation, or person participating in a transaction approved by the ICC under 49 U.S.C. 11344 was "exempt from the antitrust laws *and from all other law*, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction" (emphasis added). Section 11341(a) was variously referred to as the immunity provision, the exemption provision, and the override provision (because it "immunized" a rail carrier from laws that might otherwise have been applicable, it "exempted" that carrier from the requirements of such laws, and it effected an "override" of such laws). In the 1991 N&W decision, the Supreme Court held that the immunity provision reached *both* the Railway Labor Act itself (because the RLA was a "law") *and also* CBAs entered into under the RLA (because immunity from a law implies immunity from the obligations imposed by that law). N&W, 499 U.S. at 133. The Court noted, however, that such immunity would apply only when *necessary* to carry out a properly *approved transaction*, and the Court emphasized "that neither the

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

conditions of approval, nor the standard for necessity, is before us today." N&W, 499 U.S. at 134.

New York Dock. The basic framework *both* for mitigating the labor impacts of consolidations *and also* for bypassing the drawn-out RLA procedures that would otherwise be applicable to particular transactions was created in the Washington Job Protection Agreement of 1936, was enacted into law by the Transportation Act of 1940,[15] and was carried into its present form in 1979 when the ICC issued the New York Dock conditions. That framework provides *both* substantive benefits for affected employees (dismissal allowances, displacement allowances, and the like) *and* a procedural mechanism (negotiation, if possible; arbitration, if necessary) for resolving disputes respecting implementation of authorized transactions. See New York Dock, 360 I.C.C. at 84-90.[16]

Most recently the Board affirmed the importance it places on negotiation first, and arbitration, if necessary, to arrive at implementing agreements in its recent decision in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998) (Conrail), slip op. at 126-27, where, at the request of various organizations representing employees, it expressly stated that "approval of this transaction does not indicate approval or

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

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

disapproval of any of the CBA overrides that applicants have argued are necessary to carry out the transaction; the arbitrators are free to make whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law."

Arbitration plays a central role in the process of implementing approved transactions under New York Dock. The New York Dock conditions do not prescribe, and they could not possibly prescribe, a one-size-fits-all standard respecting implementation of particular transactions. Instead, New York Dock prescribes a procedure (negotiation, if possible; arbitration, if necessary) for arriving at an implementing agreement respecting any particular transaction.[17] The New York Dock conditions do not themselves specify how and to what extent CBAs may be overridden by arbitrators in arriving at arbitrally imposed implementing agreements. The authority to do so derives from 49 U.S.C. 11341 as explained by the ICC in Carmen I and Dispatchers I and affirmed by the Supreme Court in N&W and from 49 U.S.C. 11347 as explained by the ICC in Carmen II.

Under the approach reflected by the ICC's decision in Carmen I and Dispatchers I, as affirmed by the Supreme Court in N&W, the scope of the arbitrator's authority to override CBA terms was said to be limited only by the scope of the approved transaction--with any obstacle to its accomplishment being overridden.[18] Under the alternative approach reflected by the

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[17] An implementing agreement is *either* an agreement negotiated by management and labor *or* an "agreement" imposed in an arbitration proceeding. The arbitrators' awards, in the absence of an agreement between the carriers and the representatives of the affected employees, constitute the implementing agreements specified under New York Dock and which we have required to be in effect before a transaction affecting employee rights can be consummated. Fox Valley & Western Ltd.--Exemption Acquisition and Operation-- Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company (Petition for Emergency Cease and Desist Order), Finance Docket No. 32035 (ICC served Aug. 26, 1993) (slip op. at 3).

[18] The immunity provision has been characterized as *self-executing*. This phrase has reference to the immunizing power of 49 U.S.C. 11341(a) vis-à-vis transactions directly related to and growing out of, or flowing from, a specifically authorized transaction. Because the immunity provision was self-executing,

(continued...)

ICC's Carmen II decision, the scope of the arbitrator's authority was defined in terms of the process as conducted by arbitrators during the period from 1940-1980. Carmen II, 6 I.C.C.2d at 740-45.[19] It was the potential conflict between these two approaches, which the Supreme Court recognized but expressly declined to resolve in N&W, 499 U.S. at 134, that gave rise to

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

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

the remand of these cases, and it is this issue that has remained unresolved to this date.[20]

The present proceedings arise out of implementing agreement arbitrations conducted under the auspices of Article I, section 4 of the New York Dock conditions. The procedural mechanism provided, like the procedural mechanism provided by the WJPA from which section 4 was derived,[21] reflects the understanding that CBA modifications necessary to permit implementation of transactions approved by the ICC under 49 U.S.C. 11344 could not be relegated to the purposefully drawn-out procedures provided by the RLA.[22] The RLA seeks to preserve labor peace by preserving the CBA status quo, and it was recognized that, in many instances, preservation of the CBA status quo would effectively thwart full implementation of rail carrier transactions approved by the ICC under 49 U.S.C. 11344.

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

> Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the *selection of forces* from all employees involved on a basis accepted as appropriate for application in the particular case and any *assignment of employees* made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at

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

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

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

> the end of thirty (30) days [i.e., 30 days after the railroad contemplating a transaction has provided written notice of such intended transaction] there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures: (1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Meditation Board shall immediately appoint a referee. (2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence. (3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

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

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

> Negotiators and arbitrators may well have followed the rubric of "selection of forces and assignment of employees" when administering the provisions governing the effect of consolidations. The scope of these terms, however, is not well defined. It must extend beyond the mere mechanism for selection or assignment of employees, and include the modification of certain important contractual rights. *Southern* [Southern Ry. Co.--Control--Central of Georgia Ry. Co., 331 I.C.C.

> 151 (1967)] and Bernstein [an arbitrator cited in Carmen II] make it clear that work was transferred from one railroad to another despite contrary contractual provisions in CBAs. It was also obvious that contractual seniority rights were modified in order to consolidate rosters of the two separate, combining railroads. See Southern at 165, 185. These rosters may have been "dove-tailed" or another method [may have been] agreed upon or decreed by an arbitrator. We can assume that the reassignment of employees would have regularly taken place despite CBA prohibitions. These actions are the sort that would be necessary to permit almost any consolidation of the functions of two merging railroads. The WJPA procedures make it possible.

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

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

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

Approved Transaction. Section 11343(a) provided that certain transactions could be carried out only with the approval and authorization of the ICC; section 11344(c) provided that the ICC should approve and authorize such transactions only if they were consistent with the public interest; section 11347 directed the ICC, when approving such transactions, to require the rail carrier to provide a fair arrangement protective of the interests of its employees; and section 11341(a) provided that a rail carrier participating in an approved transaction was exempt from otherwise applicable law, as necessary to carry out the

transaction. But none of these provisions defined the scope of the transaction approved by the ICC under section 11344(c) and thereby immunized against other law under section 11341(a).

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

In our view, "approved" transactions include those specifically authorized by the ICC, such as the various proposals we have approved which led to the formation of CSXT and those that are directly related to and grow out of, or flow from, such a specifically authorized transaction. The instant transaction, the transfer of the dispatching functions, falls into the latter category. The existence of this second category of transactions is implicit in the definition of the term "transaction" in the standard labor protective conditions: "[A]ny action taken pursuant to authorizations of the ICC on which these provisions have been imposed." *New York Dock*, 360 I.C.C. at 84, CSX 23, 8 I.C.C.2d at 720-21 (footnote and internal cross-references omitted). The omitted footnote cites New York Dock, 360 I.C.C. at 70: "[T]he broad definition [of 'transaction'] is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 *et seq.*, because the event actually affecting the employees might occur at a later date than the initial transaction, yet still pursuant to our approval (consolidation of employee rosters, et cetera)." In ATDA, 26 F.3d at 1165, the court, in affirming CSX 23, found reasonable the ICC's view that the term *approved transaction* "extends to subsidiary transactions that fulfill the purposes of the main control transaction"; the court added that "[t]he ICC's elastic construction of 'approved transaction' in this case mirrors [the] settled understanding [of the term]." Moreover, it is now settled that the mere passage of time does not prevent a finding of nexus between the proposed

changes and the initially approved transaction. UTU, 108 F.3d at 1430-31.

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

Although, as we have noted above, the ICC in Carmen II did not attempt to define what would constitute necessity in such cases, the D.C. Circuit Court of Appeals has subsequently held, and we have accepted that holding, that a CBA override can be effected only where there are transportation benefits of the underlying transaction; it cannot be effected if the only benefit of the modification derives from the CBA modification itself. RLEA, 987 F.2d at 814-15. "[W]e do not see how the agency can be said to have shown the 'necessity' for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease)." RLEA, 987 F.2d at 815. "[T]he benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain." ATDA, 26 F.3d at 1164. See also UTU, 108 F.3d at 1431.

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

As stated by the ICC in its Fox Valley decision (slip op. at 3):

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

Rights, Privileges, and Benefits. The necessity standard of 49 U.S.C. 11341(a) and 11347 provides one check upon the CBA modification authority entrusted to arbitrators under Article I, section 4 of the New York Dock conditions. The rights, privileges, and benefits standard of Article I, section 2 of New York Dock[23] provides another check upon that authority. That

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[23] Article I, section 2 of the New York Dock conditions, 360 I.C.C. at 84, provides: "The rates of pay, rules, working

(continued...)

provision states that certain rights, privileges, and benefits afforded employees under pre-transaction CBAs must be preserved. RLEA, 987 F.2d at 814 (noting, however, that not every word of every CBA establishes a right, privilege, or benefit); ATDA, 26 F.3d at 1163 (indicating that a CBA "scope" provision creates no rights, privileges, or benefits).

Although it was a hotly contested issue at the time these proceedings were remanded, the definition of rights, privileges and benefits has now been established by an ICC decision, which we have adopted and applied,[24] and by the affirmance of that ICC decision by the D.C. Circuit. In CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27) (ICC served Dec. 7, 1995) (CSX 27) (slip op. at 14-16), the ICC defined the rights, privileges, and benefits that cannot be overridden to include such things as group life insurance, hospitalization and medical care, free transportation, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation. Protected rights, privileges, and benefits do not embrace scope rules and seniority provisions. Such rules and provisions, the ICC noted, have historically been changed in arbitration conducted under Article I, section 4 of the New York Dock conditions, or under the comparable provisions of the predecessor labor protective conditions imposed prior to 1979. The rights, privileges, and benefits that must be preserved, the ICC added, do not include pre-transaction union representation arrangements.[25] Aff'd, UTU.

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[23](...continued)
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."

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

[25] The ICC pointed out, however, that once a transaction
(continued...)

In explaining our denial of a petition to stay the ICC's CSX 27 decision, we indicated that rates of pay, rules, and working conditions are not rights, privileges, or benefits that must be preserved.[26] "[I]t is now well established that changes in rates of pay, rules, and working conditions can be required by this agency or by arbitrators acting under New York Dock. Carriers may invoke New York Dock to modify such CBA terms when modification is necessary to obtain the benefits of a transaction that was approved as being in the public interest." CSX 27 Stay Decision, slip op. at 3.

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

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

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

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

> scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions."

Id.

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

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

Id.

Takings. An argument has been advanced that any CBA override effected under Article I, section 4 of the New York Dock conditions amounts to a "taking" of private property in violation of the Fifth Amendment. That question cannot be resolved by a New York Dock arbitrator, it cannot be resolved by an administrative agency reviewing an award issued by the arbitrator, and it cannot be resolved even by an appellate court reviewing a decision entered by the administrative agency. See RLEA, 987 F.2d at 815-16 (takings claims can be adjudicated only in the court of Federal Claims or, in certain limited circumstances, in a District court).[27]

Whether Section 11341 Is Limited by Section 11347. As discussed, in 1991 the Supreme Court left open the question

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

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

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

The Board continues to be committed to a process of negotiation first and arbitration, if necessary, to arrive at implementing agreements. See Conrail, where the Board in response to requests by rail labor made clear that the approval of the transaction does not indicate approval or disapproval of CBA overrides that have been argued to be necessary to carry out the transaction. Decision No. 89, slip op. at 126-127.

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

In 1987 the arbitration committee directed CSX and BRC to adopt the implementing agreement that had been proposed by CSX,

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

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

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

In explaining our denial of a petition to stay the ICC's CSX 27 decision, we indicated that rates of pay, rules, and working conditions are not rights, privileges, or benefits that must be preserved.[26] "[I]t is now well established that changes in rates of pay, rules, and working conditions can be required by this agency or by arbitrators acting under New York Dock. Carriers may invoke New York Dock to modify such CBA terms when modification is necessary to obtain the benefits of a transaction that was approved as being in the public interest." CSX 27 Stay Decision, slip op. at 3.

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

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

The Board continues to be committed to a process of negotiation first and arbitration, if necessary, to arrive at implementing agreements. See Conrail, where the Board in response to requests by rail labor made clear that the approval of the transaction does not indicate approval or disapproval of CBA overrides that have been argued to be necessary to carry out the transaction. Decision No. 89, slip op. at 126-127.

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

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

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

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

therefore urges that we simply reinstate, without further ado, the ICC's Carmen I decision.

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

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

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

> We find that the applicants' estimate of employee impacts is reasonable. What dislocations there are promise to be short term. It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee

> displacements. However, no wholesale disruption of the carriers' work force should occur. Only at points where the basically end-to-end systems meet does it appear that perceptible dislocations will result. Those common point locations are clearly identified. We believe that the standard conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically.

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

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

We agree with the ICC and the D.C. Circuit and adopt the view that the approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to,

and fulfill the purposes of, the principal transaction.[28] CSX 23, 8 I.C.C.2d at 722. As long as there is "a reasonably direct causal connection between the [principal] transaction and the operational changes sought to be implemented," such operational changes are embraced within the principal transaction. CSX 23, 8 I.C.C.2d at 724 n.14. The 1986 Waycross/Raceland transfer meets these tests. It is directly related to the 1980 CSX Control principal transaction (common control of C&O and SCL allowed CSX to consolidate the work performed at Waycross and Raceland) and it fulfills the purposes of the principal transaction (one such purpose was the achievement of efficiencies made possible by common control). We therefore conclude that the 1986 Waycross/Raceland transfer was embraced within the principal transaction approved in the 1980 CSX Control decision.

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

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

accordance with the standards set forth in this decision."[29] Carmen II, 6 I.C.C.2d at 756-57.

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

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

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

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

affirmed by the Supreme Court in N&W and as satisfying the alternative and more limited approach adopted in Carmen II which we are reaffirming here.

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

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

In 1987 the arbitration committee adopted, with one minor exception, the implementing agreement that had been proposed by NS, Harris Award, at 17-18, and in 1988 the ICC affirmed, Dispatchers I, 4 I.C.C.2d at 1092. In 1989 the D.C. Circuit reversed the ICC's decision and remanded to the ICC in order that the ICC might determine whether further proceedings were necessary. Carmen, 880 F.2d at 574. In 1990 the ICC reversed and vacated the Harris Award, effectively remanding the proceeding to the parties to continue the implementing process in accordance with Article I, section 4 of the New York Dock conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[] in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 757. Finally, in 1991, the Supreme Court reversed the D.C. Circuit's Carmen decision and remanded to the D.C. Circuit for further proceedings, N&W, 499 U.S. at 134, and the D.C. Circuit remanded to the ICC for reconsideration in light of N&W.

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

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

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

In the Finance Docket No. 29430 (Sub-No. 20) proceeding, the focus of the necessity issue has been the pre-1986 CBA that covered ATDA-represented supervisors at Roanoke. The Roanoke/Atlanta transfer proposed by NS in 1986 effected a CBA override by leaving the CBA in Roanoke while transferring the "work function" previously performed thereunder to CBA-free Atlanta. Dispatchers I, 4 I.C.C.2d at 1086. In 1987 the arbitration committee determined that an override of the Roanoke CBA was necessary. Harris Award, at 11-15. In 1988 the ICC, relying heavily on the necessity standard announced in Maine Central, affirmed. Dispatchers I, 4 I.C.C.2d at 1086-87.[30] Two years later the ICC changed course. By order entered June 21, 1990, the ICC reversed and vacated the Harris Award, effectively remanding the proceeding to the parties. Carmen II, 6 I.C.C.2d at 775, ordering paragraph 2. The proceeding was remanded to allow NS and ATDA to continue the implementing process in accordance with Article I, section 4 of the New York Dock

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

conditions "through further negotiations or arbitration, if necessary, to reach [a] new implementing agreement[] in accordance with the standards set forth in this decision." Carmen II, 6 I.C.C.2d at 756-57. Eight years have now passed, but this proceeding appears to be today in essentially the same posture it was in on June 21, 1990. A new implementing agreement has not yet been reached and so far as we have been advised, neither party has attempted to compel further arbitration.[11]

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

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

It is ordered:

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

2. In Finance Docket No. 28905 (Sub-No. 22), the order entered by the ICC in its decision in Carmen I affirming in part and reversing and vacating in part the LaRocco Award is affirmed as complying with the standards established by the ICC in Carmen II and by various intervening decisions of the ICC, the United States Court of Appeals for the D.C. Circuit, and this Board.

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

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

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

SERVICE DATE
OCT 25 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30,000 (Sub-No. 8)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY-BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 29)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY-TRACKAGE RIGHTS-MISSOURI PACIFIC RAILROAD COMPANY-BETWEEN KANSAS CITY, MO AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: December 19, 1983

By petition filed May 3, 1983, the Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) seek reconsideration of our decision served May 18, 1983, denying BLE's petition for clarification in these proceedings. Replies have been filed by Missouri-Kansas-Texas Railroad Company (MKT), Denver and Rio Grande Western Railroad Company (DRGW), and jointly by Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP). UTU has petitioned for leave to file a reply to the replies.

PROCEDURAL MATTER

Our Rules of Practice do not permit a reply to a reply, 49 C.F.R. 1104.13(c). UTU, however, contends that its tendered reply is necessary for a clear presentation of the issues. As the reply does not broaden the scope of UTU's petition, we will accept the reply for filing so that we can fully address the issues.

EMPLOYEES' EXHIBIT 17
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Finance Docket No. 30,000 (Sub-No. 18) et al.

BACKGROUND

By decision served October 20, 1982, the Commission approved the consolidation of UP and MP under the common control of Union Pacific Corporation and Pacific Rail System, Inc. Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982). Several railroads, including DRGW and MKT, opposed the consolidation and filed responsive applications for the imposition of trackage rights conditions. BLE, UTU, and various other railway labor organizations opposed the consolidation and actively participated in the consolidation and responsive trackage rights applications proceedings.

As conditions to approval of the consolidation we approved DRGW's application for trackage rights over MP's line between Pueblo, CO and Kansas City, MO, and MKT's applications for trackage rights over UP and MP lines extending between Kansas City, KS, Topeka, KS, Omaha, NE, and Lincoln, NE. Pursuant to 49 U.S.C. 11343-4, we approved the proposed trackage rights agreements submitted by DRGW and MKT in their responsive applications, subject to determination of fair compensation for use of the trackage rights and further subject to our usual employee protective conditions.1/ DRGW's proposed agreement specified that DRGW could, at its option, perform trackage rights operations using its own crews. MKT, pursuant to its proposed agreement, would use its own crews in performing its operations.

After consummation of the consolidation, DRGW and MKT began performing the approved trackage rights operations. A dispute then arose between the involved railroads and BLE over whether the trackage rights tenants shall perform operations over UP's

1/ Norfolk and Western Ry. Co. — Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in [illegible] — Lease and Operate, 360 I.C.C. 653, 664 [illegible] (N&W conditions).

EMPLOYEES' EXHIBIT 17
PAGE 2

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 DRGW and WKT to operate over MP lines using their own crews. BLE and TCU now seek reconsideration of our decision denying that request for relief.

In its petition for reconsideration, 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) 45 U.S.C. '5', et seq. BLE further asserts that trackage rights operations by DRGW and WKT using their own crews constitute a unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation.2/

TCU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements. TCU states in the alternative that if the Commission has jurisdiction it failed to make necessary findings supporting overriding the RLA or showing how the policies of the RLA were accommodated with those of the Interstate Commerce Act.

In their replies, DRGW, WKT, and TP-MP assert that the arguments of BLE and TCU are legally incorrect, that petitioners have failed to satisfy the procedural requirements for reopening

2/ The consolidation is subject to the usual labor protective conditions as set forth in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. [illegible] (1979) (the New York Dock conditions).

a proceeding, and that the allegations of violations of the RLA and collective bargaining agreements were not raised during the course of the proceedings on the consolidation and the responsive trackage rights applications.

TRT, in its response to the railroads' pleadings, 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, operations using the tenants' crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. TRT also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such a determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the MP-SP and New York Dock conditions.

DISCUSSION AND CONCLUSIONS

The various arguments of BRT and TRT are all based essentially on the assertion that the proposed 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 MP-SP conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have the right

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to participate in the trackage rights employee 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.

Jurisdiction. Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. 11347 to exempt a transaction from the requirements of the RLA.

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. See Brotherhood of Loc. Eng. v. Chicago & North Western Tr. Co., 314 F.2d 424, 432 (8th Cir. 1963), cert. denied 377 U.S. 918 (1965).

Contrary to UTU's arguments, the 4-R Act[1] did not limit our authority to exempt a transaction from the RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. These standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. 11347.

[1] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

As the terms standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of these 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 11347 preserve conditions and agreements in the context of the authorized transaction.

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 preempted. 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 discussion of this point in Brotherhood of Loc. Eng., supra, at 470-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act.

Supporting Findings. Petitioners argue that even if the Commission has jurisdiction to exempt the transactions from the REA, we failed to do so in this proceeding. Further, they argue that we have not attempted to reconcile the decision with the policies of the REA nor made any findings supporting an exemption from the REA.

The terms of section "j" immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints. See Brotherhood of Loc. Eng. supra, citing Chicago, St. P., M. & O. Ry. Lease, 295 I.C.C. 696, at 702 (1958).

In evaluating a transaction under the criteria of 49 U.S.C. "j44, we must consider the policies of statutes other than the Interstate Commerce Act to the extent that these policies are relevant to the determination of whether a proposal is consistent with the public interest. For example, the public interest evaluation must include consideration of the policies of the antitrust laws. See McLean Trucking Co. v. United States, 32' U.S. 67, 87 ('944).

While the RLA, like the antitrust laws, embodies certain public policy considerations, the Interstate Commerce Act also specifies that the interests of affected employees must be considered. In these proceedings we gave full consideration to the impact of the consolidation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22.

The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

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Labor Conditions. Petitioners contend that operations by the trackage rights tenants, using their own crews, over TP-WP lines would constitute a unilateral change in working conditions for TP-WP employees in violation of the TP-WP and New York Dock conditions. They further contend that these crew assignment disputes are labor issues in which the Commission should not be involved. As previously discussed, the standard labor conditions do not freeze working conditions which must be altered to implement an approved transaction. The record in these proceedings strongly supports the conclusion that the approved trackage rights operations are not inconsistent with the terms of any collective bargaining agreements or of the imposed labor conditions.

BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the responsive trackage rights proposals would violate any applicable labor agreements. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads.

The responsive trackage rights applications in these proceedings were filed in January '98', and in accordance with regulations, included proposed trackage rights agreements which specified the operating conditions for the trackage rights. The agreement in UPC's application specified: "UPC, with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed Agreement Section 7, UPC trackage rights application. Finance

Docket No. 30,000 (Sub-No. 25) (WKT-26). DRGW's application provided: "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars on points on or over the Joint Track ...." Proposed agreement Section 6(a)(3), DRGW trackage rights application, Finance Docket No. 30,000 (Sub-No. '8) (DRGW-8). Therefore, in January '88, over a month before the commencement of hearings, all parties had notice that the responsive trackage rights applicants sought authority to perform operations using their own crews.

On February 20, '88, DRGW and WKT filed their verified statements in support of their responsive applications. These statements further make clear the position of these carriers that, if their applications were approved, they would have the right to conduct trackage rights operations using their own crews. For example, DRGW's evidence stated: "If our trackage rights applications are granted, both over UP/ and MP, we anticipate that a fewer number of employees will be displaced, or a reduction of '-5 jobs as opposed to 750 jobs if these applications are not granted." Verified Statement of A.E. Nance, at '5. WKT's evidence stated: "The projected position impacts shown on Exhibit A [to the trackage rights applications] reflect our determination of the number of positions that would be created, eliminated or transferred, or the other effects of such actions due to the acquisition of trackage rights. Our determinations were based primarily on the essential provisions of the applicable labor agreements and consultation with other carrier officers." Verified Statement of Harold N. Hacker, at

1/ The application for trackage rights over the Western Pacific Railroad Company was subsequently withdrawn.

2. These verified statements clearly demonstrate the intent of MKT and DRGW to operate using their own crews. The assessments of labor impacts make no mention of any possibility of UP-MP employees having any right to perform the proposed operations.

During the course of hearings in these proceedings, DRGW and MKT witnesses Nance and Zacker were cross-examined on the testimony in their verified statements. No labor party cross-examined Mr. Zacker. See Transcript, Finance Docket No. 30,000, Bifurcated Hearing, June 27, '80', at 3398-3417. Thus, Mr. Zacker's testimony regarding labor impact on MKT employees as a result of approval of the proposed trackage rights operations stands in the record without qualification.

Mr. Nance was cross-examined by various parties, including TCU. Under cross-examination by counsel for UP-MP, Mr. Nance testified that DRGW was willing to negotiate with UP-MP regarding whose crews would perform operations. Transcript, Finance Docket No. 30,000, June 27, '80', at 3432-3. He testified that "as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want." at 3437. Also see at 3443-50. Mr. Nance's testimony clearly states that the decision whether to use UP-MP or DRGW crews would be a matter solely within the discretion of the managements of the railroads. At no point does he indicate that UP-MP employees would have any right to participate in the decision-making process.

Following cross-examination by applicants, the labor parties had the opportunity to cross-examine Mr. Nance. TCU did not question him. Counsel for TCU's cross-examination dealt exclusively with Mr. Nance's projection of the impact of the

primary transactions on [illegible]'s employees. No questions were asked regarding [illegible]'s assessment of the labor impacts of its sought responsive trackage rights. Transcript at [illegible].

BLE and UTU submitted evidence and presented witnesses in opposition to the responsive trackage rights applications. Nowhere in these evidentiary presentations did the labor parties indicate that UP-MP employees would have a right to participate in the selection of which railroad's crews would perform trackage rights operations.

On July 7, '98', BLE submitted the verified statement of Edmund O. Becker in opposition to trackage rights over UP lines. Prepared Statement BLE-', entered into evidence as BLE-2(7S)-2. Mr. Becker noted that the trackage rights applicants intended to perform operations using their own crews. He testified that granting the responsive applications "would have an adverse effect on the engineers currently handling the traffic received from and delivered to the Missouri-Kansas-Texas Railroad at Kansas City [and] ... it would be safe to say that no less than two hundred-sixty (260) engineers would be affected due to the ripple effect ...." BLE-2(7S) 2, at 4. The verified statement does not suggest that UP engineers would have any protection from these adverse consequences under any collective bargaining agreements or the RLA. Further, on cross-examination, Mr. Becker did not indicate that UP engineers would have any right to participate in trackage rights work force selection. Rather, he testified that UP engineers would be adversely affected by approval of the responsive applications. Transcript, at '2,974-8', September '5, '98'.

In August [illegible] the parties identified as Various Labor Organizations, including TTT, submitted verified statements (VLO-3(78)-2). Representatives of TTT provided verified statements included in VLO-3(78)-2. None of those statements, however, contain testimony supporting the assertion that TT-MI employees would have any right to participate in the trackage rights crew selection process.

Finally, in their post-hearing briefs neither TTT nor BLE made any arguments or cite any evidence in support of the positions they now advocate. The brief for Various Labor Organizations, in its statement of facts, cites Mr. Jance's testimony regarding labor impact of the consolidation, with and without approval of DRGW's trackage rights application. Thus, the brief filed on behalf of TTT accepts labor impact evidence which assumes that trackage rights operations would be performed by the tenant using its own crews. BLE's brief does not discuss the labor impacts of the respective trackage rights. Rather, it merely made reference to BLE-2 (78)-2 on that point. Thus, the record contains no evidence to support the contention of TTT and BLE that TT-MI employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process.

Further, petitioners' argument regarding the alleged unilateral change of working conditions mischaracterizes the nature of the trackage rights operations. BLE and TTT have cited decisions such as St. Louis Southwestern Ry. Co. v. Brot. of Railroad Signalmen, 649 F.2d 98 (2d Cir. '80) for the proposition that railroads cannot transfer or contract out work which, under collective bargaining agreements and by custom, is

to be done by their own employees. These decisions are not relevant with respect to the trackage rights crew assignments in issue here. We approved the MKT and DRGW trackage rights applications to ameliorate certain anticompetitive impacts of the UP-MP consolidation. Those trackage rights operations will be conducted in competition with UP-MP operations. MKT and DRGW will be handling traffic for their own accounts not for UP-MP. UP-MP has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation.

BLE and UTU both contend that our decision denying BLE's petition for clarification is inconsistent with our general policy of not injecting the Commission into labor disputes. In support, petitioners cite Finance Docket No. 28046, Illinois Central Gulf R. Co.-Trackage Rights-Over Chicago & E.M. Ry. Co. (not printed), served February 22, 1977 and Finance Docket No. 30138, Cairo Terminal Railroad Co.-Trackage Rights Exemption-Illinois C.G. R. Co. (not printed), served May 17, 1983.

In Illinois Central Gulf, the Commission approved a trackage rights agreement which included a provision that the trackage rights tenant would perform operations using its own crews. UTU filed a petition for reconsideration asserting that the Commission had no authority to impose a crew assignment condition and requesting that the condition be removed. The Commission, Division 3, dismissed the petition for reconsideration finding that the crew assignment provision of the agreement was not a condition imposed by the Commission pursuant to the section of the Interstate Commerce Act now codified as 49 U.S.C. 11347. Rather, the provision was a negotiated agreement between the

railroads. The provision was approved (and thus immunized it from all other laws) because it would have no adverse transportation effects. The Division noted that the Review Board, in approving the trackage rights, declined jurisdiction over all other subject matters and the Division concluded that the Commission has no jurisdiction to impose or to remove crew assignment provisions.

UTU and BLE ask us for the same relief the Commission denied in Illinois Central Gulf. The Commission has the power to approve (and to immunize from other laws) crew assignment provisions in trackage rights agreements. These provisions are not labor conditions and cannot be removed or modified in the manner applicable to labor conditions.

In Cairo Terminal, the involved railroads sought an exemption for a proposed trackage rights agreement. The agreement contained a provision regarding which carrier's employees would perform the trackage rights operations. UTU protested the exemption request and requested that the Commission expressly disclaim jurisdiction over the crew assignment provision. UTU's argument was not considered because the Commission's action in that proceeding was based on 49 U.S.C. 10505, not on 49 U.S.C. 11344 relating to approval of trackage rights agreements. The decision noted, however, that "crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction." Slip op., at 8.

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Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement. To the extent employees are adversely affected by the transaction they are entitled to benefits under the conditions imposed pursuant to 49 U.S.C. 11347.

Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

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

It is ordered:

1. The petitions of BRC and TRT for reconsideration are denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

Agatha L. Mergenovich
Secretary

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30532

MAINE CENTRAL RAILROAD COMPANY, GEORGIA PACIFIC CORPORATION, CANADIAN PACIFIC LTD. AND SPRINGFIELD TERMINAL RAILWAY COMPANY-EXEMPTION FROM 49 U.S.C. 11342 and 11343

Decided: August 22, 1985

By petition filed April 10, 1985, the United Transportation Union (UTU) seeks reconsideration of our decision served March 20, 1985. That decision granted the petition of Maine Central Railroad Company (MEC), Georgia Pacific Corporation (GP), Canadian Pacific Ltd. (CP), and Springfield Terminal Railway Company (ST) for exemption under 49 U.S.C. 10505 from the provisions of 49 U.S.C. 11342 and 11343(a)(2). MEC replied to the petition. We affirm our prior decision.

Under the exempted transactions, MEC will lease to GP four specific lines of railroad near Woodland, ME. GP has contracted with ST to operate and maintain the lines. ST will act as the switching carrier at Woodland and CP will be the initial line haul carrier for GP's Woodland traffic moving beyond Calais, ME. GP may route its traffic for the account of either MEC or CP, but MEC and CP have agreed that CP will interline all of the Woodland traffic at Millitown Junction and haul it over a northwestern route. Thus GP's Woodland traffic will no longer move southwest over MEC's Calais Branch, but MEC and CP will continue to compete for GP's traffic.

In granting the leasing and pooling exemptions, the Commission found that regulation was not necessary to carry out the rail transportation policy because, inter alia, implementation would result in more responsive transportation of Woodland traffic and more efficient rail operations. The transaction was found to be of limited scope because the lease and operation involved only approximately 12 miles of track and the pooling of a single shipper's traffic. The Commission found that there would be no abuse of market power because of alternative truck transportation available to shippers on the Calais Branch, and noted that no shippers opposed the petition.

UTU urges reconsideration and revocation of the exemption because the corporate entities are involved in a "shell game" to enable Guilford Transportation Industries, Inc. (GTI)[1] to lower its operating costs by reducing employee obligations. UTU states that the wages of ST employees are lower than those of MEC employees, and the ST labor agreements are less restrictive than agreements involving MEC employees. Furthermore, the transaction would enable GP, the largest shipper, to have its traffic handled by ST and eventually MEC operations over the Calais Branch would be abandoned.

UTU also believes that the Commission erred in imposing only the conditions for the protection of railway employees in Mendocino Coast Ry., Inc. - Lease and Operate, 360 I.C.C. 653 (1980)(Mendocino). These conditions were imposed on the section 11343 transactions, but not in connection with the pooling arrangement.

1/ MEC is a wholly owned subsidiary of GTI. ST is a subsidiary of Boston & Maine Corporation, another wholly-owned subsidiary of GTI.

UTU argues that this is an unusual transaction requiring imposition of the conditions in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)(New York Dock) on all transactions approved in this proceeding. It claims that the transactions are unusual because of severe employment disruption and diversion of traffic from the line.

UTU states further that MEC is a party to the Washington Job Protection Agreement (WJPA), which requires carriers to give advance notice and negotiate the selection of forces when they unify, pool or consolidate their previously separate facilities or operations. Imposing Mendocino, UTU argues, authorizes the carriers to deny employees their statutory and contractual WJPA notice and negotiation rights. UTU states that the New York Dock conditions would restore employees' notice and negotiation rights.

MEC argues that reconsideration and revocation are not appropriate, because UTU has not shown that regulation is required to carry out the rail transportation policy, 49 U.S.C. 10101a as required by 49 U.S.C. 10505(d), or that the Commission erred in its findings concerning limited scope and market power. MEC argues that even if the purpose of the transaction was to lower GTI's operating costs, this is a proper purpose, because one of the principal goals of the Staggers Rail Act of 1980 (Staggers Act) was to encourage railroads to earn adequate revenues. MEC contends however, that the main reason for the transaction was to satisfy the shipper, GP.

MEC states further that abandonment of the Calais Branch is a matter distinct from the transactions at Woodland. MEC has neither abandoned nor filed to abandon the Calais Branch.

MEC agrees that there is a difference in preconsummation requirements between Mendocino and WJPA and New York Dock. It states that the appropriateness of the Mendocino conditions for lease transactions has been upheld in court. Railway Labor Executives' Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982) RLEA. MEC further disputes UTU's characterization of the transaction as an unusual one requiring greater protection than the Mendocino conditions. As indicated in UTU's own statement, only 5 employees will be affected.

Finally, MEC argues that UTU has not shown that Mendocino results in the impairment of any collective bargaining agreement. Citing UTU's own statement, MEC states that Mendocino itself requires the preservation of all rights under these agreements.

DISCUSSION AND CONCLUSIONS

There are two issues that are raised in this appeal that we need to resolve: (i) whether it was proper to grant the exemption and impose the Mendocino conditions; and (ii) the effect that our imposition of employee protective conditions has on other rail labor agreements and laws.

We determined, in our prior decision, that regulation was not necessary to carry out the rail transportation policy, that the transaction was of limited scope, and that there was no potential for the abuse of market power. While UTU has not specifically directed its appeal to any one of these findings, the appeal appears to bear most directly on the rail policy finding.

UTU is concerned that this transaction may adversely affect traffic over the Calais Branch and eventually cause that line to be abandoned. There is no evidence of harm to the Calais Branch, nor is there a pending abandonment application. In addition, if MEC wanted to abandon this line, it would first have to comply with 49 U.S.C. 10903-10906, and need approval from this agency.

Further, it is appropriate for a railroad to take steps to reduce its operating costs by directing traffic over a more efficient, less costly route. Reducing costs complies with rail transportation policy by fostering sound economic conditions in transportation [49 U.S.C. 10101a(5)] and encouraging efficient management [49 U.S.C. 10101a(10)].

In addition, the rail transportation policy does not require a carrier to route traffic over a particular line to prevent abandonment or to maintain jobs. Rather than contravening the rail transportation policy, this exemption promotes its goals by minimizing the need for Federal regulatory control over the rail system, expediting regulatory decisions, and reducing barriers to entry, in addition to those previously noted. Rail transportation policy does require that operating economics and efficiencies not be accomplished solely at the expense of rail labor. However, that objective will be met by our imposition of labor protective conditions if, as labor fears, MEC applies for authority to abandon the Calais Branch at some future date.

UTU's petition does not challenge the limited scope or lack of market power findings. We therefore affirm our prior finding that exemption is warranted here.

We also affirm the imposition of the Mendocino conditions for protection of employees affected by this lease transaction. Under 49 U.S.C. 10505 (g)(2), the Commission may not exercise its authority under section 10505 to relieve a carrier of its obligation to protect the interests of employees as required by 49 U.S.C. Subtitle IV. In this case, where the leasing by one carrier of another carrier's property was exempted from the requirements of 49 U.S.C. 11343(a)(2), et seq., labor protection is required by 49 U.S.C. 11347.2/ It is well settled that the Mendocino conditions are appropriate for lease transactions. See RLEA, supra, affirming the Commission's decision in Mendocino.

In RLEA, the Court of Appeals for the District of Columbia Circuit was called upon to determine the effect on transactions involving leases and trackage rights of Section 11347 (enacted in the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act)). To the extent pertinent here, section 11347 requires that, in transactions approved under sections 11344-46 (see n. 2, supra), the Commission impose employee protective conditions "at least as protective of the interests of employees as the terms imposed [before the 4R Act]." The critical question thus becomes the nature of the protective conditions approved by the Commission before 1976 in trackage rights and lease cases.3/

2/ We are not required by statute to impose labor protective conditions on pooling arrangements, and, as previously found, the record does not demonstrate a need for imposition here. Section 11347 mandates labor protection on transactions approved under sections 11344 (referring to the transactions under 11343), 11345 and 11346. Pooling is governed by section 11342.

3/ We have previously determined the appropriate level of labor protection for mergers and consolidations in New York Dock, supra. Those conditions are sought by UTU here. The protections under New York Dock and Mendocino are for the most part identical. The principal difference is that Mendocino does not contain the equivalent of section 4 of the WJPA (requiring 90 days notice prior to a coordination -- Mendocino requires 20 days notice) or section 5 of WPJA (no coordination could be effective until carrier and employees had reached an implementing agreement). RLEA, 675 F.2d at 1250.

The court reviewed the history of job protective arrangements, commencing with the 1936 WJPA (675 F.2d at 1250-51), and found that the Commission had customarily imposed conditions in lease and trackage cases that differed from those imposed in mergers and consolidations. 675 F.2d at 1251. The principal differences were the absence of the 90-day notice and the implementing agreement requirement (sections 4 and 5 of WJPA, n. 3 supra) in the conditions imposed in lease and trackage rights cases (id.).4/ The court found that Congress did not intend "to alter well-established Commission practice with the requirement that the Commission impose the [New York Dock-type] conditions in trackage rights cases." (675 F.2d at 1254-56). Accordingly, the Commission's Mendocino decision, "reflect[ing] an accurate interpretation of the 1976 amendment" (675 F.2d at 1256) was affirmed.

The court recognized that the protection it was approving represented the minimum protection required by Section 11347 and particular lease transactions "may threaten impacts requiring additional protection" (id.). The court noted that this was also Commission's position, quoting Mendocino (360 I.C.C. at 633): "this does not preclude the consideration in particular cases of greater levels of protection. . . where the need therefore has been specifically established" (675 F.2d at 1256, n. 19). The court went on to "entrust to the Commission" the task of determining when more protection may be needed (675 F.2d at 1256).

UTU contends that greater protection than that normally provided in lease transactions is needed here. But it fails to demonstrate that there are any new or special factors present here requiring a higher level of protection. In fact, this case comes within each of the reasons given by the Commission in the Mendocino decision for reduced level of protection in lease transactions (i.e., not requiring in such transactions "substantially advanced preconsummation notice and finalized predonsummation negotiations") (360 I.C.C. at 663). The Commission found "little justification" for these protections where "there are no substantial number of employees likely to be adversely affected by a trackage rights or lease transaction." Id. There are only five employees involved here. The Commission continued, "Typically, most of these transactions are not opposed by carriers or members of the shipping public . . . ." Id. There is neither carrier nor shipper opposition in this case.5/ These statements confirm our view that the Mendocino conditions are appropriate here.

4/ The court's factual finding as to the level of protection in pre-1976 lease cases relied in part on the Commission's decision but also on data gathered by the petitioning labor unions which supported the Commission's version of relevant labor history. 675 F.2d at 1251, n. 7.

5/ We also observed that the delay of service improvements until labor negotiations on potentially unrelated matters were concluded would not be in the public interest (360 I.C.C. at 663).

UTU contends that the provisions of WJPA should apply because MEC was a signatory of that agreement. UTU's position is inconsistent with RLEA and the history of labor protection under the Interstate Commerce Act since at least 1970 and arguably much earlier. As we have described, the RLEA court affirmed a Commission determination that the appropriate labor conditions in trackage rights and lease transactions need not include the protections afforded by Sections 4 and 5 of WJPA.6/ Not only did the court determine that the carriers were not bound by WJPA in those transactions, WJPA was not even considered to be material to the determination of appropriate conditions, other than as a significant historical event.7/

We would be impermissibly overruling RLEA and our prior decisions if we were to now impose WJPA sections 4 and 5 on all lease and trackage rights cases involving signatories of WJPA — in effect, the vast majority of such transactions. Such a result would also be inconsistent with the extended pre-1976 labor history relied upon by us in Mendocino and the court in RLEA. That history showed a consistent Commission policy (accepted by labor) of not giving WJPA section 4 & 5 protection in trackage rights and lease transactions.8/ The absence of any separate enforceable validity of the WJPA conditions has thus been an accepted aspect of labor relations under the Interstate Commerce Act for a substantial period of time.9/

Neither the Commission nor the courts have been called upon to articulate the reasons for the disappearance of any separate stature for WJPA.10/

6/ The railroads involved in RLEA, Baltimore and Ohio Railroad Company and Burlington Northern, Inc., were signatories (through predecessors in the latter case) of WJPA.

7/ WJPA was referred to as a "blueprint for all subsequent job protection agreements" by the court that upheld the Commission's determination of the appropriate protective conditions for mergers. New York Dock Railway v. United States, 609 F.2d 83, 86 (2d Cir. 1979). Nonetheless, that court did not rely on WJPA in deciding the level of protection. That determination was based on prior Commission action (609 F.2d at 94), as in RLEA.

8/ In Congress of Railway Unions v. Hodgson, 326 F. Supp. 68, (D.C.C. 1971), labor lost an argument that the full protection of WJPA sections 4 and 5 had to be included in the Amtrak protective conditions. 326 F. Supp. at 75-76. See RLEA, 675 F.2d at 1256, n. 18.

9/ An early Commission case cited by UTU speaks of the "independent nature of rights" given by WJPA. Southern Ry. Co. - Control - Central of Georgia Ry. Co., 331 I.C.C. 151, 169 (1967). First, we were there talking of the preemptive power of Section 5(11) (now Section 11341), not an issue here. Second, the substance of the WJPA was incorporated in the conditions imposed (the so-called New Orleans conditions). Finally, the suggestion that WJPA had an independent stature requiring greater than normal protection was not reflected in the future course of labor history and will not be followed today.

10/ A potential reason for the courts' and the Commission's consistent refusal to impose the higher standard of WJPA to lease and trackage rights transactions is the questionable applicability of WJPA to such transactions. WJPA only applies to "coordinations," a term defined in section 2(a) of WJPA as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or part in their [illegible] facilities . . ."

It may be that, as stated in Southern, "the terms of the Washington Agreement were in substance and almost in their entirety among the conditions imposed," 331 I.C.C. at 169. It may be due to the success of labor with Congress and the Commission in achieving a standard required level of conditions that, in the words of the Second Circuit in 1979, "can be fairly characterized as significantly more protective of the interests of railway labor than any previously imposed set employee protective conditions." 609 F.2d at 91. Whatever the reason, it is clear that all concerned parties, labor, management and the Commission, have operated under the assumption that WJPA was subsumed into or replaced by the labor protective conditions imposed in Commission decisions. The 1976 4R Act (legislation that benefited from plentiful advice from each of these concerned parties) simply reflected the existing state of Commission labor law - that employee organizations sought and received the full measure of their protection from the effects of a Commission approved transaction in Commission proceedings. WJPA, while perhaps relevant as evidence of past practice, was not an independent source of any enforceable protect

It is manifest that Congress in 1976 intended the protection afforded labor to be limited by the conditions imposed in the pertinent Commission proceeding. The conditions imposed by the Commission today may contain all or only some of the WJPA conditions (as here), but the imposed conditions are not invalid as including less than all. Therefore, UTU's objection on this ground is without merit.

We should note that similar arguments could be made on the basis of the Railway Labor Act (RLA). A union may contend, for example, that labor is entitled to the 30-day notice provisions of Section 6 of that Act. 9 U.S.C. 156. We believe this would fall in the same category as the WJPA contentions, discussed above. The provisions of RLA are reflected and subsumed in the conditions imposed by the Commission. It is apparent that such has been the assumption of Congress and all the interested parties.

In Southern Central, 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 Central 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. 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 of section 7 of the RLA which provides that arbitration awards thereunder may not inasmuch or extinguish any of our powers under the Interstate Commerce Act.11/

It is ordered:

1. The petition of UTU for revocation and reconsideration is denied.

2. This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboly and Strenio. Commissioner Lamboley concurred. Chairman Taylor was absent and did not participate in the disposition of this proceeding.

(SEAL)

James H. Bayne
Secretary

11/ 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.

NYD 9 -J

BIB

JAN 21 1982

IN RE:

ARBITRATION PROCEEDINGS

UNDER

NEW YORK DOCK LABOR PROTECTIVE CONDITIONS (IMPOSED BY INTERSTATE COMMERCE COMMISSION IN FINANCE DOCKET NO. 29455 ((SUB NOS. 1-5)) AND RELATED PROCEEDINGS)

PARTIES TO DISPUTE: NORFOLK & WESTERN RAILWAY COMPANY AND ILLINOIS TERMINAL RAILROAD COMPANY

AND

UNITED TRANSPORTATION UNION

APPEARANCES:

FOR NORFOLK & WESTERN RAILWAY
J. D. Gereaux

FOR ILLINOIS TERMINAL RAILROAD
J. W. Horan

FOR UNITED TRANSPORTATION UNION
W. G.Mahoney
E. DuBester
C. L. Caldwell
R. S. Metz

GENERAL CHAIRMAN, UTU-CET
W. H. Pelton

GENERAL CHAIRMAN, UTU CET
J. J. Hultz

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DECISION AND AWARD

STATEMENT OF FACTS:

The Interstate Commerce Commission approved the co-ordination of operations by the Norfolk and Western Railway Company (hereinafter for brevity referred to as NW), and Illinois Terminal Railroad Company (hereinafter referred to as IT) in its decision in Finance Docket No. 29455 (Sub Nos. 1-5) and related proceedings, service date June 22, 1981. Conditions for the protection of employees as set forth in New York Dock Ry.--Control--Brooklyn Eastern District, 360 I.C.C. 60(1979) herein referred to as "New York Dock Conditions" were imposed in connection with this coordination of operations, and as prequisites thereof.

Article 1, Section 4 of said New York Dock Conditions requires that following such order of coordination, the Carriers serve a ninety day notice of the intended transaction; and pursuant to such order the involved parties meet and attempt to negotiate an implementing agreement under which the employees will work upon consummation of the consolidation.

Accordingly, following the I.C.C. order and the imposition of the New York Dock Conditions, the Carriers served such required notice on the United Transportation Union, representative of certain of its employees as of July 29, 1981, notifying of Carriers' intent to unify, coordinate, and/or consolidate their respective operations on or after November 1, 1981.

Pursuant to such notice, the parties on five days during August, 1981, being August 10, 11, 19, 20, and 21; and upon eleven days in September, 1981, being September 2, 3, 4, 14, 15, 16, 17, 18, 28, 29 and 30; and on three days in October, 1981, being October 1, 2 and 18; and endeavored to reach an implementing agreement under which the employees would work upon consumation of the consolidation.

The parties, however, despite such sustained meetings and efforts, did not succeed in reaching a complete implementing agreement. Many items

however, were tentatively settled. Upon such impasse being reached, the Carriers advised the employees that all proposals made during the conferences, except the original proposal, be considered withdrawn; and that the Carriers would proceed by invoking arbitration as provided for in Article 1, Section 4, of the New York Dock Conditions.

The arbitration agreement in this dispute was thereupon created. The undersigned was named as Arbitrator by the National Mediation Board. Oral arguments were held in St. Louis, Missouri and the parties filed written submissions and briefs.

SENIORITY LIST

The first and most important issue, it seems to the Arbitrator, is a decision as to the method by which the seniority rosters are to be combined.

It is the Carrier's proposal as it now stands to dovetail by seniority date and craft the active employees of IT with the corresponding active employees on the St. Louis Terminal. Thereafter the inactive (furloughed) IT employees' names would be dovetailed by craft with the inactive NW employees on St. Louis Terminal and the combined inactive group will then be placed on the bottom of the previously dovetailed active group of employees; this procedure to produce the new NW consolidated St. Louis Terminal Roster.

(This procedure also contemplated provisions under which certain employees may have their names removed from the St. Louis Terminal Roster or in some possible instances when qualified be placed on a different roster elsewhere).

The employees reject this method of constructing a combined seniority list. The employees have insisted throughout negotiations that the preferred and fairest method is an "order of selection" so-called working list; or as the employees have also characterized it, an "order of equity" in the actual assignments remaining upon consolidation. The employees, therefore, repudiate and oppose the method of dovetailing the list as proposed by Carriers.

LEVERETT EDWARDS
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531-2345 • 536-1225

February 11, 198

Mr. Martin M. Lucente
Sidely & Austin
One First National Plaza
Chicago, Illinois 60603

Dear Mr. Lucente:

Following the issuance of the Decision and Award in the captioned ar bitration proceeding, the Arbitrator has reviewed its contents and wishes to clarify, for the benefit of the parties, the purpose and intent of the Award.

Throughout the Decision and Award this Arbitrator emphasized his opinion and belief that the differences between the parties remainin after the removal by the Decision and Award of the primary obstacles of seniority and jurisdiction could be resolved by negotiation be- tween the parties. The Arbitrator remains firmly convinced of the soundness of that view.

It was for that reason that the Arbitrator referred back to the parties for further negotiations those portions of the dispute not resolved by arbitration.

The Arbitrator retained jurisdiction "to resolve by further or suppl mental Arbitration Award or Awards any deadlocks that may remain" after further negotiations. In the light of the holding in the Decision, the retention of that jurisdiction was, of course, limited to any changes in the schedule agreements which the parties upon further negotiation would mutually agree to submit to him for arbitral resolution.

Sincerely yours,

Leverett Edwards

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Founded in 1866 as
Williams & Thompson

February 9, 1982

Mr. Leverett Edwards
2704 Scott Avenue
Fort Worth, Texas 76103

Re: UTU and N&W/IT (New York Dock §4 Arbitration)

Dear Mr. Edwards:

We have received Mr. Mahoney's letter of February 5, 1982, to you and we wish to make a few comments on it.

First, we were most surprised to read Mr. Mahoney's interpretation of your award as "inconsistent." We understand that you held that the blanket imposition on former Illinois Terminal employees of the entire NW-Wabash agreement was beyond your jurisdiction based upon the evidence presented. You left your door open, however, for the resolution of subsequent deadlocks between the parties over specific matters which might be necessary for the Illinois Terminal coordination. You did not hold, we do not think, that the parties would have to negotiate an entirely new arbitration agreement in order to resolve those deadlocks. If this were the case, the union could frustrate the coordination by simply refusing to arbitrate certain issues.

Moreover, as Mr. Mahoney concedes, neither you nor Mr. Sickles held that changes in agreements could never be made in Section 4 arbitration.

The fact is that the parties have been negotiating productively and all but a few of the substantive terms of the Illinois Terminal coordination have been agreed to.

Very truly yours,

Martin M. Lucente

Martin M. Lucente

MML/gk

cc: William C. Mahoney

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PAGE 5

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*ADMITTED IN NEW JERSEY AND FLORIDA ONLY
**ADMITTED IN PENNSYLVANIA ONLY

February 5, 1982

Mr. Leverett Edwards
2704 Scott Avenue
Fort Worth, Texas 76103

Re: UTU and N&W/IT (New York Dock §4 Arbitration).

Dear Mr. Edwards:

Your decision in the above-designated case involving the issue of an arbitrator's authority to eliminate or modify schedule rules under Section 4 of the New York Dock II conditions and the decisions of Messrs. Sickles and Zumas on the same issue are consistent. Each holds that an arbitrator has no jurisdiction under Section 4 to do so. Your decision does state that you do not hold that under no circumstances could such jurisdiction be present but that no such circumstances are present in this case.

In your Award, however, after stressing your conviction that further negotiations could resolve the remaining unresolved issues involving the modification of schedule rules, you retain jurisdiction "to resolve by further or supplemental Arbitration Award or Awards any deadlocks that may remain" following those further negotiations. At first reading, the Award seems to conflict with the Decision which concludes that no such jurisdiction exists.

The Decision and Award would be completely consistent, of course, if the retention of jurisdiction was intended to be limited to the arbitration of changes in the schedule agreements which the parties after further negotiations mutually agree to submit to you.

It would be most appreciated if you would clarify your Decision and Award in this respect.

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Thank you for your courtesy and consideration in this matter.

Sincerely yours,

William G. Mahoney

cc: Mr. R. D. Kidwell
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The Carriers argue in support of their proposal that:

a. It includes all the provisions necessary to fully comply with the provisions and obligations imposed and contained within Article 1, Section 4 of the New York Dock Conditions;

b. It is equitable, and fulfills the criteria necessary to implement the consolidation of firemen, hostlers, conductors and trainmen in the Carrier's operations of the consolidation; and that

c. It carries out the intent of the Interstate Commerce Commission order which authorized Norfolk and Western's purchase of the Illinois Terminal.

Other factors which Carriers assert are that their proposal has been proven by experience; that Carriers' proposed method of dovetailing "is fair and equitable and the easiest method to administer, thus eliminating a lot of confusion as well as ill will among the involved employees."

Discussion. The Arbitrator has given careful consideration to the arguments and submissions of both Carriers and Employees with reference to the method of arriving at a seniority list that would be fair and equitable, so far as is possible, to everyone concerned. No question of the Arbitrator's authority to rule on this particular point has been raised in these proceedings, and the Arbitrator rules full jurisdiction exists to proceed to make a determination that will put this particular issue to rest and may have some impact upon the solution of any remaining issue or issues.

WABASH AGREEMENT

The Carriers in their proposals during the period mentioned made a further primary proposal which was not resolved by the required negotiations and which

substantially contributed to the breaking off of such conferences. This was the Carriers' proposal to place all employees under the provisions of the Wabash schedule agreements upon final consummation of the consolidation. The Carriers make substantially the following argument:

> The St. Louis Terminal area is where the greatest impact of this transaction will fall. The NW already has a consolidated St. Louis Terminal, having taken control of the former Wabash Railroad and the former Nickel Plate Road on October 16, 1964. As a result of that transaction NW already has one group of employees working under the former Wabash schedule agreement and another group working under the former Nickel Plate agreement on the St. Louis Terminal.

The Carriers further allege that the problems such an arrangement, coupled with other arrangements throughout the merged NW chain, led to the Carriers' proposal to place all employees under the NW (formerly Wabash) schedule agreement and dovetailing the seniority rosters as explained during that portion of the negotiations.

The Carriers explain that the problems of maintaining separate schedule agreements are numerous. The Carriers further allege,

> While the basic provisions of most agreements are alike, the differences in many of the "secondary rules" present severe problems such as rules governing investigation and discipline, calling employees for work, arbitraries, and special allowances. Such a situation would be extremely burdensome and wasteful to administer. Where NW has had to apply two or more agreements to the same work forces at other places in its system, serious problems have arisen.

Discussion. Much of the argument and discussion of the Wabash agreement revolved about the jurisdiction or power of the Arbitrator to impose all or part of a negotiated schedule agreement upon part of a membership foreign to that

agreement, that being the Carriers' proposal to place all employees hereby affected under the so-called Wabash agreement.

There is no doubt the product of that "transaction," (if it can be called that), might initially result in a better working or more convenient agreement for the Carriers, and might even have benefits for the employee group involved, but there is very substantial doubt of the Arbitrator's jurisdiction to deliver such a package.

There are decisions both ways on that issue and the Arbitrator cannot say that there is no authority to revise or rearrange some provisions of a working agreement in some cases if clearly specified and required, (as is not in this case), in the order of the Interstate Commerce Commission or a superior body.

This, however, is not one of those situations. What the Carriers are asking here goes much too far. It involves the entire destruction of part of one negotiated working agreement. The answer here is further negotiations.

The Arbitrator is of the opinion, from the record, that negotiations for a new and proper implementing agreement have not been carried out to the extent required for success. The Arbitrator is of the further opinion that such negotiations, if resumed, may result in a full and complete resolution by agreement of all issues, both major and minor, necessary to secure a complete implementing agreement, satisfactory and fair to all.

No good cause or necessity has been shown for arbitrarily applying and imposing the Wabash agreement upon a group of employees who had no hand or participation in negotiating the Wabash agreement.

AWARD

Seniority List. In consideration of all the foregoing, the Arbitrator therefore hereby sustains the Carriers' proposal as to the method to be used in integrating and compiling the new seniority list as set forth and discussed previously herein.

AWARD

Wabash Agreement. The Arbitrator hereby denies the Carriers' request to place all of the employees under the Wabash Agreement and refers that portion of the dispute to the parties for further negotiations as hereinafter provided.

IT IS FURTHER ORDERED AND AWARDED that in addition to any protection benefits which may be awarded or confirmed above, all eligible employees affected by this Award shall be and are hereby awarded protective benefits not less in any event than those conferred by the Washington Job Protection Agreement; and/or of those specifically conferred or confirmed by the Interstate Commerce Commission in its order or orders (including New York Dock Conditions, Article 1, Section 4) permitting this consolidation.

The Arbitration Awards on the Seniority List and the Wabash Agreement have removed important road blocks. The remaining issues in such arbitration concern the schedule rules and that portion of the total dispute remains open in this arbitration.

The parties have tentatively agreed upon some various sections of an Implementing Agreement including certain day-to-day operating rules. It is believed that with the rulings on the Seniority List and the Wabash Agreement now accomplished, that additional effort by the parties will result in final and complete disposition of all issues.

The Arbitrator now therefore returns that remaining portion of the dispute to the parties, reserving arbitral jurisdiction to resolve by further or supplemental Arbitration Award or Awards, any deadlocks that may remain following the expiration of twenty (20) days from date of this document.

Dated at Fort Worth, Texas, this 29 day of December, 1984.

Leverett Edwards, Arbitrator

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ARBITRATION UNDER SECTION 4
NEW YORK DOCK II, APPENDIX III

In the matter of	
NORFOLK AND WESTERN RAILWAY COMPANY ILLINOIS TERMINAL RAILROAD COMPANY	
and	ICC FINANCE DOCKET 29455
RAILROAD YARDMASTERS OF AMERICA	
and	
UNITED TRANSPORTATION UNION	

DECISION AND AWARD

JOSEPH A. SICKLES, ARBITRATOR

APPEARANCES:

For Norfolk & Western:	J. D. Gereaux R. J. Cooney Sidley and Austin (on Briefs)
For Illinois Terminal Railroad Company:	J. W. Horan
For Railroad Yardmasters of America:	T. W. Goodell
For United Transportation Union:	W. G. Mahoney E. DuBester C. L. Caldwell R. S. Metz

STATEMENT OF THE CASE

On October 2, 1981, the undersigned Arbitrator was nominated by the National Mediation Board as a Neutral Referee in a dispute between the Norfolk and Western Railway Company, the Illinois Terminal Railroad Company, the United Transportation Union and the Railroad Yardmasters of America. The dispute concerned the process for the selection of yardmaster forces following the acquisition of the Illinois Terminal by the Norfolk and Western.

A hearing on the matter was held on October 20, 1981, in St. Louis, Missouri. All parties were represented at the hearing, and were given an opportunity to present arguments and offer written documents into evidence. Following the hearing, the parties submitted Post-hearing Submissions on November 9, 1981, and Rebuttal Submissions on November 18, 1981.

BACKGROUND

The Parties to the Dispute

The Illinois Terminal Railroad Company (the IT) has operated a system principally connecting St. Louis, Missouri with Springfield, Decatur and Champaign, Illinois. IT Yardmasters are represented by the United Transportation Union (UTU) and have worked under an IT/UTU Collective Bargaining Agreement.

The Norfolk and Western Railway Company (N&W) operates in Missouri and Illinois, as well as a number of other states. The Railroad Yardmasters of America (RYA) represents Yardmasters on the N&W under a June, 1971 Schedule Agreement.

It appears, from the Submissions of the parties, that there are three or four Yardmaster positions at the IT McKinley Terminal, filled from a nine-man roster; there is one Yardmaster position at IT Decatur, filled from a seven-man roster. The N&W Ruther Yard has four Yardmaster jobs, and the N&W Decatur has about eleven Yardmaster jobs. It appears that about twenty N&W employees have qualified as Yardmasters at the St. Louis Terminal; the number of N&W Yardmasters in the N&W Decatur Seniority District was not submitted

ICC Finance Docket 29455 (Sub-Nos. 1-5)

In December, 1980, the N&W and the IT filed an application with the Interstate Commerce Commission (ICC) seeking authority for the N&W to purchase the principal assets of the IT. The plan which was submitted to the ICC called for the dissolution of IT as a corporate entity and for the N&W

to operate the acquired IT lines as a single carrier. The purpose of the acquisition was to consolidate the carriers' several redundant facilities and operations into one system. As the ICC noted, the N&W already served the IT's principal market and all IT terminal points, except one, connected with the N&W.

At the time the application was filed with the ICC, the carriers supplied a description of the anticipated post-acquisition operations of the N&W. Although the proposed plan covered many aspects of the carriers' operations, only the following have relevance to this proceeding. First, the carriers' proposed plan called for closing the IT's McKinley Yard in Madison, Illinois (a point just east of St. Louis, Missouri), and IT's Decatur Yard in Decatur, Illinois. According to the proposed plan, the work of the McKinley Yard would be picked up by the N&W's Luther Yard in St. Louis and the IT's A. O. Smith, Granite City and Federal Yards in Illinois. The IT Decatur Yard work was to be shifted to the N&W Decatur Terminal 1/.

On June 19, 1981, the ICC approved the carriers' application, "subject to the conditions for the protection of employees stated in New York Dock Rv.-Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). The order was made effective 30 days from the date of service, and the authority granted was not to be exercised prior to that date.

New York Dock II Conditions

The ICC's imposition of employee protective conditions flows from the long-standing Congressional mandate to provide labor protective conditions in transactions following an ICC approved merger, acquisition, abandonment, etc. 49 U.S.C. Sec. 11347. The 1979 Order of the New York Dock Rv.-Control - Brooklyn Eastern Dist., set forth the most recent protections "to be afforded employees under the statute in the absence of a voluntarily negotiated agreement." ICC Finance Docket No. 29455, at p. 8, Appendix III of the New York Dock II Opinion, contains both the substantive protections to be provided to employees, as well as the procedural mechanisms for the

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1/ The plan anticipated that one yard crew formerly originating at McKinley would originate at Luther and the other three crews at McKinley would be relocated at Federal; the IT yard crew at the IT Decatur Terminal would operate out of the NW Decatur Terminal. At the time of the hearing, however, it was not clear whether any IT positions would be relocated and continued. Indeed, subsequent to the July 29, 1981 notification, the N&W abolished two N&W positions at Decatur.

resolution of disputes arising from the carriers' changes in operations, facilities, services and equipment.

The Parties' Negotiations Over the Transaction

As discussed above, N&W and IT planned to close the IT McKinley Yard and IT Decatur Yard upon the ICC's approval of the acquisition. Because this action was one which would result in the dismissal or displacement of employees, or could result in the rearrangement of forces, the carriers were required, under Section 4, Article 4 of the New York Dock Conditions, to provide the unions with 90 days' notice of the intended transaction and the opportunity to negotiate an acceptable method for the selection of forces. Specifically, Section 4, Article 1, provides as follows:

"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. 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 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:

(selection procedures)

(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."

Pursuant to the provisions of Section 4, the carriers posted the following notices on July 29, 1981, at both of the yards in Decatur, Illinois:

"Notice is hereby given, pursuant to Article 1, Section 4(a), of the New York Dock II conditions, of the Carriers' intention to unify, coordinate and/or consolidate their respective operations on or after November 1, 1981, in order to effectuate the transaction authorized in Interstate Commerce Commission Finance Docket No. 29455 (Sub-Nos. 1-5).

Statement of Proposed Changes:

As a result of the Carrier's exercise of the above-described authority, it is intended to unify, coordinate and/or consolidate, in whole or in part, facilities used and operations and services presently performed separately by Illinois Terminal Railroad Company and Norfolk and Western Railway Company.

It is intended that the seniority dates of all addressee yardmasters will, on the effective date of the unification, coordination and/or consolidation, be integrated into an appropriate single seniority roster, and that such employees will be employees of NW and will be available to perform service on a coordinated basis subject to currently applicable NW agreements.

Negotiations with employee representatives for the purpose of reaching an agreement on these changes will commence in the near future.

It is anticipated that one (1) yardmaster will be affected by the intended changes."

Similar notices were posted at the McKinley and St. Louis Yards. In each of those notices the carriers stated that, "It is anticipated that four (4) yardmasters will be affected by the intended changes."

By letters of the same date, the carriers served the notices on the General Chairman of UTU and RYA. The letters proposed meeting dates in order to negotiate an agreement

"with respect to application of New York Dock II conditions to the yard closings." A meeting between the carriers and the RYA was held on August 11, and a meeting with UTU was held the following day. At both of these meetings, the carriers presented a proposed Implementing Agreement. The principal provisions of the proposed agreement were:

1) To dovetail IT Yardmasters holding regular positions at McKinley Yard into the N&W St. Louis seniority district roster on the basis of their IT seniority date;

2) to place unassigned Yardmasters below employees holding regular positions with their relative ranking based on their former seniority dates;

3) to dovetail IT Yardmasters at Decatur into the N&W Decatur seniority district roster in the same fashion; and

4) to terminate the provisions of the IT/UTU Agreement and place all employees under the 1971 Schedule Agreement between N&W and RYA.

Neither union supported the carriers' proposal. Further, neither union proposed a position which was acceptable to the other. A meeting was held on September 3, 1981, but again, no agreement was reached. On September 22, 1981, the carriers wrote to both unions. The letter restated the carriers' position and described the unions' positions as the carriers perceived them. In conclusion, the carriers stated that they had no alternative but to invoke arbitration under Section 4 of the New York Dock II Conditions. As indicated above, the arbitrator was appointed by the National Mediation Board on October 2, 1981, and the parties argued the merits of their respective positions before this Arbitrator on October 20, 1981.

CONTENTIONS OF THE PARTIES

All parties agree that the carriers' plan to close two IT Terminals constitutes a "transaction" within the meaning of Section 1(a), Article 1 of the New York Dock Conditions 2/. Thus, there is no question that the results of the transaction

2/ "Transaction" is defined as "any action taken pursuant to authorizations of (the) Commission on which (the New York Dock) provisions have been imposed. Whether the carriers' plan to eliminate the IT contract is also a transaction is an issue discussed, infra, at Pages 15-16.

must be in accordance with, and reached pursuant to, the remaining provisions of the New York Dock Conditions. Other than this area of agreement, the parties have argued sharply conflicting positions. In particular, the parties disagree as to what would constitute an appropriate selection of forces and what schedule agreement should cover the former IT Yardmasters who remain employed after the closing of the Decatur and McKinley Terminals.

The Position of the UTU

The UTU (representing the Yardmasters at the IT Terminals) objects to the Implementing Agreement proposed by the carriers in August, 1981. The UTU objects both to the method proposed for the consolidation of the N&W and IT seniority rosters and to the carriers' proposal to terminate all provisions of the UTU/IT Collective Bargaining Agreement.

a. Seniority Roster

The UTU, like the carriers, seeks the consolidation of the UTU and N&W Yardmasters rosters. Rather than dovetailing by seniority dates, however, the UTU believes the fairest and most equitable solution would be to consolidate under a "work equity" principle. Work in the terminals would be allocated between N&W and IT employees based on the percentage of work each group contributed to the whole prior to the coordination 3/. As precedent for this proposal, the UTU suggests the 1972 Agreement of the N&W and UTU covering the NKP and Wabash employees at St. Louis.

b. The UTU-IT Collective Bargaining Agreement

The UTU argues that the result of this proceeding should not be (indeed, cannot be) a termination of the UTU-IT Collective Bargaining Agreement. As support for this position, the UTU cites Section 2, Article 1 of the New York Dock Conditions:

> "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/ Because of the relative seniority youth of IT employees, straight dovetailing by seniority date would place only one IT employee in the top seven on the active roster at St. Louis. Under the UTU proposal, three IT Yardmasters would rank in the top seven.

This provision, it is argued, guarantees the continuation of the substance of the UTU-IT Collective Bargaining Agreement, even after the IT has ceased to exist as a separate entity.

The Position of the RYA

The RYA, representing the Yardmasters employed by the N&W, has also rejected the carriers' proposed Implementing Agreement. The RYA's position is, in essence, as follows:

a) The carriers' planned transaction does not call for the elimination of any N&W positions and, therefore, N&W Yardmasters cannot be adversely affected by the transaction. When the IT positions at the terminals are abolished, the IT Yardmasters will become "dismissed" or "displaced" employees under Sections 5 and 6, Article 1 of the New York Dock Conditions and should be treated accordingly.

b) To place all IT Yardmasters on the N&W roster, under any method, would violate the June 1, 1971 N&W-RYA Agreement, since Article 4(a) of that agreement sets up a 42 day qualifying period before seniority is granted. Furthermore, RYA claims that a roster consolidation would violate RYA's 1972 Implementing Agreement with N&W. That agreement provides the exclusive method for placement on an N&W roster and does not contemplate that placement of Yardmasters from other carriers on the N&W roster. Since New York Dock Section 2, Article 1, quoted above, guarantees the integrity of pre-existing agreements, the RYA contends that any roster consolidation would be inappropriate.

c) If, however, a roster consolidation is imposed pursuant to this proceeding, the RYA argues for a "top and bottom" roster in which the two groups of Yardmasters are given priority rights only on their former property. The RYA points out that the "top and bottom" system was used in the 1971 consolidation of the N&W/RYA Cleveland Terminal Yardmasters and 1972 consolidation of the RYA St. Louis Terminal Yardmasters 4/.

d) Finally, if IT Yardmasters are dovetailed into the N&W roster, the RYA asks that the Arbitrator give the same benefits as those provided in the Award in Conrail and Detroit

4/ The RYA notes that the UTU proposal for consolidation would place IT Yardmasters ahead of N&W Yardmasters with greater Yardmaster seniority and would displace active N&W Yardmasters with IT employees who do not now hold regular Yardmaster positions, but who are only carried on the IT Yardmaster roster.

Terminal and RYA (New York Dock Labor Conditions)(August 13, 1981). Specifically, the RYA suggests that severance allowances be offered on a seniority basis to Yardmasters at N&W, as well as IT.

The Position of the Carriers

The carriers seek an award adoption of the Implementing Agreement proposed on August 11 and 12, 1980. They seek both a roster consolidation and the elimination of the UTU-IT Agreement. With respect to the consolidation of rosters, the carriers contend that such action is necessary if the IT operations are to be fully integrated into the N&W network. The carriers contend that of the methods proposed, theirs is the most equitable since it will insure that the most senior employees on both systems will remain in positions.

The carriers also assert that it is essential that all Yardmasters on the consolidated roster work under a single set of rules, the 1971 N&W-RYA Agreement. Indeed, the carriers contend that it would be contrary to the purpose and intent of the ICC Order authorizing N&W's purchase of IT if N&W was not allowed to place the IT employees under the same rules as the N&W employees 5/.

In response to both UTU's and RYA's argument that Section 2, Article 1 of the New York Dock expressly prohibits this, the carriers have responded as follows:

> "The organizations now contend, however, that section 2 of the New York Dock Conditions precludes such changes in existing collective bargaining agreements. (Citation omitted). The section upon which the organizations rely is as follows:
>
> 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."

What the organizations ignore is the proviso

5/ The carriers contend that the two sets of rules differ in the basic pay rate, holiday and vacation pay, disciplinary procedures and seniority rules.

that existing collective bargaining agreements may be changed "by future collective bargaining agreements or applicable statutes." It is clear that the arbitration process set forth in section 4 is an integral part of the collective bargaining process contained therein, resulting eventually in an agreement voluntarily negotiated between the parties or one prescribed by arbitration. The fact that arbitration may be required does not, however, deprive the ultimate product of its character as a collective bargaining agreement."

In support of the principle that an Arbitrator's Award under Section 4 of New York Dock may change the provisions of a collective bargaining agreement, the carriers rely on the recent Awards in Conrail and Detroit Terminal Company and RYA (New York Dock II Labor Protective Conditions, Seidenberg, Arb. August 1981); New York Dock Railway and Brooklyn Eastern District Terminal and Brotherhood of Locomotive Engineers (New York Dock II Labor Protective Conditions, Quinn, Arb., December 1980); and Chesapeake and Ohio Ry. Co. and Brotherhood of Locomotive Engineers and UTU (Oregon Short Line II Labor Protective Conditions - Abandonment of Cross Lake Ferry Service, Van Wart, Arb., May 1980). Moreover, the carriers rely extensively on authorities in pre-New York Dock II cases for the proposition that the ICC has the power under the Interstate Commerce Act to prescribe terms which are inconsistent with an earlier collective bargaining agreement. Southern Co.-Control - Central Ga. Railway, 331 I.C.C. 151 (1967); Brotherhood of Locomotive Engineers v. Chicago & North Western Ry., 314 F.2d 424 (8th Cir. 1963).

DISCUSSION AND FINDINGS

The carriers seek the adoption of a consolidated roster consisting of the N&W and IT employees with seniority as Yardmasters. Those IT employees who are, as a result of their placement on the roster, able to hold regular positions would work under the N&W Schedule Agreement 6/. The carriers claim that this is the most equitable plan and the only plan which will permit an efficient integration of operations. According to the carriers, an award to this effect would be the result of "the collective bargaining process", and thus, the benefits and working conditions of IT employees could be changed without running afoul of Section 2 of the New York

6/ Those IT employees displaced or dismissed as a result of the roster consolidation would, presumably, exercise certain seniority rights in other crafts or receive protective benefits under New York Dock II based on the earnings they received under the IT contract.

Dock II Conditions. In essence, the carriers' position assumes that an arbitration proceeding under Section 4 of the New York Dock may take the posture of an "interest arbitration" proceeding in which all terms and conditions of employment may be debated and determined. As the carriers point out, the award they seek would not only alter the seniority ranking of IT employees, but would alter all other aspects of the employment relationship, including such things as the holiday pay they receive and the disciplinary procedures applied to them.

In considering the merits of the carriers' argument, I have reviewed the history of labor protective provisions, in general, and the development of the New York Dock II Conditions, in particular 7/. My conclusion is that Article 1, Section 4 of the New York Dock II Conditions does not provide an avenue for interest arbitration of all benefits and working conditions to the extent suggested by the carriers. This view is derived from an anlysis of the language and structure of Section 4, as well as an analysis of the ICC Order which approved N&W's acquisition of IT.

Section 4 is invoked when a railroad contemplates a "transaction"; which term is defined as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." What the Commission authorized in Finance Order 29455 was the acquisition of IT by N&W with all the attendant changes in operations, including the closing of the McKinley and Decatur Yards. In contrast to the authorization for changes in operations, the Commission did not authorize changes in working agreements. Indeed, to the extent that the Commission involved itself with labor relations, it imposed labor protective conditions of New York Dock II. Apart from this, it cannot be said that the Commission authorized the carriers to take steps to alter working conditions in the abstract. Thus, in my view, the term "transaction" is limited to those actions proposed by a carrier to make the changes in operations authorized by the ICC 8/.

7/ This history is set forth in New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

8/ I understand that my view of the term "transaction" differs from that expressed by the Arbitrator in New York Dock and Brooklyn Eastern District Terminal. Nevertheless, I cannot subscribe to the view that the ICC intended the word "transaction" to encompass proposals for changes in seniority rosters only in the absence of operational changes.

The only transaction that invoked Section 4 in this instance was the carriers' proposal to close the two terminals. The arbitration clause in Section 4 must necessarily be limited to labor disputes connected with the implementation of that specific transaction. There is no language in Section 4, or anywhere else, that suggests that the scope of arbitration should extend beyond the transaction contemplated. Certainly, nothing suggests that the scope of the Award may go so far beyond the particular transaction involved to determine, as the carriers now ask, such things as the rates of holiday pay to be provided to all employees, or the particular disciplinary procedures which should be followed.

Furthermore, the importance of Section 2 in the New York Dock II Conditions cannot be ignored. The carriers did not articulate their interpretation of that section until they submitted the Rebuttal Submission (see Page 9, et seq, above). Prior to this argument, the carriers relied on other authorities for the proposition that changes in collective bargaining agreements may be made pursuant to an ICC Order. In support of their contentions, the most precise authority was found in Southern-Control - Central Georgia Railway, supra; BLE v. C & NW Rv., supra, as well as two arbitration awards under New York Dock Conditions: New York Dock Railway and Brooklyn Eastern District Terminal, supra, and BLE and Conrail and Detroit Terminal Co., supra.

With the passage of time and concepts, and in contemplation of the "transaction" limitation mentioned above, I question whether Central Georgia and BLE v. C & N Western are as persuasive to the carriers' position as they urge. To be sure, the Arbitrator in Conrail and Detroit Terminal did eliminate a collective bargaining agreement. But, nothing in the Award offered any insight into the Arbitrator's views as to the extent of his authority to make such a ruling. The Award in New York Dock and Brooklyn Eastern District Terminal is currently under District Court review in the Eastern District of New York.

It may be that an Order which placed all employees under one set of rules would be a logical step or result in a smoother operation. But, even if the record convinced me of that, said circumstances would not confer jurisdiction where none existed otherwise. Moreover, I have been asked here to eliminate an entire collective bargaining agreement without any actual evidence regarding the practical operation of that agreement. Within the framework of the limited time available to us, such a step could hardly be considered to be a true extension of "collective bargaining" and a valid exercise of interest arbitration.

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In any event, I reject the carriers' invitation to eliminate the UTU-IT Agreement in toto, and hold that the only alterations which are proper are those necessary to effectuate the selection of forces 9/.

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

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9/ In view of the holding above, it is unnecessary to decide whether the Interstate Commerce Act gives the ICC authority to supersede all provisions in collective bargaining agreements.

AWARD

1. The names and seniority dates of Illinois Terminal Yardmasters at McKinley Yard, Madison, Illinois, will be integrated into the Norfolk and Western St. Louis consolidated roster established by Implementing Agreement, July 18, 1972, between the Norfolk and Western Railway Company (former Wabash Railroad) and its employees represented by the Railroad Yardmasters of America by first dovetailing seniority of employees who held regular positions on June 22, 1981, with their seniority dates as shown on the respective rosters as of June 22, 1981. All other employees shown on the rosters of the group involved will be listed on the integrated rosters below employees who held regular positions on June 22, 1981, with their relative ranking to be determined on the basis of their former seniority dates, but will have their seniority on the integrated rosters dated June 22, 1981.

2. The names and seniority dates of Illinois Terminal Yardmasters at Decatur, Illinois will be dovetailed into the Norfolk and Western roster of Yardmasters at Decatur, Illinois in the same manner set forth in Section 1.

3. The St. Louis Terminal Seniority District is expande to include the Illinois Terminal McKinley Yard, Madison, Illinois, and the Decatur, Illinois Seniority District is expanded to include the Illinois Terminal Yard at Decatur, Illi nois.

4. The parties are directed to execute any agreement necessary to implement this Award. Any agreement executed by the parties pursuant to this Award will become effective fifteen (15) days after the date of execution.

JOSEPH A. SICKLES
Arbitrator

DECEMBER 30, 1981

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3

In The Matter of Arbitration
Between

NORFOLK AND WESTERN RAILWAY COMPANY

and

ILLINOIS TERMINAL RAILROAD COMPANY

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

and

UNITED TRANSPORTATION UNION

10

Finance Docket 29455

2-1-82

OPINION AND AWARD

Background

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 29455.

Hearing was held at St. Louis, Missouri on November 11, 1981, at which time oral argument was heard and exhibits offered and made part of the record.

In addition to the submissions presented at the hearing, the parties agreed to file post-hearing submissions and reply submissions. The post-hearing submissions of Carriers and UTU were received on November 25, 1981. Because of an incorrect mailing address, the post-hearing submission of BLE was not received until December 2, 1981.

Carriers were represented by R. D. Kidwell, System Director Labor Relations and M. M. Lucente, Esq. The UTU was represented by Vice Presidents C. L. Caldwell and H. G. Kenyon, and W. G. Mahoney, Esq. The BLE was represented by Vice President E. E. Blakeslee.

Statement of the Case

On June 22, 1981, the Interstate Commerce Commission (ICC) authorized the acquisition of the Illinois Terminal Railroad Company (IT) by the Norfolk & Western Railway Company (N & W). The acquisition authorization was conditioned upon the N & W's agreement to accept the provisions of the New York Dock II (New York Dock Railway-Control - Brooklyn Eastern District, 360 I. C. C. 60 (1979).

Article I, Section 4 of the New York Dock Conditions require that subsequent to Carriers' serving a 90 day notice of the intended transaction, the parties endeavor to negotiate an implementing agreement under which the employees will work after the implementation of the consolidation.

On July 29, 1981, Carriers' served the required notice on the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) of their intent to "unify, coordinate and/or consolidate their respective operations" on or after November 1, 1981. After serving the requisite notice, the parties met on several occasions in an effort to reach agreement under which the employees would work upon implementation of the consolidation. The parties were unable to reach agreement, and Carriers then advised the Organizations that all proposals made (except

Carriers' orig ..l proposal) were withd. ..; and that Carriers were invoking arbitration pursuant to Article I, Section 4 of the New York Dock Conditions.

The pertinent portions of the July 29, 1981 Notice by Carriers read:

> "As a result of the Carriers' excercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Illinois Terminal Railroad Company and Norfolk & Western Railway Company.
>
> It is intended that all train and engine service employees represented by the Brotherhood of Locomotive Engineers or the United Transportation Union will, on the effective date of the unification, coordination and/or consolidation, be integrated into an appropriate single seniority roster and that such employees will be employees of NW and will be available to perform service on a coordinated basis subject to currently applicable NW (former Wabash) agreements."

Carrier's initial Implementing Agreement dated August 31, 1981, was a proposal involving BLE only, and excluded UTU. That Agreement read in pertinent part:

> "Article I
> Section 1
> (a) Except as provided as in (b) below, the names and seniority dates of the active IT engineers (all who are working as engineer or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) will be dovetailed with the active NW engineers (all who are working as engineer, fireman or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) on St. Louis Terminal. Thereafter, the inactive (not working or do not stand to work as engineer, fireman or hostler) IT engineers names will be dovetailed with the inactive NW engineers on St. Louis Terminal and the combined inactive group will then be placed on the bottom of the previously dovetailed active group of engineers. This will constitute the new NW consolidated St. Louis Terminal Roster.

(b) IT engineers electing not to have their names and seniority dates dovetailed into the St. Louis Terminal Roster will advise the Carrier within ten (10) days of the effective date of this Agreement of the NW's Decatur Division road or yard roster, excluding roster of Forrest District and Hannible-Quincy Yards, on which they elect to have their names and seniority dates dovetailed, and their names will be removed from said St. Louis Terminal Roster.

Article II - Schedule Agreement

Upon implementation of this Agreement, all engineers in the consolidated seniority districts will be subject to the applicable Schedule Agreement in effect on the former Wabash, except as specifically provided herein.

* * * *

Article XIV

This Agreement, while bearing the signature of the United Transportation Union General Chairman who formerly represented engineers on the former Illinois Terminal Railroad Company is hereafter recognized as an agreement between Norfolk and Western Railway Company and Brotherhood of Locomotive Engineers only."

In summary, Carriers' proposed Implementing Agreement would:

(1) Dovetail the seniority of employees on a two-tiered basis (active with active, inactive with inactive)

(2) Place the IT employees under the N & W (Wabash) schedule agreement, and

(3) Transfer the representation of the IT employees from UTU to BLE. 1/

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1/ Carriers reject the third contention, asserting that the Board is not being asked to alter representation rights. Carriers state: "The Illinois Terminal engineers represented by UTU constitute a minority of the employees of the craft of engineers in the post-consolidation NW system. As such, UTU must apply for certifica to represent engineers of the consolidated NW system, regardless of which agreements remain in effect."

Issues To Be Resolved

The parties are in agreement that there are two essential issues to be resolved in this dispute:

1. Does this Board have the authority under New York Dock Conditions to change the provisions of existing collective bargaining agreements, i.e. the authority to terminate the IT - UTU agreement and remove the IT engineers from UTU's jurisdiction.

2. Is the Carriers' proposal to dovetail seniority rosters (active with active and furloughed with furloughed) a fair and equitable method of combining the N & W - IT work of locomotive engineers.

Position of the Carriers

Carriers argue that the consolidation proposal, particularly the provision for the placement of all employees under one N & W schedule agreement, is the only proposal that will effectively achieve the purpose and intent of the ICC order. Otherwise, Carriers argue, N & W will have to live indefinitely with two separate and distinct work forces -- "One still operating under N & W rosters and rules and one still dependent on IT's rosters and rules even though IT and its operations have disappeared."

Carriers argue that the arbitrator's authority under Section 4 of the New York Dock Conditions includes the power to change the provisions of existing collective bargaining agreements. Carriers assert that the arbitrator's authority is consistent with the principal enunciated by the ICC in Southern Railway - Control-Central of Georgia, 331 ICC 165: "That the very purpose of the first and landmark set of merger protection conditions - the Washingt Job Protection Agreement (WJPA) - was to provide a basis for 'superseding' existing agreements in order 'to avoid... the pro-

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hibitions against transfering work from one railroad to another contained in collective bargaining agreements ... ' While Carriers agree that the ICC in Southern Railway-Control that agreements were not automatically cancelled by a merger order, they argue that the ICC "prescribed Sections 4 and 5 of the Washington Job Protection Agreement as conditions of the merger in order to provide a mechanism by which agreements could be changed, " and that Sections 4 and 5 (which formed the basis for Section 4 of the New York Dock Conditions) "required Carriers and labor organizations to negotiate over 'each plan of coordination which results in the rearrangement of forces' "and that in the event that the parties failed to agree, both Section 5 of the Washington Job Protection Agreement and Section 4 of New York Dock, a 'superseding process' through arbitration."

Carriers refer to the New York Dock decision 2/ (Which expressly refers to the consolidation of seniority rosters as a change that is subject to its procedures), and quotes the Commission's statement that "any future related action taken pursuant to an approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions," and urge that "where seniority rosters and work are consolidated, it necessarily follows that rules must be consolidated and made uniform as well. Otherwise, the absurd situation of employees working at the same time on the same crew under a different set of work rules would result."

2/ New York Dock Railway-Control-Brooklyn E.D.T., 360 ICC 60 (1979)

(Underscoring provided.)

Carriers reject the Organizations' contention that Section 2 of the New York Dock Conditions does not allow changes in agreements through the arbitration process. Section 2 reads:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privleges 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."

Carriers argue that the arbitration process set forth in Section 4 is an integral part of the collective bargaining process that results eventually in an agreement voluntarily negotiated between the parties or an agreement prescribed by arbitration. Even though arbitration might be required, this does not change the character of the ultimate product, namely, a collective bargaining agreement; thus meeting the requirements of Section 2 of the New York Dock Conditions with respect to the procedures for changing existing collective bargaining agreements. In support of their argument, Carriers rely on the Seidenberg Award involving the Yardmasters, Conrail and the Detroit Terminal Company.

Finally, Carriers argue that the consolidation of seniority rosters and the placement of the N & W and IT work forces under the N & W Wabash agreements are necessary to carry out the transaction authorized by the ICC. Without a consolidation of seniority rosters and a unification of schedule agreements, Carriers contend th could not accomplish the central features of the application

approved by the ICC. Carrier states: "IT positions will not become NW positions and IT's operations will not be fully consolidated with NW's operations. Instead, an inconsistent and obstructive aspect of IT's former operations will survive and impede the consolidation. NW will be forced to manage the physically consolidated NW-IT properties with an unconsolidated NW-IT work force."

With respect to the question of the method of consolidating the seniority rosters, Carriers contend that the dovetailing as proposed is the most fair and equitable method of putting the rosters together. Carriers assert:

> "It would tend to keep the same employees working subsequent to consolidation that are working today. Furthermore, those presently active engineers who possibly would be furloughed subsequent to consolidation through a reduction in assignments would be the first group returned to active status by atrition of senior engineers or an increase in total number of assignments."

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Carriers reject the "equity proposals" as being too difficult to administer and creating confusion and ill will among the involved employees.

Position of the Organizations

Both the UTU and BLE argue that an arbitrator does not have the authority to terminate the IT-UTU Agreement and place the IT engineers under the N & W-BLE (Wabash) Agreement. The Organizations argue that the arbitrator's jurisdiction under Article I, Section 4 of the New York Dock Conditions is limited to determining the implementing agreement provisions having direct application to the basic employee protections arising from the immediate transaction and to the selection and assignments of employees affected [illegible] transaction. Unless such jurisdiction is specifically and

unequivocally given, an arbitrator may not write an collective bargaining agreement for the parties.

The Organizations argue that the arbitrators authority in this case, arising from Article I, Section 4 of the New York Dock Conditions, is limited. Section 4 requires "each railroad contemplating a transaction which is subject to [the New York Dock] conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces " to give advance written notice thereof to the employees and their bargaining agents which notice must "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." Before Carriers can consummate the transaction, the parties are required to negotiate an "agreement with respect to the application of the terms and conditions of this appendix", (Appendix III to the Commission's Order in New York Dock) and further providing "for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case." Thus, if the parties cannot agree upon the employee protections contained in Appendix III or the basis for the selection of work forces, the dispute may be submitted to arbitration for adjustment. The limited nature of an arbitrator's authority is further confirmed by Section 2 of the New York Dock conditions. In Section 2, the Commission preserves and continues the application of existing collective bargaining agreements when it 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 the railroads employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining or applicable statutes." (Underscoring added)

When Section 4 is read in conjunction with Section 2, the Organizations argue, "the limitation on an arbitrator's authority is placed beyond serious argument."

The Organizations argue further that, in addition to the preservation of existing agreements found under the provisions of Section 2 of the New York Dock Conditions, Sections 2, Seventh and 6 of the Railway Labor Act prohibit the Carriers from abolishing bargaining agreements; and that a collective bargaining agreement subject to the provisions of the Railway Labor Act cannot be revised except through the procedures of a Section 6 Notice and the other mandatory provisions of the Railway Labor Act. Since the Organizations have not agreed to any changes in the working agreements of the employees they represent or to make such changes an issue in this dispute, it is contended that this arbitrator is not authorized to adopt the Carriers proposal that the UTU-represented employees be placed under the Wabash schedule agreement; rather, they contend, this arbitrator is limited to imposing an Implementing Agreement that provides the basic protections and a "fair and equitable method for the selection of forces to perform the work involved."

The Organizations further argue that neither judicial decisions, ICC decisions, nor arbitration decisions support the Carriers' argument that the Interstate Commerce Act gives the ICC the authority to supersede collective bargaining agreements and change represen-

tation of railroad employees by its approval of a railroad acquisition. The Organizations further argue that even if the ICC had such authority as claimed by Carriers, it did not excercise such authority in this case.

With respect to the question of the method of consolidating the seniority rosters, the Organizations take different positions.

The BLE is opposed to dovetailing rosters on the basis proposed by Carriers contending that such method is inequitable and would do violence to the basic concept of seniority. The BLE urges that the seniority rosters for the craft of locomotive engineers on the combined Carrier be consolidated by dovetailing the rosters for locomotive engineers on the N & W and the IT on the basis of entry into the craft of fireman and engine service without penalizing senior employees presently furloughed by the recession. The BLE opposes the effort by Carriers to consolidate the engineers' rosters by promotion dates after seperating the engineers into so-called active and inactive categories. The Carriers' proposal, BLE contends, creates runarounds of senior engineers by junior engineers, and penalizes senior employees on furlough and those persons who may be on sick leave or in an inactive status through no choice of their own; and is further inequitable because it does not take into consideration the employee's length of service with his orginal employer, thereby failing to consider his work contribution, disregards the different hiring and promotion patterns and practices on the two Carriers, and serves to benefit the employee working for an inefficient Carrier that has not already made economies in operation as compared with efforts to economize on the other Carrier. The BLE further oppose the UTU proposal (suggesting that the

N & W and IT roster be combined on the basi of a work equity principal) asserting that the UTU proposal "suffers from much of the same criticism of the Carriers' proposal" in that it "overlooks the foundational premise of seniority integration to first look to the employees length of service with his original employer," and to the prior seniority rights of employees to service on their former seniority district or territory. Additionally, the BLE argues, that there is little if any data upon which to adequately consider and apply an equity formula in this case. The BLE suggests that any figures obtainable are "tainted" and cannot serve as the basis for integrating seniority rosters in a fair and equitable manner. The exclusive engine hour formula proposed by UTU could benefit the IT engineers and penalize N & W engineers because they were employees of a more efficient Carrier; and that an equity formula such as that proposed by UTU fails to take into account various factors including number of employees, hours worked, earnings, mileage, car count and tons carried. Since there is little uniformity of these factors between the two Carriers, the formula suggested by the UTU must be "disregarded as impracticable and inequitable, and other considerations must be used in combining the rosters."

The UTU takes the position that its "work equity" proposal is the most equitable because it recognizes the increase in work and job opportunities for all employees contributed to the combined operation by IT employees. Since IT employees are comparatively junior, the straight dovetailing by seniority date method would result in the IT work being performed by N & W employees. The UTU further argues that placing all presently furloughed

N & W and IT employees in a separate furlough roster would eliminate all future job opportunities for those employees even though some of them may be senior to employees on the active roster.

The UTU urges that the integration of rosters be made on the basis of the existing 1972 St. Louis Terminal Agreement; and that the difficulties in working out the terms of that Agreement as allegedly experienced by the N & W could be obviated by renegotiating the terms of that Agreement. Otherwise, the UTU argues, "to sanction implementation of such a [dovetailing] plan would not only violate the provisions of the Railway Labor Act and NYD but could in no sense be considered the 'fair and equitable arrangement to protect the interests of the railroad employees affected'".

Findings and Conclusions

Issue No. 1

After careful examination of the relevant statutory provisions and their legislative history, judicial and arbitral decisions, and the ICC imposed Conditions, this Arbitrator is compelled to conclude that he has no authority to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

The ICC, in its decision of June 22, 1981, stated:

> "Our approval of NW's acquisition of IT must, nonetheless be conditioned on NW's agreement to provide 'a fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49USC § 11347. In New York Dock RY.-Control-Brooklyn Eastern Dist. 360 ICC 60 (1979) (New York Dock

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Aff'd Sub. Nom. New York Dock RY. v. United States, 609 F. 2D 83 (Second Cir. 1979), we described the minimum protection to be afforded employees under that statute in the absence of a voluntarily negotiated agreement...."

Article I, Section 4 of the New York Dock conditions (Appendix III) provides in pertinent part:

"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) written notice of such intended transaction... 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 thrity (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. ..." (Underscoring added)

Section 2 of Appendix III provides:

"The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges 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

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collective bargaining agreements or applicable statutes." (Underscoring added)

Title 49 USC §11347 of the Revised Interstate Commerce Act (a recodification of Section 5 (2)(f) applicable at the time the New York Dock matter was pending before the ICC), provides:

> "When a rail carrier is involved in a transaction for which approval is sought under Sections 11344 and 11345 or Section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests 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 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)."

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Prior to February 5, 1976, the Commission developed a series of standard employee protective conditions imposed by the ICC in approving a transaction involving one or more railroads under Section 5 (2) of the Interstate Commerce Act.3/ All of these job protection agreements were patterned after the Washington Job Protection Agreement of 1936 (WJPA.) Section 4 of the WJPA requires that employees be given 90 days' notice of a coordination, and that such notice "shall contain a full and adequate statement of the proposed changes to be effected by such

3/ The principal sets of conditions imposed by the ICC under former Section 5(2)(f) in Stock Control cases were the "New Orleans Conditio

conditions, including an estimate of the number of employees of each class affected by the intended changes." Section 5 of WJPA states:

> "Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on basis accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

The New York Dock Conditions are derived from the Washington Job Protection Agreement, the New Orleans Conditions, and Appendix C - 1. 4/ In formulating the New York Dock conditions, the ICC selected the most favorable of the provisions contained in these conditions. The New York Dock conditions included a provision not contained in the WJPA, and that was Section 2, quoted above.

Carriers argue that this Arbitrator has the authority and the duty to prescribe N & W's proposal, and that this Arbitrator's power is not constrained in his authority to prescribe the terms of any "rearrangement of forces." Since the Commissions authority is exclusive and plenary under the provisions of Section 11341 of the Interstate Commerce Act, the Arbitrator's authority is derived from, and is an extension of, such exclusive and plenary authority . Carriers argue that the Commission's order authorizing the purchase

4/ Protective provisions promulgated by the Secretary of Labor under the Rail Passenger Service Act of 1970.

and consolidation of IT by N & W and requiring arbitration of disputes involving the "rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act. 5 /

Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.

This Arbitrator is of the opinion that the question must be answered in the negative.

An Arbitrator's authority under Article I, Section 4 of New York Dock, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III, and to provide a basis for the selection of... work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process

5 / Sections 2 Seventh, and 6 of the Railway Labor Act prohibit a Carrier from unilaterally abolishing or revising a bargaining agreement.

(provided in Section 4) is an integral part of the collective bargaining process, and as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

Contrary to the contention of Carriers, the ICC in Southern Railway Company-Control-Central of Georgia Railway Company (Finance Docket No. 21400, 331 ICC 151) does not, in the opinion of this Arbitrator, support the position of Carriers.

A reading of the ICC decision in Central of Georgia warrants the finding that the ICC, notwithstanding its plenary and exclusive jurisdiction in these matters, recognizes the need to preserve the rights of employees under their collective bargaining agreements; and that those rights may not be abrogated by arbitral fiat.

At page 169, the Commission states:

> "[T]he rights of railroad employees under their collective bargaining agreements, under the Washington Agreement and under the protective conditions imposed upon the Carriers under Section 5 (2)(f) are independent, seperate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees."

The Commission goes on to state, at page 170:

> "Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, Section 5 (11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved***'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed Section 5 transactions have been successfully consummated in full compliance with such terms.
>
> * * *
>
> The designated 'exclusive and plenary power' of the Commission in Section 5 (11) cannot be so broadly construed as to brush aside all laws - be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law." (Underscoring added)

In further support of this Arbitrator's holding that Carriers are in error when they contend that the ICC's exclusive and plenary authorization of the purchase and acquisition of IT by N & W supersedes any other agreements or the Railway Labor Act, and, by extension, that "an arbitrator has the authority, under the necessary, 'superseding' authority of Section 4 of New York Dock, to alter collective bargaining agreements in order to achieve an effective consolidation," Referee Bernstein in American Railway Supervisors Association et al vs. Southern Railway System (Docket No. 141) stated the following relative to the WJPA (from which New York Dock conditions are derived) and the Railway Labor Act:

> "Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations

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they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5 (11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws - there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements - assuredly a fundamental and important change - was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time. Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them.

* * *

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of is applicability.

> Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractural arrangement as harmonious with the ICC power to imposed employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated."

The Arbitrator has reviewed the awards cited and relied upon by Carriers and, with all due respect for their authors, disagrees with their conclusions.

None of the awards contains any rationale or analysis that would form any justifiable basis for the result reached. These awards are not only not instructive but cannot be considered to have any precedential value. See: Conrail & Detroit Terminal Company & RYA (August 13, 1981); Chesapeake & Ohio Railway & BLE/UTU (May 12, 1980); and New York Dock Railway & Brooklyn Eastern District Terminal & BLE (December 15, 1980.)

The Aribtrator has also reviewed the judicial decisions cited by Carriers, and has found them to be either irrelevant or unpersuasive as to the matters involved in this dispute. None of the cases cited deals directly with the nature and extent of an Arbitrator's authority to alter or invalidate negotiated bargaining agreements under the circumstances presented.

Issue No. 2

With respect to the question of the method of consolidating the seniority rosters for the craft of locomotive engineers on the combined Carrier, the Arbitrator finds that dovetailing is fair, equitable and workable; and should be consolidated on the basis of the date of entry into the craft of firemen and engine service without penalizing any employees presently furloughed.

Initially, Carriers proposed to dovetail by seniority date the active engineers of each road, and thereafter dovetailing the furloughed engineers below the roster of active engineers. Carriers rejected the BLE contention that dovetailing be effected on the basis of entry dates as firemen or engine service, and also rejected BLE's further contention that Carriers' two-tiered (active and inactive rosters) created a situation where senior employees were penalized through no fault of their own.

At the hearing, there were indications by the Carriers' representatives that the BLE proposal was acceptable. In their post-hearing submission, Carrier expressly agreed, stating:

> "The Brotherhood of Locomotive Engineers (BLE) appears to accept the Carriers' proposal to dovetail NW and IT seniority rosters, provided that entry of service dates rather than seniority dates are used and that limitations are placed upon the ability of former IT engineers to work in certain areas. In addition, BLE accepts some unification of schedule agreements. At the November 11 hearing, the Carriers stated that they had no objection to the BLE suggestion that dovetailing should be on the basis of entry dates and should not differentiate between active and inactive employees. This remains the position of the Carriers."

The Arbitrator is satisfied, considering all of the circumstances, that the "work equity" proposal of the UTU is not as equitable over-all as the method proposed by BLE and agreed to by the Carriers.

* * *

Based on the foregoing, the Arbitrator renders the following:

AWARD

1. The Arbitrator is not empowered, without specific authority and mutual agreement by the parties, to substitute, modify or abrogate a collective bargaining agreement (or any provisions thereof.) There is, therefore, no jurisdiction to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

2. The parties are directed and ordered to consolidate the seniority rosters for the craft of locomotive engineers on the combined Carrier on the basis of date of entry into the craft of firemen and engine service without differentiating between active and furloughed employees; and the parties should execute any agreement necessary to carry out the direction and order of this paragraph of the Award.

Nicholas Rumas
NICHOLAS H. ZUMAS, ARBITRATOR

Date: February 1, 1982

AWD	274
Referee:	O'Brien
Fin. Docket:	28905
Carrier(s):	CSXT
Union(s):	UTU/BLE
Award Date:	4-24-95
NYD Articles:	Art. I, §§ 2, 4

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, R-F&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, 1994, 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 I, 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 these 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, Arbitrator

April 24, 1995

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SURFACE TRANSPORTATION BOARD

SERVICE DATE
APR 29 1996

DECISION

Finance Docket No. 28905 (Sub-No. 26)

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.
AND SEABOARD COAST LINE INDUSTRIES, INC.
ARBITRATION REVIEW)

Decided: April 15, 1996

CSX Transportation, Inc. (CSXT), filed an appeal with the former Interstate Commerce Commission (ICC) to review an arbitration award interpreting and applying a labor protective agreement. The Surface Transportation Board has now been given jurisdiction over this matter. We reverse the findings of facts and conclusions of law in the award of Arbitrator Robert O. Harris concerning the implementing agreement proposed by CSXT to effect that carrier's coordination of operations in a new operating district. We will vacate the arbitral decision and award, and remand the proceeding to the parties to continue the implementing process in accordance with Article I, Section 4 of the New York Dock conditions through further negotiations or arbitration to reach a new implementing agreement.

PROCEDURAL MATTERS

On January 25, 1995, the Railway Labor Executives' Association (RLEA) and its affiliated labor organizations[2] filed a notice under 49 U.S.C. 10328 to intervene. RLEA contends that all the affiliated labor organizations maintain collective bargaining agreements (CBAs) with CSXT, and will be significantly affected by the resolution of the issues raised in this proceeding.

CSXT opposes RLEA's intervention on the grounds that RLEA is not a party to the proceeding. CSXT argues that section 10328 applies to intervention by designated representatives of employees and is, therefore, not available to RLEA, which is

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

[2] The affiliated labor organizations are: American Train Dispatchers Department, Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Locomotive Engineers; Hotel Employees & Restaurant Employees International Union; International Brotherhood of Boilermakers & Blacksmiths; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers International Association.

comprised of chief executives of several unions. According to petitioner, the CSXT employees who may be affected by this proceeding are represented by the United Transportation Union (UTU), which already is a party. In response, RLEA argues that it is being utilized as a convenient, shorthand reference for each of the nine railway labor organizations listed in the Notice, as well as the unincorporated associations to which their chief executives belong.[2] Consequently, RLEA believes section 10328 is applicable to its intervention.

We agree with RLEA that the issues to be decided here are pertinent to collective bargaining agreements between its affiliates and CSXT as well as between labor and the railroad industry in general. RLEA and its affiliates have a legitimate interest in the outcome of this proceeding. Thus, we will grant RLEA's request to intervene, and will accept into the record its statement filed on January 25, 1999. We will refer to the UTU and the RLEA collectively herein as the Unions or as labor.

By pleading filed February 18, 1999, CSXT petitions for leave to file a reply to UTU's reply and a 2-day extension to file a reply to RLEA's statement. In the interest of developing a full and complete record, we will grant CSXT's request in its entirety. CSXT's reply to UTU and to RLEA, filed February 18, 1999, is accepted into the record.

BACKGROUND

CSXT in its present form was created by a series of transactions approved by the ICC. In the 1980 decision in CSX Corp.--Control--Chessie & S.C.L. Industries, Inc., 363 I.C.C. 521 (1980) (CSXT Control), the Commission allowed CSX Corporation, a noncarrier holding company, to control as subsidiary corporations the Chessie System, Inc. (Chessie) and Seaboard Coast Line Industries, Inc. (SCLI). 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 Company (Clinchfield), and several smaller carriers. In a subsequent series of decisions, the ICC approved the consolidation of the railroad corporate entities controlled by CSX Corporation into its subsidiary CSXT.[3]

Each of these transactions creating present-day CSXT was approved subject to the ICC's 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 the Congressional mandate to provide such protection under 49 U.S.C. 11347.

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[3] In CSXT Control, 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).

Under New York Dock, labor changes necessary for consummation of agency-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.[4]

Pursuant to the ICC's 1980 decision in CSXT Control, on March 4, 1981, CSXT and the UTU entered into an implementing agreement (the 1981 Agreement) for the coordination of certain territories of the C&O, L&N, and Clinchfield Railroad Company (Clinchfield). In that agreement, the affiliate carriers and relevant labor organizations agreed that train operations between Hazard-Fleming and Martin, KY, on the C&O and L&N lines, and between Shelby, KY, and Erwin, TN, on the C&O and Clinchfield lines would be combined into "the Coordinated Territory." The Agreement concluded with the following statement in Article XVIII: "This Agreement shall remain in full force and effect until revised or modified in accordance with the Railway Labor Act, as amended."

On February 11, 1993, CSXT served a notice pursuant to Article I, Section 4 of New York Dock upon the UTU Committees of C&O, L&N, and Clinchfield to expand the Coordinated Territory.[5] The 1993 proposed coordination involved operations from Ravenna, KY, through Perrit, Hazard, Deane, and Martin, KY, to Beaver Jct., and then to either Russell or Shelby, KY. UTU opposed the notice on the grounds that Article XVIII required that the 1981 Agreement could only be revised or modified by the Railway Labor Act (RLA). Arbitration followed.

On October 17, 1994, an Arbitration Committee[6] found that the carrier's New York Dock notice of February 11, 1993, was improper because the 1981 Agreement specified RLA procedures as the only method of modification of the 1981 Agreement. In support of its ruling, the Committee stated:

> If the ICC found, as it has, that parties can make enforceable arrangements, jointly agreed to, which are different from those required by New York Dock, it

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[4] Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Trans. Co.--Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain). Under the Lace Curtain standard, the agency 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 735-36. 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 said:

> 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] A second notice, dated March 17, 1993, referred to the February 11, 1993 notice, and explained in detail the proposed coordination between: (1) Ravenna and Martin; (2) Hazard and Shelby; and, (3) Russell and Dent.

[6] Robert O. Harris, chairman and neutral member, M. S. Emerick, for the carrier, and Robert W. Earley, for the union.

would appear that an arbitration committee acting under authority granted by the ICC would be similarly bound to follow such arrangements. If that is the case, the carrier, by its 1981 agreement, has precluded itself from asking for de novo arbitration of a coordination which encompasses a coordination which it previously agreed may only be modified in an agreed upon-manner.

On December 9, 1994, CSXT petitioned for review of the Arbitration Committee's decision and award. CSXT requested the ICC to vacate the decision, find that the 1981 Agreement is not an impediment to implementing the transaction proposed by the 1993 notice, and direct the Arbitration Committee to fashion a new implementing agreement as required by Article I, Section 4 of New York Dock. UTU replied. RLEA filed a statement in support of UTU's position, and CSXT filed a rebuttal. For the reasons discussed below we will review the arbitrator's decision, vacate the decision, and remand the proceeding to the parties to continue the implementing process in accordance with Section 4 of New York Dock.

ARGUMENTS OF THE PARTIES

The parties raise three main issues: (1) whether CSXT was bound by the provisions of Article XVIII of the 1981 Implementing Agreement; (2) whether the changes would improperly reopen the prior 1981 Agreement by re-coordinating the territory already coordinated there; and (3) whether the changes are the type that may justify our overriding Article XVIII as an impediment to the proposed transaction.

Lace Curtain Review. CSXT contends that its appeal meets the Lace Curtain standard of review. The carrier avers that its appeal raises recurring and otherwise significant issues of general importance regarding the proper interpretation of New York Dock and, thus, satisfies the Lace Curtain criteria. In addition, CSXT argues that the Arbitrator's conclusion that the parties, through a prior implementing agreement, could replace the agency's New York Dock procedures with RLA procedures for implementing future transactions, is egregious error, and thus, merits our review and reversal. The Unions do not challenge our authority to review the Arbitrator's decision, but they argue that there is no reason to overturn the award.

Article XVIII Language. UTU contends that CSXT knowingly and voluntarily agreed to the Article XVIII language that provides that the RLA procedures are the only way to modify the 1981 Agreement, and that CSXT is, therefore, bound by the bargaining clause.

CSXT counters that Article XVIII's reference to the RLA was merely "boilerplate phraseology" found in many collective bargaining agreements, and that it applied only to modifications of those provisions relating to employees' rates of pay and work rules after implementation of the 1981 transaction. CSXT maintains that the agency's New York Dock procedures would be followed for any future transactions that also involved the Coordinated Territory.

UTU, however, takes issue with the railroad's categorization of Article XVIII as merely boilerplate language pertaining to employee rates or work rules. It argues that it was not necessary to include the disputed language to assure the use of the RLA for negotiating those provisions, because such matters are subject to RLA procedures anyway.

CSXT complains that the labor organizations' interpretation of Article XVIII focuses only on the reference to RLA procedures

and ignores the Agreement's recognition of New York Dock procedures in Article XII A of the Agreement. Because the agreement specifically referenced New York Dock, CSXT contends that it was free to carry out new coordinations under those procedures, pursuant to the authority granted in CSXT Control.

CSXT asserts that it and its predecessors have previously coordinated territories under New York Dock in subsequent ICC-authorized transactions, despite the inclusion of similar RLA language in the implementing agreement, and without any objection from UTU. For example, the WM and B&O entered into an implementing agreement with UTU on November 28, 1979. Section XI of the agreement contained the same reference to the RLA as does Article XVIII. B&O and WM served notice in 1983 under Article I, Section 4 of New York Dock to expand the Coordinated Territory by adding track from Curtis Bay Railroad. After UTU refused to agree to a new implementing agreement, one was imposed by an arbitration committee under New York Dock.

In 1989, the former Atlantic Coast Line Railroad Company and L&N entered into an implementing agreement with a predecessor union of the UTU coordinating their operations in Montgomery, Alabama. Section 5 of that agreement contained the same Article XVIII reference to the RLA at issue here. Nevertheless, this territory was expanded to include track of the former Atlanta & West Point Railroad and the Western Railway of Alabama, pursuant to a 1993 New York Dock implementing agreement. The former B&O, C&O and L&N expanded their coordinated train operations in Cincinnati, Ohio under a 1984 New York Dock implementing agreement, see Appendix I, even though this same territory had been the subject of an earlier coordination accomplished under an implementing agreement with the UTU containing the RLA reference. In 1992 CSXT expanded coordinated territories of the former C&O and Seaboard System in Richmond, Virginia to include track of the former Richmond, Fredericksburg and Potomac Railroad. The previous November 29, 1989 implementing agreement again contained the RLA reference.

The union responds that its failure to invoke its right to follow RLA procedures in the past is not a waiver of that right here. The union contends that in the instance involving B&O and WM, it did not invoke its RLA bargaining right because there was an intervening ICC decision under which the second coordination agreement proceeded. In addition, the consolidation involved only 0.15 miles of rail and five employees, who were not subject to significant changes.

CSXT also argues that the arbitrator's decision failed to explain what "quid pro quo" it would receive for relinquishing its statutory right to accomplish coordinations through New York Dock procedures. CSXT implies that the 1981 Agreement was not a typical "contract" embodying some bargain between CSXT and UTU in which the railroad could waive its statutory right. Rather, CSXT characterizes the 1981 Agreement as a regulatory requirement of the ICC.

UTU states that the language is clear, simple, and unambiguous, and that the Arbitrator had no need to "psychologize" the carrier's motivation. UTU speculates that CSXT readily and knowingly agreed to Article XVIII because it had no meaningful expectation in 1981 that it would re-coordinate the same territory 12 years later.

CSXT maintains that the Committee's construction of Article XVIII is contrary to the statute, to New York Dock, and to the CSXT Control decision. Citing Norfolk & Western Railway Company, Southern Railway Company and Interstate Railroad Company--Exemption--Contract to Operate and Trackage Rights (Arbitration

Review), Finance Docket No. 31582 Sub-No. 2) (ICC served May 7, 1992 and July 7, 1992) (Norfolk & Western), the railroad argues that the exclusive method required by ICC precedent for accomplishing a transaction such as it proposed here is that provided in New York Dock. According to CSXT, the parties may not, by agreement, vary the requirements set by the statute and ICC order, especially when the alternative procedure is contained in an agreement that has never been reviewed by the agency.

UTU maintains, however, that nothing in the statute or in New York Dock prohibits the carrier and the labor organization from voluntarily agreeing in a New York Dock implementing agreement to a different method of resolving matters concerning future coordinations of the involved lines.

Relation to 1981 Agreement. CSXT argues that its 1993 proposed transaction was not intended to be a modification of the 1981 Agreement, but was a new coordination, requiring a completely new notice and a new implementing agreement under Article I, Section 4 of New York Dock. CSXT maintains: (1) that the transaction covered by the 1981 Agreement had already been consummated; (2) that, by its terms and by operation of New York Dock, it was limited to coordinating the train operations described therein, and did not address future transactions; (3) that the 1981 Agreement would not be modified or revised by the proposed transaction, but would be superseded and replaced by a new New York Dock Implementing Agreement governing the expanded, Coordinated Territory; and, (4) that employees' interests would still be protected, because they would continue to receive the protections and benefits under New York Dock, as guaranteed in CSXT Control.

In response, UTU cites language from CSXT's 1993 notices that appears to contradict the railroad's argument that the 1993 proposal was not intended to modify the 1981 Agreement. The February 11, 1993 notice stated that it was "necessary to reopen discussions of the consolidated area." The stated intention of the March 11, 1993 notice was "to reopen the agreements coordinating the operations between Hazard and Shelby, Kentucky . . . to revise the present agreements to operate as indicated below: ****." According to the union, the matters "indicated below" were three proposals to expand the 1981 Hazard-Deane-Martin coordination.[1]

DISCUSSION AND CONCLUSIONS

Lace Curtain Review. In Lace Curtain, the ICC asserted its authority to review arbitral awards arising from the labor protective conditions that the agency imposes upon its approval of mergers and other transactions embraced within 49 U.S.C. 11343(a). The ICC stated there that it would review such awards if they involve "significant issues of general importance regarding the proper interpretation of our labor protective conditions."[2] It also said that where there is egregious error or where the award fails to draw its essence from the labor conditions, it would reverse an arbitral award.[3]

The issue of whether the railroad has bound itself to follow RLA procedures in undertaking the changes at issue is a significant issue of general importance which merits our review.

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[1] See Exhibits A and B, UTU's verified statement.

[2] Lace Curtain, 3 I.C.C.2d at 736.

[3] Id. at 735.

Neither Union disputes our authority to review the Arbitrator's decision. Accordingly, we will hear the appeal.

Article XVIII Language. Arbitrator Harris concluded that the carrier notice under Section 4 of New York Dock was improper because the Implementing Agreement provides that following the procedures of the RLA offers the "only method for modifying or expanding the coordination of forces originally agreed to covering the territory between Hazard and Martin, KY." But Harris did not support his finding that the reference to the RLA had that meaning. Before the arbitrator, CSXT argued, as it does here, that the reference to RLA procedures in Article XVIII means that changes in pay and working conditions must be negotiated pursuant to the RLA. But the railroad claims that the language does not mean that any further modification of the implementing agreement to carry out an ICC-authorized transaction is subject to RLA rather than ICA procedures.

Rather than restating the procedure under the law, labor believes that including the subject language would express the intent to adopt a new procedure, the RLA, rather than the customary procedure under the ICA for implementing changes arising out of an ICC-approved transaction. The Unions argue that such an interpretation makes the most sense because section 6 notice under the RLA must be served by the carrier if it proposes any changes in rates of pay or work rules, whether such a provision is inserted in the implementing agreement or not. Thus, reasons UTU, a more reasonable interpretation of the language is that it was included to make clear in this agreement that a wider scope was envisioned for the RLA than is usually the case. Labor concludes that the language is clear, simple, and unambiguous.

We do not agree with the Unions that the reference to the RLA is free from ambiguity. It is neither uncommon nor unreasonable for the parties to an agreement to recite the applicable law in the contract. Thus the interpretation argued by CSXT may not be rejected out of hand. Moreover, assuming without deciding that carriers and unions may by agreement replace the ICA process with that of the RLA, the fact that Congress enacted sections 11347 and 11341(a) to govern in these instances suggests that any ambiguity in an agreement be resolved in favor of the ICA process. See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, (1991). Any agreement by the parties to depart from section 11347 and New York Dock procedures to resolve matters that would normally be covered by those procedures should therefore be clearly and unambiguously expressed. That is not the case here.

In looking at the evidence submitted by the parties, we note that the railroad has pointed to certain circumstances to support its position. CSXT notes that similar language had been included in four other implementing agreements. The railroad points to this as a practice continuing over 30 years which has never been interpreted by the railroads, the unions or anyone else to until now mean that the RLA displaces New York Dock as the procedure for modifying implementing agreements to make changes arising out of transactions approved by the ICC. The unions have challenged the relevance of one of those precedents, but have not produced any precedents where a provision such as the one in Article XVIII has been employed or interpreted to provide for modifications for an implementing agreement pursuant to RLA provisions.

In another arbitration case, CSX Corporation--Control--Chessie, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27), (ICC served Dec. 7, 1995) (CSX--Control--Chessie/Seaboard), Arbitrator Robert M. O'Brien addressed a similar provision in an

implementing agreement. The [illegible] and the Brotherhood of Locomotive Engineers (BLE) argued there, as [illegible] and the RLEA have argued here, that any change to the implementing agreement had to be undertaken pursuant to RLA procedures. In support of their arguments to Arbitrator O'Brien, the unions cited the decision of Arbitrator Harris in this proceeding. O'Brien distinguished Harris' award by construing the latter's holding as limited to a "second coordination of the same properties." O'Brien then found that in the proceeding before him the properties to be coordinated were different. Arbitrator O'Brien then went on to say, O'Brien Award at 20, that:

> 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.

In support of his conclusion, Arbitrator O'Brien cited the fact that CSXT had negotiated several implementing agreements containing the RLA language and noted that many of these properties were subsequently coordinated without resort to the RLA. "Rather", he noted, "they were coordinated in accordance with ICC procedures. O'Brien Award at 21. The ICC upheld Arbitrator O'Brien's award.

Because we conclude that Article XVIII merely recites existing law, which provides that RLA procedures apply to modifications of rates of pay and rules (i.e., matters which are outside the scope of modification to CBA's which can be made by an implementing agreement), we need not address CSXT's assertion that this transaction warrants a new implementing agreement rather than modification of the 1981 Agreement. Nor need we resolve the issue of whether the parties to an implementing agreement, by mutual consent, may supplant New York Dock procedures with RLA procedures to govern matters that otherwise would be covered by the New York Dock procedures. Finally, we need not consider whether we may or should override the provisions of such an agreement pursuant to the provisions of section 49 U.S.C. 11321(a) or 49 U.S.C. 11347.[10]

We find that the arbitrator committed egregious error in finding that CSXT was bound to effect the coordination at issue by resorting to the RLA as a result of the provisions of Article XVIII. Accordingly, we vacate the arbitrator's award and remand the proceeding to the parties to continue the implementing process in accordance with Article I, Section 4 of the New York Dock conditions through further negotiations or arbitration to reach a new implementing agreement.

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[10] The court in Brotherhood of Locomotive Engineers v. I.C.C., 885 F.2d 446 (8th Cir. 1989), held that parties to an implementing agreement under New York Dock could agree to follow RLA procedures for any modifications to an implementing agreement and that the ICC lacked authority to override such an agreement. The court, however, based its conclusions on Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989) (holding that the ICC lacked authority to modify CBA's), which was subsequently overturned by the Supreme Court. Norfolk & W. Ry Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991).

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

It is ordered:

1. The decision and award of Arbitrator Robert O. Harris is vacated. The proceeding is remanded to the parties for further proceedings in accordance with our findings.

2. A copy of this decision will be served on Arbitrator Robert O. Harris.

3. This decision is effective on the service date.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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EB

SERVICE DATE - JULY 15, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 28905 (Sub-No. 27)

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.
AND
SEABOARD COAST LINE INDUSTRIES, INC., *ET AL.*
(Arbitration Review)

Decided: July 1, 1997

We deny the petition of the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) (jointly, the Unions) for a supplemental order concerning the ICC's decision served December 7, 1995.

BACKGROUND

CSXT Transportation, Inc. (CSXT) was created through various transactions that were approved by the ICC subject to the standard *New York Dock* labor protection conditions.[2] Under *New York Dock*, labor changes related to approved transactions are effected through implementing agreements negotiated before the changes occur. If the parties cannot agree, the issues are resolved by arbitration, with possible appeal to the Board under its deferential *Lace Curtain* standard of review.[3] The Board (or arbitrators acting under *New York Dock*) may, with

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (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 and 11327. 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] The ICC adopted these conditions in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), to implement its mandate to provide such protection under former 49 U.S.C. 11347, which has been recodified as 49 U.S.C. 11326.

[3] Under 49 CFR 1115.8, the standard for review is provided in *Chicago & North Western Tpn. Co.--Abandonment*, 3 I.C.C.2d 729 (1987), popularly known as the "*Lace Curtain*" case. Under the *Lace Curtain* standard, the Board does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error," which is to say, error that may have far reaching consequences for a substantial number of employees subject to the conditions or that may interfere with our ability to oversee implementation of the 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

(continued)

limited exceptions not relevant here, override provisions of collective bargaining agreements (CBAs) that prevent realization of the public benefits of approved transactions.[4] Affected employees receive comprehensive displacement and dismissal benefits for up to 6 years.

This proceeding arose because of CSXT's efforts to make operational changes related to a series of ICC-approved transactions that helped to create the carrier as it is today. Briefly, CSXT proposed to coordinate train operations and make related labor changes over a portion of its system by creating a new operating district, the "Eastern B&O Consolidated District" (Eastern District), and merging seniority rosters in that new district. All engineers and trainmen working in the new Eastern District were to be placed under CSXT's CBAs with UTU and BLE covering the former Baltimore & Ohio Railroad Company lines. There was to be a net loss of five positions. On January 10, 1994, CSXT served a notice on UTU and BLE of its intention to implement the labor changes under *New York Dock*.

The Unions refused to participate in the negotiation of an implementing agreement. The Unions argued, *inter alia*, that the labor changes may not be compelled under *New York Dock* because they would violate existing CBAs.[5] Unable to negotiate, CSXT invoked arbitration under *New York Dock*. The parties selected Robert M. O'Brien as the arbitrator. Arbitrator O'Brien issued his award on April 24, 1995.

The arbitrator ruled that he had jurisdiction to arbitrate an implementing award under *New York Dock*. The arbitrator held that CSXT could implement the labor changes, unless the ICC were to find that they would unlawfully override "rights, privileges, or benefits" of CBAs that must be preserved under Article I, section 2 of *New York Dock*. The arbitrator reserved that issue for the ICC itself to decide in light of the District of Columbia Circuit Court of Appeals' remand of this issue in *RLEA*, *supra* n.4. Both sides appealed the arbitrator's award.

In its December 7, 1995 decision, the ICC affirmed the arbitrator's authority to implement labor changes related to the consolidation. The ICC rejected the Unions' argument that the changes could not be implemented under *New York Dock* because they involved CBA "rights, privileges, or benefits" that must be preserved under that decision. The ICC reaffirmed its authority to modify CBA terms when such changes are necessary to permit the carrier to realize the public benefits of an approved transaction. The ICC upheld the arbitrator's finding that public benefits would arise out of the positive effects of the workforce consolidation on

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(...continued)

> imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

The ICC reviewed issues of law and policy, including issues involving interpretation of the statute or its labor conditions, under the more expansive standard of review appropriate for a regulatory agency charged with administration of a regulatory statute and its conditions thereunder. *See Wallace v. CAB*, 755 F.2d 861, 864-65 (11th Cir. 1985); *Pan American World Airways Inc. v. CAB*, 683 F.2d 554, 562 (D.C. Cir. 1982).

[4] Where modification is necessary, we may act under either former sections 11347 or 11341(a), where these former provisions apply, or under the successors to these provisions. *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*).

[5] The Unions also argued that (1) CSXT improperly based the changes on a succession of Commission decisions rather than on a specified individual decision and (2) the changes cannot be based on any of the transactions approved in the succession of decisions because those decisions are too old. These issues are not involved in this decision.

operational efficiency. Subsequently, the ICC's decision was affirmed in *United Transportation Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997).

By petition filed October 17, 1996, the Unions request that we enter a "supplemental order" under current 49 U.S.C. 11327 requiring CSXT to submit quarterly reports as to: (1) the public transportation benefits "assertedly realized" by the transaction; and (2) the manner in which those benefits have been used.[4] On November 6, 1996, CSXT replied in opposition to the Unions' petition for a supplemental order.

On December 31, 1996, the Unions filed a motion to file a reply to CSXT's reply and tendered a separately filed reply. CSXT filed a reply in opposition to the Unions' motion on January 8, 1997.[5]

DISCUSSION AND CONCLUSIONS

The Unions' petition for a supplemental order is more properly construed as a petition to reopen this administratively final matter. We may reopen and revise such decisions based on material error, changed circumstances or new evidence. The Unions urge us to begin a separate proceeding to reexamine the issue of whether the public benefits of the transaction are actually being realized; they argue that the benefits found by the arbitrator were "presumed" and based on unsupported assumptions. In essence, they are arguing that the ICC committed material error by adopting the arbitrator's finding that there would be public benefits from the proposed consolidation of seniority districts.

We disagree. As noted by the ICC in its December 7, 1995 decision at 12-13, and affirmed by the court (slip op. at 11-12), the efficiency benefits of the consolidation were supported and quantified in the record before the arbitrator. Thus, the efficiency benefits were neither presumed nor based on unsupported assumptions. The Unions have failed to justify reopening of this administratively final and judicially affirmed matter.

The Unions also argue that we must reconsider the issue of whether the efficiency benefits of the transaction (assuming *arguendo* that they exist) will likely be passed through to the public. But the ICC's final decision thoroughly explained why the efficiency gains would benefit the general public as well as the railroad (slip op. at 13):

> 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 revenues 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 thereby benefits from these lower costs, so does the public.

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[4] On April 12, 1996, the Unions filed an earlier petition for a "supplemental order" asking us to remedy alleged defects in CSXT's implementation of the labor changes in the new Eastern District. On October 23, 1996, the Unions filed a notice of withdrawal of that petition.

[5] We will not consider the Unions' reply to CSXT's reply. Under 49 CFR 1104.13(c), replies to replies are prohibited. This prohibition may be waived upon a showing of good cause, but the Unions have not shown good cause here because they have not explained why the additional argument could not have been submitted in their original petition. Moreover, the Unions' reply merely offers further argument in support of its petition that we impose a reporting requirement on CSXT.

The Unions have not attempted, however, to explain why they believe the ICC's decision was erroneous as regards efficiency gains. Once again the question of efficiency gains was expressly addressed by the court reviewing the ICC's decision and the ICC's conclusions were affirmed. Thus, their petition must be denied.

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

It is ordered:

1. The Unions' petition for a supplemental order is denied.

2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

UNITED TRANSPORTATION UNION
and Brotherhood of Locomotive
Engineers, Petitioners,

v.

SURFACE TRANSPORTATION BOARD
and United States of America,
Respondents,

Railway Labor Executives' Association,
et al., Intervenors.

No. 96-1631.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 4, 1997.

Decided March 21, 1997.

Railroad unions petitioned for review of order of the Surface Transportation Board allowing abrogation of seniority terms of existing collective bargaining agreements as part of consolidation of former railroads into consolidated rail district. The Court of Appeals, Harry T. Edwards, Chief Judge, held that: (1) established seniority provisions are within category of interests that are subject to abrogation to effectuate an railroad transaction approved by the Interstate Commerce Commission (ICC), and (2) evidence supported finding that changes proposed by railroad were necessary to effectuate consolidation of railway operations approved by the ICC.

Petition denied.

1. Commerce ⇐82.7

When a proposed consolidation involves rail carriers, statute requires Interstate Commerce Commission (ICC) to impose la-

bor-protective conditions on the transaction to insure a fair arrangement that will safeguard interest of adversely affected employees. 49 U.S.C.(1994 Ed.) § 11347.

2. Commerce ⇐85.7

Seniority provisions of collective bargaining agreement (CBA) are not within the compass of "rights, privileges, and benefits" protected absolutely by statute from power of Interstate Commerce Commission (ICC) to abrogate certain terms of collective bargaining agreement (CBA) as necessary to effectuate an ICC-approved railroad consolidation. 49 U.S.C.(1994 Ed.) § 11347.

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

3. Commerce ⇐89

Evidence supported arbitrator's factual finding that railroad's abrogation of terms of existing collective bargaining agreements (CBAs), in order to merge separate seniority rosters of former railroads into single seniority list for engineers and trainmen for entire consolidated rail district, was necessary to effectuate consolidation approved by the Interstate Commerce Commission (ICC).

On Petition for Review of an Order of the Surface Transportation Board.

William G. Mahoney, Washington, DC, argued the cause for petitioners, with whom John O'B. Clarke, Jr. and Richard S. Edelman were on the briefs.

Louis Mackall, V, Attorney, Surface Transportation Board, Washington, DC, argued the cause for respondents, with whom Henri F. Rush, General Counsel, was on the brief. John J. Powers, III and Robert J. Wiggers, Attorneys, U.S. Department of Justice, entered appearances.

Ronald M. Johnson argued the cause and filed the brief for intervenor CSX Transportation, Inc.

Jeffrey S. Berlin, Mark E. Martin, Robert W. Blanchette, Washington, DC, and Kenneth P. Kolson, Vienna, VA, were on the brief for amicus curiae Association of American Railroads.

Before: EDWARDS, Chief Judge, HENDERSON and ROGERS, Circuit Judges.

Opinion for the Court filed by Chief Judge EDWARDS.

HARRY T. EDWARDS, Chief Judge:

This case arises out of an effort by CSX Transportation, Inc. ("CSXT") to implement an approved merger of operations of portions of four former railroads into a new, consolidated rail district. In so doing, CSXT sought to abrogate terms of existing collective bargaining agreements ("CBAs") in order to merge separate seniority rosters from the former railways into single seniority lists for engineers and trainmen for the entire district and to place the employees of the consolidated district under one CBA. CSXT served notice on the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers ("BLE") (jointly, "unions") of its intent to consolidate the various seniority districts. After negotiations between CSXT and the unions failed to produce an agreement implementing the proposed changes, the dispute was referred to arbitration. The arbitrator ruled in favor of CSXT, holding that the proposed changes are necessary to effectuate a transaction approved by the Interstate Commerce Commission ("ICC"); however, in light of this court's decision in *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 814 (D.C.Cir. 1993) (*Executives*), the arbitrator reserved for the Commission the question whether CSXT's proposed changes undermine "rights, privileges, and benefits" protected by 49 U.S.C. § 11347 and the so-called "*New York Dock* rules." *See New York Dock Ry.-Control-Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir.1979) (*New York Dock*).

Section 11347 incorporates the protections of the Rail Passenger Service Act, 45 U.S.C. § 565, which provides that, in transactions (such as railway consolidations) approved by the Commission,

> protective arrangements shall include such provisions as may be necessary for

the preservation of rights, privileges, and benefits under existing collective bargaining agreements.

However, the Supreme Court and this court have made it clear that the ICC may abrogate certain terms of a CBA as necessary to effectuate an ICC-approved transaction. *See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 127–28, 111 S.Ct. 1156, 1162–63, 113 L.Ed.2d 95 (1991) *Dispatchers*; *American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157, 1162–64 (D.C.Cir. 1994) (*ATDA*); *Executives*, 987 F.2d at 814. The questions at issue here are (1) whether established seniority provisions are within the category of interests that are subject to abrogation, and, if so, (2) whether the changes proposed by CSXT are necessary to effectuate the consolidation of railway operations that had been approved by the ICC. The Commission answered affirmatively to each of these questions, and we can find no error in the agency's judgment.

The principal dispute in this case is over the meaning of "rights, privileges, and benefits," for the parties agree that any employment arrangement meeting this definition is fully protected, save for modifications achieved through collective bargaining. The Commission held that "the term 'rights, privileges, and benefits' means the 'so-called incidents of employment, or fringe benefits' ... and does not include scope or seniority provisions." *CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27) (Nov. 22, 1996) (*Commission decision*), reprinted in Joint Appendix ("J.A.") 228. In light of the applicable statutory provisions and the judicial decisions construing them, we can find no basis to overturn the Commission's holding on this point.

Furthermore, the Commission did not err in upholding the arbitrator's finding that CSXT's proposed changes are necessary to effectuate an ICC-approved consolidation. The ICC found that "merging the separate seniority rosters into one will produce real efficiency benefits," *see id.* at 13, reprinted in J.A. 236, thus making clear the nexus between the proposed changes and the effectuation of an approved transaction found to be in the public interest.

On the record at hand, the petition for review must be denied.

I. Background

CSXT, a major rail carrier, is the product of various railroad mergers, all approved by the ICC.[1] CSXT had its genesis in the ICC's 1980 decision authorizing CSX Corporation to control two railroad holding companies. *See CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521 (1980) (*CSX Control*). Over time, the operations of the railroad subsidiaries of Chessie System, Inc. ("Chessie") and Seaboard Coast Line Industries, Inc. ("SCLI") were merged together and, ultimately, became CSXT. CSXT has combined various operations, facilities, and workforces throughout portions of the former railroads that today constitute CSXT.

This case arises out of an attempt by CSXT to consolidate train operations, workforces, and facilities on portions of four former railroads—the Baltimore and Ohio Railroad ("B&O"), Western Maryland Railway ("WM"), Chesapeake and Ohio Railway ("C&O"), and Richmond, Fredericksburg and Potomac Railway ("RF&P"). In 1988, CSXT decided to combine train operations, workforces, and facilities on the eastern portion of the former B&O with contiguous portions of the former RF&P, WM, and C&O to create the Eastern B&O Consolidated District. CSXT proposed to place all of the train crew employees working in the new, consolidated district on merged seniority rosters, with one

1. The ICC is the predecessor to the Surface Transportation Board ("STB"). Effective January 1, 1996, the Interstate Commerce Act ("ICA") was amended by the ICC Termination Act, thereby transferring all of the ICC's remaining functions to the STB. *See* Pub.L. No. 104-88, 109 Stat. 803 (1995). A savings clause in the Termination Act, § 204, provides that matters arising before January 1, 1996 will continue to be governed by the ICA as it existed pre-amendment. We, therefore, will refer to the pre-amendments ICA. We note that §§ 11341(a) and 11347 of the ICA were continued by the ICC Termination Act, but were renumbered, respectively, as §§ 11321(a) and 11326.

list for engineers and a separate list for trainmen.

At the time when the disputed proposals were advanced, CSXT had CBAs with the UTU and BLE covering each of the former railroads constituting the new district. The seniority rules in the CBA for each railroad generally required that work in that geographic region be performed by employees with seniority rights under that agreement. Under CSXT's proposed implementation plan for its consolidation of operations in the Eastern B&O District, CSXT could use any engineer or trainman to staff a train throughout the consolidated district, regardless of whether the territory was within the boundaries of the employee's railroad prior to consolidation.

On January 10, 1994, pursuant to Commission-mandated procedures under section 4 of the *New York Dock* rules, *see New York Dock*, 360 I.C.C. at 77, CSXT served notice on the unions of its intent to consolidate various seniority districts of its affiliate carriers. The unions refused to negotiate an implementing agreement concerning these changes. Because the unions and CSXT could not reach an agreement, the matter was referred to arbitration as required by section 4 of the *New York Dock* rules, *see New York Dock*, 360 I.C.C. at 78.

A neutral arbitrator found (1) that the coordination proposed by CSXT was linked to an ICC-approved transaction; (2) that *New York Dock* arbitration was not barred by the terms of prior implementing agreements that made reference to Railway Labor Act ("RLA") bargaining; (3) that CSXT had shown that modification of existing CBAs was necessary; and (4) that the proposed changes to the existing CBAs could be made, provided, as required by section 2 of *New York Dock* rules implementing 49 U.S.C. § 11347, they did not undermine protected "rights, privileges, and benefits." *See UTU v. CSX Transp., Inc.*, (Apr. 21, 1995) (O'Brien, Arb.), *reprinted* in Supplemental Appendix ("S.A.") 412. The arbitrator, in light of this court's decision in *Executives*, 987 F.2d at 814 (leaving for the Commission to determine in the first instance the scope of protected "rights, privileges, and benefits"), reserved for the Commission the question whether CSXT's proposed changes to the CBAs undermine protected "rights, privileges, and benefits." *See UTU v. CSX Transp., Inc.*, (Apr. 21, 1995) (O'Brien, Arb.), *reprinted* in S.A. 413.

The unions petitioned the Commission to review and reverse the arbitrator's decision, *see* Petition of UTU and BLE, *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27) (June 9, 1995), *reprinted* in J.A. 33, while CSXT requested the Commission to uphold the arbitrator's findings and, further, to find that CSXT's proposed changes to the CBAs did not undermine protected "rights, privileges, and benefits." *see* Petition of CSXT, *CSXT—Bhd. of Locomotive Eng'rs and United Transp. Union*, Finance Docket No. 28905 (Sub-No. 27) (June 9, 1995), *reprinted* in J.A. 7.

The Commission ruled in favor of CSXT. *See Commission decision*, *reprinted* in J.A. 224–41. First, the ICC sustained the arbitrator's finding that CSXT's proposed coordination of train operations in the new, consolidated B&O Eastern District was linked to ICC-approved merger and control transactions. *See id.* at 8, *reprinted* in J.A. 231. Second, the Commission upheld the arbitrator's finding that prior implementing agreements of CSXT do not require that CSXT accomplish the coordination at issue here through Railway Labor Act ("RLA") bargaining procedures, as CSXT's proposed changes involve a different (*i.e.*, greater) territory than that to which the prior agreements applied. *See id.* at 10–12, *reprinted* in J.A. 233–35. The Commission also found that applying *New York Dock* rules in the instant case comports with the parties' prior implementing agreements. On several occasions, CSXT has consolidated operations within the territory of the former railroads and, without objection from the unions, applied *New York Dock* rules. *See id.* Third, the Commission found that CSXT's proposed changes to seniority rights as established by CBAs were necessary to effectuate the ICC-approved transaction. The ICC also found that CSXT's proposed changes are not a device to transfer wealth from the employees

to the railroad, and that the merging of the separate seniority districts will produce real efficiency benefits. *See id.* at 13, *reprinted in* J.A. 236. Finally, the ICC determined that CSXT's proposed changes do not involve "rights, privileges, and benefits" that are protected by 49 U.S.C. § 11347 and section 2 of the *New York Dock* rules. The Commission noted that "rights, privileges, and benefits" include only "the incidents of employment, ancillary emoluments or fringe benefits." *See id.* at 14, *reprinted in* J.A. 237. The Commission concluded that the CBA provisions at issue in this case do not fall within the protected "rights, privileges, or benefits," as they involve scope and seniority changes of the type that consistently have been modified in the past in connection with consolidations. *See id.* at 15, *reprinted in* J.A. 238.

On January 4, 1996, the STB denied the unions' petition for an administrative stay. The unions then filed a petition for review in this court.

II. Analysis

The Supreme Court has made clear that, to effectuate an ICC-approved transaction, 49 U.S.C. § 11341(a) (1994) allows for the abrogation of terms in a CBA. *See Dispatchers*, 498 U.S. at 127–28, 111 S.Ct. at 1162–63.[2] In this court's *Executives* decision, however, we pointed out that "§ 11347 [involving 'employee protective arrangements in transactions involving rail carriers'] on its face provides more, not less, generous labor protection than does § 11341(a)." 987 F.2d at 814. Thus, the court found that, with respect to transactions covered by section 11347, "the Commission may not modify a CBA willy-nilly." *Id.* Nonetheless, the *Executives* decision is clear in recognizing that the Commission may modify CBAs as necessary to effectuate covered transactions:

> 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.

Id. at 814 (footnotes omitted). Subsequently, in *ATDA*, the court construed *Executives* as holding that "certain contractual provisions," i.e., those treading upon any rights, privileges, or benefits in a CBA, "are immutable." 26 F.3d at 1168.

In this case, we face two main issues—(1) whether CSXT's proposed seniority changes involve terms of a CBA that are shielded absolutely from the ICC's abrogation authority and, if not, (2) whether the proposed changes are "necessary" to effectuate an ICC-approved transaction.[3]

A. *"Rights, Privileges, and Benefits"*

The unions argue that the Commission erred in finding that CSXT's proposed merger of the seniority rosters in the consolidated district would not undermine protected rights. We disagree.

[1] When a proposed consolidation involves rail carriers, 49 U.S.C. § 11347 requires the Commission to impose labor-protective conditions on the transaction to ensure a "fair arrangement" that will safeguard the interests of adversely affected employees. *See Executives*, 987 F.2d at 813. In interpreting the safeguards required by § 11347, the Commission held in *New York Dock* that "[t]he rates of pay, rules, working conditions and all collective

2. Section 11341(a) provides, in relevant part, that 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." 49 U.S.C. § 11341(a) (1994).

3. In their briefs, the unions also contend that, under previous implementing agreements, CSXT was required to make any modifications to CBAs for the former railroads comprising the new consolidated district through RLA procedures. On the record at hand, we find nothing in this claim that gives us pause or that would deter us from deferring to the Commission's judgment.

We also note that, in a related case involving the same contract language at issue here (but a different consolidated district), a panel of this court is currently considering, and will address, whether the language requires application of RLA procedures. *See UTU v. STB*, No. 96-1201.

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 I.C.C. at 84 (emphasis added). In other words, CBA terms that establish "rights, privileges, and benefits" may not be abrogated outside of collective bargaining.[4] Up until now, this broad conceptual framework has been clear, but the scope of the rights at issue has defied comprehension. Obviously confused, the court in *Executives* remanded that case to the Commission to allow the agency to explain the meaning of the phrase "rights, privileges, and benefits." *See* 987 F.2d at 814.

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

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

In this case, the only contested changes to the CBAs are seniority provisions covering the previously separate regions of rail service. When pressed at oral argument, the unions' counsel was forced to acknowledge that employees will lose no so-called "fringe benefits" by virtue of CSXT's proposed changes to the CBAs. Thus, the Commission committed no error in holding that CSXT's proposed changes do not undermine protected "rights, privileges, and benefits."

B. *Necessity*

[3] We next turn to the question whether CSXT's proposed changes to the seniority rosters were *necessary* to effectuate an ICC-approved transaction. The unions contend that the Commission erred in finding a nexus. We disagree.

1. Nexus Between Changes Sought and ICC-Approved Transaction

It is undisputed that the Commission has, through a series of decisions, approved CSXT's proposed consolidation of the Chessie and Seaboard subsidiaries as being in the public interest. *See CSX Control*, 363 I.C.C. at 521. Petitioners, however, contend that the Commission erred by finding that there is a nexus between CSXT's proposed changes to the seniority rosters and the ICC-approved transaction. They argue simply that the passage of time between the ICC approval in *CSX Control* and the proposal for changes to the seniority rosters has rendered

4. No one has suggested that seniority provisions fall within the compass of "rates of pay, rules, working conditions" under *New York Dock*, so the scope of this term is not an issue in this case. It is only the meaning of "other rights, privileges, and benefits" that is at issue.

the two events unrelated. This argument is meritless.

The record clearly supports the Commission's affirmance of the arbitrator's factual finding that the proposed changes are linked to an approved transaction. As the Commission noted, CSXT has consolidated its operations gradually, often waiting until corporate entities were merged. The Chessie and Seaboard Coast subsidiaries were not fully merged until 1992. On this record, we are satisfied that the passage of time does not diminish a causal connection. *See CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus.*, 8 I.C.C.2d 715, 724 n. 14 (1992), *aff'd sub nom. ATDA*, 26 F.3d at 1157.

2. Transportation Benefit

In *Executives*, we held that, in addition to finding a nexus between the proposed changes and an ICC-approved transaction, "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." *ATDA*, 26 F.3d at 1164 (quoting *Executives*).

CSXT argued, and the ICC accepted, that a consolidation of seniority rosters was necessary to effectuate the merger of the rail lines. This is both obvious on its face and was demonstrated by CSXT. First, there is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation. Second, CSXT demonstrated that changing crews at previous territorial boundaries of the former railroads, as would be required with separate seniority rosters, would increase costs and slow down transit times. Improvements in efficiency generated by a consolidated seniority roster will reduce CSXT's cost of service, resulting in reduced rates to shippers and ultimately to consumers. The unions offered no evidence to the arbitrator or Commission to challenge CSXT's contentions of improved efficiency. Indeed, at oral argument, the unions' counsel conceded that these efficiencies are not open to dispute. In short, the record supports the Commission's finding that CSXT's proposed changes to the CBAs are necessary to effectuate the ICC-approved transaction.

III. Conclusion

For the foregoing reasons, the petition for review is denied.

MODEL SECTION 13(C) AGREEMENT
FOR UMTA OPERATING ASSISTANCE

WHEREAS, the Congress recognized in the National Mass Transportation Assistance Act of 1974 that the urban mass transportation industry required operating assistance to maintain service to the public, stimulate ridership and assist communities in meeting their overall development aims; and

WHEREAS, Sections 3(e) (4), 5(a) (2) and 13(c) of the Act require, as a condition of any such assistance, that suitable fair and equitable arrangements be made to protect urban mass transportation industry employees affected by such assistance; and

WHEREAS, the fundamental purpose and scope of this agreement is to establish such fair and equitable employee protective arrangements on a national and uniform basis for application throughout the urban mass transportation industry to those employees and employees represented by the labor organizations signatory hereto; and

WHEREAS, the undersigned American Public Transit Association and the national labor organizations signatory hereto have agreed upon the following arrangements as fair and equitable for application to any urban mass transportation employer ("Recipient") who is a signatory hereto and who has been designated to receive federal operating assistance under the Urban Mass Transportation Act of 1964, as amended ("Act");

NOW, THEREFORE, it is agreed that the following terms and conditions shall apply and shall be specified in any contract governing such federal assistance to the Recipient:

(1) The term "Project", as used in this agreement, shall not be limited to the particular facility, service, or operation assisted by federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this agreement.

(2) The Project, as defined in paragraph (1) shall be performed and carried out in full compliance with the protective conditions described herein.

(3) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the union involved to substitute other rights, privileges and benefits. Unless otherwise provided, nothing in this agreement shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the applicable collective bargaining agreement.

(4) The collective bargaining rights of employees covered by this agreement, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued.* Provided, however, that this provision shall not be interpreted so as to required the Recipient to retain any such rights which exist by virtue of a collective bargaining agreement after such agreement is no longer in effect.

The Recipient agrees that it will bargain collectively with the union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreement with the union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining. If, at any time, applicable law or contracts permit or grant to employees covered by this agreement the right to utilize any economic measures, nothing in this agreement shall be deemed to foreclose the exercise of such right.

(5) (a) In the event the Recipient contemplates any change in the organization or operation of its system which may result in the dismissal or displacement of employees, or rearrangement of the working forces covered by this agreement, as a result of the Project, the Recipient shall do so only in accordance with the provisions of subparagraph (b) hereof. Provided, however, that

* As an addendum to this agreement, there shall be attached where applicable the arbitration or other dispute settlement procedures or arrangements provided for in the existing collective bargaining agreements or any other existing agreements between the Recipient and the Union, subject to any changes in such agreements as may be agreed upon or determined by interest arbitration proceedings.

changes which are not a result of the Project, but which grow out of the normal exercise of seniority rights occasioned by seasonal or other normal timetable changes and regular picking procedures under the applicable collective bargaining agreement, shall not be considered within the purview of this paragraph.

(b) The Recipient shall give to the unions representing the employees affected thereby, at least sixty (60) days' written notice of such proposed change, which may result in the dismissal or displacement of such employees or rearrangement of the working forces as a result of the Project, by sending certified mail notice to the union representatives of such employees. Such notice shall contain a full and adequate statement of the proposed changes, including an estimate of the number of employees affected by the intended changes, and the number and classifications of any jobs in the Recipient's employment available to be filled by such affected employees.

At the request of either the Recipient or the representatives of the affected employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this agreement shall commence immediately. These negotiations shall include determining the selection of forces from among the employees of other urban mass transportation employers who may be affected as a result of the Project, to establish which such employees shall be offered employment with the Recipient for which they are qualified or can be trained; not, however, in contravention of collective bargaining agreements relating thereto. If no agreement is reached within twenty (20) days from the commencement of negotiations, any party to the dispute may submit to arbitration in accordance with the procedures contained in paragraph (5) hereof. In any such arbitration, final decision must be reached within sixty (60) days after selection or appointment of the neutral arbitrator. In any such arbitration, the terms of this agreement are to be interpreted and applied in favor of providing employee protections and benefits no less than those established pursuant to §5 (2) (f) of the Interstate Commerce Act.

(5) (a) Whenever an employee, retained in service, recalled to service, or employed by the Recipient pursuant to paragraphs (3), (4), (6), or (13) hereof is placed in a worse position with respect to compensation as a result of the Project, he shall be considered a "displaced employee", and shall be paid a monthly "displacement allowance" to be determined in accordance with this paragraph. Said displacement allowance shall be paid each displaced employee during the protective period following the date on which he is first "displaced", and shall continue during the protection he is first "displaced", and shall continue during the pro-

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tective period so long as the employee is unable, in the exercise of his seniority rights, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee, including vacation allowances and monthly compensation guarantees, and his total time paid for during the last twelve full months in which he performed compensated service more than fifty per centum of each such months, based upon his normal work schedule, immediately preceding the date of his displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and the average monthly time paid for. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for. If the displaced employee's compensation in his current position is less in any month during his protective period than the aforesaid average compensation (adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for), he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time, but he shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. If a displaced employee fails to exercise his seniority rights to secure another position to which he is entitled under the then existing collective bargaining agreement, and which carries a wage rate and compensation exceeding that of the position which he elects to retain, he shall thereafter be treated, for the purposes of this paragraph, 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 cause in accordance with any labor agreement applicable to his employment.

(7) (a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, in accordance with any collective bargaining agreement applicable to his employment, he shall be considered a "dismissed employee" and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph. Said dismissal allowance shall first be paid

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each dismissed employee on the thirtieth (30th) day following the day on which he is "dismissed" and shall continue during the protective period, as follows:

Employee's length of service prior to adverse effect	Period of protection
1 day to 6 years	equivalent period
6 years or more	6 years

The monthly dismissal allowance shall be equivalent to one-twelfth (1/12th) of the total compensation received by him in the last twelve (12) months of his employment in which he performed compensation service more than fifty per centum of each such months based on his normal work schedule to the date on which he was first deprived of employment as a result of the Project. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for.

(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position he holds is abolished as a result of the Project, or when the position he holds is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of the Project or as a result of the exercise of seniority rights by other employees brought about as a result of the Project, and he is unable to obtain another position, either by the exercise of his seniority rights, or through the Recipient, in accordance with subparagraph (c). In the absence of proper notice followed by an agreement or decision pursuant to paragraph (5) hereof, no employee who has been deprived of employment as a result of the Project shall be required to exercise his seniority rights to secure another position in order to qualify for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Recipient informed as to his current address and the current name and address of any other person by whom he may be regularly employed, or if he is self-employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of that position, until the regular employee is available for service, and thereafter shall revert to his previous status

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and will be given the protections of the agreement in said position, if any are due him.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by his former employer after being notified in accordance with the terms of the then-existing collective bargaining agreement: Prior to such call to return to work by his employer, he may be required by the Recipient to accept reasonably comparable employment for which he is physically and mentally qualified, or for which he can become qualified after a reasonable training or retraining period, provided it does not require a change in residence or infringe upon the employment rights of other employees under then-existing collective bargaining agreements.

(f) When an employee who is receiving a dismissal allowance again commences employment in accordance with subparagraph (e) above, said allowance shall cease while he is so reemployed, and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, he shall be entitled to the protections of this agreement to the extent they are applicable.

(g) The dismissal allowance of any employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings from such other employment or self-employment, any benefits received from any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his union representative, and the Recipient shall agree upon a procedure by which the Recipient shall be kept currently informed of the earnings of such employee in employment other than with his former employer, including self-employment, and the benefits received.

(h) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service in accordance with the applicable labor agreement, or to accept employment as provided under subparagraph (e) above, or in the event of his resignation, death, retirement, or dismissal for cause in accordance with any labor agreement applicable to his employment.

(i) A dismissed employee receiving a dismissal allowance shall actively seek and not refuse other reasonably comparable employment offered him for which he is physically and mentally qualified and does not require a change in his place of residence. Failure of the dismissed employee to comply with this obligation shall be grounds for discontinuance of his allowance; provided

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that said dismissal allowance shall not be discontinued until final determination is made either by agreement between the Recipient and the employee or his representative, or by final arbitration decision rendered in accordance with paragraph (15) of this agreement that such employee did not comply with this obligation.

(8) In determining length of service of a displaced or dismissed employee for purposes of this agreement, such employee shall be given full service credits in accordance with the records and labor agreements applicable to him and he shall be given additional service credits for each month in which he receives a dismissal or displacement allowance as if he were continuing to perform services in his former position.

(9) No employee shall be entitled to either a displacement or dismissal allowance under paragraphs (6) or (7) hereof because of the abolishment of a position to which, at some future time, he could have bid, been transferred, or promoted.

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

(11) (a) Any employee covered by this agreement who is retained in the service of his employer, 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 in order to retain or secure active employment with the Recipient in accordance with this agreement, and who 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 for himself and members of his immediate family, and for his own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter, not to exceed five (5) working days. The exact extent of the responsibility of the Recipient under this paragraph, and the ways and means of transportation, shall be agreed upon in advance between the Recipient and the affected employee or his representatives.

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(b) If any such employee is laid off within three (3) years after changing his point of employment in accordance with paragraph (a) hereof, and elects to move his place of residence back to his original point of employment, the Recipient shall assume the expenses, losses and costs of moving to the same extent provided in subparagraph (a) of this paragraph (11) and paragraph (12) (a) hereof.

(c) No claim for reimbursement shall be paid under the provisions of this paragraph unless such claim is presented to the Recipient within ninety (90) days after the date on which the expenses were incurred.

(d) Except as otherwise provided in subparagraph (b), changes in place of residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(12) (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 employer (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 as a result of the Project, and is thereby required to move his place of residence.

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 Recipient for any loss suffered in the sale of his home for less than its fair market value, plus conventional fees and closing costs, such loss to be paid within thirty (30) days of settlement or closing on the sale of the home. In each case, the fair market value of the home in question shall be determined, as of a date sufficiently prior to the date of the Project, so as to be unaffected thereby. The Recipient shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person and to reimburse the seller for his conventional fees and closing costs.

If the employee is under a contract to purchase his home, the Recipient shall protect him against loss under such contract, and in addition, shall relieve him from any further obligation thereunder.

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

(b) No claim for loss shall be paid under the provisions of this paragraph unless such claim is presented to the Recipient within one year after the effective date of the change in residence.

(c) 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 a joint conference between the employee, or his union, and the Recipient. In the event they are unable to agree, the dispute or controversy may be referred by the Recipient or the union to a board of competent real estate appraisers selected in the following manner: one (1) to be selected by the representatives of the employee, and one (1) by the Recipient, and these two, if unable to agree within thirty (30) days upon the valuation, shall endeavor by agreement within ten (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 State or local Board of Real Estate Commissioners to designate within ten (10) days a third appraiser, whose designation will be binding upon the parties and whose jurisdiction shall be limited to determination of the issues raised in this paragraph only. A decision of a majority of the appraisers shall be required and said decision shall be final, binding, and conclusive. The compensation and expenses of the neutral appraiser, including 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.

(d) Except as otherwise provided in paragraph (11) (b) hereof, changes in place of residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(e) "Change in residence" means transfer to a work location which is either (A) outside a radius of twenty (20) miles of the employee's former work location and farther from his residence than was his former work location, or (B) is more than thirty (30) normal highway route miles from his residence and also farther from his residence than was his former work location.

(13) A dismissed employee entitled to protection under this agreement may, at his option within twenty-one (21) days of his dismissal, resign and (in lieu of all other benefits and protections provided in this agreement) accept a lump sum payment computed in accordance with section (9) of the Washington Job Protec-

tion Agreement of May 1936:

Length of Service	Separation Allowance
1 year and less than 2 years	6 months' pay
2 " " " 3 "	9 " "
3 " " " 5 "	12 " "
5 " " " 10 "	12 " "
10 " " " 15 "	12 " "
15 " " over	12 " "

In the case of an employee with less than one year's service, five days' pay, computed by multiplying by 5 the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied, for each month in which he performed service, will be paid as the lump sum.

(a) Length of service shall be computed as provided in Secion 7 (b) of the Washington Job Protection Agreement, as follows:

For the purposes of this agreement, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve (12) such months shall be credited as one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization, he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(b) One month's pay shall be computed by multiplying by 30 the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied prior to time of his dismissal as a result of the Project.

(14) Whenever used herein, unless the context requires otherwise, the term "protective period" means that 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 six (6) years therefrom, provided, however, that the protective period for any particular employee during which he is entitled to receive the benefits of these provisions shall not continue for a longer period

following the date he was displaced or dismissed than the employee's length of service, as shown by the records and labor agreements applicable to his employment prior to the date of his displacement or his dismissal.

(15) (a) In the event there arises any labor dispute with respect to the protection afforded by this agreement, or with respect to the interpretation, application or enforcement of the provisions of this agreement, not otherwise governed by Section (12) (a) hereof, the Labor-Management Relations Act, as amended, Railway Labor Act, as amended, or by impasse resolution provisions in a collective bargaining or protective agreement involving the Recipient and the union, which cannot be settled by the parties thereto within thirty (30) days after the dispute or controversy arises, it may be submitted at the written request of the Recipient or the union to a board of arbitration to be selected as hereinafter provided. One arbitrator is to be chosen by each interested party, and the arbitrators thus selected shall endeavor to select a neutral arbitrator who shall serve as chairman. Each party shall appoint its arbitrator within five (5) days after notice of submission to arbitration has been given. Should the arbitrators selected by the parties be unable to agree upon the selection of the neutral arbitrator within ten (10) days after notice of submission to arbitration has been given, then the arbitrator selected by any party may request the American Arbitration Association to furnish, from among members of the National Academy of Arbitrators who are then available to serve, five (5) arbitrators from which the neutral arbitrator shall be selected. The arbitrators appointed by the parties shall, within five (5) days after the receipt of such list, determine by lot the order of elimination and thereafter each shall, in that order, alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral arbitrator. If any party fails to select its arbitrator within the prescribed time limit, the highest officer of the Union or of the Recipient or their nominees, as the case may be, shall be deemed to be the selected arbitrator, and the board of arbitration shall then function and its decision shall have the same force and effect as though all parties had selected their arbitrators. Unless otherwise provided, in the case of arbitration proceedings, under paragraph (5) of this agreement, the board of arbitration shall meet within fifteen (15) days after selection or appointment of the neutral arbitrator and shall render its decision within forty-five (45) days after the hearing of the dispute has been concluded and the record closed. The decision by majority vote of the arbitration board shall be final and binding as the decision of the arbitration board, except as provided in subparagraph (b) below. All the conditions of the agreement shall continue to be effective during the arbitration proceedings.

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(b) In the case of any labor dispute otherwise covered by subparagraph (a) but involving multiple parties, or employees of urban mass transportation employers other than those of the Recipient, which cannot be settled by collective bargaining, such labor dispute may be submitted, at the written request of any of the parties to this agreement involved in the dispute, to a single arbitrator who is mutually acceptable to the parties. Failing mutual agreement within ten (10) days as to the selection of an arbitrator, any of the parties involved may request the American Arbitration Association to furnish an impartial arbitrator from among its members of the National Academy of Arbitrators who is then available to serve. Unless otherwise provided, in the case of arbitration proceedings under paragraph (5) of this agreement, the arbitrator thus appointed shall convene the hearing within fifteen (15) days after his selection or appointment and shall render his decision within forty-five (45) days after the hearing of the dispute or controversy has been concluded and the record closed. The decision of the neutral arbitrator shall be final, binding, and conclusive upon all parties to the dispute. All the conditions of the agreement shall continue to be effective during the arbitration proceeding. Authority of the arbitrator shall be limited to the determination of the dispute arising out of the interpretation, application, or operation of the provisions of this agreement. The arbitrator shall not have any authority whatsoever to alter, amend, or modify any of the provisions of any collective bargaining agreement.

(c) The compensation and expenses of the neutral arbitrator, and any other jointly incurred expenses, shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(d) In the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be his obligation to identify the Project and specify the pertinent facts of the Project relied upon. It shall then be the Recipient's burden to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee (Hodgson's Affidavit in Civil Action No. 825-71).

(e) Nothing in this agreement shall be construed to enlarge or limit the right of any party to utilize, upon the expiration of any collective bargaining agreement or otherwise, any economic measures which are not inconsistent or in conflict with applicable laws or this agreement.

(16) Nothing in this agreement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or arrangements by collective bargaining agreement or law where applicable, including P. L. 93-236, enacted January 2, 1974; provided that there shall be no duplication of benefits to any employees, and, provided further, that any benefit under the agreement shall be construed to include the conditions, responsibilities, and obligations accompanying such benefit.

(17) The Recipient shall be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee affected as a result of the Project may file a claim through his union representative with the Recipient within sixty (60) days of the date he is terminated or laid off as a result of the Project, or within eighteen (18) months of the date his position with respect to his employment is otherwise worsened as a result of the Project; provided, in the latter case, if the events giving rise to the claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event; provided, further, that no benefits shall be payable for any period prior to six (6) months from the date of the filing of the claim. Unless such claims are filed with the Recipient within said time limitations, the Recipient shall thereafter be relieved of all liabilities and obligations related to said claims. The Recipient will fully honor the claim, making appropriate payments, or will give notice to the claimant and his representative of the basis for denying or modifying such claim, giving reasons therefor. In the event the Recipient fails to honor such claim, the Union may invoke the following procedures for further joint investigation of the claim by giving notice in writing of its desire to pursue such procedures. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be requested of them relevant to the disposition of the claim and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual material as may be relevant. In the event the claim is so rejected by the Recipient, the claim may be processed to arbitration as hereinabove provided by paragraph (15). Prior to the arbitration hearing, the parties shall exchange a list of intended witnesses. In conjunction with such proceedings, the impartial arbitrator shall have the power to subpoena witnesses upon the request of any party and to compel the production of documents and other information tended in the pre-arbitration period which is relevant to the disposition of the claim.

Nothing included herein as an obligation of the Recipient shall be construed to relieve any other urban mass transportation employer of the employees covered hereby of any obligations

which it has under existing collective bargaining agreements, including but not limited to obligations arising from the benefits referred to in paragraph (10) hereof, nor make any such employer a third-party beneficiary of the Recipient's obligations contained herein, nor deprive the Recipient of any right of subrogation.

(18) During the employee's protective period, a dismissed employee shall, if he so requests, in writing, be granted priority of employment to fill any vacant position within the jurisdiction and control of the Recipient, reasonably comparable to that which he held when dismissed, for which he is, or by training or re-training can become, qualified; not, however, in contravention of collective bargaining agreements relating thereto. In the event such employee requests such training or re-training to fill such vacant position, the Recipient shall provide for such training or re-training at no cost to the employee. The employee shall be paid the salary or hourly rate provided for in the applicable collective bargaining agreement for such position, plus any displacement allowance to which he may be otherwise entitled. If such dismissed employee who has made such request fails, without good cause, within ten (10) days to accept an offer of a position comparable to that which he held when dismissed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such ten-day period, forfeit all rights and benefits under this agreement.

As between employees who request employment pursuant to this paragraph, the following order where applicable shall prevail in hiring such employees:

(a) Employees in the craft or class of the vacancy shall be given priority over employees without seniority in such craft or class;

(b) As between employees having seniority in the craft or class of the vacancy, the senior employees, based upon their service in that craft or class, as shown on the appropriate seniority roster, shall prevail over junior employees;

(c) As between employees not having seniority in the craft or class of the vacancy, the senior employees, based upon their service in the crafts or classes in which they do have seniority as shown on the appropriate seniority rosters, shall prevail over junior employees.

(19) This agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by reason of the arrangements made by or for the Recipient to manage and operate the system.

Any such person, enterprise, body, or agency, whether publicly- or privately-owned, which shall undertake the management or operation of the system, shall agree to be bound by the terms of this agreement and accept the responsibility for full performance of these conditions.

(20) The employees covered by this agreement shall continue to receive any applicable coverage under Social Security, Railroad Retirement, Workmen's Compensation, unemployment compensation, and the like. In no event shall these benefits be worsened as a result of the Project.

(21) In the event any provision of this agreement is held to be invalid, or otherwise unenforceable under the federal, State, or local law, in the context of a particular Project, the remaining provisions of this agreement shall not be affected and the invalid or unenforceable provision shall be renegotiated by the Recipient and the interested union representatives of the employees involved for purpose of adequate replacement under §13 (c) of the Act. If such negotiation shall not result in mutually satisfactory agreement, any party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this agreement only as applied to that Project, and any other appropriate action, remedy, or relief.

(22) This agreement establishes fair and equitable employee protective arrangements for application only to federal operating assistance Projects under §§3 (a) and 5 of the Act and shall not be applied to other types of assistance under §5 or under other provisions of the Act, in the absence of further understandings and agreements to that effect.

(23) The designated Recipient, as hereinabove defined, signatory hereto, shall be the sole provider of mass transportation services to the Project and such services shall be provided exclusively by employees of the Recipient covered by this agreement, in accordance with this agreement and any applicable collective bargaining agreement. The parties recognize, however, that certain of the recipients signatory hereto, providing urban mass transportation services, have heretofore provided such services through contracts by purchase, leasing, or other arrangements and hereby agree that such practices may continue. Whenever any other employer provides such services through contracts by purchase, leasing, or other arrangements with the Recipient, or on its behalf, the provisions of this agreement shall apply.

(24) An employee covered by this agreement, who is not dismissed, displaced, or otherwise worsened in his position with regard to his employment as a result of the Project, but who is

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dismissed, displaced, or otherwise worsened solely because of the total or partial termination of the Project, discontinuance of Project services, or exhaustion of Project funding, shall not be deemed eligible for a dismissal or displacement allowance within the meaning of paragraphs (6) and (7) of this agreement.

(25) If any employer of the employees covered by this agreement shall have rearranged or adjusted its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which he should be entitled under this agreement, the provisions of this agreement shall apply to such employee as of the date when he was so affected.

(26) Any eligible employer not initially a party to this agreement may become a party by serving written notice of its desire to do so upon the Secretary of Labor, the American Public Transit Association, or its designee, and the unions signatory hereto, or their designee. In the event of any objection to the addition of such employer as a signatory, then the dispute as to whether such employer shall become a signatory shall be determined by the Secretary of Labor.

(27) In the context of a particular Project, any other union which is the collective bargaining representative of urban mass transportation employees in the service area of the Recipient, and who may be affected by the assistance to the Recipient within the meaning of 49 U.S.C.A. 1609 (c), may become a party to this agreement as applied to the Project, by serving written notice of its desire to do so upon the other union representatives of the employees affected by the Project, the Recipient, and the Secretary of Labor. In the event of any disagreement that such labor organization should become a party to this agreement, as applied to the Project, then the dispute as to whether such labor organization shall participate shall be determined by the Secretary of Labor.

(28) This agreement shall be effective and be in full force and effect for the period from November 26, 1974 to and including September 30, 1977. It shall continue in effect thereafter from year to year unless terminated by the A.P.T.A. or by the national labor organizations signatory hereto upon one hundred twenty (120) days' written notice prior to the annual renewal date. Any signatory employer or labor organization may individually withdraw from the agreement effective October 1, 1977, or upon any annual renewal date thereafter, by serving written notice of its intention so to withdraw one hundred twenty (120) days prior to the annual renewal date; provided, however, that any rights of the parties hereto or of individuals established and fixed during the term of this agreement shall continue in full force and effect, notwithstanding the termination of the agreement or the exercise by any signatory of the right to withdraw therefrom. This agreement shall be subject to revision by mutual agreement of the parties hereto at any time,

but only after the serving of a sixty (60) days' notice by either party upon the other.

(29) In the event any project to which this agreement applies is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the federal government and the Recipient or other applicant for federal funds; provided, however, that this agreement shall not merge into the contract of assistance but shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms, nor shall any other employee protective agreement nor any collective bargaining agreement merge into this agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their duly authorized representatives.

AMERICAN PUBLIC TRANSIT ASSOCIATION

By: Stanley H. Gates, Jr. /s/

Date: _____

By: B. R. Stoker /s/

Date: 7/23/75

AMALGAMATED TRANSIT UNION, AFL-CIO

By: D. V. Maroney, Jr. /s/

Date: 7-23-75

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

By: Matthew Guinan /s/

Date: 7-23-75

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RAILWAY LABOR EXECUTIVES' ASSOCIATION

American Railway Supervisors' Association
American Train Dispatcher's Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of the United States and Canada
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employes & Bartenders International Union
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Transport Workers Union of America
United Transportation Union

By: C J Chamberlain
Date: 7-31-75
By: William J. Hershey
Date: 7-30-75

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

By: J. C. Dennis, VP
Date: 7/31/75

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

By: William E. Bell
Date: July 31, 1975

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

By: John F. Peterpaul
Date: 7/31/75

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(Cite as: 1995 WL 717122 (I.C.C.))

*1 CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.
AND
SEABOARD COAST LINE INDUSTRIES, INC., ET AL.

Decided: November 22, 1995

Service Date: December 7, 1995

INTERSTATE COMMERCE COMMISSION DECISION
ARBITRATION REVIEW
Finance Docket No. 28905 (Sub-No. 27)

By the Commission, Chairman Morgan, Vice Chairman Owen, and Commissioner Simmons.

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

This decision will be printed in the bound volumes of the ICC printed reports at a later date.

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., [FN1] we allowed CSX Corporation, a noncarrier 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"). [FN2] 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.

In a subsequent series of decisions, we approved the consolidation of the railroad corporate entities controlled by CSX Corporation into its subsidiary CSXT. [FN3] The last steps in this process involved the RF & P Railroad. In 1991, CSXT spun off RF & P Railroad's 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. [FN4] 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. [FN5]

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. [FN6]

*2 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. [FN7] 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.

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 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 (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. [FN8]

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 [FN9] 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.

*3 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 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. [FN10] 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.)

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 2 of New York Dock.

*4 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 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. [FN11]

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. 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. [FN12] The unions maintain that the prior implementing agreements require that the changes proposed here be accomplished through bargaining under the Railway Labor Act (RLA) rather than arbitrations under New York Dock. [FN13]

*5 In its reply, CSXT responds that the language in question 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 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 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. [FN14]

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. [FN15] 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 to collective bargaining agreements, not just changes that are designed to transfer wealth from labor to carriers.

*6 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 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 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. [FN16] 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 Dot approved via an exemption under section 10505.

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 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 before the Arbitrator under New York Dock.

*7 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. [FN17] The opportunity to make these changes was created by an entire 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. [FN18] 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.

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 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.

*8 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. 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 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. [FN19] We have no reason to question this finding, much less to find it egregiously wrong. [FN20]

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 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.

*9 (b) Past dealings. The Arbitrator also implied that past dealings show that the RLA requirement was not intended to bar the instant coordination. [FN21] 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 coordination efforts under New York Dock. [FN22] 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.

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) 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....

*10 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 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, [FN23] 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 thereby benefits from these lower costs, so does the public.

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. [FN24] 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.

The one adverse effect on employees from the proposed consolidation of seniority districts apparent from the record is that some 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.

*11 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 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 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; [FN25] 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 Amtrak Act as incorporated into 49 U.S.C. 11347. 987 F.2d at 814.

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 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."

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

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

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

In any event, the particular provisions at issue here do not come within "rights, privileges, or benefits" because they have consistently been modified in the past in connection within consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions. The ATDA court looked to past conduct in consolidations when it ruled that scope rules were not among those provisions protected as "rights, privileges, and benefits." 26 F.3d at 1163. The court relied, in part, on CSX Corporation--Control--Chessie System. Inc. and Seaboard Coast Line Industries, Inc., 6 I.C.C.2d 715, 736, 742 (1990) (Carmen II), and its recitation of the power of arbitrators under the Washington Job Protection Agreement of 1936 and pre-1976 labor conditions.

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

The unions argue that section 2 of New York Dock gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the B & O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd.--Exemption Acquisition and Operation--Certain Lines of Green Bay and Western Railroad Company. Fox River Valley Railroad Corporation. and the Ahnapee & Western Railway Company, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), slid 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.

*13 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 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 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.

Vernon A. Williams
Secretary
(SEAL)

FN1. CSX Corp.--Control--Chessie System. Inc. and Seaboard Coast Line Industries. Inc., 363 I.C.C. 521 (1980) (CSXT--Control--Chessie and Seaboard).

FN2. At that time, RF & P Railroad was controlled (65.9%) by the Richmond-Washington Company, which, in turn, was owned by Chessie (40%) and SCLI (40%).

FN3. 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).

FN4. 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).

FN5. CSX Transportation. Inc.--Operation Exemption--Richmond, Fredericksburg and Potomac Railway Company, Finance Docket No. 32020 (ICC served Apr. 15, 1992).

FN6. 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.]

FN7. 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).

FN8. 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.

FN9. See note 3, supra, for a statement of the decisions.

FN10. 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.

FN11. 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.

FN12. 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.

FN13. 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 8.

FN14. See Appendices A and B of the unions' reply filed June 29, 1995.

FN15. 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.

FN16. 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).

FN17. 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.

FN18. 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.

FN19. 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.

FN20. 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 subsequent of the B & O track involved here. Unlike the agreements at issue here, the 1992 agreements did not involve C & O track.

FN21. 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.

FN22. 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.

FN23. See note 16, above.

FN24. 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.

FN25. See ATDA, 26 F.3d at 1160-61 for discussion of scope provisions.

APPENDIX

"14 CSXT's Statement of Changes Under Section 4 of New York Dock [FN1]

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)
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.--Muddlety, 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 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. Cumberland will remain as the home terminal. Grafton will remain as the away from home terminal.

*15 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 was included within their original seniority district.

FN1. 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.

I.C.C.
Slip Copy, 1995 WL 717122 (I.C.C.)

AWD	279
Referee:	Yost
Fin. Docket:	32760
Carrier(s):	UP - control - SP
Union(s):	UTU
Award Date:	4-14-97
NYD Articles:	Art. I, §§ 2, 4

ARBITRATION PROCEEDING

United Transportation Union
and
Union Pacific Railroad Company, et al.
Control and Merger - Southern Pacific
Transportation Company, et al.

STB Finance Docket
No. 32760

Findings and Award
Pursuant to Art. I,
Section 4, New York
Dock Conditions

Appearances:

For the Organization:

Byron A. Boyd, Jr., Assistant President
Clinton J. Miller III, General Counsel
J. Previsich, General Chairman

For the Carrier:

W. S. Hinckley, General Director Labor Relations
Dick Meredith, Asst. Vice President-Employee Relations, Planning
Catherine J. Andrews, Assistant Director Labor Relations
Mark E. Brennan, Operating Department

FINDINGS:

The parties to this dispute are the United Transportation Union and the Union Pacific System/Southern Pacific System. In Finance Docket No. 32760, the U.S. Department of Transportation, Surface Transportation Board (STB) approved the merger of the two systems which included various rail entities.

In accordance with New York Dock provisions the Carrier served notices on the Organization's General Chairmen covering two geographical areas referred to by the Carrier as the Salt Lake Hub and the Denver Hub. The parties in their submissions detailed the negotiating dates which covered approximately a 120 day period. The parties were unable to reach an agreement and a request was made for arbitration in accordance with New York Dock. The parties were unable to jointly select an arbitrator and through a joint letter to the National Mediation Board requested that one be appointed. By letter dated February 21, 1997 the undersigned was appointed by the National Mediation Board.

This arbitration is somewhat unique in that in addition to the normal terms and conditions of arbitration, under New York Dock, the Organization requested arbitration of what is known as the

"commitment letter". This letter was signed by the Carrier and addressed to the Organization's President and provided for certain commitments with regards to the entire merger process beginning with the Carrier's filing with the STB. It is the Organization's position that the Carrier did not live up to the commitments and as a result the issues raised therein should be arbitrated.

Two separate arbitration presentations were made beginning on March 25, 1997, one covering the commitment letter and the other the terms and conditions to govern the two Hubs. Since these two hearings are so intertwined, they shall be dealt with in this one award.

COMMITMENT LETTER

The purpose of the letter was to 1. Limit the Organization's exposure in the merger to items "necessary" to completing the merger, 2. Gain protection certification under New York Dock for a number of employees, and 3. Give affected General committees an opportunity to develop a seniority system for the merged areas.

In exchange, the Carrier wanted 1. the UTU's support for the merger and operating plans, 2. the Organization's recognition that some changes were "necessary" in the merger and, 3. a seniority system that was not illegal, administratively burdensome or costly.

It is apparent that the writer and the addressee of the commitment letter understood the benefits of a simpler merger process than the parties had previously undertaken: however, the negotiators on both sides failed to see the same benefits and in essence pushed the envelope too far. Both parties included items in their proposals that went beyond what was necessary. While the Organization was the moving party in requesting arbitration over the letter, their proposals included several unnecessary items such as changing work rules, cherry picking work rules, certification beyond the number in the commitment letter in lieu of relocation and a seniority system that was administratively burdensome and potentially more costly. However, when the Carrier's proposals, which included an unnecessary 25 mile zone and crew consist changes are brought before this arbitrator, it is not difficult to say that anything beyond what was contemplated in the commitment letter will not be used to escape any commitment to provide for automatic certification as provided later in this award, because the parties failed to make a voluntary agreement.

It is apparent to this arbitrator that not all the parties to the negotiations are aware or understand the value the Organization received by the letter. Some members of the Organization's

negotiating team apparently feel there is no need to reach a voluntary agreement in order to achieve automatic certification and have made demands that most certainly will not lead to such a voluntary agreement. On the other hand, as mentioned above the Carrier has reached beyond the limits that would be acceptable to creating a voluntary agreement.

Neither party should take comfort in future negotiations that this award provides for future automatic certification. The commitment letter is an example of responsible recognition of the needs of both parties and for the first round of merger negotiations/arbitration this arbitrator simply will not substitute his judgement for those behind the commitment letter.

TERMS AND CONDITIONS

One of the key areas of dispute deals with what is "necessary" to accomplish the merger. In reviewing previous mergers and the need to coordinate employees and operations at common points and over parallel operations, it is proper to unify the employees and operations under a single collective bargaining agreement and single seniority system in each of the two Hubs. This does not mean the Carrier has authority to write a new agreement, but the Carrier's selection of one of the existing collective bargaining agreements to apply to all those involved in a Hub as proposed in this case is appropriate.

While selecting one existing collective bargaining agreement puts many issues to rest, both parties recognized in the letter that other changes may be necessary for a merger to accomplish a smooth flow of operations. These changes, however, were not to be monetary but operational. Such operational changes would include the combining of yards into single terminals, consolidating pool freight, local and road switcher operations and combining extra boards into fewer extra boards that would cover the more expansive operations of the two Hubs.

Seniority is always the most difficult part of a merger. There are several different methods of putting seniority together but each one is a double-edged sword. In a merger such as this one that also involves line abandonments and alternate routing possibilities on a regular basis, the tendency is to present a more complicated seniority structure as the Organization did. What is called for is not a complicated structure but a more simplified one that relies on New York Dock protection for those adversely affected and not perpetuating seniority disputes long into the future. The Carrier's proposals fairly address the issue in both Hubs.

There are two issues that must be addressed with regards to crew consist. The first is the special allowance/productivity fund issue and the second is the Carrier's request for the least restrictive yard/local provisions to overlay the Eastern District agreement. The second is easier to deal with. If the Carrier believed that another agreement would better fit this area, it had the opportunity to select that agreement for this area in total. Since it did not, this arbitrator will not give a separate crew consist provision to them. The Eastern District agreement covers this area with respect to crew size and work in both yard and road service.

The special allowance/productivity funds must be coordinated. This arbitrator does not see any undue advantage to the Carrier in its proposal to pay out the existing funds and create a new one. Those who would have been eligible for a productivity fund and special allowance had they worked under the Eastern District agreement since their entry into train service shall be entitled to them under the new plan. Those who sold their special allowances/productivity funds previously are not entitled to a windfall now and would not be eligible for those payments regardless of their seniority date.

Without the commitment letter, the Carrier is not required to certify any employees as protected. The letter identified a number of employees to be protected and the Carrier's notices, as amended, identified a larger number. Since the Carrier's proposal exceeded the commitment letter, it should protect the larger number referenced in its notices. If the Eastern District General Chairman and Carrier are not able to agree within 30 days of this Award who the specific employees are, then it shall be the employees whose assignments are involuntarily changed until the number in the notices is reached. If both proposals were proper and were not over reaching, as they were here, then this arbitrator would not have imposed this provision.

I have identified the major issues in more detail above and now turn to the proposals. In reviewing the proposals, this Board finds that the Carrier's proposals, including questions and answers, for each Hub, submitted to this panel are appropriate for inclusion as part of this Award except for the following:

Salt Lake City proposal:

1. Article III A (2) and (3) concerning the metro complex.
2. Article IV B (1) concerning the 25 mile zone.
3. Article VI protection is amended per above.
4. Article VIII E. Concerning the least restrictive crew consist.

5. All questions and answers referring to these eliminated sections.

Denver Hub proposal:

1. Article IV B (1) concerning the 25 mile zone.
2. Article VI protection is amended per above.
3. Article IX E concerning the least restrictive crew consist.
4. All questions and answers referring to these eliminated sections.

Copy of Carrier's proposed implementing agreement for the Salt Lake Hub and the Denver Hub are attached hereto and made a part of this Award.

This arbitrator is convinced from the facts of record that the changes contained in the Carrier's proposals as modified by the exceptions noted herein are necessary to effectuate the STB's approved consolidation and yield enhanced efficiency in operations benefiting the general public and the employees of the merged operations.

This Award is final and effective immediately. Should the Organization and the Carrier desire to continue negotiations over other elements then they should so proceed. These negotiations should be between the Eastern District General Chairman and the Carrier. These would be voluntary and not subject to Section 4 New York Dock arbitration if they do not prove fruitful.

Signed this 14th day of April 1997.

James E. Yost

James E. Yost, Arbitrator

35538
EB

SERVICE DATE - LATE RELEASE JUNE 26, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 22)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY
--CONTROL AND MERGER--
SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY, SPCSL CORP. AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: June 26, 1997

We grant the petition of the United Transportation Union (UTU) for review of the arbitration decision issued by James E. Yost as it pertains to health benefits and decline to review the decision concerning the remaining issues raised by UTU.

BACKGROUND

By decision served August 12, 1996, in Finance Docket No. 32760 (the *Merger Proceeding*), we approved the common control and merger of the rail carriers controlled by the Union Pacific Corporation and the rail carriers controlled by the Southern Pacific Rail Corporation. The controlling operating railroad is now the Union Pacific Railroad Company (UP or the carrier), the respondent in this proceeding. In our decision approving the control and merger application, we imposed the employee protection conditions established in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979) (*New York Dock*), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

Under *New York Dock*, labor changes related to approved transactions are effected through implementing agreements negotiated before the changes occur. If the parties cannot agree, the issues are resolved by arbitration, with possible appeal to the Board under its deferential *Lace Curtain* standard of review.[1] Affected employees receive comprehensive displacement and termination benefits for up to 6 years.

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[1] Under 49 CFR 1115.8, the standard for review is provided in *Chicago & North Western Tpn. Co.--Abandonment*, 3 I.C.C.2d 729 (1987), *aff'd sub nom. International Brotherhood of Electrical 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 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 735-36. 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 Interstate Commerce Commission (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.]

EMPLOYEES' EXHIBIT 23
PAGE 6

Here, the parties were unable to reach an implementing agreement on labor changes covering two geographical areas, referred to by UP as the "Salt Lake Hub" and the "Denver Hub." When the parties could not agree, the dispute was taken to arbitration. On April 14, 1997, arbitrator James E. Yost issued his decision. The decision adopted the two implementing arrangements proposed by the carrier, with exceptions that have not been appealed by the carrier. The arbitrator found that the implementing provisions adopted in his decision were "necessary to effect the STB's approved consolidation and yield enhanced efficiency in operations benefitting the general public and the employees of the merged operations."

On May 5, 1997, UTU filed an appeal of the arbitrator's decision. UTU also requested a stay of the decision pending our review.[1] On May 21, 1997, UTU filed a motion for leave to submit a supplement to its petition for review and a tendered supplemental petition. UP filed a reply in opposition to admission of UTU's tendered supplement on May 23, 1997. UP filed its reply in opposition to UTU's appeal on May 27, 1997.

PRELIMINARY MATTER

In its motion for leave to supplement its petition, UTU submits two UP notices scheduling implementation of the award, which were sent to UTU on May 1, 1997. We will consider these notices because they provide material that was not available to UTU until shortly before the deadline for submission of its appeal and UP does not object.

UP does object to consideration of the remaining content of UTU's tendered supplement to its petition, arguing that UTU is not entitled to file "yet another brief on the merits." We agree. Under 49 CFR 1115.8, UTU is entitled to file only one appeal pleading. Moreover, UTU's supplement essentially constitutes repetitive and cumulative argument.

DISCUSSION AND CONCLUSIONS

UTU raises four issues in its appeal: (a) whether it was proper for the arbitrator to include language in his decision regarding representation during future negotiations; (b) whether the arbitrator properly approved provisions allowing the carrier to merge seniority districts and to force employees to switch seniority districts; (c) whether the arbitrator's approval of the current UP Eastern District Agreement as the uniform collective bargaining agreement for the affected employees (replacing the separate pre-consolidation agreements) was proper; and (d) whether the arbitrator properly approved the provisions in the implementing arrangements requiring employees to switch health care providers.

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[1] By decisions served May 30, 1997, and June 10, 1997, implementation of the arbitrator's decision was stayed, with the latter stay running until July 1, 1997. The Brotherhood of Locomotive Engineers, on June 19, 1997, filed in opposition to the grant of a further stay. On the same date, UP filed a petition to vacate the stay. Given our decision here resolving the merits of the petition for review, the relief sought in these two pleadings has become moot. Moreover, both BLE and UP could have, and indeed should have, made the arguments contained in these pleadings in response to the initial stay request rather than some 45 days afterwards. Further, we find incredible the claim by UP now that a less than 30-day stay of the implementation of the subject arbitral award has materially disrupted the implementation of the underlying merger, our approval of which has been in effect since September 11, 1996. And we continue to expect UP to submit an in-depth analysis of the effects of the merger and condition implementation in its July 1, 1997 quarterly progress report on the underlying merger. Because we are resolving the merits of the petition for review, however, we will vacate the stay as of the service date of this decision.

I. UP's Allegation of Waiver

Before we discuss these issues, we must consider UP's contention that UTU waived consideration of them for the Denver Hub. During arbitration, UTU submitted a separate implementation proposal concerning the Salt Lake Hub but did not submit a separate proposal for the Denver Hub. The carrier argues that by not making its own proposal concerning the Denver Hub, UTU waived its right to raise any of the aforementioned four issues on appeal as they apply to that Hub.

We disagree. A party can waive its objections only by failing to make them below. UTU did not fail to make objections below concerning the Denver Hub. In its submission, UTU phrased its criticism of UP in general terms that applied equally to the changes proposed by UP for both hubs, which changes were virtually identical. There was nothing in UTU's overall submission to indicate that UTU did not object to the changes proposed by the carrier for the Denver Hub. UTU's submission put the arbitrator on notice that UTU believed that certain changes proposed by UP were improper under *New York Dock* for *both* hubs. The arbitrator must have been on notice as to the scope of UTU's objections because he rejected implementation provisions proposed by the carrier for both hubs, not just the Salt Lake Hub. Because the record shows that UTU did object to the carrier's Denver Hub proposals, we conclude that UTU has not waived all arguments for the Denver Hub simply by not submitting its own separate proposal for that Hub.

II. The Issues Appealed by UTU

As explained in greater detail below, only one issue — whether the arbitrator properly approved the provisions in the implementing arrangements requiring employees to switch health care providers — satisfies the criteria for review by us under our *Lace Curtain* standard of review. The health care issue is reviewable because it involves an allegation that the arbitrator's decision exceeds the authority entrusted to him under our *New York Dock* labor conditions. The issue involving language pertaining to union representation during future negotiations is moot in light of our interpretation of the arbitrator's decision. The issues involving the necessity of seniority district changes and the consolidation of collective bargaining agreements are the sort of matters that have historically been decided by arbitrators under the Washington Job Protection Agreement of May 1936 and subsequently under our labor protective conditions on which, with the approval of the courts, we have traditionally deferred to arbitrators in the absence of egregious error. *CSX Corp.–Control–Chessie and Seaboard C.L.*, 6 I.C.C.2d 715 (1990).

A. Representation During Future Negotiations

The arbitrator's decision stated (at 4 and 5) that, if there are to be future negotiations, they should be between the "Eastern District General Chairman" and the carrier. UTU asserts that any future negotiations must be between "UTU" and the carrier, arguing that only UTU, as the current bargaining representative of the affected employees, has the authority to direct the carrier to the persons with whom the carrier must negotiate.

We do not interpret the decision as interfering with UTU's right to designate its own representative for future bargaining over issues affecting the Hubs. UTU has selected the UP Eastern District General Chairman to bargain for employees who come under the UP Eastern District Agreement.[1] The arbitrator imposed the UP Eastern District Agreement. When the arbitrator referred to possible future negotiations as being between the carrier and the Eastern District General Chairman, he was not attempting to lock UTU into this choice of a bargaining representative but was merely referring to the person whom UTU itself had designated to represent its members as being best able to discuss with management what various provisions mean. His suggestion was limited to the implementing agreement process and was not made any

[1] Declaration of W. Scott Hinckley, filed May 27, 1997, at 5-6.

part of the award we are asked to review. Plainly, the arbitrator did not purport to, nor could he, dictate representation for future bargaining purposes. Our interpretation moots UTU's appeal concerning this issue.

B. Changes in Seniority Districts[4]

UTU objects to the general provisions of the implementing arrangements approved by the arbitrator that allow the carrier to alter seniority districts and to force employees within the new hubs to move to different seniority districts. The implementing arrangements also contain special provisions that, in conjunction with the aforementioned general provisions, specifically allow the carrier to make seniority district changes for firemen, and UTU specifically objects to these provisions as well. UTU argues that all of these provisions contravene *New York Dock* by overriding collective bargaining agreement provisions[5] when an override is not necessary to realize the public benefits of the consolidation.

It is now firmly established that the Board, or arbitrators acting pursuant to authority delegated to them under *New York Dock*, may override provisions of collective bargaining agreements when an override is necessary for realization of the public benefits of approved transactions. Where modification has been necessary, it has been approved under either former sections 11341(a) [recodified in section 11321(a)] or 11347 [recodified in section 11326(a)]. *Norfolk & Western v. American Train Dispatchers*, 499 U.S. 117 (1991); *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806 (D.C. Cir. 1993) (*RLEA*); *American Train Dispatchers Association v. I.C.C.*, 26 F.3d 1157 (D.C. Cir. 1994) (*ATDA*); and *United Transportation Union v. Surface Transportation Board*, 108 F.3d 1425 (D.C. Cir. 1997) (*UTU*). In *RLEA*, 987 F.2d at 814-15, the court elaborated on the necessity test, as follows:

> [I]t 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 necessary to effect a public benefit of the transaction.

As noted, the arbitrator found that the consolidation was "necessary to effect the STB's approved consolidation and yield enhanced efficiency in operations benefitting the general public and the employees of the merged operations." This was a factual finding to which we must accord deference to the arbitrator under our *Lace Curtain* standard of review. Under our *Lace Curtain* standard of review, such factual findings are reviewed only if the arbitrator committed egregious error. Because UTU has failed to make the required showing, applying the *Lace Curtain* standard of review, we decline to review this finding.

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[4] Due to the nature of work in the railroad industry, operating employees are assigned to "seniority districts," which are lists of employees who are eligible to work in a given craft or operation in a defined geographical area, such as a hub. The order in which employees appear on these lists determines various employment rights.

[5] Except for the firemen, UTU does not cite or provide the specific collective bargaining agreement provisions that are alleged to be contravened by the provisions of the implementing arrangements that allow mandatory switching of seniority districts. For the firemen, UTU cites language in Article XIII, section 1(f) of the October 31, 1985 UTU National Agreement.

C. Uniform Collective Bargaining Agreement

UTU challenges the arbitrator's decision to allow UP to select its collective bargaining agreement for the Eastern District as the uniform collective bargaining agreement that will apply to the affected employees (replacing the separate pre-consolidation agreements). As noted in our discussion of the changes in seniority districts, it is now firmly established that the Board (or arbitrators acting under *New York Dock*) may override provisions of collective bargaining agreements when an override is necessary for realization of the public benefits of approved transactions. Here, the arbitrator found that application of a uniform collective bargaining agreement was also among the changes that were necessary to effect the STB's approved consolidation and yield enhanced efficiency in operations benefitting the general public and the employees of the merged operations. This was a factual finding to which we must accord deference to the arbitrator under our *Lace Curtain* standard of review. Again, under our *Lace Curtain* standard of review, such factual findings are reviewed only if the arbitrator committed egregious error.

UTU itself admits that there are circumstances in which collective bargaining agreements may be merged to effect the goals of mergers, stating on page 29 of its submission to the arbitrator: "The Organization has continually recognized where there is a coordination, a fusion of collective bargaining agreements is necessary." Here, the necessity for the merger of bargaining agreements is supported by the number of collective bargaining agreements alone that were in effect before the merger — before the merger, the Salt Lake Hub consisted of six collective bargaining agreements, and the Denver Hub consisted of three collective bargaining agreements.[6] The arbitrator could reasonably find that UP cannot effectively manage employees in a merged and coordinated operation if the operation must be burdened with six collective bargaining agreements, each with its own set of work rules. Our predecessor agency has previously upheld the consolidation of collective bargaining agreements.[7] Under these circumstances, UTU bears a heavy burden in attempting to show that the consolidation of collective bargaining agreements in the Hubs was egregious error. We find that UTU has failed to meet its burden of showing that the arbitrator committed egregious error in approving the consolidation of collective bargaining agreements in the Hubs.

UTU also seems to argue that the arbitrator erred by failing to apply the predominate collective bargaining agreements in the respective Hubs.[8] We disagree. UTU has submitted no

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[6] Declaration of W. Scott Hinckley, filed May 27, 1997, at 5.

[7] In *Norfolk and Western Railway Company, Southern Railway Company and Interstate Railway Company—Exemption—Contract to Operate and Trackage Rights*, Finance Docket No. 30582 (Sub-No. 2) (ICC served July 7, 1989), the ICC upheld an arbitrator's merger of only two collective bargaining agreements. Consolidation of collective bargaining agreements was also approved in *CSX—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc., et al.*, Finance Docket No. 28905 (Sub-No. 27) (ICC served Dec. 7, 1995) (*CSX—Control—Chessie/Seaboard*), 10 I.C.C.2d __ (1995), *aff'd, UTU, supra*. In *Wilmington Term. R.R.--Pur. & Lease—CSX Transp., Inc.*, 6 I.C.C.2d 799, 819-21 (1990), the ICC refused to require a lessee to apply the different collective bargaining agreement in effect for the lessor to former employees of the lessor who transferred to the lessee, citing a court decision that noted the operational difficulties involved in such a requirement. *See also*: the 1985 Seidenberg arbitration decision (Exh. 11 of UP's submission to the arbitrator); the 1985 Brown arbitration decision (Exh. 12 of UP's submission to the arbitrator); and the 1985 Ables arbitration decision (Exh. 13 of UP's submission to the arbitrator). These examples of approved consolidations do not exhaust the list.

[8] UTU states (Petition at 23) that it agreed to application of UP's Eastern District Agreement for the Salt Lake Hub and that the Eastern District Agreement predominates in the Denver Hub. UP responds that the UP Eastern District Agreement does *not* predominate in the

(continued...)

authority from the Board, the ICC, or a court that establishes a duty to adopt the predominate collective bargaining agreement that is in effect in an area where operations are being coordinated when consolidation of collective bargaining agreements is necessary in such an area to effect the benefits of a merger. While arbitrators may conclude that adoption of the predominate agreement makes sense in given situations, UTU has not explained why the arbitrator's failure to so conclude here was egregious error.

In *RLEA, supra*, the court admonished the ICC to refrain from approving modifications that are not necessary for realization of the public benefits of the consolidation but are merely devices to transfer wealth from employees to their employer. In its appeal, UTU made no effort to show that the UP Eastern District collective bargaining agreement is inferior to the collective bargaining agreements that it replaced. This is not a situation where the carrier is using *New York Dock* as a pretext to apply a new, uniform collective bargaining agreement that is inferior in matters such as wage levels, benefit levels, and working conditions. In fact, UP argues that its Eastern District Agreement is more costly because the collective bargaining agreement for the Denver & Rio Grande Western Railway Company, which was the other pre-merger agreement that might have been selected, has a crew consist provision more favorable to the carrier than the UP Eastern District Agreement.[9]

For these reasons, UTU has not shown that the arbitrator committed egregious error in approving the consolidation of collective bargaining agreements in the Hub territories as necessary for realization of the public benefits of the consolidation. Nor has UTU shown that the arbitrator committed egregious error in imposing the UP Eastern District collective bargaining agreement as the uniform agreement for operations in both of the Hubs. Because UTU has failed to make either of these required showings under the *Lace Curtain* standard of review, we decline to review this finding.

D. Health Benefits

UTU challenges the arbitrator's approval of provisions requiring employees to change their health benefits provider from the DRGW Hospital Association to the UP Hospital Association. UTU argues that: (1) the carrier negotiated implementing arrangements with the carmen, clerical, and engineer crafts that offered employees a choice of plans and that the same choice should be available here; (2) the withdrawal of employees from the DRGW Hospital Association plan will jeopardize that plan; (3) under the DRGW Hospital Association plan, the premiums are $300 lower for a retired couple with no drug limits; and (4) health "fringe benefits" have a protected status under *New York Dock*.

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[9](...continued)
Denver Hub but proceeds to argue that (1) UTU has in effect locked itself into its statement that the Eastern District Agreement should apply in both Hubs, if a single collective bargaining agreement is applied, and therefore (2) we should dismiss UTU's attack on the consolidation of collective bargaining agreements on the grounds that the arbitrator applied the agreement sought by UTU.

We will not dismiss UTU's argument on these grounds. While UTU's statements in this portion of its petition are not clear, a fair reading of the entire record submitted by UTU shows that it is interested in preserving prior collective bargaining rights as much as possible and that it believes that the consolidation of collective bargaining agreements approved by the arbitrator would be detrimental to this interest.

[9] The arbitrator rejected the carrier's attempt to reduce train operating crews in the Hubs (and several other changes), apparently finding that crew size was a systemwide "problem" having nothing to do with the *multiplicity* of carriers operating in any given area prior to the merger.

UP responds that UTU waived objection to the change in health benefits provider by failing to object to this change when the carrier submitted it to the arbitrator. We disagree. On page 19 of its separate submission to the arbitrator addressing certain commitments by UP made during the *Merger Proceeding*,[9] UTU argues that, under our labor protective conditions, SP employees are entitled to retain their hospitalization and medical care after the merger. This put the arbitrator on notice that health benefits were at issue and that UTU desired to have negotiated benefits retained. Moreover, as explained below, the issue of health benefits goes to the adequacy of an implementing agreement imposed under our labor conditions--a matter that we are required to address whenever it is brought to our attention. *See Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37 (1971).

In its decision in *CSX--Control--Chessie/Seaboard*, *supra* note 8, the ICC defined the scope of rights, privileges, and benefits that must be preserved as including hospitalization and medical care. It did so by looking to an essential item of legislative history, paragraph 10 of the Model Agreement for the protection of labor under the Urban Mass Transit Act of 1962, which it set forth in its decision (ICC served Dec. 7, 1995, slip op. at 14-15):

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

Immediately after quoting this provision, the ICC summarized its view of rights, privileges, and benefits by stating (slip op. at 15):

> 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 its decision reviewing *CSX--Control--Chessie/Seaboard*, the court adopted the ICC's test, which definitively governs this issue, holding (108 F.3d at 1430):

> In this case, the Commission offers a definition: "rights, privileges, and benefits" refers to "the incidents of employment, ancillary emoluments or fringe benefits—as opposed to the more central aspects of the work itself—pay, rules and working conditions." *See Commission decision* at 14, *reprinted in* J.A. 237. And "the incidents of employment, ancillary emoluments or fringe benefits" refers to employees' vested and accrued benefits, such as life insurance, hospitalization and medical care, sick leave, and similar benefits. *See id.* at 15, *reprinted in* J.A. 238.
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> • • • •
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> Under the Commission's interpretation, "rights, privileges and benefits" are protected absolutely, while other employee interests that are not inviolate are protected by a test of "necessity," pursuant to which there must be a showing of a nexus between the changes sought and the effectuation of an ICC-approved transaction. Under this scheme, the public interest in effectuating approved consolidations is ensured without any undue

[9] *See* Attachment A to Second Declaration of Paul C. Thompson, filed May 5, 1997

sacrifice of employee interests. In our view, this is exactly what was intended by Congress.

From this definition, we believe that employees' rights to membership in the DRGW Hospital Association plan must be preserved because these rights are a fringe benefit pertaining to "hospitalization and medical care."

UP responds that we must uphold the change in health benefits because (1) it is merely incidental to the approved adoption of a uniform collective bargaining agreement and (2) a contrary result would contravene the Board's refusal to allow parties to "cherry pick" among the provisions of pre-merger collective bargaining agreement provisions.[11] Moreover, UP notes that the arbitrator declined to impose the crewing provision it sought from another collective bargaining agreement on the grounds that doing so would violate the prohibition against "cherry picking."

We disagree. Our approval of a uniform collective bargaining agreement and refusal to allow "cherry picking" was not intended, and may not be used, to abrogate UTU's absolute right to the preservation of pre-consolidation rights, privileges, or benefits under collective bargaining agreements as a result of Section 2 of our *New York Dock* labor conditions, as interpreted by the ICC with the approval of the court in *UTU*.

UP also argues that UTU supported similar changes of benefits pursuant to the adoption of uniform agreements in other merger proceedings. Even if UTU did this, however, its support of such changes in the past would not estop UTU from opposing a change here. A union does not waive its right to preservation of rights, privileges, and benefits by failing to assert that right in prior proceedings. Nor does the fact that it might voluntarily agree to changes in rights, privileges and benefits mean that it can be forced to do so where, as here, the implementing agreement is imposed by arbitration. Thus, at a minimum, as UTU contends and as UTU asserts UP has done in other instances, UTU's members should have been afforded the choice of remaining with the DRGW Hospital Association plan or switching to the UP Hospital Association plan.

Regarding UP's argument that the change in health benefits is merely incidental, and that the harms alleged by UTU from the change in health care providers are "entirely speculative," there may be circumstances in which a "change" in a right, privilege, or benefit would be so inconsequential or nonsubstantive that it is really not a change at all and may thus be made without contravening the requirement in *New York Dock* that rights, privileges, and benefits under pre-existing collective bargaining agreements must be preserved. However, on the record before us, we conclude that the arbitrator exceeded his authority in imposing provisions requiring employees to change to the UP Hospital Association health plan against their will instead of preserving their right to continue to be covered by the DRGW Hospital Association plan.

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

It is ordered:

1. The arbitration decision requiring employees to change their health benefit provider from the DRGW Hospital Association to the UP Hospital Association for the Salt Lake Hub and the Denver Hub is reversed. We otherwise decline to review the arbitration decision.

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[11] In approving the underlying merger, we specifically rejected a proposal by a group of unions to allow the unions to "cherry pick" the best provisions from existing UP or SP collective bargaining agreements. *Merger Proceeding*, slip op. at 84-85, 174.

2. The stay of the implementation of the arbitration award is vacated.

3. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

EMPLOYEES' EXHIBIT 23
PAGE 14

ARBITRATION COMMITTEE PURSUANT TO ARTICLE 1, SECTION 11
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

Neutral Member Robert O'Brien
Boston, Mass., January 6, 1999

TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION	**I.C.C. FINANCE DOCKET**
and	
SOUTHERN PACIFIC RAILWAY LINES **UNION PACIFIC RAILROAD COMPANY**	**32760**

Supplemental Statement of Position

At the Hearing in this matter TCU modified the position set forth in its submission. It acknowledged after a review of the carrier's submission that the involved notice as it pertains to the crew hauling work does constitute a "transaction" within the meaning of Article II of NYD-217 as well as Article I, Section 4, of the New York Dock conditions. At the hearing's close the arbitrator held that it would be useful for TCU to submit a written statement of its new position and that Union Pacific would be afforded the opportunity to simultaneously comment on TCU's change of position.

Consistent with the arbitrator's ruling permitting the parties to submit concise post-hearing statements, TCU provides the following:

1. **Ramp Work**

The notice proposed to abolish six (6) ramp clerical positions at Armourdale Yard, which are currently under the Southern Pacific (SP) Collective Bargaining Agreement (CBA), and establish seven (7) ramp clerk positions at Armourdale under the Union Pacific (UP) CBA. The notice does not purport to transfer any ramp clerk positions or work from Neff yard, which is under the UP CBA.

The effect of removing ramp clerk work at Armourdale from the SP CBA and placing it under the UP CBA is to reduce wage rates by approximately 7% and to arguably afford UP the right to subcontract this work. In addition, the Armourdale Yard would be placed under the lower manning requirements of the UP extra board agreement. Ramp clerical work at UP's Neff Yard is currently performed by an independent contractor, not TCU represented UP employees.

TCU's position regarding the notice as it pertains to ramp clerks is that:

(a) The notice does not constitute a "transaction" within the meaning of Article II of NYD-217 and the New York Dock Conditions:

- The abolishment of positions under one agreement and the rebulletining of those positions under a different agreement does not constitute a "transaction."

- The notice does not purport to cover the transfer of any work from Neff Yard.[1] Even assuming it did so, such a work transfer would not be accomplished as a New York Dock transaction, since ramp work at Neff yard is not covered by TCU's CBA and is not performed by UP employees. Such work is therefore not reserved by CBA to UP employees and UP can transfer this work to Armourdale without resorting to New York Dock procedures.

- A notice which has the sole purpose of reducing wage rates, reducing extra board requirements, and permitting the carrier to arguably sub-contract work currently reserved to TCU represented employees constitutes a transfer of wealth from the employees to the carrier and is not a "transaction."

(b) Assuming arguendo the involved notice is a "transaction" UP has not demonstrated any necessity to override the SP CBA.

- NYD-217 is silent on override, contrary to UP's various implementing agreements with other crafts and the Conrail Master Implementing Agreement for the clerical craft which explicitly reserves to the carrier the right to override CBAs.

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[1]While neither the notice nor written submission claim that work is being transferred from Neff Yard, UP at the hearing contended that there would be such transfers in the future. Namely, UP plans at some unspecified future date to temporarily transfer all Armourdale ramp work to Neff, expand the Armourdale ramps, and then transfer all ramp work back to Armourdale. Thereafter, all ramp work in the Kansas City area would be performed at Armourdale, none at Neff.

These future plans do not justify an override of the SP Agreement because they were not contained in the notice and were not made part of the transaction at issue herein. Further, the future temporary movement of work to Neff yard cannot justify an override of the entire SP CBA covering Armourdale Yard where the ramp work is to be performed on a permanent basis.

- In response to TCU's arguments regarding the silence of NYD-217, the carrier at the hearing cited Letters of Understanding 5 and 18. (UP Exhibit 3.) A review of these letters, however, demonstrate that the parties contemplated work being transferred to the UP from SP and vice versa. Neither letter discusses the override question.

- UP maintained that past practice supported its interpretation that transferred work is to be placed under the UP Agreement. Before establishing how UP is misguided on this point, we note that past practice is not relevant in interpreting protective agreements. Most work has been transferred from SP to UP, but in Denver work was transferred from UP to SP. In each instance, the transferred work was placed under the agreement applicable at the receiving location. In no case was one CBA substituted for another in the absence of any work transfer.

- UP attempted to distinguish the Denver situation by claiming that it only placed work under the UP CBA if a UP facility was present at that geographic location. Notwithstanding, UP cannot claim that it routinely places SP facilities under the UP Agreement contrary to the controlling carrier principle upon which it claims to rely herein. Nor can UP point to any agreement language in NYD-217 to support this alleged practice, because none exists, nor was it ever discussed.

- Finally, the UP argued that the applicable CBA should be the one applied at the preponderance of facilities in the area. However, at Houston where the majority of facilities and employees were under the SP Agreement, UP continues to maintain the UP CBA at UP facilities. Further, this contention, even were it accurate, would not constitute an open

and notorious past practice which effectively established an implied agreement, permitting the carrier to select the CBA of its choice.

- In the absence of any language to the contrary, NYD-217 should not be construed as affording UP authority to override CBAs beyond the limitations placed by the STB on such authority.

- STB in Carman III requires the "reconciliation" of the need for operational efficiency with the need to maintain pre-transactional agreements.

- Carman III further requires that a carrier must show that an override is necessary to implement the primary transaction approved by the STB, i.e., the merger of UP and SP.

- Arbitration decisions by O'Brien and Yost, and their subsequent review by the STB, have distinguished between overrides of work assignment, seniority district, or reporting points necessary for the efficient performance of commingled work, and the override of wage rates or prohibition on subcontractors, the latter being viewed as not necessary to effectuate the primary transaction.

- As noted above, no override is required to transfer ramp clerical work from Neff to Armourdale Yard.

- The proposed transaction does not meet the standards of Carman III and its progeny. Rather it is a transfer of wealth from employees to the carrier, which is prohibited by that decision.

- Override authority has been generally used to apply the CBA at the receiving locations, to which work has been transferred. Under the controlling carrier concept, the CBA that controls

the work at a particular facility applies.

- In the notice at issue herein, no ramp clerical work is to be transferred, and if any were to be transferred no override of any work assignment rules are necessary. UP should be required to continue the ramp work at Armourdale under the SP CBA which traditionally controlled at that facility.

2. **Crew Hauling**

Crew hauling by TCU represented employees at Neff Yard is limited to the transportation of crews within the yard and between the yard and area hotels (inside the yard). Crew hauling to and from points within a fifty mile radius of the yard (outside the yard) is performed by independent contractors.

All crew hauling at Armourdale, both inside and outside the yard, is reserved by the SP CBA for TCU represented UP employees. Further, crew haulers under the SP CBA are paid 30% to 36% higher wage rates.

TCU had argued in its submission that UP's notice as it pertains to crew hauling work did not constitute a "transaction." UP, however, in its submission demonstrated that as a result of implementing agreements with the operating crafts, there will no longer be identifiable UP and SP crews. The work of transporting these previously separate crews will be commingled. In light of the foregoing, TCU acknowledges that the notice as it pertains to crew hauling constitutes a transaction.

UP has argued, and TCU acknowledges, that a single CBA is necessary to permit the efficient performance of this commingled work.

It is at this point that the parties part company. The carrier maintains that NYD-217 gives it sole discretion to select the CBA of its choice, namely the UP Agreement, which reduces wage rates 30% to 36%, as well as extra board manning requirements, and arguably affords UP the right to subcontract crew hauling outside the yard. Moreover, UP argues that the arbitrator lacks authority to continue the SP CBA wage rates, extra board requirements, and restrictions on subcontracting at Armourdale.

TCU's position is that the commingled crew hauling work should either be (a) placed under the UP Agreement, with that agreement modified to include the SP CBA wage rates, subcontracting rules and guaranteed extra board rules; or (b) placed under the SP Agreement.

As noted above, NYD-217 is silent on the question of override, and UP has not reserved for itself the discretion it now claims. Further, the STB has made clear that an override is to be used only to the extent necessary to effectuate the transaction. UP has not even attempted to make a case that an override of the SP wage rates, subcontracting rules and extra board staffing rules are necessary.

Rather, UP maintains that the arbitrator cannot "cherry pick" rules from the UP and SP CBA, and that it is for UP, not the

arbitrator, to select the applicable agreement. This view is contrary to the O'Brien award and the STB review, which limits override only to certain seniority and reporting rules, otherwise leaving four separate agreements intact. Similarly, the Myers Award, cited by UP and vacated as moot by the STB, permitted the adoption of a single agreement but required use of the highest wage rates from the involved agreements. It is also contrary to the STB holdings emphasizing the "central role" arbitration plays in the administration of New York Dock Conditions:

> "...approval of this transaction does not indicate approval or disapproval of any of the CBA overrides that applicants have argued are necessary to carry out the transaction, the arbitrators are free to make whatever findings and conclusions they deem appropriate with respect to CBA override under the law." Carmen III at p. 17-18 quoting STB Conrail Merger decision. Exhibit 16.

UP has not restricted the scope of this authority in NYD-217. In the absence of such restrictive language, NYD-217 should be interpreted as affording the arbitrator full authority to issue an award consistent with applicable STB precedent. Clearly, both parties recognize the applicability of that precedent since both cite the O'Brien and Yost awards for support.

Again, UP's sole argument is that TCU affirmatively granted UP carte blanche to override existing CBA's and to select which CBA will apply during the negotiation of NYD-217. Yet UP cannot cite a single line of NYD-217 conferring such authority. Instead, NYD-217

explicitly contemplates the continuation of both the SP and UP agreements, as reflected in Side Letters 5 and 18.

As to past practice, assuming arguendo it was relevant, UP could not cite a single instance where TCU was notified that work was being commingled between two facilities, as opposed to being transferred in toto from one facility to another, and where after the commingling both facilities continued to operate. The dispute here is over work that is being commingled between two facilities, not work that is being transferred from one facility to another. Here, crew hauling jobs are being rebulletined at both Armourdale and Neff yards. In the handful of notices cited by UP of work being transferred from an SP facility to a UP facility within the same city, work and positions were actually moved from one facility to another.[2]

UP maintains that it only seeks the ability to operationally commingle the crew hauling work. (UP Submission, pp. 13-14.) Either of TCU's proposed solutions would afford the carrier that operational efficiency without transferring wealth from the employees to the employer.

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[2] The overwhelming majority of notices served to date under NYD-217 involved the transfer of work across large geographic distances to centralized UP operations in Omaha and St. Louis. There has been no dispute between the parties that the controlling carrier doctrine applies in such cases. In its brief and oral argument, UP pointed to a handful of notices involving work being transferred within a city -- Houston and Portland. Even if those transactions involved commingling of work rather than transfer, which they did not, such isolated instances do not rise to the level of a past practice.

Conclusion

TCU has demonstrated that the notice as it pertains to ramp work (a) does not constitute a transaction; and (b) if it is a transaction, UP cannot demonstrate a basis, no less any necessity, for overriding the SP Agreement at Armourdale, contrary to the controlling carrier principle upon which it purports to rely.

TCU has further demonstrated that the crew hauling work should either be placed under the UP Agreement, as modified by the inclusion of the SP wage rates, subcontracting and extra board rules; or alternatively be placed under the SP Agreement. Union Pacific has shown no necessity for the override of wage rates, subcontracting and extra board provisions in order to accomplish the consolidation of crew hauling work.

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

December 21, 1998

The Honorable John McCain
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510

The Honorable Kay Bailey Hutchison
Chairman
Subcommittee on Surface Transportation and Merchant Marine
United States Senate
Washington, DC 20510

Dear Chairman McCain and Chairman Hutchison:

In our letter of June 30, 1998, Vice Chairman Owen and I reported to you on the Board's recent informational hearings to examine issues of rail access and competition in today's railroad industry. After summarizing the testimony, the Board responses to the testimony (including the Board's April 17 decision, copy attached hereto as Addendum A), and further actions that might be taken by Congress, our letter reported on certain ongoing private-sector initiatives. The purpose of this follow-up letter is to inform you of the outcome of the Board's proceedings and the private-sector initiatives undertaken as a result of the hearings; and to suggest possible ways in which related issues that are still outstanding might be addressed.

1. **Board Proceedings.** As we pointed out in our prior letter, the Board initiated rulemaking proceedings addressing market dominance and service inadequacies. The Board has completed those proceedings. In Market Dominance Determinations - Product and Geographic Competition, STB Ex Parte No. 627 (STB served Dec. 21, 1998), the Board repealed the product and geographic competition tests of the market dominance rules. This change applies to both large and small rail rate cases. In Relief for Service Inadequacies, STB Ex Parte No. 628 (STB served Dec. 21, 1998), the Board issued rules giving shippers and smaller railroads opportunities to obtain service from alternate carriers during periods of poor service, using either the emergency service or the access provisions of the law. Copies of these decisions are attached as Addenda B and C.

2. **Railroad Industry Discussions.** One of the issues that arose at the Board's hearings was the desire of smaller railroads to eliminate industry restrictions on their ability to compete.

The Board directed the railroads to address this issue through private-sector discussions. As our earlier letter noted, the large and small railroads separately indicated that they were having some difficulties in reaching agreement, but the Board encouraged them to continue their dialogue, and indicated that it would take action, as appropriate, if they did not reach agreement. We are pleased to report that in September, an agreement was reached, portions of which were formally approved by the Board. A copy of the Board's press release announcing the agreement is attached as Addendum D.

3. **AAR/NGFA Agreement.** In our June 30 letter, we advised you that, consistent with the Board's preference that private parties seek non-litigative dispute resolution mechanisms, the railroads were meeting with the National Grain and Feed Association (NGFA) in an effort to arrive at an agreement on a mandatory arbitration program to resolve certain disputes. The Association of American Railroads (AAR) and the NGFA recently announced such an agreement. A copy of the AAR/NGFA press release describing the agreement is attached as Addendum E.

4. **Formalized Dialogue Among Railroads and Shippers.** Another issue that arose at the Board's hearings involved the concern of some shippers that railroads had not been adequately communicating with them. To address this concern, the Board directed railroads to establish formalized dialogue with their shippers and their employees, particularly about service issues in general, small shipper issues, and any other relevant matters. The railroads have organized and conducted discrete and formalized meetings with various shippers and shipper groups throughout the Nation. The meetings, which have been attended by Chairman Morgan, were held in Chicago, IL; Houston, TX; Atlanta, GA; Newark, NJ; and Portland, OR. AAR's letter to the Board describing the meetings and the follow-up actions to be taken—including, among other things, issuance of performance reports by each of the large railroads, development of a plan for facilitating interline movements, and continuation of the outreach meetings—is attached as Addendum F. The Board, which supports the continued dialogue that the AAR letter promises, will be closely monitoring all of these follow-up steps. In addition to the AAR letter, a letter from various shippers regarding those meetings, and Chairman Morgan's response to that letter, are attached as Addenda G and H.

5. **Additional Railroad/Shipper Discussions.** Other shipper concerns that were raised at the Board's hearings involved railroad "revenue adequacy" and the Board's competitive access rules in general. Concluding that each of these issues could be better addressed initially in a private-sector rather than governmental forum, the Board directed railroads to meet with shipper groups to address the issues under the auspices of an Administrative Law Judge. Although extensive meetings were conducted, the parties could not reach agreement on these issues. Attached as Addendum I are copies of the reports that the parties submitted to the Board on their recommendations as to these issues.

Revenue Adequacy. Although the concept of revenue adequacy has thus far had minimal real-world impact, the existing judicially approved revenue adequacy measurement, which focuses on a railroad's return on investment, has been a source of controversy. Based on suggestions from railroad and shipper representatives at the Ex Parte No. 575 hearing, the Board

directed railroads to meet with shippers with a view toward selecting a panel of three disinterested experts to make recommendations as to an appropriate revenue adequacy standard, and to name a panel and report back to the Board by May 15, 1998. The panel was then to report back with final recommendations on July 15, 1998.

Shippers opposed this approach, contending that it would be expensive and inefficient for them to pay part of the costs of the expert panel, while also paying for litigation associated with the conduct of the proceeding before the panel and the Board (and, presumably, if either side wanted to litigate further, the courts). Ultimately, most of the participating shippers recommended that the Board itself initiate a new rulemaking looking to adoption of a revenue adequacy approach that would permit the Board to consider a variety of financial indicators in determining whether railroads are revenue adequate.[1] By contrast, contending that the multiple indicator approach advanced by the shippers would not provide enough certainty or predictability, the railroads supported the expert neutral panel approach.

Competitive Access. The Board directed railroads and shippers to attempt to find common ground, and to meet, negotiate, and report back to the Board by August 3, 1998. After extensive meetings, the parties reached an impasse. The principal areas of concern involved the definition of terminal areas; the scope of reciprocal switching; appropriate compensation to an incumbent carrier; and, perhaps most fundamentally, whether access to other carriers ought to be required only when an incumbent carrier has acted in some sort of an anticompetitive way, or whether it ought to be provided whenever additional competition is determined to be in the public interest.

6. Possible Resolutions of Revenue Adequacy, Competitive Access, and Small Rate Case Issues. The Board appreciates the opportunity to assist Congress in addressing the transportation issues that face the Nation during these important times and believes that it has appropriately addressed matters of concern within the scope of the authority given to it by Congress. Nevertheless, it is likely that certain legislative proposals will be discussed in Congress during the next session. Following are some thoughts on some of the issues as to which legislative proposals are likely.

Revenue Adequacy. The revenue adequacy issue, in our view, has unnecessarily polarized the transportation community. The underlying policy objective—that the Board's regulatory approach among other goals permit railroads to earn adequate revenues—is a laudable one that should be retained. As we see it, however, and as we have testified before, the revenue adequacy status of any particular railroad has little practical effect. Revenue adequacy is not a factor in maximum rate cases prosecuted under the "stand-alone cost" (SAC) methodology. It is not a factor in construction, merger, or abandonment proceedings. Revenue adequacy does play a small role in rate cases brought under the "small case" guidelines, but to date, no such cases

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[1] The shippers indicated that, given the Board's own resources and their own priorities, they would not object if the Board deferred this rulemaking until a later date.

have been brought. Therefore, Congress may wish to consider legislatively abolishing the requirement that the Board determine on a regular basis which railroads are revenue adequate.

That is not to say that Congress should abandon the concept of revenue adequacy. As we have testified before, in order to oversee the industry, the Board needs to have some indication of how the industry is faring financially. Moreover, revenue adequacy is one of the non-SAC constraints in the Board's "constrained market pricing" (CMP) methodology for handling larger maximum rate cases. Although, thus far, all railroad rate cases brought under CMP have been handled under SAC procedures, if a "revenue adequacy" case were brought, the Board would need a basis on which to address it.

For those reasons, and because Congress may not wish to abolish the revenue adequacy requirement immediately, the questions that have been raised about the Board's current revenue adequacy methodology cannot be ignored. With its credibility on the issue under challenge by several shippers, however, the Board, with its limited resources, does not plan to undertake the shippers' proposed rulemaking at this time. Rather, given the benefits, the Board continues to support the expert panel approach that was suggested by both shipper and railroad interests during the Board's Ex Parte No. 575 hearings. The shippers are correct that someone would need to provide funding for the expert panel; that costs rise as layers of litigation are added to the regulatory process; and that it is the Board, and not a private expert panel, that is charged with establishing regulatory procedures. Nevertheless, the Board is willing to make a commitment to give great deference to the expert panel, which would be a competent body that would be perceived as neutral if selected after agreement among the private parties. If the private parties were also to give the expert panel deference, rather than to litigate should they disagree with its (and the Board's) conclusions, then not only would the parties' confidence in the objectivity of the process likely be enhanced, but the overall costs also would likely be contained.

Competitive Access. In its Ex Parte No. 575 decision served April 17, 1998, the Board addressed in some detail the implications of the competitive access debate. The differences between the railroads and the shippers on the Board's competitive access rules are fundamental, and they raise basic policy issues—concerning the appropriate role of competition, differential pricing, and how railroads earn revenues and structure their services—that are more appropriately resolved by Congress than by an administrative agency. Moreover, the so-called "bottleneck cases," which involve issues related to competitive access, are still being reviewed in court. For those reasons, although the Board has moved aggressively to adopt the new rules described above to open up access during times of poor service, the Board does not plan to initiate administrative action to otherwise revisit the competitive access rules at this time.[2]

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[2] Should Congress choose to review the issue, we would note, as we did in our April 17 decision, that the shape and condition of the rail system that open access would produce is a significant but unresolved issue. Certain shippers assume that the replacement of differential pricing by purely competitive pricing would reduce the rates paid by shippers, and that added competition would result in increased infrastructure investment. The railroads, by contrast, argue

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Small Rate Cases. As you know, the Board has adopted small rate case guidelines, which apply in cases in which CMP cannot be practicably used. Under these small case guidelines, the Board reviews the profits that the carrier obtains from the challenged rate from three perspectives: it compares them with the profits that railroads in general earn from comparable traffic; it compares them with the level of profits that the carrier would need to obtain from all of its potentially captive traffic in order to become "revenue adequate"; and it compares them with the profits that the defendant carrier earns on all of its potentially captive traffic. Taken together, these three comparisons are designed to permit carriers to price "differentially" as provided under the law, in a way that will promote their financial health, while still protecting individual shippers from bearing an unfair share of a particular carrier's revenue needs. Although the procedures may sound complex, in fact the information needed to make this sort of a case is readily available at reasonable cost. Moreover, the Board concluded, after reviewing many years of debate, that these guidelines are the only procedures that have been identified that readily address each of the concerns that the Board must consider under the statute.

Nevertheless, we are aware that certain shippers are concerned that, for small cases, anything other than a single benchmark test could unreasonably impede access to the regulatory process. If Congress agrees, it could adopt specific small rate case standards. As an example, it could provide that, for certain types of cases, all rates above a specified revenue-to-variable cost ratio, or series of ratios, would be considered unreasonable. If this approach were to follow the tenets of the existing statute, the specifics of such an approach—for example, the cases to which it would apply, and the level or levels at which rates might be capped—would have to balance issues such as differential pricing and railroad revenue need against the fairness in requiring captive shippers to pay substantially higher prices than competitive shippers.

7. **The Override of Railroad Collective Bargaining Agreements.** Another matter that may be presented to Congress next year is the question of limiting the authority of arbitrators under the standard labor conditions imposed by the Interstate Commerce Commission (ICC) or the Board to modify existing collective bargaining agreements (CBAs) in the process of implementing approved rail consolidations. This process has become extremely controversial since a decision of the Supreme Court in 1991. That decision, Norfolk & Western Ry. v.

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[2](...continued)
that, because their traffic base would shrink, the rates paid by those shippers that would continue to receive service would actually increase, even as overall revenues received by railroads would decline, because the overall traffic base from which costs could be recovered would be reduced. Additionally, as the Board noted in the April 17 decision, carriers could be expected to seek to maintain an adequate rate of return by cutting their costs, which could include shedding unprofitable lines and reducing new investment in infrastructure. Thus, while certain shipper representatives believe that an open access system would ensure better service, concern has been raised that, unless smaller railroads were able to fill in service gaps that could be created, open access could produce a smaller rail system that would serve fewer shippers, and a different mix of customers, than are served today, with different types and levels of, and perhaps more selectively provided, service.

American Train Dispatchers Ass'n, 499 U.S. 117 (1991) (N&W), held that the exemption from all other laws to carry out approved rail consolidations provided by former 49 U.S.C. 11341(a) and carried forward as 49 U.S.C. 11321(a) extends to existing CBAs and operates automatically to permit the override of CBA provisions as necessary for implementation of an approved rail consolidation.

Present practice for implementing Board-approved rail consolidations is for the unions and the railroads involved to negotiate agreements to enable implementation of the Board-approved transaction. If they are unable to agree, the matter is submitted to an arbitrator selected by the parties or the National Mediation Board if the parties cannot agree on the choice of an arbitrator. Because the arbitrator is acting under section 11321(a), he or she has the authority and the obligation to modify existing CBAs as necessary to carry out the transaction.

In the recent Conrail Acquisition[3] decision, at the request of the various labor organizations, the Board specifically declined to make a finding in its decision approving the transaction that overriding provisions in Conrail CBAs was necessary to carry out the transaction. Rather, the Board specifically left the determination of necessity to the process of negotiation and, if necessary, arbitration. Even more recently, in the Carmen[4] decision, the Board elaborated on the limitations on arbitrators' authority to modify CBAs as permitted by the Supreme Court's N&W decision. In Carmen the Board held that overrides of CBAs by arbitrators are limited, among other things, to the override authority exercised by arbitrators during the period 1940-1980, an era marked by labor/management peace regarding the implementation of rail consolidations. A copy of the Carmen decision is attached as Addendum J.

Nonetheless, the Board is aware that labor representatives oppose, and are understandably dissatisfied with, any provision or action that permits overriding any existing CBA provisions. If Congress were to agree with their position, given the Supreme Court decision in N&W, some modification of section 11321(a) so as to exclude CBAs, or some other legislative expression, could address labor's concerns in this area.

8. **Conclusion.** Again, we appreciate the confidence that Congress has shown by allowing us to play a role in this important process, and we remain committed to providing a

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[3] CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388, Decision No. 89 (STB served July 23, 1998).

[4] CSX Corporation -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 22), and Norfolk Southern Corporation -- Control -- Norfolk and Western Railway Company and Southern Railway Company (Arbitration Review), Finance Docket No. 29430 (Sub-No. 20) (STB served Sept. 25, 1998). This decision was not appealed by any party.

forum for constructive dialogue and appropriate regulatory relief. If we can be of further assistance in this or any other matter, please do not hesitate to contact us.

Sincerely,

Linda J. Morgan

Linda J. Morgan

Addenda

cc: The Honorable Ernest F. Hollings
Ranking Democrat
Senate Committee on Commerce, Science,
and Transportation