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ITEM 12

1999

OFFICE OF THE SECRETARY
Clearance Branch

STB Finance Docket No. 33388 (Sub-No. 88)

CSX CORPORATION AND CSC TRANSPORTATION, INC., NORFOLK SOUTHERN
CORPORATION AND NORFOLK SOUTHERN RY. COMPANY
—CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

(ARBITRATION REVIEW)

May 6, 1999

MEMORANDUM TO SECRETARY WILLIAMS:

The Board voted on a no-objection basis May 5, 1999, to approve the Chairman's order circulated May 5, 1999. This decision partially stay the effect of an arbitration award to provide time for negotiations in light of the reported ratification by membership of the Brotherhood of Maintenance of Way Employees (BMWE) of the agreements reached by BMWE and the railroads.

This decision was served late release, May 5, 1999.

Taledia M. Stokes

cc: Chairman Morgan
Vice Chairman Clyburn
Commissioner Burkes
Director Konschnik
General Counsel Rush
Office of Congressional and Public Services

STB FD

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*(Sub88)

5-17-99

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194536

Mac A. Fleming
President



William E. Laine
Secretary-Treasurer

194536

Brotherhood of Maintenance of Way Employees
Affiliated with the A.F.L.-C.I.O. and C.L.C.



May 13, 1999

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ENTERED
Office of the Secretary

MAY 17 1999

Part of
Public Record

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Finance Docket No. 33388 (Sub-No. 88)

Dear Sir:

Enclosed for filing with the Board are the original and ten copies of the Brotherhood of Maintenance of Way Employees' notice of withdrawal of its petition for review and petition for stay of the arbitral award. Also enclosed is a diskette containing the document in WordPerfect 7.0 format.

Please stamp the extra copy and return it to me in the enclosed, self-addressed, postage prepaid envelope. Thank you.

Respectfully submitted,

Donald F. Griffin
Asst. General Counsel

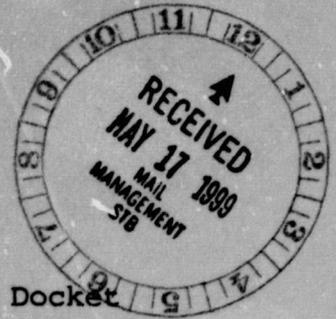
enclosures

cc: service list
M. A. Fleming
W. A. Bon

William A. Bon, General Counsel
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Southfield, MI 48076-4225
Telephone (248) 948-1010
FAX (248) 948-7150

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FAX (202) 737-3085

BEFORE THE SURFACE TRANSPORTATION BOARD



CSX CORPORATION AND CSX TRANSPORTATION, INC.,)
NORFOLK SOUTHERN CORPORATION AND NORFOLK)
SOUTHERN RAILWAY COMPANY-CONTROL AND) Finance Docket
OPERATING LEASES/AGREEMENTS-CONRAIL, INC.) No. 33388
AND CONSOLIDATED RAIL CORPORATION) (Sub-No. 88)
)

NOTICE OF WITHDRAWAL OF PETITION FOR REVIEW
AND PETITION FOR STAY OF ARBITRAL AWARD

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Of Counsel:

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O'Donnell, Schwartz & Anderson
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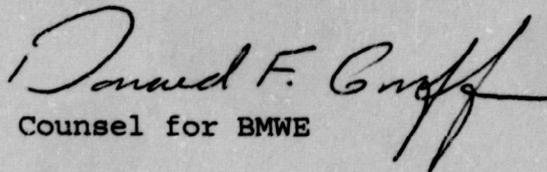
Counsel for Brotherhood of
Maintenance of Way Employes

Dated: May 13, 1999

NOTICE OF WITHDRAWAL OF PETITION FOR REVIEW
AND PETITION FOR STAY OF ARBITRAL AWARD

The Brotherhood of Maintenance of Way Employes ("BMWE") and Norfolk Southern Railway Company ("NSR") and Consolidated Rail Corporation ("Conrail") reached settlement agreements dated May 6, 1999, resolving the parties' disputes over the arbitrated implementing agreement of January 14, 1999 that is the subject of BMWE's pending petition for review and petition for stay. Similarly, on May 11, 1999, BMWE and CSX Transportation, Inc. ("CSXT") and Conrail finalized settlement agreements resolving the parties' disputes over the arbitrated implementing agreement of January 14, 1999. Accordingly, BMWE respectfully submits this notice of withdrawal of its petition for review and petition for stay filed in this proceeding.

Respectfully submitted,

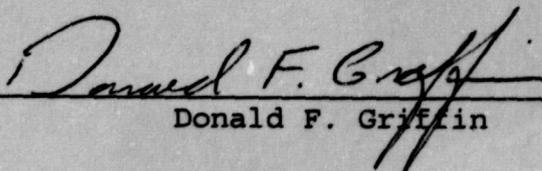

Counsel for BMWE

Dated: May 13, 1999

Certificate of Service

I hereby certify that today I served a copy of the foregoing notice of withdrawal by first class mail delivery upon all parties of record.

Dated: May 13, 1999



Donald F. Griffin

STB FD

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(Sub88)

5-14-99

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May 14, 1999

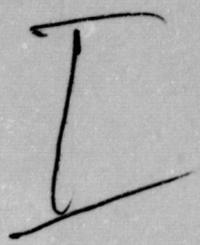


*NOT ADMITTED IN D.C.

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of the Secretary
MAY 17 1999
Part of
Public Record



Re: CSX Corp., et al., Norfolk Southern Corp., et al.
-- Control and Operating Leases/Agreements --
Conrail Inc., et al., Finance Docket No. 33388
(Sub-No. 88)

Dear Secretary Williams:

On behalf of the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"), we are pleased to advise that the Board's May 5 decision granting a stay in the above-referenced proceeding enabled the parties to reach agreement on the issues presented by the IAM's pending Petition to Review. Accordingly, the IAM hereby withdraws its Petition For Review And Request For Stay in Finance Docket No. 33388 (Sub-No. 88).

Thank you for your attention to this matter.

Sincerely,

Joseph Guerrieri, Jr.
Debra L. Willen

Counsel for the IAM

DLW:mmw

cc: Allison Beck, Esq.
Mark Filipovic
Robert L. Reynolds
Joe R. Duncan

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Letter withdrawing IAM's Petition For Review And Request For Stay were served this 14th day of May, 1999, by first-class mail, postage prepaid, upon the following parties of record in the underlying arbitration proceeding:

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Admin. Asst. - Int'l President
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Acting Gen. Chairman & Pres.,
System Council No. 6
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General Chairman
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Debra L. Willen

Debra L. Willen

STB FD

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(Sub 88)

4-29-99

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April 29, 1999

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ROBERT S. CLAYMAN
DEBRA L. WILLEN
JEFFREY A. BARTOS
ANNA L. FRANCIS
NICOLAS M. MANICONE
LESLIE DEAK *

*NOT ADMITTED IN D.C.



VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of the Secretary

APR 30 1999

Part of
Public Record

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Re: CSX Corp., et al., Norfolk Southern Corp., et al.
-- Control and Operating Leases/Agreements --
Conrail Inc., et al., Finance Docket No. 33388
(Sub-No. 88)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and 25 copies of the Motion Of The International Association Of Machinists And Aerospace Workers For Expedited Action On Its Previously-Filed Request For Stay. Also enclosed is a 3.5" diskette containing the text of this filing in WordPerfect 6.0/6.1 format.

I have included an additional copy to be date-stamped and returned with our messenger.

Thank you for your attention to this matter.

Sincerely,

Debra L. Willen

Debra L. Willen
Counsel for the IAM

DLW:imw

cc: Allison Beck, Esq.
Mark Filipovic
Robert L. Reynolds
Joe R. Duncan

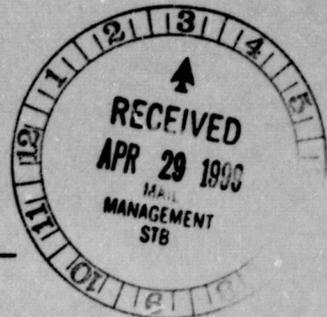
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ENTERED
Office of the Secretary

APR 30 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD

Part of
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FINANCE DOCKET NO. 33388 (Sub-No. 88)

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORTHERN
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(Arbitration Review)

MOTION OF THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS FOR EXPEDITED
ACTION ON ITS PREVIOUSLY-FILED REQUEST FOR STAY

Pursuant to 49 C.F.R. § 1115.8, the International Association of Machinists and Aerospace Workers ("IAM") has petitioned for review of an Arbitration Award, dated January 14, 1999, issued by Neutral Referee William E. Fredenberger, Jr., ("Fredenberger Award"), regarding application of the New York Dock^{1/} provisions imposed by the Surface Transportation Board ("STB" or "Board") as a condition of its approval of the primary application in this docket. In addition, pursuant to 49 C.F.R. § 1115.5, the IAM requested a stay of the Fredenberger Award pending the STB's decision on the IAM's petition for review. That request remains pending. In the meantime, the carriers are rearranging and

^{1/} New York Dock Railway -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90, aff'd sub nom., New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

consolidating maintenance of roadway equipment work. For this reason, the IAM respectfully moves the Board to expedite its consideration of the IAM's stay request.

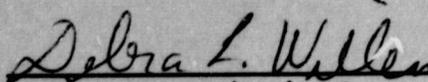
By letter dated April 22, 1999, Norfolk Southern Railway Co. ("NSR"), CSX Transportation, Inc. ("CSXT"), and Consolidated Rail Corp. ("CRC") notified union representatives that "effective April 29, 1999, CSXT, NSR, and CRC will effect the coordination or rearrangement of maintenance of roadway equipment work[.]"^{2/} Exhibit 1 at 2. Specifically, the maintenance of roadway equipment allocated to NSR formerly performed at CRC's Canton Shop will be transferred to NSR's Charlotte Roadway Shop; CSXT will transfer maintenance of its share of roadway equipment to its Richmond Roadway Shop. To effectuate this transfer, today, April 29, the carriers will begin moving the Canton Shop equipment, machinery, parts, tools and supplies to Charlotte and Richmond. The bulletining and awarding of positions will also be initiated. See Exhibit 1 at 2-3.

For the reasons set forth in the IAM's previously-filed request for a stay, the IAM respectfully urges the Board to immediately stay implementation of the Fredenberger Award, pending administrative review of that decision. The IAM has presented a serious legal question as to whether the Arbitrator exceeded his authority by extinguishing the IAM's representational rights and by arbitrating matters that were not the subject of bargaining under

^{2/} A true and correct copy of this April 22, 1999 letter is attached as Exhibit 1.

Article I, Section 4 of New York Dock. If the carriers proceed as planned with implementation of the Award pending resolution of these issues, the consolidation of work and integration of Conrail employees onto new seniority lists will result in widespread relocations and displacements of employees that would be impossible to unscramble at a later date. See, e.g., Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Transp. Co., et al., STB Finance Docket No. 32760 (Sub-No. 22) (June 6, 1997).

Respectfully submitted,



Joseph Guerrieri, Jr.
Debra L. Willen
GUEPRIERI, EDMOND & CLAYMAN, P.C.
1625 Massachusetts Avenue, N.W.
Suite 700
Washington, DC 20004
(202) 624-7400

Counsel for the IAM

Date: April 29, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the Motion Of The IAM For Expedited Action were served this 29th day of April, 1999, by first-class mail, postage prepaid, upon the following parties of record in the underlying arbitration proceeding:

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Debra L. Willen

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ALL STATE LEGAL 800-222-2839 EDR11 RECYCLED



April 22, 1999

VIA OVERNIGHT MAIL

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Mr. L. L. Phillips
General Chairman, BMW
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General Chairman, BMW
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Gentlemen:

Pursuant to the Arbitrated Implementing Agreement among CSX Transportation, Inc. ("CSXT"), Norfolk Southern Railway Company ("NSR"), and Consolidated Rail Corporation ("CRC") and the Brotherhood of Maintenance of Way Employees, et al., Attachment No. 1 to the January 14, 1999 Decision of Referee W. E. Fredenberger, Jr., this shall constitute advance written notice that effective April 29, 1999, CSXT, NSR, and CRC will effect the coordination or rearrangement of maintenance of roadway equipment work as provided under Article I, Section 1, paragraph (g) of the Arbitrated Implementing Agreement, which provides:

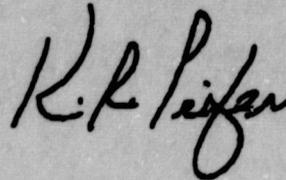
- "(g) The maintenance of any CRC roadway equipment allocated to NSR formerly maintained at the Canton Shop may be performed at Charlotte Roadway Shop and/or other locations on the expanded NSR system (footnotes omitted). The maintenance of any CRC roadway equipment allocated to CSXT formerly

maintained at the Canton Shop may be performed at the Richmond, Virginia Roadway Shop and/or other locations on the expanded CSXT system. This coordination may be accomplished in phases."

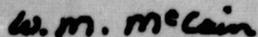
Accordingly, effective April 29, 1999, the Carriers will commence the relocation of Canton shop CRC roadway equipment, machinery, parts, tools and supplies etc, to Charlotte, North Carolina and Richmond, Virginia, and other locations throughout their systems. Bulletins and awarding of positions, pursuant to Attachments No. 2 and No. 3, will be initiated by separate notice. No position will be transferred prior to June 1, 1999.

If you have any questions or comments concerning the above, please advise.

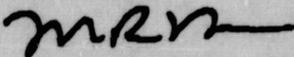
Very truly yours,



K. R. Peifer
Vice President Labor Relations
CSX Transportation, Inc.



W. M. McCain
Asst. Vice President
Labor Relations
Consolidated Rail Corporation



M. R. MacMahon
Assistant Vice President
Labor Relations
Norfolk Southern Railway Company

STB

FD

33388

(Sub 88)

3-25-99

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193881

AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.

ATTORNEYS AT LAW

A REGISTERED LIMITED LIABILITY PARTNERSHIP
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1333 NEW HAMPSHIRE AVENUE, N.W.

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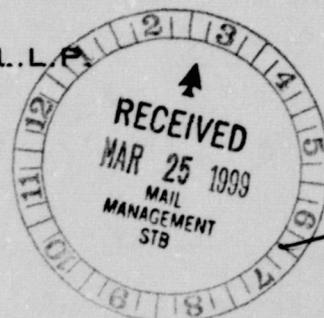
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SAN ANTONIO
WASHINGTON



March 25, 1999

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

ENTERED
Office of the Secretary

MAR 26 1999

Part of
Public Record

Re: Finance Docket No. 33388 (Sub-No. 88)

Dear Secretary Williams:

Enclosed for filing with the Board are the original and ten copies of the Petition of CSX Transportation, Inc. ("CSXT") for Leave to File Late. An additional copy of the Petition is also included to be date-stamped and returned to the waiting messenger.

Also enclosed is a disk with WordPerfect 6.1 formatting of the Reply of CSXT to the Brotherhood of Maintenance of Way Employees' Petitions for Review and for Stay.

Thank you for your assistance.

Sincerely yours,

Jonathan Krell

JK/db
Enclosure

cc: Richard S. Edelman
Donald F. Griffin
Debra Willen

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193881

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (Sub-No. 88)

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASE/AGREEMENTS--
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(Arbitration Review)

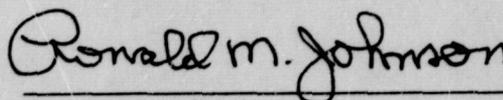
PETITION OF CSX TRANSPORTATION, INC. FOR LEAVE
TO FILE LATE

CSX Transportation, Inc. ("CSXT") seeks leave to file the following briefs one day out of time: (a) its Reply to the Brotherhood of Maintenance of Way Employees ("BMWE") Petitions for Review and for Stay of Referee Fredenberger's Award; and (b) its Petition for Leave to File in Excess of Page Limitations.

Replies to BMWE's Petition were due March 24, 1999. On Wednesday, March 24, 1999, a courier carrying six boxes of documents, consisting of the original and ten copies of CSXT's Reply and Petition and ten copies of the Carriers' Joint Appendix, arrived at the Board's loading dock, where the boxes were stamped at approximately 4:50 PM. See Attachment. However, the courier was unable to have the boxes x-rayed and transported to the seventh floor in time to have CSXT's briefs stamped before 5:00 PM.

Accordingly, CSXT respectfully requests that its petition to file late be granted. The granting of this one-day extension will not prejudice any party.

Respectfully submitted,



Ronald M. Johnson
Jonathan M. Krell
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4114

Counsel for CSX Transportation, Inc.

Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 783-1343

Nicholas S. Yovanovic
CSX TRANSPORTATION, INC.
500 Water Street J150
Jacksonville, FL 32202
(904) 359-1244

March 25, 1999

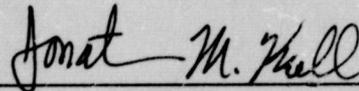
CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Petition of CSX Transportation, Inc. for Leave to File Late by overnight delivery to the following:

Richard S. Edelman, Of Counsel
O'Donnell, Schwartz & Anderson, P.C.
1900 L Street, N.W. Suite 707
Washington, D.C. 20036

Donald F. Griffin, Counsel
Brotherhood of Maintenance of Way Employees
10 G Street, N.E., Suite 460
Washington, D.C. 20002

Debra Willen
Guerrici, Edmond & Clayman, P.C.
1625 Massachusetts Ave., N.W., Suite 700
Washington, D.C. 20036-2243



Jonathan M. Krell
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036

Counsel for CSX Transportation, Inc.

March 25, 1999

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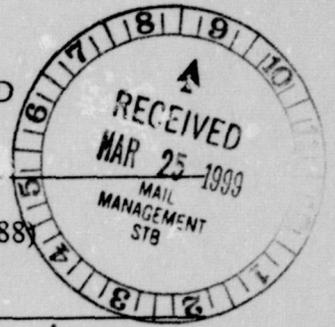
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BEFORE THE
SURFACE TRANSPORTATION BOARD

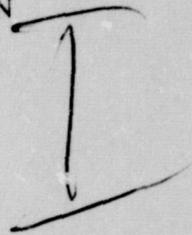


FINANCE DOCKET NO. 33388 (Sub-No. 88)

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MAR 25 1999
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CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK
SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASE/AGREEMENTS--
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(Arbitration Review)



PETITION OF CSX TRANSPORTATION, INC. FOR LEAVE
TO FILE IN EXCESS OF PAGE LIMITATIONS

CSX Transportation, Inc. ("CSXT") is filing a Reply to the Brotherhood of Maintenance of Way Employees' ("BMW") Petitions for Review and for Stay of Referee Fredenberger's Award of January 14, 1999. Pursuant to 49 C.F.R. §§ 1115.2(d) and 1115.8, the reply to a petition for review should not exceed thirty pages, including appendices. Pursuant to 49 C.F.R. § 1115.5(c), the reply to a petition for stay should not exceed ten pages. CSXT is filing a combined 43-page reply to the petitions for review and for stay in one brief. CSXT, with Norfolk Southern Railway Company, is also filing a four-volume appendix of materials from the arbitration record. In light of the fact that this brief and accompanying materials exceed the combined limit of forty pages, CSXT seeks leave to file its reply in excess of the page limitations.

The BMW Petition for Review was in excess of the page limitations. It is appropriate and fair to grant CSXT a similar extension to enable it to reply to the assertions raised by the BMW. Some additional pages are also necessary to point out in the extensive arbitration record the ample support for the referee's award. The Carriers' Joint Appendix includes the Carriers' prehearing submission, a transcript of the arbitration hearing, selected Carrier exhibits submitted to Referee Fredenberger, and relevant arbitration awards. Leave should be granted to submit this appendix in excess of the page limitations because, if the Board chooses to review the Fredenberger Award, consideration of the underlying record by the Board would be necessary.

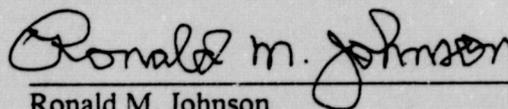
Accordingly, CSXT respectfully requests that its petition to exceed page limitations be granted.

Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 783-1343

Nicholas S. Yovanovic
CSX TRANSPORTATION, INC.
500 Water Street J150
Jacksonville, FL 32202
(904) 359-1244

March 24, 1999

Respectfully submitted,



Ronald M. Johnson
Jonathan M. Krell
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4114

Counsel for CSX Transportation, Inc.

STB FD I 33388 (Sub 88) 3-24-99 193865

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



**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
(ARBITRATION REVIEW)**

**MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR LEAVE TO FILE MEMORANDUM EXCEEDING PAGE LIMITATION**

Norfolk Southern Railway Company ("NSR") requests leave to file the accompanying memorandum in reply to the pending petitions of the Brotherhood of Maintenance of Way Employees ("BMWE") in the above-captioned arbitration review proceeding. BMWE's first petition, dated February 12, 1999, seeks review of the arbitration award rendered by neutral referee William E. Fredenberger, Jr. on January 14, 1999 (the "Fredenberger Award"), and BMWE's petition dated February 22, 1999 seeks a stay of the Fredenberger Award pending the Board's ruling on the merits of BMWE's petition for review.

The Fredenberger Award adopts an implementing agreement that provides for allocation of the approximately 3,000 available Consolidated Rail Corporation ("Conrail") maintenance of way employees among the railroads (NSR, CSX Transportation, Inc. ("CSXT"), and Conrail as operator of the Shared Assets Areas) and prescribes the workforce arrangements that will govern maintenance of way work and employees on each railroad's new operations.

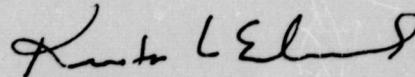
The Board's rules limit petitions for review of arbitration awards, and replies to petitions for review, to 30 pages in length, including appendices (49 C.F.R. § 1115.8), and limit replies to stay requests to ten pages (49 C.F.R. § 1115.5 (c)). NSR has combined its replies to the BMW petitions in a single memorandum, which is 43 pages in length. NSR also is submitting a five-page declaration in reply to BMW's petition for a stay. In addition, NSR and CSXT are submitting a joint appendix of pertinent materials from the arbitration record, including the Fredenberger Award, the Carriers' Prehearing Submission, selected exhibits, and excerpts from the transcript of the arbitration hearing. These materials are referenced in NSR's and CSXT's replies and may assist the Board's consideration of BMW's challenges to the Fredenberger Award.

BMW has also asked for an enlargement of the page limitation in connection with its petition for review and accompanying exhibits. BMW's petition challenges the Fredenberger Award on a number of grounds and makes several assertions that must be refuted by reference to the voluminous arbitration record in this case.

NSR's accompanying memorandum addresses, fully and concisely, all of the issues raised by BMW's petitions. In the interests of a full and complete record, NSR respectfully

requests that the Board accept and consider the accompanying combined memorandum, including the joint appendix, in its entirety.

Respectfully submitted,



Jeffrey S. Berlin
Krista L. Edwards
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8178

Jeffrey H. Burton
NORFOLK SOUTHERN CORPORATION
Three Commercial Place - 17th Floor
Norfolk, VA 23510-9241
(757) 629-2633

*Counsel for Norfolk Southern Railway
Company*

Dated: March 24, 1999

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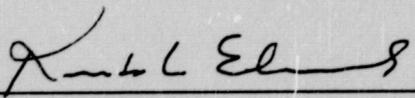
CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of March, 1999, caused copies of the foregoing Motion Of Norfolk Southern Railway Company For Leave To File Memorandum Exceeding Page Limitation to be served, by hand, upon the following:

Richard S. Edelman
O'Donnell, Schwartz & Anderson, P.C.
1900 L Street, N.W., Suite 707
Washington, D.C. 20036

Donald F. Griffin
Brotherhood of Maintenance of Way
Employes
10 G Street, N.E., Suite 460
Washington, D.C. 20002

Joseph Guerrieri, Jr.
Debra L. Willen
Guerrieri, Edmond & Clayman, P.C.
1625 Massachusetts Avenue, N.W.
Suite 700
Washington, D.C. 20036



Krista L. Edwards

STB

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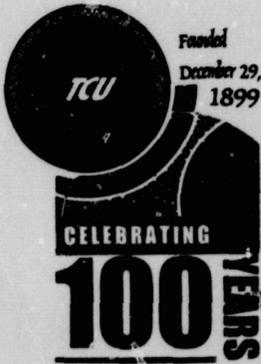
(Sub 88)

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Transportation Communications International Union

Robert A. Scardelletti
International President

ENTERED
 Office of the Secretary

MAR 10 1999

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 Public Record

LEGAL DEPARTMENT

Mitchell M. Kraus
General Counsel

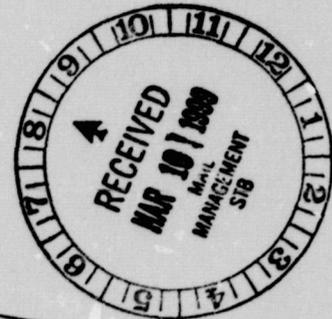
Christopher J. Tully
Assistant General Counsel

**Challenging
 the future with
 a century of
 pride!**

March 9, 1999

VIA UPS OVERNIGHT DELIVERY

Mr. Vernon A. Williams, Secretary
 Surface Transportation Board
 1925 K Street, NW, Suite 700
 Washington, DC 20423-0001



Re: Finance Docket No. 33388 Sub-No. 88

Dear Mr. Williams:

Enclosed please find an original and ten copies of the Petition for Leave to File Comments of Transportation Communications International Union as Amicus in Support of Petition of the Brotherhood of Maintenance of Way Employees for Review of Arbitration Award in the above-referenced matter. I am also enclosing a diskette formatted in WordPerfect 6.1.

Thank you for your attention to this matter.

Very truly yours,

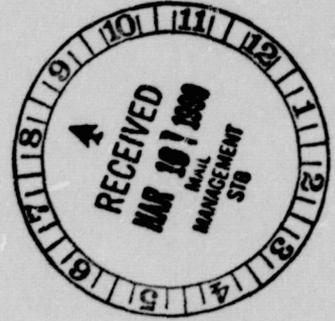
Mitchell Kraus

Mitchell M. Kraus
 General Counsel

MMK:rm
 Enclosures



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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 88)

ENTERED
Office of the Secretary

MAR 10 1999

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Public Record

**CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. And Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail, Inc.
And Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk Southern
Railway Company to CSX Transportation, Inc.**

**PETITION FOR LEAVE TO FILE COMMENTS AS AMICUS
IN SUPPORT OF PETITION OF THE BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYES FOR REVIEW OF ARBITRATION AWARD**

Submitted by

THE TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION

Mitchell M. Kraus
General Counsel
Transportation•Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

March 9, 1999

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 88)

**CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. And Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail, Inc.
And Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk Southern
Railway Company to CSX Transportation, Inc.**

**PETITION FOR LEAVE TO FILE COMMENTS AS AMICUS
IN SUPPORT OF PETITION OF THE BROTHERHOOD OF
MAINTENANCE OF WAY EMPLOYES FOR REVIEW OF ARBITRATION AWARD**

Submitted by

THE TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION

The Transportation•Communications International Union ("TCU") respectfully petitions the Surface Transportation Board for leave to file the attached pleading. The attached pleading is in the nature of amicus comments in support of the petition filed by the Brotherhood of Maintenance of Way Employes to review a January 14, 1999, award issued by Arbitrator Fredenberger. The Board's Rules of Practice do not provide for the filing of amicus comments.

However, Section 1117.1 of Title 49 of the Code of Federal

Regulations provides that "[a] party seeking relief not provided for in any other rule may file a petition for such relief." In doing so, the petitioner must identify: (1) the grounds upon which the Board's jurisdiction is based; (2) the claim showing that the petitioner is entitled to relief; and (3) the type of relief sought. In this matter, the Board's jurisdiction rests within its authority to review arbitration awards interpreting labor protective conditions imposed pursuant to 49 U.S.C. §11326. 49 C.F.R. §1115.8. The TCU seeks to file amicus comments in support of the BMW's petition in this matter because this is the first time since the issuance of Carmen III that the Board has been asked to consider the post-transaction override of collective bargaining agreements. Consequently, TCU believes that a full record, including the comments of not only the BMW, but of other rail labor organizations, is crucial to the Board's review of Arbitrator Fredenberger's award on this important issue.

Accordingly, to ensure that the Board has a complete record before it, TCU respectfully requests that the attached amicus comments be accepted into the record.

Respectfully submitted,



Mitchell M. Kraus
General Counsel
Transportation•Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

March 9, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of March, 1999, served a copy of the foregoing petition and comments by first-class mail, postage prepaid, upon all parties of record in this proceeding.



Mitchell M. Kraus

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)

**CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. And Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail, Inc.
And Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk Southern
Railway Company to CSX Transportation, Inc.**

**COMMENTS OF TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION AS AMICUS IN SUPPORT OF
PETITION OF THE BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES FOR REVIEW OF ARBITRATION AWARD**

The Transportation•Communications International Union (TCU) submits these comments in support of the Brotherhood of Maintenance of Way Employees' (BMWE) petition to review Arbitrator Fredenberger's award in the above-captioned matter. This is the first time, since the issuance of Carmen III, that the Board is being asked to consider the override of pre-transaction collective bargaining agreements. Because of the importance of this matter, TCU requests that the Board consider these brief comments.

As we discuss below, Carmen III limited arbitrators' authority under Article I, Section 4 of the New York Dock Conditions to modify such agreements. The Board in its Decision No. 89 approving this transaction made clear, at rail labor's request, that its decision was not to be taken as the Board's

approval of the Applicants' proposed changes in collective bargaining agreements. Rather, it was up to the arbitrator in the first instance to determine whether any proposed changes meet the standards established by Carmen III.

Notwithstanding, while giving lip service to Carmen III, Arbitrator Fredenberger approved Applicants' proposal to replace collective bargaining agreements on a wholesale basis. This is the first instance where an arbitrator has approved the complete elimination of a pre-existing agreement. Both Applicants are themselves products of mergers, and both have continued to administer multiple agreements covering virtually all crafts and classes including the maintenance of way craft.

As we set forth below, Arbitrator Fredenberger failed to apply the Carmen III standards. Instead, he rubber stamped the Applicants' proposal without making the requisite findings. In short, this case presents a simple question to the Board; namely, did it mean what it said in Carmen III and Decision No. 89 approving the instant transaction?¹ If so, the award must be reversed.

¹In her recent testimony before the Senate Commerce Committee, Subcommittee on Surface Transportation, Chair Morgan emphasized that, "Board approval of a railroad merger does not mean that collective bargaining agreements may be swept aside wholesale." She pointed out that Carmen III "limited arbitrators' authority to override collective bargaining agreements." Not surprisingly, this testimony suggests that the Board meant what it has said.

Carmen III was the culmination of complex litigation extending over a number of years. The history of this litigation is summarized in the opinion, and we will not summarize it herein. In Carmen III, the Board imposed several important limitations on arbitrators' authority to modify collective bargaining agreements.

The Board, over the Applicants'² objections, reaffirmed its holding in Carmen II that modification of agreements was only permissible to the extent traditionally done by arbitrators under the Washington Job Protection Agreement and the ICC during the period 1940-1980.

Modifications of agreements during this period was limited to those required for the selection and assignment of forces and related changes needed to accomplish the transfer or consolidation of work. Certainly, no arbitrator during this period replaced one agreement with another on a wholesale system-wide basis, as is being done herein.

The Board then set forth three additional "crucial limitations" -- the transaction sought to be implemented must be an approved transaction; the modifications must be necessary to the implementation of that transaction; and the modification cannot reach rights, privileges and benefits protected by Article

²Carmen III involved two separate cases from CSXT and NS, the same carriers in the instant matter.

I, Section 2 of the New York Dock Conditions. We discuss the first two limitations below.

The Board defined approved transaction as constituting both the principal transaction approved by the Board (in this case the approval of the acquisition and control in Decision No. 89) and subsequent transactions that are directly related to, grew out of, or flowed from the principal transaction. The Board noted that the passage of time does not prevent a finding of nexus between the proposed changes and the initially approved transaction. However, there must be such a nexus.

It is unclear how the override herein relates to a transaction since there does not appear any nexus between the override and a coordination of work and employees or a consolidation of work and facilities involving these employees. NS proposed that its new maintenance of way region for its allocated Conrail lines is to be composed entirely of former Conrail lines and former Conrail employees. No current NS employees are to be assigned to this region. CSXT similarly plans no or very little coordination of work between its current maintenance of way districts and its allocated share of Conrail.

Any modification of existing agreements must be necessary to the implementation of the transaction. This emphasis on necessity stems from Carmen II where the Board held that collective bargaining agreements were not to be overridden simply

to "facilitate a transaction" but could be overridden only "to the extent necessary to permit the approved transaction to proceed."

Carmen III at p. 11.

The Board discussed the issues arbitrators must address in applying the necessity standard by quoting from its decision in Fox Valley & Western:

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.) (Emphasis supplied.)

Carmen III at pp. 26-27.

In Carmen III the Board indicated its acceptance of additional limitations imposed on its override authority by the D.C. Circuit Court of Appeals. The court has held that there can be an override only where it is necessary to achieve the

transportation benefits of the underlying transaction, but there can be no override if the only benefit derives from the collective bargaining agreement modification itself. Carmen III at p. 24. Contracts cannot be overridden "willy nilly" to "merely transfer wealth from employees to their employer." RLEA v. U.S., 987 F.2d 806, 814-15 (D.C. Cir. 1993). In short, the override must be necessary to an approved transaction -- namely, a transfer, coordination or consolidation of work, not merely to lower marginal labor costs. Ibid.

In the instant matter, Arbitrator Fredenberger held that two goals of the STB's approval of this transaction were "more efficient and less costly operations" and a serious competitive balance between NS and CSXT. According to the arbitrator, the override of the entire agreement furthers these goals, and continuation of the Conrail agreement "strikes at the heart" of this transaction. Fredenberger Award at p. 13.

Notably missing from Fredenberger's finding is any discussion of necessity. Clearly, he makes no effort "to reconcile the operational needs of the transaction with the need to preserve pre-transaction arrangements." Carmen III at pp. 26-27. There is no discussion of the various differences between the Conrail, NS and CSX agreements outlined by the BMW in its pre-hearing brief. While such sweeping changes may "facilitate" the transaction by reducing labor cost, the award is devoid of

any analysis of why such changes are "necessary." Merely to state that a change in the pre-existing agreement will save the carrier money is clearly insufficient. That results in precisely the type of transfer of wealth from employees to their employer prohibited by the D.C. Circuit. Yet that conclusion in essence represents the sum total of Arbitrator Fredenberger's analysis.

Finally, we note that the arbitrator's decision to override the existing restrictions in the CSX, NS and Conrail agreements on subcontracting is unprecedented. While the arbitrator contended that this change meets the necessity test of Carmen III, that decision makes clear that arbitrators have not been given a license to override whatever agreement provisions carriers maintain are inefficient. As noted by Arbitrator Fredenberger, such restrictions are common in rail collective bargaining agreements. They are central to the collective bargaining relationship. In short, the removal of the requirement that the Applicants use their employees represented by BMW to perform certain work may save the Applicants money, but it cannot be viewed as necessary to permit the consummation of this transaction. Indeed, it does not appear that this modification is connected to an approved transaction at all. It is clearly unrelated to the transfer, consolidation or coordination of work and/or employees.

Our analysis of the merits of this dispute has purposefully been of a summary nature. An explanation of the operation of the three BMWWE agreements at issue is best left to the BMWWE. Our point is that Carmen III, as well as Board decision No. 89 authorizing this merger, hold that an arbitrator under Article I, Section 4 of New York Dock must address specific issues in order to override pre-existing collective bargaining agreements. Arbitrator Fredenberger simply failed to meet those responsibilities. If Carmen III is to have any practical meaning, this decision must be reversed.

Respectfully submitted,

Mitchell Kraus

Mitchell M. Kraus
General Counsel
Transportation•Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

March 9, 1999

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(Sub 88)

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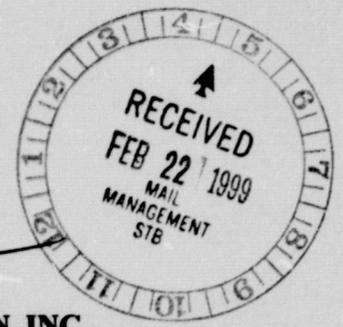
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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



**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
(ARBITRATION REVIEW)**

**JOINT MOTION FOR LEAVE TO FILE
MEMORANDUM EXCEEDING PAGE LIMITATION**

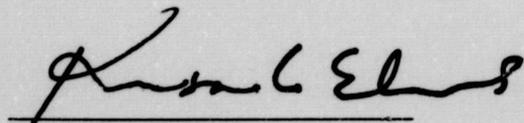
Norfolk Southern Railway Company ("NSR"), CSX Transportation, Inc.

("CSXT"), and Consolidated Rail Corporation ("Conrail") (collectively, "the railroads") jointly request leave to file the accompanying memorandum in reply to the request of the International Association of Machinists and Aerospace Workers ("IAM") for a stay of the arbitration award rendered by neutral referee William E. Fredenberger, Jr. on January 14, 1999 (the "Fredenberger Award").

The railroads have stated their opposition to the IAM stay request in a single joint memorandum, which concisely sets forth the pertinent legal standards and Board precedent. The memorandum also sets forth the relevant factual background and corrects misstatements by IAM regarding the nature and scope of employee impacts attributable to the Fredenberger Award.

The Board's rules, 49 C.F.R. § 1115.5 (c), limit replies to stay requests to ten pages in length. The railroads' proffered joint reply exceeds the page limitation by one page (representing only a few lines of text).

The railroads respectfully request that the Board accept and consider the accompanying joint memorandum in its entirety.



Jeffrey S. Berlin
Krista L. Edwards
Alan Gura
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8178

Jeffrey H. Burton
NORFOLK SOUTHERN CORPORATION
Three Commercial Place - 17th Floor
Norfolk, VA 23510-9241
(757) 629-2633

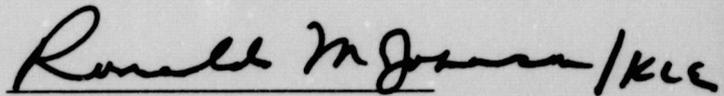
*Counsel for Norfolk Southern
Railway Company*

John B. Rossi, Jr.
Consolidated Rail Corporation
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(215) 209-4922

Counsel for Consolidated Rail Corporation

Dated: February 22, 1999

Respectfully submitted,



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Counsel for CSX Transportation, Inc.

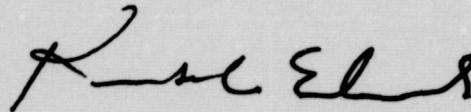
CERTIFICATE OF SERVICE

I hereby certify that I have, this 22nd day of February, 1999, caused copies of the foregoing Joint Motion For Leave To File Memorandum Exceeding Page Limitation to be served, by hand, upon the following:

Joseph Guerrieri, Jr.
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Donald F. Griffin
Brotherhood of Maintenance of Way
Employes
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Krista L. Edwards

STB

FD

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(Sub 88)

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Mac A. Fleming
President

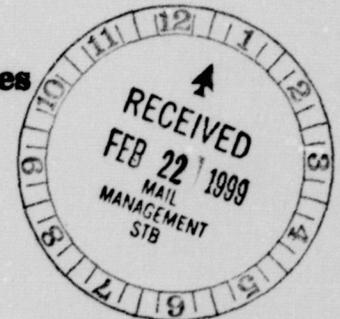
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William E. LaRue
Secretary-Treasurer

193470

Brotherhood of Maintenance of Way Employees
Affiliated with the A.F.L.-C.I.O. and C.L.C.



February 22, 1999

via messenger

ENTERED
Office of the Secretary

Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

FEB 22 1999

Part of
Public Record



Re: Finance Docket No. 33388 (Sub-No. 88)

Dear Sir:

Enclosed for filing with the Board are the original and ten copies of the Brotherhood of Maintenance of Way Employees' petition for stay of the arbitral award, dated June 14, 1999, issued by William E. Fredenberger, Jr. Also enclosed is a diskette containing the document in WordPerfect 7.0 format.

Please stamp the extra copy received so that the messenger can return it to me. Thank you.

Respectfully submitted,

Donald F. Griffin
Asst. General Counsel

enclosures

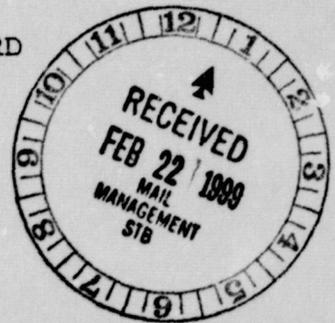
cc: service list
M. A. Fleming
W. A. Bon

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)



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

PETITION FOR STAY OF ARBITRAL AWARD

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Dated: February 22, 1999

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 88)

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

PETITION FOR STAY OF ARBITRAL AWARD

The Brotherhood of Maintenance of Way Employes ("BMW") respectfully petitions this Board, pursuant to 49 C.F.R. §1115.5, for a stay of the arbitral award issued by William E. Fredenberger, Jr. on January 14, 1999 ("the Award").^{1/} BMW previously filed a petition for review of the Award on February 12, 1999. BMW seeks this stay to prevent any further implementation of the Award to preserve the integrity of the appellate process.

^{1/}The parties involved in the Award include Norfolk Southern Railway Company ("NSR"), CSX Transportation, Inc. ("CSXT"), Consolidated Rail Corporation ("Conrail"), International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("IBB"), Brotherhood Railway Carmen-Division of TCU ("BRC"), International Brotherhood of Electrical Workers ("IBEW"), National Conference of Firemen & Oilers-SEIU ("NCF&O"), International Association of Machinists and Aerospace Workers ("IAM") and Sheet Metal Workers' International Association ("SMWIA").

STATEMENT OF FACTS

BMW adopts and incorporates by this reference the Statement of Facts set forth at pages 1 through 6 in its Petition for Review filed on February 12, 1999.

ARGUMENT

I. The Standards Governing A Petition For Stay

"The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay." Finance Docket No. 33429, Burlington Northern Santa Fe Ry. v. American Train Dispatchers Dept., Bhd. of Locomotive Engineers, slip. op. at 2, served July 18, 1997 (not published). In other words, "[a]n order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." Washington Metropolitan Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). Recently, the Board has applied the "status quo" consideration when reviewing

arbitral awards that affect substantial numbers of employees or raise significant issues. E.g., FD No. 31700 (Sub-No. 13), Canadian Pacific Ltd.-Purchase & Trackage Rights-Delaware & H. Ry., served June 16, 1998 (not published) and FD No. 32760 (Sub-No. 22), Union Pacific Corp.-Control & Merger-Southern Pacific Trans. Co., served May 30, 1997 (not published). We submit our petition for review meets the Board's standards for granting a stay.

II. BMW's Petition For Review Raises Substantial Legal Questions

The Award is the first significant implementing agreement award issued since the Board's decision in FD No. 28905 (Sub-No. 22), CSX Corp.-Control-Chessie System, Inc., served September 25, 1998 ("Carmen III"). BMW submits that the arbitrator grossly exceeded the limits of his jurisdiction as set forth in Carmen III and committed egregious error in his application of the "necessity" test for the modification or abrogation of CBAs. In essence, the arbitrator understood his charge under Carmen III to exercise roving authority to reshape the Carriers' collective bargaining agreements ("CBAs") in a way that he believed would afford them maximal flexibility and efficiency in operations. We submit the Board expressly rejected that type of free-wheeling

approach in Carmen III. The arbitrator's decision stands the national labor policy on its head because his actions, taken as a delegate of this Board, amounts to governmental review of the substantive terms of collective agreements.

We have set forth our position regarding the error of the Award in detail at pages 7 through 37 of our Petition for Review filed on February 12, 1999, and incorporate those arguments herein by this reference.

III. BMW Represented Employees Will Suffer Irreparable Harm In The Absence Of A Stay

Article II, Section 2 of the implementing agreement imposed by the Award provides for the consolidation of the various Conrail seniority rosters as part of the allocation of that carrier's properties between NSR and CSXT. Existing CSXT and Conrail forces will be consolidated onto new rosters comprising three new consolidated seniority districts covering 16 states and two provinces in Canada. Conrail forces allocated to NSR will be consolidated into a single Track Department seniority district running from Peoria, Illinois to Philadelphia, Pennsylvania.

The force rearrangements contemplated by the Award will likely result in many employees relocating to new work locations. Also, as employees exercise seniority after consolidation, the

pre-merger work forces will become even further mixed. For all practical purposes, if the Carriers implement the Award, it will be extremely difficult for employees to return to their pre-implementation positions if the Award subsequently is set aside or modified by the Board on appeal. Make whole remedies cannot remedy these dislocations because employee relocations also involve the uprooting of the community ties of all members of the employee's family. That type of disruption to family life simply cannot be remedied effectively after the fact.

IV. A Stay Will Not Harm The Carriers

The Carriers previously announced that the effective date for the operational division of Conrail's asset will be June 1, 1999. The only step the Carriers have taken to implement the Award is the allocation of Conrail employees between the NSR, CSXT and Conrail. That allocation, however, is on paper only and will not be implemented until June 1, 1999.^{2/}

BMWE and the IAM filed petitions to review the Award on February 12, 1999. The Carriers' responses to those petitions are due 20 days later on March 4, 1999. The Board should be able to rule on the merits of the appeal before June 1, 1999;

^{2/}A copy of the Carriers' letter of February 5, 1999 is attached as Exhibit 1.

therefore, a stay of the Award should not harm the Carriers.

Additionally, the Board also should be aware that the June 1, 1999 implementation date is a revision of the Carriers' earlier projected implementation date of March 1, 1999.

Certainly there is no guarantee that the Carriers will be able to stick to the new June 1, 1999 date. Therefore, any claim by the Carriers of harm flowing from a stay is purely speculative given their own self-imposed delay of three months in the operational implementation of the division of Conrail.

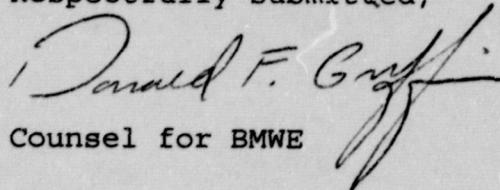
V. The Public Interest Favors Issuance Of A Stay

Finally, BMWWE submits that the public interest is better served by the Board issuing a stay. Section 11326 requires that any protective conditions imposed by the Board upon a transaction must provide a "fair arrangement" to protect the interests of employees affected by an approved transaction. Certainly, it would not be "fair" to the employees for them to relocate and risk the possible loss of their jobs pursuant to work rules imposed by an arbitral award that is the subject of a pending appeal before the Board. A "fair" result would require the Board to act on the appeal before those new rules were imposed.

Conclusion

Based upon the foregoing, BMW respectfully urges the Board to grant its petition for a stay of the Award pending review of BMW's appeal.

Respectfully submitted,


Counsel for BMW

Dated: February 22, 1999

Certificate of Service

I certify that I have this day served copies of the foregoing Petition upon all parties of record in the arbitration, by hand delivery or, where hand delivery is not feasible, by overnight mail delivery.

Donald F. Griff

Dated: February 22, 1999

EXHIBIT 1

February 5, 1999

VIA OVERNIGHT MAIL

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General Chairman, BMW
Southern System Division
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Mr. J. R. Cook
General Chairman, BMW
Allied Eastern Federation
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✓ Mr. J. Dodd
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Mr. J. D. Knight
General Chairman, BMW
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Mr. T. R. McCoy, Jr.
General Chairman, BMW
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2706 Ogden Road, SW
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Mr. L. L. Phillips
General Chairman, BMW
RR #3, Box 724
Springville, IN 47462

Mr. R. L. Taylor
General Chairman, BMW
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Moberly, MO 65270-1550

Gentlemen:

Pursuant to the Arbitrated Implementing Agreement among CSX Transportation, Inc. ("CSXT"), Norfolk Southern Railway Company ("NSR"), and Consolidated Rail Corporation ("CRC") and the Brotherhood of Maintenance of Way Employees, et al., which is Attachment No. 1 to the January 14, 1999 Decision of Referee W. E. Fredenberger, Jr., this shall constitute advance written notice that **effective on the Closing Date for the Conrail transaction (now set for June 1, 1999)**, CSXT, NSR,

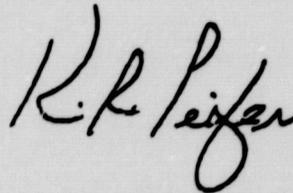
and CRC will effect the coordination or rearrangement of forces under Article I, Section 1, paragraph (a) of the Arbitrated Implementing Agreement, which provides:

"(a) BMW E represented employees will be allocated among CSXT, NSR, and CRC as provided in Appendix A."

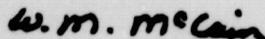
Accordingly, effective as of the Closing Date, CRC employees represented by BMW E will be allocated, as set forth in Appendix A to the Arbitrated Implementing Agreement, among CSXT, NSR, and CRC (Shared Assets Areas), based upon the position held on the "allocation date," which is February 5, 1999. As stipulated by the Carriers in the arbitration hearing, employees on short-term furlough on the allocation date, whether or not eligible for SUB-Plan benefits, will be allocated in accordance with Part I.D. of Appendix A; this will include any employee who was active at any time in 1998.

If you have any questions or comments concerning the above, please advise.

Very truly yours,



K. R. Peifer
Vice President Labor Relations
CSX Transportation, Inc.



W. M. McCain
Asst. Vice President
Labor Relations
Consolidated Rail Corporation



M. R. MacMahon
Assistant Vice President
Labor Relations
Norfolk Southern Railway Company

STB FD 33388 (Sub 88) 2-12-99 I 193328V1 1/2

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ENTERED
Office of the Secretary

FEB 16 1999

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SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub No. 88)



**CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. and Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail Inc.
and Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk
Southern Railway Company to CSX Transportation, Inc.**

**PETITION OF THE BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES FOR REVIEW OF ARBITRATION AWARD**

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Counsel For the Brotherhood
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FILED

FEE RECEIVED

FEB 12 1999

February 12, 1999

FEB 12 1999

**SURFACE
TRANSPORTATION BOARD**

**SURFACE
TRANSPORTATION BOARD**

Pursuant to 49 C.F.R. §1115.8, The Brotherhood of Maintenance of Way Employees ("BMWE") petition's the Board for review of the arbitration award issued by William E Fredenberger, Jr. under the *New York Dock* employee protective conditions imposed in the above-captioned proceeding. A copy of the Award is appended to this petition as Appendix A.

STATEMENT OF FACTS

On August 24, 1998, the Carriers served notices upon BMWE, pursuant to Article I, Section 4 of the *New York Dock* conditions, proposing an arrangement regarding the selection of forces and assignment of employees the Carriers believed were necessary to carry out the division of Conrail among NSR, CSXT and Conrail/SAA.¹ Negotiations between the parties were unsuccessful. The Carriers wrote the National Mediation Board ("NMB") for appointment of an arbitrator. On November 13, 1998, the NMB appointed Mr. Fredenberger. The arbitration occurred on December 15 through 18, 1998.²

The Carriers and the BMWE each presented the arbitrator with a comprehensive proposal concerning the selection of forces and assignment of employees. The respective proposals are summarized below.

¹ The facts of this cases are fully set forth in detail in BMWE's pre-hearing submission and arbitration exhibits which are submitted with this petition as BMWE Exhibits Volume I and II. BMWE Exhibits Volume III contains the Carriers' pre-hearing submissions. Because of page limitations, this petition will contain only a summary of the facts with limited record references. The Board is respectfully referred to BMWE Exhibits Volumes I and II for detailed factual references.

²The following unions also participated in the arbitration: International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Iron Ship Builders, Forgers and Helpers; International Brotherhood of Electrical Workers; National Conference of Firemen & Oilers, SEIU; Sheet Metal Workers' International Association; and Transportation•Communications International Union ("the Shopcraft Unions"). Those unions made separate proposals to the Carriers regarding matters specific to them; no issues relating to those unions are raised in this petition.

BMW designed its proposal for the allocation of Conrail's lines between NSR, CSXT and SAA, in a fashion that concedes CBA changes that are "necessary" to implement the transaction, *i.e.*, the integration of the Conrail trackage into CSXT's and NS's existing operations. The proposal would effect the least impact possible upon pre-Transaction seniority rights and collective bargaining agreements ("CBAs") of *all* employees involved in the transaction.

The BMW's proposal contains two stages. The first concerns changes to the present Conrail seniority rosters and seniority districts *before* the actual selection of forces and assignment of employees to positions following the allocation. These changes include disposition of the Conrail regional maintenance of way rosters and adjustment of existing seniority district boundaries to align them with the manner in which Conrail lines and facilities will be divided among the Carriers. *See* BMW Ex. 20 in arbitration (BMW Exhibits To Petition Volume II).

The second stage concerns the manner in which forces are selected and employees assigned to positions following the division of Conrail's property. The first step requires the Carriers to advertise the positions they would operate post-transaction to the affected Conrail employees. Those positions will be assigned "on paper" and employees will report physically to the positions after the Carriers provide advance notice of their intent to divide Conrail.³ Also all existing CBAs are preserved, except that regional and system gang operations on the allocated Conrail lines operated by NSR will be governed by the Designated Program Gang agreement of June 12, 1992 ("DPG Agreement") and the same type of operations on the lines allocated to

³The BMW's proposal also contained a limited "flowback right" that permitted former Conrail employees to exercise seniority to another carrier if they possess seniority rights on a roster on the other carrier and the employee cannot hold a position (except for regional or system gangs) on his or her "home" road.

CSXT will be governed by the System Production Gang agreement ("SPG Agreement"). Additionally Roadway Equipment Repairmen on CSXT, including former Conrail employees, will work under the system-wide Roadway Mechanic's Agreement. Any Conrail employees transferred to locations off the former Conrail lines, *i.e.*, Charlotte, North Carolina; Richmond, Virginia or Atlanta, Georgia; will work under the CBAs applicable to the work performed at those locations.⁴

The Carriers' proposal provides for no employee involvement in the selection and assignment process. Employees holding fixed headquarters assignments will be allocated to NSR and CSXT based upon the location of the headquarters. Employees in mobile service (over half the Conrail track workers, (*see* Carriers Ex. A-51 which is reproduced in Appendix B hereto as B-2)) will be allocated based upon their earliest seniority dates on a maintenance of way seniority roster, which could be in a seniority district other than the one in which the employee currently is working. NSR proposal eliminates the BMW/Conrail CBA and creates the acquired Conrail lines as a new region within the current BMW/N&W-Wabash CBA. CSXT's proposal preserves the BMW/Conrail CBA in a new consolidated Northern District; however all existing Conrail seniority districts in that new District would be consolidated into a single mega-district. Additionally, CSXT would create two other "consolidated" mega-districts, the Eastern and Western. Each district would operate under the BMW/B&O CBA and all other CBAs in the districts would be eliminated along with all pre-Transaction seniority districts. The Western

⁴BMW also contended that the Conrail Supplemental Unemployment Benefits ("SUB") Plan, the Conrail Agreement Employees' Savings Plan (a 401K plan), New Jersey Transit "Flowback Rights" under an arbitrated implementing agreement of October 14, 1982, the Conrail Continuing Education Assistance Plan, the L&N Laundry Allowances, the Conrail Safety Shoe Allowance should be preserved as rights, privileges or benefits under Article I, Section 2 of *New York Dock*.

District would be predominantly (78%) comprised of CSXT employees who currently work under various CBAs applicable to seven formerly separate CSX railroads; the Eastern District would be comprised almost totally (97.5%) of CSXT employees who currently work under various CBAs applicable to four formerly separate CSX railroads. See CSXT chart, Distribution of Employees, CSXT arbitration Ex. 15, reproduced in Appendix B hereto as B-1. Conrail/SAA would continue to operate under the BMW/Conrail CBA with some modifications. Additionally, the Carriers sought an unrestricted right to subcontract maintenance of way work to perform "construction and rehabilitation" asserted to be related to carrying out the Operating Plan submitted to the Board.

On January 14, 1999, the arbitrator issued his decision that imposed, with one exception, the Carriers' proposal. The record included "approximately 300 pages of pre-hearing submissions or briefs together with several hundred pages of exhibits and attachments thereto as well as over 1,000 pages of hearing transcript..." Award at 4. The arbitrator stated that "only those [facts and argument] deemed to be decisionally significant ... are dealt with or addressed in this Decision."

Id.

The arbitrator noted that the threshold important issue in the proceeding was his "authority ... under Article I, Section 4 to override or extinguish, in whole or in part, the terms of the pre-Transaction CBAs." Award at 6. He cited the Board's recent decision in *Carmen III* to find his authority to be the following (*id.*, emphasis in original):

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.

The arbitrator began his award granting the Carriers' proposal for allocating Conrail

employees. Award at 8. He noted that “[w]hile employee choice is a laudable goal, it cannot be placed ahead of efficient implementation of the transaction.” *Id.* at 8. He found, without specific citation to Decision No. 89, that “prompt effectuation” of the division of Conrail was an “implicit element of the transaction” and the Board intended “application of the strict time limits of Article I, Section 4.” *Id.* According to the arbitrator, the BMW’s proposal “could delay implementation of the transaction several months beyond what would be required under the Carriers’ plan.” *Id.* Therefore, he found the Carriers’ proposal fell “within the gambit [sic] of the selection of forces made necessary by the transaction” and involved the “principle [sic] transaction approved” in Decision No. 89. *Id.*

The arbitrator next adopted the Carriers’ proposals for realignment of existing Conrail and CSXT seniority districts. He found that while the transaction was “somewhat unusual,” the Board’s approval of the primary application in Decision No. 89 meant that the Board already had determined the seniority district realignments proposed by the Carriers were approved. Award at 11. Finding that “[f]lexibility with respect to the workforce is the key to the success of the transaction” any preservation of the Conrail seniority districts “would severely restrict that flexibility.” *Id.* The arbitrator made no findings as to why the CSXT seniority districts that were not adjacent to Conrail districts acquired by CSXT also had to be realigned. Nor did he explain why creation of the CSXT Northern Seniority District which consists entirely of former Conrail trackage and would remain under the Conrail/BMW CBA required the elimination of existing seniority districts. Nor did he explain his decision to authorize the consolidation of current CSXT districts into new mega-districts under single CBAs without reference to any CSXT transaction but ostensibly under CSX/NS-Conrail transaction even though there were essentially no CSXT-former Conrail coordinations in the Eastern district and limited CSXT-former Conrail

coordinations in the Western district.

Following his approval of the Carriers' proposed changes in seniority districts, he also approved the Carriers' choices for the CBAs that would apply to the new districts. The arbitrator said that "[t]wo plain goals of the STB's approval of the transaction in Decision No. 89 are more efficient and less costly operations by the Carriers involved and a serious competitive balance between NS and CSXT." Award at 13. He found the application of the BMW-Conrail CBA to portions of NS or CSXT operations after the division of Conrail "strikes at the heart of both propositions." *Id.* The arbitrator made no findings as to why the BMW-B&O CBA had to be applied to the consolidated Western and Eastern seniority districts on CSXT, nor did he reconcile his findings on the BMW/Conrail CBA with CSXT's own proposal to *preserve* the BMW/Conrail CBA in the Northern Seniority District.

The arbitrator made an additional finding regarding CBA terms governing the Carriers' use of subcontractors. He noted that a "[r]estriction on contracting out, either through the scope clause of a CBA or a specific prohibition therein, is a common provision in railroad CBAs." Award at 14. The arbitrator then found that application of such "restrictions ... would cause serious delay to implementation of the transaction insofar as capital improvements are concerned and would unduly burden CRC with an employee complement it could not keep working efficiently." *Id.* Accordingly, he abrogated those CBA provisions of the Conrail CBA and the CSXT and NSR CBAs that he imposed on the former Conrail territories, as well as in pre-Transaction CSXT and NSR territories.⁵

⁵The arbitrator also held the Conrail Supplemental Unemployment Benefit Plan was a right, privilege or benefit entitled to preservation under Article I, Section 2 of *New York Dock*. Award at 15. The arbitrator rejected BMW's arguments that the BMW-L&N laundry allowance and BMW-Conrail safety shoe allowance were rights privileges or benefits. *Id.* He

LEGAL FRAMEWORK

I. STB REVIEW OF ARBITRATION DECISIONS

The ICC/STB has held that it will limit its review of awards of employee protective conditions arbitrators to cases of recurring or otherwise significant issues of general importance regarding the interpretation of the protective conditions, and that an award will be overturned if it is irrational or fails to draw its essence from the conditions or exceeds the arbitrator's authority under the conditions. *Chicago & North Western Transp. Co.-Abandonment-Near Dubuque and Oelwein, IA*, 3 ICC 2d 729 (1987); *Union Pacific Corp. et al --Control and Merger--Southern Pacific Transp. et al.* F.D. No. 32760(Sub-No. 22) (Served June 26, 1997).

II. ARBITRATOR AUTHORITY WITH RESPECT TO CBAS

The issue of the scope of ICC/arbitrator ability to override CBAs was addressed in a series of D.C. Circuit cases beginning with *Railway Labor Executives Ass'n v. U.S.*, 987 F.2d 806 (D.C. Cir. 1993) ("*Executives*"). The Court noted that Article I §2 was derived in part from Section 405 of the Rail Passenger Service Act which required "the preservation of rights, privileges and benefits... under existing collective bargaining agreements'....", but nonetheless concluded that it would be "obviously absurd" to conclude that "every word of every CBA" established a right, privilege or benefit", although the ICC could not modify a CBA "willy-nilly", terms other than rights privileges and benefits can be overridden only when "necessary to effectuate a transaction". 987 F. 2d at 813-814.

also arbitrator rejected BMW's proposal that the pool of applicants for maintenance of way equipment repairmen's positions transferred to Charlotte or Richmond include all employees possessing such rights on Conrail's Canton MW Repair Shop roster. Award at 21. Instead, adopted the Carriers' limitation that the pool of applicants contain only those actually working in the Shop at the time of transfer. The arbitrator also made certain other findings specific to roadway equipment shops. None of these aspects of the Award are at issue here.

The Court has held that rights, privileges and benefits are immutable: preserved absolutely. *American Train Dispatchers Ass'n v. ICC*, 26 F. 3d 1157, 1163 (D.C. Cir. 1994). CBA terms (other than rights, privileges and benefits) are presumptively or qualifiedly preserved; they may be overridden where "necessary to effectuate a transaction". *Executives*, 987 F. 2d at 814. Necessity must relate to the purpose of the transaction but not if "the purpose of the transaction was to abrogate the terms of a CBA". *Id.* at 815. There must be a public purpose to be secured by the **transaction** "that would not be available if the CBA were left in place". *Id.* So the public transportation benefit must flow from the transaction itself, not from the CBA modification alone. The employee protective conditions can not be used to "transfer wealth from employees to their employer". *Id.* Mere reference to general "public interest factors" and "creation of a more competitive and efficient carrier" were not sufficient to show necessity for a CBA override. *Id.* at 815. There is no showing of necessity where "enhanced service levels would result solely from the reduced labor cost stemming from the modifications to the CBAs-when a producer's marginal cost declines it increases its output, i.e. service". *Id.* The transportation "benefit can not arise from the CBA modification itself; considered independently of the CBA, the **transaction** must yield enhanced efficiency, greater safety, or some other gain". *ATDA v. ICC*, 26 F. 3d 1164, emphasis added. The ICC's view that "the necessity predicate is satisfied whenever a CBA is an impediment to a transaction clearly misstate[d] the necessity standard". *Id.* at 1165, internal quotations omitted. In *United Transportation Union v. STB*, 108 F. 3d 1425 (D.C. Cir. 1997), the Court reiterated that rights, privileges and benefits are "immutable" (*id.* at 1429), and that other changes could be made only upon a showing of necessity which must be based on a transportation benefit to the public, and not from the CBA modification itself (*id.* at 1431). It concluded that the seniority provisions at issue in that case were not rights, privileges and benefits

which are essentially fringe benefits and ancillary emoluments (*id.* at 1430), and that it had not been argued that the provisions fell within the Article I §2 protection of rates of pay, rules and working conditions “so the scope of this term is not an issue in this case. It is only the meaning or ‘other rights, privileges and benefits’ that is at issue”. *Id.* at 1430 n. 4.⁶

Thus, the public transportation benefit must derive from the transaction itself, a change in operations that intrinsically benefits the public (*e.g.* more direct routes, reduced terminal delay, more single line service, consolidated facilities, coordinated work); and the relevant question is whether continued operation of a CBA provision would prevent that transaction so it is necessary to override the CBA to allow implementation of the operational change that would benefit the public. There may be no override where alleged benefits do not flow from an actual transaction/rearrangement of forces. Where the override is merely to increase flexibility, to reduce administrative costs, to lower labor costs or to eliminate inconvenient work rules based on the notion that there is an indirect benefit to public by trickle down of lower rates from lower costs, there is no public transportation benefit necessity. For a more detailed discussion of the D.C. Circuit precedent, *see* BMW’s pre-hearing brief (BMW Exhibits To Petition Volume I) at 61-68.

2. CARMEN III

In *CSX Corp.-Control-Chessie System and Seaboard Coast Line Industries (Arbitration*

⁶ The Carries have repeatedly argued that this part of the decision is mere dicta, but it clearly is a limitation on the scope of the Court’s decision. A statement that a particular question is not an issue in the case, and thus is not part of the holding, cannot be dismissed as mere dictum with respect to that particular question. The explanation for focusing only on the phrase “other rights, privileges, and benefits” shows that “rates of pay, rules, and working conditions” is a separate phrase in Article I §2, the meaning of which is not encompassed in the phrase “other rights, privileges, and benefits.”

Review), F.D. No. 28905 (Sub-No. 22) (served September 25, 1998) ("*Carmen III*") the Board affirmed the *Carmen I* awards that allowed certain consolidations, but adopted the rationale of *Carmen II* instead of the rationale of *Carmen I*. The Board noted that in *Carmen II* the ICC said that Article I §2 could not realistically be interpreted as requiring that CBAs be preserved without any qualification whatsoever, but that "contract rights shall be respected and not overridden unless necessary to permit an approved transaction to proceed"; while CBAs may have to "yield to allow implementation of an approved transaction", under Section 11347 and the conditions, CBAs and the RLA were only required "to yield to permit modification of the type traditionally made by arbitrators under the WJPA and the ICC's conditions from 1940-1980". The Board stated that "[t]he implementing agreements imposed in arbitration under labor conditions that antedated *New York Dock* generally focused on selection of forces and assignment of work"; "[i]f the 1940-1980 arbitrators felt themselves bound by these terms [selection of forces and assignment of employees], 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 III* at 12, 22.

The Board cited three other "crucial limitations" on CBA overrides by arbitrators. First, the override must be for an **approved transaction**: the principal Transaction, (*i.e.* a merger or acquisition of control), or subsequent transactions "directly related to, [growing] out of or flow[ing] from the principal transaction (such as consolidations of facilities, transfer of work assignments etc.). *Carmen III* at 24. Second, "A CBA override can be had only if such **override is necessary to carry out the transaction**". *Id.* at 25. Necessity determinations are to be made in the first instance by arbitrators, who "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 the transaction”.

Id. at 27. Third, rights privileges and benefits must be preserved. *Id.* at 27-28.

Thus under *Carmen III*, contract rights may have to yield to allow implementation of an approved transaction, but must be respected and retained unless an override is necessary to permit the approved transaction to proceed, and they may be required to yield only to permit overrides of the type engaged in by WJPA arbitrators (*i.e.* to fashion appropriate arrangements for the selection of forces and assignment of employees which would necessarily involve movement of work, transfers of employees, consolidations of rosters and adjustments in seniority). Overrides are limited to approved Transactions (principal Transactions), as well as transactions to implement those Transactions. A change to make the railroad more flexible or a lower cost operation or more efficient in the performance of work, is not itself a Transaction or a transaction to implement a principal Transaction. For a more detailed discussion of the *Carmen III* decision, see BMW's pre-hearing brief (BMW Exhibits To Petition Volume I) at 68-80.

3. Decisions In This Case

In Decision No. 89 the STB held that it was not explicitly or implicitly approving the Carriers' operating plans or any CBA overrides that the carriers claimed were necessary to their operating plans, and that arbitrators were to make their own determinations in this regard.

Decision No. 89 at 126-127,188.⁷

⁷ In the arbitration, the Carriers asserted that in Decision No. 89 the Board denied the arguments raised here by BMW when it rejected (*id.* at 126, fn. 198) union arguments of RLA "primacy" over the ICCTA, and of the "immutability of rates of pay, rules and working conditions". This assertion is patently false. BMW has not here argued the primacy of the RLA, only that the Board must give due consideration to the RLA and accommodate the RLA and its policies *as a matter of ICCTA law*. And BMW has not here argued that rates of pay, rules and working conditions are *immutable*, but rather that they are *presumptively or qualifiedly preserved* — *i.e.* they are preserved unless the tests set forth by the D.C. Circuit and *Carmen III* are

In Decision No. 101 the Board defined necessity for override of contractual rights in a analogous situation (*see Executives*, 987 F. 2d at 814), under Section 11321(a). The Board stated “we clarify that we only intended to override the 1982 order of the Special Court to the extent necessary to permit the CSX/NS/Conrail transaction to go forward. In other words, our preemption was only to the extent that the Special Court order could be read to block this transfer [Conrail to CSX].”

ARGUMENT

The Award should be vacated because the Arbitrator erroneously assumed that his job was to facilitate the Carriers’ operations, to allow them to run their work forces as they see fit by maximizing their flexibility in using maintenance of way workers regardless of their existing contract rights; and because the Award is inconsistent with the controlling D.C. Circuit precedent and the decisions of this Board in *Carmen III* and in this proceeding. Moreover, it is fundamentally in conflict with precedent holding that the ICA requires that collective bargaining agreements, and the labor laws be respected. Accordingly, this petition raises significant issues of general importance regarding interpretation of the employee protective conditions; and the Award is arbitrary, fails to draw its essence from the conditions, and exceeds the authority conferred on the arbitrator under the conditions. Review should be granted and the Award should be vacated.

I. THE AWARD IS IN DIRECT CONFLICT WITH DECISIONS IN THIS PROCEEDING

As is noted above, in Decision No. 89, this Board declared that approval of the Transaction did not constitute explicit or implicit approval of the Carriers’ plans with respect to their employees and CBAs; and this was in response to a union request for such a declaration

satisfied.

because arbitrators had been doing exactly what Mr. Fredenberger did: assume that he was required to affirm and facilitate the Carriers' plans because the STB approved the principal Transaction.

Mr. Fredenberger stated that the STB approved the distribution of Employees as agreed among the Carriers (Award at 2); that the STB contemplated the seniority changes planned by the Carriers (Award at 11), and that "[f]lexibility with respect to the work force is key to success of the transaction" (id.). These conclusions are directly contrary to the Board's declaration that it did not explicitly or implicitly approve the Carriers' plans with respect to employees. These fundamentally erroneous assumptions pervade the entire Award, despite the Board's efforts to restore some balance in these proceedings and to eliminate any notion that it had pre-determined the merits of the Carriers' plans. Thus, the arbitrator did exactly what some arbitrators had done which caused the Board to issue its declaration. He clearly misunderstood, his mandate, the error underlies everything he did and for this reason alone the entire award must be vacated.

However, the Award is also infirm with respect to a number of its individual conclusions.

**II. THE AWARD'S METHOD FOR SELECTION OF FORCES
AND ASSIGNMENT OF EMPLOYEES IS UNFAIR, INAPPROPRIATE
AND CONTRARY TO ARTICLE I §4 AND CONTROLLING DECISIONS**

BMW and the Carriers presented two contrasting proposals for the selection of forces and assignment of employees required to carry out the division of Conrail among NSR, CSXT and Conrail/SAA. BMW's proposal required the Carriers to advertise the actual jobs they would need post-split. Then, pre-split, the Conrail workforce would bid for the actual jobs based upon their applicable Conrail seniority. The Carriers' proposal would effect a much cruder selection. Fixed headquartered positions and employees would be allocated *in situ*. Employees in mobile service in Zone and Regional gangs (over 50% of track workers involved, *see* Carriers' Ex. A-51,

which is reproduced in Appendix B hereto as B-2) would be allocated to a carrier based upon their earliest trackman seniority date. Those employees would not be assigned to any positions post-split, they would simply be allocated to one of the Carriers.

The Arbitrator adopted the Carriers' proposal. While he described employee choice as a "laudable goal", he viewed it as subordinate to "efficient implementation of the transaction." Award at 8. According to the Arbitrator, an "implicit element", indeed (to him) a compulsory element, of the Board's approval of acquisition was "prompt effectuation" of the division between NSR and CSXT. *Id.*

The Arbitrator's findings misconstrue *New York Dock*, the Board's order in Decision No. 89, and, in fact egregiously err in finding the Carriers' proposal to be less disruptive to the employees and the Carriers' operations.

The Arbitrator's belief that "prompt effectuation" of the split up of Conrail was an "implicit" element of the Board's Decision No. 89 mandating a subordination of employee choice was wrong. In Decision No. 89, the Board adopted the Carriers/NITL settlement which prohibited operational consummation of the split until all labor implementing agreements were in place. *Decision No. 89* at 54. This condition was imposed so that operational implementation would occur in an "orderly manner" unlike the chaos that surrounded the Union Pacific/Southern Pacific merger the year earlier. *Id.*

Furthermore, under *New York Dock* and *Decision No. 89*, the implementing agreement must contain employee choice, provide for an orderly transaction and occur promptly provided those limiting conditions are followed. The Arbitrator's choice of the Carriers' proposal complied with none of those conditions.

An implementing agreement's purpose is to furnish employees with "the means by which

they could determine their rights to retention of employment, work assignments, and competitive job opportunities." *Southern Ry.-Control*, 331 I.C.C. 151, 172 (1967). Therefore, the "selection of forces under *New York Dock* involves more than simply according priority to employees of the selling carriers. The manner in which individual positions are filled is an equally important selection of forces issue under *New York Dock*." *Fox Valley & W. Ltd.-Exemption, Acquisition & Operation-Certain Lines of Green Bay & W.R.R.*, 9 I.C.C. 2d 272 (1993) 1993 ICC LEXIS 9 at *13-14. These decisions make it clear that prior ICC decisions did not subordinate employee choice to "efficient implementation" of a transaction. The need for employee choice is even more pressing here because the allocation of forces will take a unified work force and divide it between three carriers. Employees are not chattels and an implementing agreement cannot be considered a fair arrangement without providing employee choice in the selection of individual assignments.

Furthermore, the Carriers' proposal will not, as a matter of fact, promote an orderly transaction. BMW's proposal, while it would take longer to implement than the Carriers', would end with every allocated employee in place on a position the Carriers intend to operate after the split. The Carriers' proposal simply allocates a substantial number of employees to each carrier based upon a formula unrelated to each carrier's need for types of employees. Under the Carriers' proposal, Zone and Regional employees (over 50% of the track workers, *see* B-2) are allocated by their earliest Trackman date. That date may not be held in the area where the employee now works. Accordingly, employees will be required to relocate to follow "allocation" based upon their earliest seniority on the railroad. Also, because most maintenance of way employees hold positions other than Trackman, an allocation based on that seniority date does not promote an orderly allocation of forces, instead it promotes an *arbitrary* allocation because employees are not allocated based upon a carrier's need for certain types of employees, or based

on the actual work done by particular employees in recent years. Under the BMW's proposals, the frictions caused by selection and assignment through a bidding procedure would occur *before* the split; the Carriers' proposal merely postpones them until *after* when they are forced to try to assign the allocated employees to actual positions. As BMW warned the arbitrator, the Carriers may find themselves with the right numbers of employees, but not the right types of employees with the right skill sets in the right locations.

Finally, the Arbitrator's implicit reliance upon the Carriers' claim that the split date was March 1, 1999 was error. Since the arbitration concluded, the Carriers pushed the split date to June 1, 1999 and there is no guarantee that the split will occur on that date either. More to the point, the March 1, 1999 date was not made public until November 20, 1998, after the Arbitrator had been selected in this case. *See* hearing transcript excerpts, reproduced in Appendix B hereto as B-3) pp. 977-979. BMW noted at the hearing, without contradiction from the Carriers, that BMW had asked the Carriers on many occasions for a schedule for the split so that the parties could try to fashion a selection and assignment proposal that could accommodate the Carriers' perceived needs. It was error for the Arbitrator to rely on the Carriers' alleged deadline and reject BMW's proposal because it did not comply with it when the Carriers' deadline never was given in negotiations even though BMW had requested it.

Accordingly, the arbitrator adopted a method for selection of forces and assignment of employees that was fundamentally at odds with the requirements of the *New York Dock* conditions, inconsistent with the mandate of this Board in Decision No. 89 and premised upon irrelevant and erroneous considerations about the Carriers' planned implementation date; and, ironically, he devised an allocation arrangement that would be less effective in matching appropriate employees to actual jobs than the BMW proposal. For all of these reasons, the

Award's method for selection of forces and assignment of employees should be vacated.

III. THE ARBITRATOR'S DETERMINATION TO SUBSTITUTE THE NSR AND CSXT CBAs FOR DIVISION AND SECTION MAINTENANCE OF WAY EMPLOYEES IS CONTRARY TO D.C. CIRCUIT AND STB PRECEDENT

As is explained above, BMWWE acceded to the Carriers' plans with respect to CBA coverage for regional and system production gangs which would cross the boundaries of the formerly separate railroads, the consolidated roadway equipment shops and the consolidated rail welding shops. BMWWE did so because these forces would be affected by transactions pursuant to the principal Transaction (creation of production gangs that would cross former territorial boundaries; consolidation of shops) which required arrangements for selection of forces and assignment of employees and integration of forces from previously separate railroads with different CBAs. However, BMWWE argued that there was no basis whatsoever for the arbitrator to substitute the CSXT and NSR CBAs for the Conrail CBA for the Conrail division and section day-to-day maintenance of way work, when the workers affected would not be integrated with CSXT and NSR maintenance of way workers, and when that work would not be coordinated with the work of NSR and CSXT maintenance of way workers. BMWWE further argued that there also was no basis for the Carriers to massively change the size of the Conrail seniority districts, to consolidate CSXT seniority districts into new mega-districts where there were virtually no, or comparatively few Conrail seniority districts or employees involved; or to negate existing contracting-out rules on all three railroads. However, the arbitrator nonetheless authorized the substitution of the NSR and CSXT CBAs for the Conrail CBA for division and section workers; the creation of new mega-districts in areas encompassing only former Conrail lines (the NSR Northern Region and the CSXT Northern District); the creation of new CSXT mega-districts by

consolidation of essentially CSXT-only, or predominantly CSXT districts; and negation of the existing contracting-out rules. As is shown in BWWE's prehearing brief at 43-48, 137-139 and BMW Arbitration exhibits 25-28 (BMW Exhibits to Petition Volume II), these changes will result loses of significant and valuable contract rights of BMW's members under the Conrail CBA and various CSXT CBAs.

Arbitrator Fredenberger authorized the broad elimination of employee contract rights without providing any explanation or support from either findings of fact or application of the controlling precedent discussed above (there were minimal but inadequate findings with respect to the contracting-out rules). Moreover, these summary grants of CBA overrides were plainly contrary to D.C. Circuit precedent and recent STB precedent.

A. The Award Is Devoid of Findings Or Analysis
To Support its Conclusions

Despite the fact that BMW's pre-hearing submission and its oral presentation took great pains to differentiate the circumstances of the division and section workers from the regional and system gang, rail welding shop and roadway equipment shop workers, the arbitrator did not even discuss the CBA overrides as to division and section workers or the creation of mega-districts for those workers. Nor did he discuss the elimination of the current seniority districts for CSXT workers and creation of the Eastern and Western mega-districts.

With respect to the creation of new mega-districts for CSXT, the arbitrator made no findings at all and provided no rationale. A huge change in the work lives of many CSXT maintenance of way employees was authorized without any discussion whatsoever. It simply cannot be said that this aspect of the award is rational, within the arbitrator's authority or draws its essence from the conditions because the award is utterly devoid of facts or a rationale on this

point. It must therefore be vacated.

The only specific findings the arbitrator made in support of the substitution of the CSXT and NSR CBAs for the Conrail CBA was a citation to the need for single agreements for regional and system production gangs. Award at 12-13. But BMW did not dispute the Carriers with respect to that group of employees! The fact that single agreements were appropriate for those groups of employees who were affected by a transaction involving the integration of forces and operation across former jurisdictional boundaries says nothing about employees who do division and section work who were not affected by a transaction, were not going to be integrated with CSXT and NSR employees and would not work across CSXT-Conrail lines or NSR-Conrail lines. Nor does that fact support the creation of mega districts within the former Conrail territories or the creation of mega-districts out of CSXT seniority districts that had been separate for many years.

The Award also states that “[t]wo plain goals of the STB’s approval of the transaction in Decision No. 89 are more efficient and less costly operations by the Carriers involved and a serious competitive balance between NS and CSXT” and that continuation of the Conrail CBA “strike at the heart of both propositions”. Award at 13. This conclusion has no support in Decision No. 89 and is contrary to the controlling precedent. While the Board’s decision indicated that goals of approval of the Transaction were greater efficiency and lower costs for shippers, and enhanced competition, the Board’s findings were predicated on the nature of the combined systems as well as *operational changes* and *coordinations* that would flow from approval of the principal Transaction (*i.e.* the follow-on transactions). The Board did not say that goals of approval of the Transaction were greater efficiency and lower costs for shippers through elimination of CBA rules. Nor is there any statement in Decision No. 89 from which the finding

made by the arbitrator can be inferred. Indeed the Board's declaration that it did not implicitly or explicitly approve the Carriers plans with respect to employees contradicts the finding made by the arbitrator.

Moreover, even if the arbitrator was correct in his description of the general goals of approval of the Transaction, he made no findings whatsoever to support his conclusion that elimination of the Conrail CBA for division and section workers was in any way related to those goals. It plainly is not enough to melodramatically, but summarily conclude that continuation of the Conrail CBA would "strike[] at the heart" of those goals. In the absence of findings of fact and provision of a rationale, there is no way for the Board to conclude that the Award is within the arbitrator's authority or draws its essence from the conditions. The Board is confronted with a broad, summary override of a CBA, despite Article I §2 and without support under Article I §4, so the Award must be vacated.

Furthermore, if the arbitrator was correct, then the Board's decision was contrary to controlling D.C. Circuit precedent because it is impermissible to override CBAs where they do not interfere with a coordination or operational change, but merely to lower marginal labor costs to transfer wealth from employees to employer. BMWWE submits that the Board did not make that mistake, but Arbitrator Fredenberger did and his award must therefore be vacated.

B. Neither The Principal Transaction Nor Any Follow-on Transaction Supports Substitution Of The CSXT And NSR CBAs For The Conrail CBA For Division And Section Work Employees Or The Seniority District Changes Authorized By The Award

Not only did the arbitrator fail to identify any transaction which supported the substitution of the CSXT and NSR CBAs for the Conrail CBA for division and section maintenance of way work; in fact there is no such transaction. Conrail Division and section work will be affected by

the principal Transaction only in that the employees who do that work will be divided among the Carriers, otherwise, even under the Carriers' plans for allocation of forces, they will remain essentially where they are currently assigned, working on the same portions of Conrail track that they currently work. Moreover, they will not be integrated with NSR and CSXT division and section workers. The only thing that will change for them is the identity of their employer.

Consequently, the only action taken with respect to Conrail division and section work and employees in connection with the principal Transaction involves the division and allocation of employees among the Carriers. The only CBA changes that relate at all to those actions involve modification of the existing Conrail seniority districts so they are aligned with the division of lines and facilities among the carriers. That change is accomplished under the BMW proposal to reform certain seniority districts to comport with the division of Conrail's assets as described above and as shown in BMW arbitration Exhibit 21 (BMW Exhibits To Petition Volume II). Thus, Conrail division and section employees are only minimally affected by the principal Transaction, and that effect is accounted for by BMW's proposal.

Moreover, the Conrail division and section work employees will not be involved in any transaction to implement the principal Transaction; there will be no coordination of work and employees or consolidation of work and facilities involving these employees. In the proceedings before the Board, NSR admitted that the new maintenance of way region for its allocated Conrail lines would be composed entirely of former Conrail lines and former Conrail employees; no NSR line and no NSR maintenance of way employee will be assigned to the planned Northern Region. Additionally, NS conceded that the former Conrail territory would be administratively separate from the current NSR regions, just as those two regions are administratively separate. And those two regions are covered by separate CBAs. Thus NS' plan with respect to non-production gang,

non-shop work, on the Conrail lines it will operate fails under the first of the three "crucial limitations" on CBA overrides by arbitrators: the change is unrelated to any approved transaction, either the Principal Transaction or a transaction flowing from the Principal Transaction.

Similarly, CSXT will engage in no real transaction involving day to day maintenance of way work. In the proposed Northern district there will be no coordination at all. CSXT will retain the Conrail CBA, but it would consolidate the existing Conrail seniority districts in that region even though no CSXT lines would be involved in that consolidation. Like NSR's Northern region, the CSXT Northern district would be administratively separate from the remainder of CSXT. In the Eastern district almost all of the lines and 97.5% of the employees would be from current CSXT railroads; there would be no meaningful coordination or consolidation of CSXT and former Conrail work in the Eastern district. In the Western district there would be some locations and areas where current CSXT and former Conrail work and employees will be combined, but CSXT would force thousands of employees, some hundreds of miles from Conrail lines into a single multi-State district. In the planned Western District, 78% of the employees involved are current CSXT employees. Under the guise of the Conrail Transaction, CSXT is planning to combine its current forces that have acted independently and been covered by several separate agreements for many years, but without citation to any CSXT transaction--either the CSXT control Transaction, the Chessie merger Transaction, or any merger following those two transactions. For the all of the employees in the planned Northern district, virtually all of the employees in the planned Eastern district and the vast majority of employees in the planned Western District, there is no transaction pursuant to the CSX/NS-Conrail Transaction that would be a predicate for changing their seniority districts and CBA coverage; the recent transaction is just a smokescreen for other goals.

Accordingly, there is no basis for any finding that the NSR and CSXT proposal with respect to seniority districts and CBA coverage for division and section employees is permissible because the planned changes are not for an approved transaction, either the principal Transaction or a subsequent transaction "flow[ing] from the principal transaction (such as a consolidation of facilities, transfer of work assignments etc)." (*Carmen III* at 24); and because CBA modification itself is not a transaction (*Executives*, 987 F. 2d at 815; *ATDA v. ICC*, 26 F 3d at 1164).

C. There Will Be No Selection Of Forces And/Or Assignment Of Employees Involving Division And Section Work That Would Support Substitution Of The CSXT And NSR CBAs For The Conrail CBA For Division And Section Work Employees Or The Seniority District Changes Authorized By The Award

There will be no selection of forces or assignment of employees with respect to non-regional and system gang and non-roadway equipment and rail welding shop work, that would provide the arbitrator with authority under Article I §4, notwithstanding Article I §2, to change the seniority districts and the Conrail CBA as planned by CSXT and NSR.

As is described above, in *Carmen II* and *Carmen III*, the ICC and STB balanced Article I §§ 2 and 4 by concluding that Article I §4 arbitrators had authority to override CBAs, but it was only the type of authority exercised by arbitrators prior to 1980 primarily under the WJPA, which was found to be limited to facilitating arrangements for selection of forces and assignment of employees which might otherwise be prohibited under existing CBAs, particularly with respect to scope and seniority rules. *Carmen II* (at 721, 724); *Carmen III* at 22-23.

Mr. Fredenberger did refer to the *Carmen III* decision and the authority exercised by arbitrator from 1940-1980. Award at 11. However, he then ignored the whole point of *Carmen III* and overrode CBAs in a broad, arbitrary and summary fashion. Instead of following the path

described by the Board of limited overrides typically involving scope and seniority rules to allow for arrangements for selection of forces and assignment of employees in connection with coordinations, he simply eviscerated everything in order to facilitate the Carriers' plans. That was not what was done between 1940-1980, and it was not consistent with the practice in that period described in *Carmen III*.

The arbitrator simply eliminated the Conrail CBA (except where the Carriers agreed to retain it) even though, with respect to division and section work, there will be no selection of forces or assignment of employees requiring such massive use of the arbitrator's limited Article 1§4 authority regarding CBAs. There will be no combinations of jobs, transfers of work, coordinations of work, movement of employees or shifting of work between NSR and the former Conrail lines allocated to NSR, except for the DPGs, work equipment shop work and rail welding shop work. For the remainder of the former Conrail territory and former Conrail employees allocated to NSR, there is no selection of forces and assignment of employees that would necessitate combinations of Conrail and NSR seniority districts, integration of former Conrail employees and NSR employees or selection between the Conrail CBA and an NSR CBA.

For CSXT except for the SPGs, work equipment shop work and rail welding shop work, and except for some locations in the Midwest, there will be no combinations of jobs, transfers of work, coordinations of work, movement of employees or shifting of work between CSXT and the former Conrail lines allocated to CSXT. For the remainder of the former Conrail territory and former Conrail employees allocated to CSXT, and for the CSXT employees in the mid-Atlantic States and most CSXT employees in the Midwest, there will be no selection of forces and assignment of employees that would necessitate combinations of Conrail and CSXT seniority districts, integration of former Conrail employees and CSXT employees or selection between the

Conrail CBA and a CSXT CBA.

As to division and section work, the only rearrangements of forces involves allocation of Conrail among the Carriers. Once that is done, once it is known who will be working for whom, there is no basis for any other selection of forces and assignment of employees. Under *Carmen III*, the need to divide the Conrail employees among the Carriers brings with it the ability to modify the Conrail seniority districts to effect that division and rearrangement of Conrail employees and that is just what was proposed under BMW's plan. But there is no need for any selection of forces and assignment of employees involving NSR and CSXT work and employees, and NSR and CSXT seniority districts, or CSXT only seniority districts. Consequently, once the selection of forces and assignment of employees is accomplished by allocating them among the Carriers, there is no further selection of forces and assignment of employees to be done and whatever authority that the arbitrator had to override CBAs ceases. Accordingly, the arbitrator lacked jurisdiction to generally override the Conrail CBA for the day-to-day maintenance of way work on the former Conrail properties by substituting the NSR and CSXT agreements, to generally override the CSXT agreements in the Midwest and Mid-Atlantic or to modify the current seniority districts beyond the modifications to the Conrail districts as proposed by BMW.

D. The Carriers Failed To Demonstrate That Substitution Of The CSXT And NSR CBAs For The Conrail CBA For Division And Section Work Employees And The Seniority District Changes Authorized By The Award Are Necessary To The Realization Of Public Transportation Benefits Of The Principal Transaction Or Any Follow-on Transaction

The arbitrator made no findings at all to support his conclusions that the seniority district changes on the former Conrail territories, the substitution of the CSXT and NSR CBAs for the Conrail CBA and the creation of the CSXT mega-districts under one CBA satisfied the necessity

test described by the D.C. Circuit. All he said was that the Carriers want to be more efficient and flexible and that the Conrail CBA would "strike at the heart" of those goals. Award at 13. The absence of real findings of fact and application of the necessity precedent alone requires that his award be vacated. However, from the facts of the case it is clear that the record would not support any finding of necessity.

First, it must be recognized that the key element of the necessity test is that the CBA override must be necessary to permit some Transaction or transaction which will provide some public transportation benefit. In their Application to this Board, CSX and NS made a number of claims that approval of the Transaction would be in the public interest, citing increased competition, greater service options, improved rail networks, more single line service, reduced terminal delay and savings from reduced fuel consumption, improved equipment utilization and availability, and facility consolidations. Application Vol. 1 at 16-17, 22-24. The arbitrator did not find, CSXT and NSR did not show, and it cannot be concluded that the seniority district changes and substitution of the CSXT and NSR CBAs for the Conrail CBA for division and section work, or the planned seniority district changes and CBA changes for CSXT workers is necessary to the attainment of any of those public transportation benefits or to any coordination or other action which is designed to attain those benefits.

With respect to maintenance of way work, the Carriers did cite public transportation benefits flowing from operation of regional and system production gangs across the boundaries of the formerly separate railroads and from consolidations of the roadway equipment work and rail welding work at NSR and CSXT shops. However, BMWWE agreed to those coordinations and consolidations and to application of the CSXT and NSR CBAs to the affected employees. What was in dispute was the employees who do the day-to-day track, right of way and bridge and

building maintenance. There was no showing to the Board or to the arbitrator of any public transportation benefits flowing from any action the Carriers would take as to those employees. Those employees will continue to perform the jobs they did previously, essentially in the same areas, and certainly in the same former railroad territories (former Conrail or current CSXT or NSR).

A fundamental problem for the Carriers and for the Award on this point is that both carriers acknowledged they currently operate under multiple CBAs, that they both retained the maintenance of way CBAs that applied on their constituent railroads before the various acquisitions and mergers. So it simply can not be found that there is an inherent problem with retaining a CBA when new property is acquired but not operationally joined with other properties, particularly in situations like this one, where rather large properties are being acquired and only one CBA applies to those properties.

In the proceedings before Mr. Fredenberger, the Carriers made it plain that they do not like the smaller Conrail seniority districts and they argued that this allegedly would inhibit scheduling for track time windows for necessary track maintenance which could slow down train operations. Ingram ¶22-3; Roots ¶¶8-9. However, they failed to demonstrate how this problem relates to elimination of the Conrail CBA or creation of mega-districts for employees who do day to day maintenance of way work. They did talk about scheduling production gangs so as not to interfere with trains, but BMW E agreed to their proposals on regional and system gangs; and the Conrail CBA does provide for region and zone production gangs that are able to work across seniority district lines and can be scheduled. BMW E's proposed seniority districts with production zones (see maps, BMW E Ex. 22 and 23, BMW E Exhibits Vol. II), and its concession on regional and system gangs, demonstrate that NSR and CSXT can reasonably and efficiently schedule and

perform production work on the former Conrail lines with BMW's proposed seniority districts and under the Conrail CBA. The track time windows argument simply does not carry their burden with respect to elimination of the Conrail seniority districts and broad substitution of their CBAs for the Conrail CBA.

Moreover the CSXT and NSR descriptions of actual assignments of employees to areas of work for day to day work under their agreements cited small gangs with relatively small areas of work, augmented with mechanized gangs that work over larger areas. (e.g. Woods ¶¶10-18, CSXT part III at 4-5). Assignment of work under the Conrail CBA is generally similar, except that it is contractually mandated so employees are guaranteed an ability to work within a geographically manageable area, employees can not be required to exercise seniority over a several State area. Thus the Carriers did not show that retention of the Conrail seniority arrangement precludes or even impedes realization of the public transportation benefits of the Transaction or any transaction. They can not even show that the seniority arrangement is simply inimical to their ability to do maintenance of way work in a manner that meets public transportation needs. While their own agreements may provide them with greater flexibility as arbitrator Fredenberger concluded, such flexibility is not in itself a public transportation benefit.

Much of the argument of CSXT and NSR comes down to administrative convenience and the view that the Conrail CBA rules are not designed for the way they run their existing properties. They appear to have a general problem with defined boundaries. And NSR cited a number of rules in the Conrail CBA that it does not like. However, management would always want fewer boundaries, and the greatest flexibility in rules. But they can not show that giving them boundary relief and more flexible rules is necessary to a transaction which would result in some public transportation benefit. The point of an Article I§4 proceeding is not for the government to improve

the carrier's labor relations position; it is not an interest arbitration on the best terms and conditions of employment; it is a method for selection and assignment of forces where there is ancillary authority to override CBA terms as necessary to the transaction for which the selection and assignment is done.

CSXT made a special effort to exploit the Article I §4 process for illegitimate goals by seeking to use this proceeding to effect coordinations that are unrelated to the Principal Transaction here or any follow-on transaction, by combining seniority districts and eliminating CBAs for its current lines and employees in the Midwest and Mid-Atlantic States. The plan is not related to the principal Transaction or any follow on transaction since almost no Conrail track is involved in the planned Eastern district and little Conrail track is involved in the planned Western district. And CSXT did not serve any notice under any other transaction that would be a predicate for coordinating the work on the lines it currently owns. And CSXT did not, and could not, carry its burden of proving necessity for coordination of these lines which have operated under separate CBAs for many years. Moreover, CSXT already has the right to operate SPGs in this territory, so it can not claim a need to coordinate programmed production gang work. Furthermore, CSXT's own publication on its post-division operations belies its necessity argument. The July issue of *CSX Today* (BMW Ex. 36) shows planned service lanes which demonstrate that there will not be unified operations in the planned Eastern and Western districts; there will be at least several different operating areas, and that CSXT has swept into these districts lines that will not relate in any way to the Conrail lines that are allocated to CSXT. Finally in this regard, there is no basis at all for CSXT to eliminate the Conrail seniority districts in the planned Northern District where it will otherwise retain the Conrail CBA. CSXT could not even muster the illusion of some transaction, or public transportation benefit that would flow from such an arbitrary action; all that

is involved with that change is mere preference, and that is not enough to justify what the arbitrator allowed.

Additionally, the arbitrator and the Carriers failed to account for the Board's decision regarding the operation of Section 11321(a) with respect to the Providence & Worcester. *CSX/NS-Conrail Decision No. 101*. As is noted above, the necessity standard under the employee protective conditions is derived from the Section 11321(a) necessity standard. There is no basis for a finding that preservation of the Conrail CBA will block the Transaction, the division of the Conrail lines and employees or any coordination pursuant to the Transaction, so there is no basis for concluding that elimination of the Conrail CBA is necessary to permit any of these things to go forward.

All of the Carriers contentions amount to claims of convenience and even that application of their own agreements would be advantageous. But that does not prove necessity. They have essentially asserted that their costs would be lower, and that overall management of the railroads would be easier without the Conrail CBA (and without certain current CSXT CBAs). But the D.C. Circuit has said that the "benefit can not arise from the CBA modification itself". The public benefits must flow from an underlying transaction such as new single line service and reduced interchanges and actual consolidations that improve operations like centralization of dispatching and consolidation of shops. At best what was offered to Mr. Fredenberger was a claim that there would be "reduced labor cost stemming from the modifications to the CBAs-when a producer's marginal cost declines it increase its output, i.e. service", which the D.C. Circuit said does not show necessity. 987 F.2d at 815 What is involved here is just a transfer of wealth from employees to employer *Id.* That does not satisfy the necessity test and Mr. Fredenberger's acceptance of the Carriers' proposal to eliminate the current Conrail and CSXT seniority districts, to broadly

substitute the CSXT and NSR CBAs for the Conrail CBA, and to consolidate CSXT properties into mega districts under a single agreement was therefore arbitrary, at odds with controlling precedent, failed to draw its essence from the conditions and in excess of his authority.

E. There Was No Basis Whatsoever For The Arbitrator
To Grant The Carriers Relief From Current Rules
On All Of The Railroads Regarding Contracting-out

The Carriers' proposal contained a provision that would permit the use of contractors "without notice" to BMW under existing CBAs. Contractors would augment existing forces "to perform construction and rehabilitation projects ... initially required for implementing the Operating Plan and to achieve the benefits of the transaction as approved by the STB." Carriers' Proposal, (BMW Arbitration Ex. 24 (BMW Exhibits To Petition Volume II) , Art. I(h). Both Carriers justified their requests by arguing that their maintenance of way employee complement was too small to complete the projects in the period proposed by the Carriers. Also, the Carriers claimed that hiring new employees and purchasing additional equipment would be inefficient and inconsistent with how they wanted to use their workforces. Finally, the Carriers admitted, *arguendo*, the various CBAs with BMW could be construed to prohibit such subcontracting, although CSXT admitted that the B&O/BMW CBA it had proposed for the consolidated Eastern and Western Seniority Districts permitted subcontracting new construction. *See*, Carriers Brief II at 66-74; Brief III at 31-34 (BMW Exhibits Vol. III).

The arbitrator imposed the Carriers' contracting-out proposal *verbatim*. He concluded that application of the CBA provisions pertaining to subcontracting "would cause serious delay to implementation of the transaction insofar as capital improvements are concerned and would unduly burden CRC with an employee complement it could not keep working efficiently." Award at 14.

BMW submits the arbitrator lacked jurisdiction to make the subcontracting award. A *New*

York Dock arbitrator only obtains jurisdiction to make an implementing agreement when a transaction "may cause the dismissal or displacement of any employees, or rearrangement of forces." *New York Dock*, Art. I, §4(a). BMW contended that the subcontracting of work is not a "transaction" within that definition. See Hearing transcript excerpts, reproduced in Appendix B hereto as B-4) at 538-549. A *New York Dock* transaction is similar to a WJPA "coordination" which concerns the unification, consolidation, merger or pooling of separate railroad facilities or operations. *New York Dock v. U.S.*, 609 F.2d at 70. The key point is that for a transaction to occur, the involved Carriers must be unifying their formerly separate operations in some way that results in the displacement, dismissal or rearrangement of forces.

Subcontracting is not unification. If the Carriers had served a notice under *New York Dock* seeking only the right to contract-out work, this point would be obvious because the "transaction" would be shown for what it really is—an attempt to force a change in collective bargaining agreements through mandatory arbitration. The contracting-out of work does not concern the selection of Conrail employees to work for one of the three Carriers or assigning individual employees to positions after the initial selection is complete. The Carriers' claims that the subcontracting would not result in any furloughs further support this point. Brief II at 73; Brief III at 34. Thus, the arbitrator clearly lacked authority to impose the Carriers' proposal because the contracting-out is not a "transaction" cognizable under Article I, Section 4.

Even if the Carriers' proposal concerned a transaction, the ICC already determined that a CBA's subcontracting provisions can not be overridden in a *New York Dock* arbitration. In *New York Dock*, the ICC rejected rail labor's request to include a term in Article I, Section 2 expressly preserving pre-merger subcontracting rules because the proposed terms were "redundant and unnecessary." 360 I.C.C. at 73. Certainly since 1979, no *New York Dock* arbitrator ever granted a

carrier the right to contract-out work in contravention of an existing CBA.

Finally, while expedited completion of capital projects may involve a public transportation benefit, the avoidance of the costs of hiring additional employees and purchasing the equipment necessary to carry out the proposed capital projects in a short time is not a public transportation benefit under the *Executives'* standard. The Carriers' arguments relate to the advantages that accrue to them by lowering their marginal labor costs, *i.e.*, a "transfer of wealth from employees to their employer," through the abrogation of the subcontracting rules. 987 F.2d at 815. No "public transportation benefit" arises from the subcontracting of work because of the CBA changes proposed by the Carriers. The arbitrator grossly misconstrued the applicable standards in applying *New York Dock*, even if the contracting-out proposal was a "transaction."

**IV. THE ARBITRATOR FAILED TO ACCOMMODATE THE RAILWAY
LABOR ACT AND THE NATIONAL LABOR POLICIES
AS HE WAS REQUIRED TO DO UNDER THE ICCTA**

Without prejudice to our argument that the arbitrator exceeded the authority granted him under *New York Dock*, he also failed to show that he accommodated the national labor policy, as he was required to do under the ICCTA.

In its brief, BMW we alerted the arbitrator to his obligation to consider the commands and policies of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* (Brief at 58-61). That obligation, briefly stated, requires the arbitrator and the STB to explain and account for the possible effects of their decisions "on the functioning of the national labor relations policy"; that the Commission acts in a "most delicate area" when its decisions can affect the labor laws; that the "policies of the Interstate Commerce Act and the labor act necessarily must be accommodated one to the other"; and, that the ICC must take care not to "trench upon" the labor law because its decision could contravene national labor policy. *Burlington Truck Lines v. United States*, 371

U.S. 156, 172-73 (1963). See also, *McLean Trucking Co. v. U.S.*, 321 U.S. 67 (1944). In *New York Shipping Ass'n v. F.M.C.*, 854 F.2d 1338, 1363-65, 70 (D.C. Cir. 1988), the D.C. Circuit cited these decisions and held that agencies must identify, acknowledge and attempt to accommodate conflicts arising between enforcement of their organic law and other statutes that apply to the areas they regulate. The arbitrator did not discharge this aspect of his duty under the law.⁸

The Award is replete with favorable references to the "efficiency" or "flexibility" or "less costly" elements of the Carriers' proposal. The arbitrator found the Carriers' proposed allocation of employees more "efficient" than BMW's. Award at 8. Similarly, the Carriers' proposed consolidation of seniority districts added "flexibility" to their operations while BMW's proposal would "restrict" that flexibility. *Id.* at 11. Efficiency and lowered costs were the factors the arbitrator relied upon to adopt the Carriers' proposals on abrogation of CBAs. *Id.* at 13. Finally, the arbitrator found the CBA terms concerning subcontracting of work to be "restrictions" that would delay implementation of capital projects proposed by the Carriers. *Id.* at 14.

Obviously, the arbitrator felt obligated to "clean-up" the freely negotiated contractual arrangements in place on the Carriers and substitute for them ones that were more "efficient" and "less costly." These changes, according to the arbitrator, were required to implement the transaction and carry out the Board's approval of the primary application. However, no where in

⁸ In the arbitration, the Carriers argued that *Norfolk & Western Ry. v. ATDA*, 499 U.S. 117 (1991) had resolved all ICA-RLA issues by holding that the ICA overcomes the RLA in then section 11343 matter. However, the Court merely held that in section 11343 cases, the ICA would permit actions that were violative under the RLA and CBAs if the public interest aspects of section 11344 were properly considered and if section 11347 were complied-with. 499 U.S. at 127, 134. The Court did not overrule *McLean Trucking* and *Burlington Truck*; moreover, what is required by these decisions is part of the Section 11343 (now section 11324) public interest determination referred to by the Court at p. 127.

the Award did the attempt to accommodate this governmental intervention in the substantive terms of a CBA with the national labor policy applicable to the railroad industry.

“The national labor policy rests on the principle that parties should be free to marshal the economic resources at their disposal in the resolution of a labor dispute, consistent with the specific rights and prohibitions established by the labor statutes.” *Air Line Pilots Ass'n v. C.A.B.*, 502 F.2d 453, ___ (D.C. Cir. 1974). The labor statute applicable here is the RLA. That statute “retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration and conciliation [however] no authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.” *Bhd. of R.R. Trainmen v. Jacksonville Term. Co.*, 394 U.S. 369, 379-80 (1969), quoting, *Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711, 725 (1945).

The genesis for adoption of the RLA in 1926 was the nation's unsatisfactory experience under the U.S. Railroad Labor Board (“RLB”) created by Title III of the Transportation Act of 1920. Section 307 of that Act gave the RLB authority to issue decisions that would provide for “‘just and reasonable’ wages, salaries and working conditions” according to a seven-factor test. *The Railway Labor Act* 39 (Douglas L. Leslie, ed.) (1995). In 1921 and 1922, the RLB abrogated the Shopcraft Unions' national agreement with the carriers and authorized two rounds of wage cuts. *Id.* at 40. The Shopcraft Unions responded by engaging in the largest rail strike in history. *Id.* The RLB outlawed the strike and the Justice Department obtained an anti-strike injunction. *Id.* at 40-41. As a result of this governmental meddling, the unions engaged in a boycott of the RLB that culminated in its elimination in the 1926 RLA. *Id.* As one commentator noted, “[i]n failing to rely primarily on voluntary collective bargaining assisted principally by mediation to resolve interest disputes, the Transportation Act of 1920 was not attuned to the basic ethos of

employee-management relations as it was developing in the United States." *The Railway Labor Act at Fifty 7* (Charles M. Rehmus, ed.)(1976).

Here, the arbitrator essentially acted like the RLB of the 1920's. His actions were the antithesis of the national labor policy contained in the RLA. While the arbitrator was not charged with enforcing the RLA in this arbitration, he was obligated to minimize any trenching upon the RLA, explain why governmental rearrangement of the parties' collective bargaining relationships furthered the purposes of *New York Dock* and the ICCTA, and also why he could not accommodate those purposes to the RLA's purposes that eschew governmental imposition of CBA terms. The arbitrator's failure to do so was error and requires the Award be vacated and the dispute returned to the parties for further negotiation.

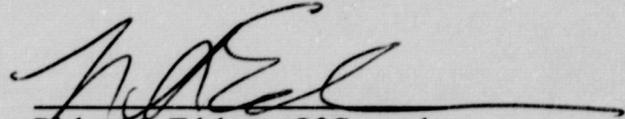
CONCLUSION

In the *Executives* case and its progeny, the D.C. Circuit set out certain guidelines for the Board and its arbitrators with respect to preservation of CBAs and overriding CBAs in connection with implementation of approved transactions. And in *Carmen III*, this Board expanded upon those guidelines. Moreover, in *Carmen III*, this Board stated an intention to bring some balance to the Article I§4 and Article I§2 determinations and described an approach to the problem to do just that. And in Decision No. 89 in this proceeding the Board, declared that it, and its arbitrators, would not be mere instruments of carriers, simply facilitating their labor relations goals; but they instead would independently examine and assess carrier plans with regard to employees as they relate to the approved transaction. Arbitrator Fredenberger ignored all of these decisions and simply gave the Carriers what they wanted because what they wanted was beneficial to them. His decision was arbitrary, contrary to controlling precedent, failed to draw its essence from the conditions and in excess of his jurisdiction. If the D.C. Circuit decisions, and the recent decisions

of this Board are to be more than abstract pronouncements in long-closed cases, if those decisions are to have any meaning, the Fredenberger Award must be vacated.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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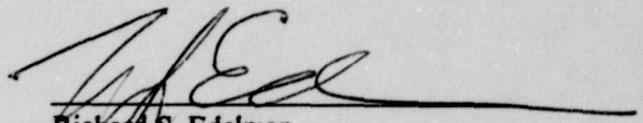
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Dated at Washington, D.C. this 12th day of February, 1999.


Richard S. Edelman

APPENDIX A

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK CONDITIONS

PARTIES	NORFOLK SOUTHERN RAILWAY COMPANY,)
	CSX TRANSPORTATION, INC., and)
	CONSOLIDATED RAIL CORPORATION,)
)
TO	and)
)
DISPUTE	BROTHERHOOD OF MAINTENANCE OF WAY)
	EMPLOYEES; INTERNATIONAL BROTHERHOOD)
	OF BOILERMAKERS, IRON SHIP BUILDERS,) DECISION
	BLACKSMITHS, FORGERS AND HELPERS;)
	BROTHERHOOD RAILWAY CARMEN DIVISION)
	- TRANSPORTATION COMMUNICATIONS)
	INTERNATIONAL UNION; INTERNATIONAL)
	BROTHERHOOD OF ELECTRICAL WORKERS;)
	NATIONAL CONFERENCE OF FIREMEN AND)
	OILERS; INTERNATIONAL ASSOCIATION OF)
	MACHINISTS AND AEROSPACE WORKERS; and)
	SHEET METAL WORKERS' INTERNATIONAL)
	ASSOCIATION)

HISTORY OF DISPUTE:

In October 1996 CSX Corp. (CSX) and Conrail, Inc. (Conrail) consummated an agreement to merge rail operations. In response Norfolk Southern Corp. (NSC) set about to purchase all outstanding Conrail voting stock. In April 1997 NSC and CSX agreed upon a plan for joint acquisition of Conrail which resulted in an application to the Surface Transportation Board (STB), successor to the Interstate Commerce Commission (ICC), to effectuate the plan.

In a Decision served July 23, 1998, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.-- Control and Operating

Lease Arrangements -- Conrail Inc. and Consolidated Rail Corp. Finance Docket No. 33388, Decision No. 89 (Decision No. 89), the STB approved the plan subject to the labor protective conditions set forth in New York Dock Ry. — Control — Brooklyn Eastern District Terminal, 360 ICC 60 (1979) (New York Dock Conditions). Decision No. 89 approved the acquisition by Norfolk Southern Railway Company (NSR) and Norfolk and Western Railway Company (NW) (collectively known as Norfolk Southern (NS) and CSX Transportation, Inc. (CSXT) of the vast majority of Consolidated Rail Corporation's (CRC) rail assets, operations and employees the distribution of which was authorized as per agreement of the three Carriers involved. According to that agreement thousands of CRC rail miles and employees were to be allocated to CSXT and NS and integrated with the operations of those Carriers with CRC continuing its railroad operations only in three specific geographic locations known as the Shared Assets Areas (SAAs) to be operated by CRC with a drastically reduced employee complement for the joint benefit of NS and CSXT.

On August 24, 1998 the rail carriers involved in Decision No. 89 gave notice under Article I, Section 4 of the New York Dock Conditions to the Carriers' employees represented by the Brotherhood of Maintenance of Way Employees (BMWE) and the six shopcraft labor organizations, i.e., the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (IBBB), the Brotherhood Railway Carmen Division - Transportation Communications International Union (BRC), International Brotherhood of Electrical Workers (IBEW), National Conference of

Firemen and Oilers (NCFO), International Association of Machinists and Aerospace Workers (IAMAW) and the Sheet Metal Workers' International Association (SMWIA). The notice stated that NS and CSXT would coordinate maintenance of way operations, including centralization of rail welding and equipment repair functions, performed by CRC with their maintenance of way operations except for the SAAs which would have greatly reduced maintenance of way operations most of which would be performed by CSXT and NS. In so doing, the notice further detailed, existing CRC seniority districts would be abolished and new ones formed on NS and CSXT. Moreover, except on the SAAs and one seniority district of one Carrier, the CRC collective bargaining agreements (CBAs) would not apply. Rather, NS and CSXT CBAs or those of their subsidiaries would apply as designated by the Carriers.

Further pursuant to Article I, Section 4, the Carriers and the BMWÉ began negotiations for an implementing agreement on September 1, 1998 and met on other dates thereafter. However, negotiations were unproductive. The Carriers met with both BMWÉ and the shopcraft organizations on September 24 for negotiations. Those negotiations fared no better.

On October 28, 1998 the Carriers invoked arbitration under Article I, Section 4. The parties were unable to agree upon selection of a Neutral Referee, and as provided therein the Carriers requested that the National Mediation Board (NMB) appoint such Referee. The NMB appointed the undersigned by letter of November 13, 1998.

By conference call among the Neutral Referee, the Carriers and the Organizations, a prehearing briefing schedule was established, and hearings were set for December 15 through 18, 1998. Prehearing briefs were filed, and hearings were held as scheduled.

FINDINGS:

After a thorough review of the record in this case the undersigned concludes that the various issues raised by the parties are properly before this Neutral Referee for determination.

Further review of the extensive record, consisting of approximately 300 pages of prehearing submissions or briefs together with several hundred pages of exhibits and attachments thereto as well as over 1,000 pages of hearing transcript, forces the conclusion that in order for this Decision to be clear and cogent some parameters must be established at the outset. First, while all the relevant facts and the arguments of the parties have been thoroughly reviewed and evaluated, only those deemed to be decisionally significant by the Neutral Referee are dealt with or addressed in this Decision. Secondly, there must be some mechanism for the orderly consideration of the issues or disputes.

Accordingly, while recognizing that this is a single proceeding which must result in an arbitrated implementing arrangement or arrangements which dispose of all outstanding issues, this Neutral Referee deems it appropriate to distinguish the issues or disputes between the BMW and the Carriers from those between the shopcraft

organizations and the Carriers. The undersigned recognizes that there may be some overlap of these considerations inasmuch as IAMAW has an interest in some maintenance of way functions in addition to those involved in the consolidation of shops and that BMWWE has an interest in shop consolidations other than its interest in general maintenance of way functions. Nevertheless, separate consideration is deemed most appropriate.

1. Nonshop Maintenance of Way Issues or Disputes

Negotiations between BMWWE and the Carriers produced final proposals for an implementing agreement by each side the terms of which differ significantly with respect to several issues. With some exceptions the BMWWE proposal would preserve the terms of the CRC CBAs with that organization and make them applicable to the CRC employees transferred to CSXT and NS. By contrast, the Carriers' proposal with some exceptions would apply CBAs between the BMWWE and CSXT, NS or their subsidiaries to CRS employees who become employed by the two Carriers. CRC CBAs would continue to apply on the SAAs.

This situation is subject to certain provisions of the New York Dock Conditions and the ICC, STB court and arbitral authorities pertaining thereto.

In addition to Article I, Section 4 of the New York Dock Conditions, the proceeding in this case is governed by Article I, Section 2 which provides:

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

At issue in this case is the authority of the undersigned under Article I, Section 4 to override or extinguish, in whole or in part, the terms of pre-transaction CBAs. That authority is defined by Article I, Section 2. The most recent authoritative pronouncement with respect to such authority came in the STB's Decision in CSX Corp -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905 (Sub-No. 22) and Norfolk Southern Corp. --Control -- Norfolk and Western Ry. Co. and Southern Ry. Co., Finance Docket No. 29430 (Sub-No. 20), served September 25, 1998 (Carmen III). Therein the STB defined the authority ". . . by reference to the practice of arbitrators during the period 1940 - 1980 . . ." under the Washington Job Protection Agreement (WJPA) and ICC adopted labor protective conditions and by the following limitations:

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.

The STB went on to detail the meaning of the terms "approved transaction," "necessary" and "rights, privileges and benefits." The undersigned deems it best to apply the STB interpretations of those terms to the various issues and disputes in this case as they are addressed.

BMWE and the Carriers are in dispute as to how CRC employees should be allocated among CSXT, NS and CRC as operator of the SAAs. The Carriers' proposal would allocate those employees to the Carrier which is allocated the territory upon which the employees worked for CSC. BMWE, on the other hand, proposes to have CRC abolish all jobs and have the three Carriers rebulletin those jobs to be bid upon by the transferring employees. Also, the BMWE proposes to allow all such employees a type of "flowback" right whereby after initially bidding a position on one of the three Carriers, an employee could exercise seniority to a position on either of the other two Carriers. Thus, a senior employee furloughed on one of the Carriers could avail himself or herself of a position on one of the other two.

BMWE argues that only under its allocation plan would employees have a meaningful choice as to where they want to work. Such choice, urges the Organization, is guaranteed to affected employees under the New York Dock Conditions.

The Carriers in support of their proposal argue that it is the most efficient and least disruptive method by which to allocate the employees. The Carriers point out that it does not involve job abolishments and rebidding which the Carriers foresee will result in

substantial delays to implementation of the transaction as well as relocation of hundreds and perhaps thousands of employees.

The undersigned believes the Carriers have the stronger position on this point. While employee choice is a laudable goal, it cannot be placed ahead of efficient implementation of the transaction. In Decision No. 89 the STB approved the transfer of CRC operation and employees to the three Carriers. Prompt effectuation of those objectives was an implicit element of the transaction. Moreover, in imposing the New York Dock Conditions the STB presumably intended application of the strict time limits of Article I, Section 4. BMW's proposal could delay implementation of the transaction several months beyond what would be required under the Carriers' plan. Moreover, the BMW's "flowback" proposal could impair establishment of a well-trained and unified work force one each of the three Carriers. It certainly would stifle the competition between CSXT and NS envisioned by the STB when it approved the transaction.

Based upon the foregoing, the undersigned believes that the Carriers' proposal for the allocation of former CRC employees is the most appropriate. Adoption thereof meets the tests set forth by the STB in Carmen III. It falls within the gambit of the selection and assignment of forces made necessary by the transaction, a subject matter frequently dealt with by arbitrators in the 1940-80 era. It involves the principle transaction approved by the STB in Decision No. 89. Its adoption is necessary to the implementation of that transaction which, as the STB explained in Carmen III, means that it is necessary to secure a public transportation benefit. It does not involve a right, privilege or benefit

under any CBA required to be maintained by Article I, Section 2 of the New York Dock Conditions.

The parties also are in dispute as to the proper modifications of seniority in connection with the transaction. As noted above, the Carriers' propose to abolish CRC's seniority districts and create new ones on their respective properties. Doing so would contravene the seniority provisions of the CRC/BMWE CBA. BMWE's proposal would modify somewhat existing CRC seniority districts but basically would maintain and apply them to the operations of the three Carriers.

Under the CRC/BMWE CBA there are eighteen seniority districts. Under the plan for allocation of CRC rail operations, NS and CSXT will receive some of those districts as a whole and some as fragments. NS plans to organize the CSC lines it is allocated into one new Northwest Region consisting of three (Dearborn, Pittsburgh and Harrisburg) Divisions. These would be added to NS's existing two operating regions encompassing nine operating divisions. CSXT will organize the CRC operations it receives by combining them with certain CSXT seniority districts into three new consolidated districts (a Northern District, a Western District and an Eastern District). CRC as operator of the SAAs in three geographic areas will maintain separate seniority districts for those areas. The three acquiring Carriers propose to dovetail the seniority of CRC employees onto the rosters of the new seniority districts.

At the outset the BMW E argues that at least in some of the Carriers' seniority districts there is no genuine transaction within the meaning of the New York Dock

Conditions and thus this Neutral Referee has no authority to effectuate any changes in the seniority arrangements. The Organization maintains that there is no genuine consolidation or coordination of functions.

The Carriers attack the BMWWE seniority proposal, much as they did the Organization's proposal for allocation of employees, as an attempt to maintain the status quo of CRC operations. The Carriers emphasize that within the CRC seniority districts are over 120 zones outside of which employees are not required to exercise seniority. This fact allows CRC employees to decline work outside the zones which is wholly inconsistent with the operating efficiencies which were an important factor in the STB's Decision No. 89. Accordingly, the Carriers urge, their proposal must be adopted in order to effectuate an important purpose of the transaction. Moreover, the Carriers emphasize, the BMWWE proposal will provide for a separation allowance for furloughed employees which, given the effect of zone seniority, would significantly increase the Carriers' costs in connection with this transaction.

BMWWE argues that its proposal protects CRC employees from being forced to work over much larger geographic areas thereby increasing travel time and time away from home for such employees. BMWWE asserts that its membership will make every effort to secure work thus minimizing the possibility of numerous and expensive separation allowance payments. The Organization urges that on NS former CRC employees will be deprived of significant work equities, and the CSXT would be worse.

The Organization contends that the dovetailing would be detrimental to existing NS and CSXT employees.

Once again, this Neutral Referee concludes that the Carrier has the stronger case.

While the nature of this transaction is somewhat unusual, the fact remains that the very matters BMWWE contends do not constitute a transaction were considered by the STB when it approved the transaction. NS, CSXT and CRC as the operator of the SAAs have simply sought to implement the transaction by taking the very actions contemplated by the STB in Decision No. 89. Imposing the seniority structure of CRC upon NS and CSXT operations would seriously hamper them in terms of increasing efficiencies and competition between NS and CSXT. Flexibility with respect to the work force is key to the success of the transaction. The CRC seniority arrangements would severely restrict that flexibility. Moreover, even if this Neutral Referee had the authority under Article I, Section 4, to include a provision for a separation allowance, which he doubts he possesses because it would expand benefits of the New York Dock Conditions, to do so in this case would expose the Carrier to undue expense.

The undersigned believes his decision on this point complies with the applicable tests set forth in *Carmen III*. Adjustment or modification of seniority arrangements by arbitrators under protective conditions was common during the period from 1940 to 1980. The adoption of the adjustments and modifications in this case are necessary to realize a public transportation benefit. The STB has determined that seniority is not a right, privilege or benefit under Article I, Section 2 of the New York Dock Conditions.

The parties further disagree as to what working agreement will apply to the CRC employees taken over by CSXT, NS and CRC as operator of the SAAs. BMW argues that with limited modifications the CRC/BMW agreement should apply. With the exception of CSXT's Northern District where the CRC/BMW CBA would continue to apply without substantial modification and the three geographical SAAs where that agreement would apply with some modifications, NS and CSXT would apply the existing CBA between those Carriers and BMW applicable to the territory on which former CRC employees will work.

The basic argument advanced by BMW in favor of its proposal is that such application would minimize disruption to the lives of former CRC employees and would preserve rates of pay rules and working conditions as provided in Article I, Section 2 of the New York Dock Conditions for those employees. Emphasizing that the former CRC employees will be working for NS and CSXT in maintenance of way operations the structure of which is different on those Carriers from that of CRC as it presently exists, both CSXT and NS maintain that applying the CRC/BMW agreement as BMW urges would materially detract from the increased efficiency expected in connection with the transaction.

The Carriers also argue that they must be free to apply their own policies with respect to their maintenance of way operations and that the best way to do so is to apply their BMW agreements. As examples, the Carriers point out that BMW has agreed with CSXT to apply the System Production Gang (SPG) agreement which has been

highly efficient and successful on that property and that BMWWE has agreed with NS to apply the District Production Gang (DPG) agreement on its property which has had similar success. However, the Carriers point out, application of the CRC working agreement to CRC employees coming to work for the two Carriers will materially diminish the efficiencies and economies otherwise available under the DPG and SPG agreements.

Again, the record in this case convinces the Neutral Referee of the superiority of the Carriers' position on this issue. Two plain goals of the STB's approval of the transaction in Decision No. 89 are more efficient and less costly operations by the Carriers involved and a serious competitive balance between NS and CSXT. Application of the CRC/BMWWE CBA as the working agreement for former CRC employees who become employed by CSXT and NS strikes at the heart of both propositions.

Accordingly, this Neutral Referee concludes that the Carriers' proposal for application of CBAs should be adopted over that of BMWWE. The undersigned believes that this determination complies with the tests set forth by the STB in Carmen III. The public transportation benefit to be derived is, as noted above, increased operating efficiencies, reduced costs and the promotion of competition between NS and CSXT. It does not involve a right, privilege or benefit protected from change by Article I, Section 2 of the New York Dock Conditions.

The parties are in further dispute with respect to the use of outside contractors by NS and CSXT for rehabilitation and construction projects necessary to link the Carriers'

system with allocated CRC lines and to upgrade track and increase capacity. The Carriers emphasizes that these projects would be temporary and that under the BMW's proposal it would be required to hire and then lay off substantial numbers of employees. Nor, emphasizes the Carriers, does BMW's proposal allow for NS, CSXT or third parties to perform maintenance of way functions for CRC as operator of the SAAs where those functions cannot be performed efficiently by the drastically reduced employee complement of CRC.

Once again the Carriers' arguments are more persuasive than those of the BMW. Restriction on contracting out, either through the scope clause of a CBA or a specific prohibition therein, is a common provision in railroad CBAs. As BMW points out, it is entitled to respect and observance under the STB's decision in Carmen III. However, the application of such restrictions in the instant case would cause serious delay to implementation of the transaction insofar as capital improvements are concerned and would unduly burden CRC with an employee complement it could not keep working efficiently. Accordingly, elimination of those restrictions meets the necessity test set forth by the STB in Carmen III. Moreover, it is not a right, privilege or benefit guaranteed maintenance under Article I, Section 2 of the New York Dock Conditions.

However, BMW maintains that there are several rights, privileges and benefits in this transaction protected from abrogation or modification by Article I, Section 2 of the New York Dock Conditions. First among these, urges the Organization, is the CRC/BMW Supplemental Unemployment Benefit, (SUB) Plan. The Carriers contend

that the plan falls within the category of wages, hours and working conditions under Article I, Section 2 which are not immutable but which may be eradicated or modified under the necessity test. Moreover, the Carriers urge the plan is in the nature of an alternative protective arrangement to the New York Dock Conditions to be accepted or rejected by employees as an exclusive source of protection.

The undersigned believes the Organization has the stronger position on this point. As the Organization points out, the STB in Carmen III specifically identified unemployment compensation as a protected right, privilege or benefit. Supplemental unemployment benefits are so closely related as to attain the same status. Accordingly, the arbitrated implementing arrangement or arrangements resulting from this proceeding are deemed to include the CRC/BMWE Supplemental Unemployment Benefit plan.

The Organization also contends that a CRC shoe allowance and an L&N laundry allowance which would be applicable on CSXT also are rights, privileges and benefits under Article I, Section 2. This Neutral Referee cannot agree. The Carriers make the stronger argument that these benefits are analogous to other provisions of collective bargaining agreements which do not represent vested or accrued rights of the nature identified by the STB in Carmen III as being elemental to rights, privileges and benefits. Accordingly, the undersigned finds that they are not rights, privileges and benefits which must be preserved under Article I, Section 2.

In its prehearing submission the BMWWE argued that the New Jersey Transit (NJT) rail operations flowback rights allowing NJT commuter employees who formerly worked

for CRC the right to exercise seniority on CRC if furloughed from NJT constituted a right, privilege or benefit under Article I, Section 2. The Carriers while denying such status for the arrangement pointed out that under both BMWWE's and the Carriers' proposals the arrangement would be honored. Accordingly, it is to be considered part of the arbitrated implementing arrangement or arrangements which issue in connection with this Decision.

Also in its prehearing submission BMWWE contended that the CRC Continuing Education Assistance Plan and the CRC Employee Savings Plan constituted rights, privileges and benefits under Article I, Section 2. However, at the hearing when the Carriers demonstrated that they had plans superior to those at issue, BMWWE withdrew its contention that the plans arose to such status in this particular case, reserving the right to raise the issue in another context. Accordingly, the CRC plans will not be considered part of any arbitrated implementing arrangement or arrangements resulting from this Decision.

The IAMAW has CBAs with CRC covering approximately thirty-eight employees performing nonshop maintenance of way work. As a result of the transaction in this case those employees will be allocated to NS, CSXT and CRC as operator of the SAAs. Under the Carriers' proposal those employees would be placed under the applicable BMWWE CBA with each Carrier. As a result IAMAW no longer would represent those employees.

The IAMAW challenges the jurisdiction of this Neutral Referee to impose the BMW agreements upon the thirty-eight employees transferred to the three Carriers as violative of the representational rights of those employees, a matter within the exclusive jurisdiction of the NMB to resolve. IAMAW urges retention of the CRC BMW agreement for application to those employees because that agreement protects the representation status of the IAMAW and the rights of the employees it represents. Alternatively, the Organization seeks application of its agreements with the three Carriers which would preserve its status as representative of those employees when they come to work for the three Carriers.

The Organization's point is well taken that questions of employee representation are within the exclusive jurisdiction of the NMB to resolve under the Railway Labor Act. However, the STB has long held, with judicial approval, that rights under the Railway Labor Act must yield to considerations of the effective implementation of an approved transaction. The most recent statement of that doctrine came in a case involving this transaction. See Norfolk & Western Ry. Co., et al & Bro. of RR. Signalmen, et al, Case No. 98-1808, USCA 4th Cir, Dec. 29, 1998. Accordingly, the Organization's jurisdictional argument is without merit.

Nor is this Neutral Referee persuaded that he should adopt IAMAW agreements with the three Carriers to apply to the thirty-eight employees who come to work for those Carriers rather than the BMW agreements with those Carriers. Although there was some discussion at the hearing that the IAMAW and the Carriers might reach an

agreement as to the applicability of one or more agreements with that Organization to the transferred employees, the undersigned has not been informed that agreement on such applicability was reached. In the absence thereof the IAMAW's request for implementation of its proposal is based solely upon its desire to maintain its status as representative of the employees. While that desire is understandable, as noted above it raises an issue beyond the scope of the jurisdiction of this arbitrator.

In view of the foregoing, the IAMAW's proposal will not be adopted.

2. Consolidation of Roadway Equipment Maintenance and Repair Functions and Rail Welding Functions

Presently CRC maintains and repairs roadway equipment at its shop in Canton, Ohio. That shop will be closed and the work transferred to the CSXT Shop in Richmond, Virginia and the NS Roadway Shop in Charlotte, North Carolina. Additionally, CRC's rail welding shop at Lucknow (Harrisburg), Pennsylvania will be closed and its functions transferred to the CSXT's Rail Fabrication Plant in Atlanta, Georgia and to CSXT rail welding facilities in Russell, Kentucky and Nashville, Tennessee. The Carriers' proposal would allow affected CRC employees at Lucknow and Canton to follow their work to the shops to which it is transferred. Their seniority would be dovetailed onto existing rosters at those points and the employees would work under CBAs applicable to those locations. BMW's interest in this phase of the transaction is that it represents most of the CRC employees to be transferred from Lucknow and Canton. The shopcrafts' interests arise

by virtue of the fact that those Organizations represent CSXT and NS employees at one or more of the shops receiving the work and employees from Canton and Lucknow.

At the outset the shopcrafts raise jurisdictional objections to this Neutral Referee's authority to impose an arbitrated implementing arrangement on the parties with respect to the consolidation of the maintenance of way shop work. The basis for this contention is that the Carriers did not engage in the prerequisite negotiations with the shopcraft organizations as required by Article I, Section 4 of the New York Dock Conditions. The Organizations point out that in reality there was but one meeting between the Carriers and the Organizations which took place on September 24, 1998 and lasted a scant three hours. This, the Organizations urge, did not comply with the spirit or the letter of the thirty-day negotiating period contemplated by Article I, Section 4.

Although the Organizations characterize the September 24, 1998 meeting as a take it or leave it session on the Carrier's part, it appears that the Organizations actually informed the Carriers that before they should negotiate with the Carriers for an implementing agreement the Carriers should reach a master implementing agreement with BMW. Negotiations with that Organization never were fruitful and such an agreement apparently was not possible. The Carriers thus were looking at an unacceptable delay in negotiations that would extend far beyond any time for such contemplated by Article I, Section 4. Under these circumstances the undersigned does not believe the Carriers' handling of this matter constituted a violation of its negotiating obligations under Article I, Section 4.

The shopcraft organizations also challenge the propriety of the Carriers providing notice by fax of the meeting to attempt to select a Neutral Referee for this case. The Organizations argue that the notice of the meeting, to be accomplished by conference call, did not reach many of the Organizations and thus effectively eliminated them from participation therein. The use of a fax machine to transmit important information has the advantage of speed. However, there are drawbacks. Nevertheless, this Neutral Referee cannot conclude that what occurred in this case amounted to a violation of the terms of Article I, Section 4.

The shopcraft organizations seek to expand bidding opportunities for the jobs to be created for employees following their work from the closed CRC shops to the NS and CSXT facilities. The Organizations also question the qualifications of transferring employees as legitimate craft members, citing the fact that the work performed in the closed shops was not under shopcraft contracts and the employees performing that work never met the more rigid craft qualifications applicable at NS and CSXT facilities. The IBEW, in particular, seeks modifications to the Carriers' proposed implementing agreement to assure that the shopcrafts agreement in effect at the location to which employees are transferred will be strictly followed.

The Carrier maintains that to open the new jobs to bid as desired by the shopcrafts would seriously dilute the principle that an employee should follow his or her work to where it is transferred. Moreover, the Carriers emphasize, there are provisions in the existing applicable CBAs for training or retraining employees who cannot qualify for jobs

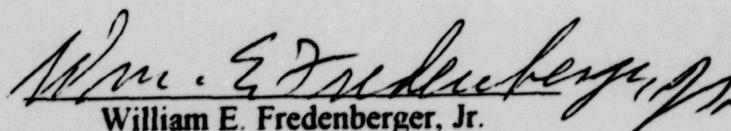
within a craft. The Carriers maintain that the changes such as those sought by IBEW in the Carriers' implementing proposal are unnecessary.

This Neutral Referee agrees with the Carrier on this issue. To over extend the bidding process would compromise the right of employees to follow their work. Problems with qualifications can be resolved by application of training and retraining provisions in existing CBAs. While clarification of agreement terms always is desirable, the undersigned believes that in this case what the IBEW seeks borders upon establishing the terms of a CBA which is beyond the jurisdiction of a Neutral Referee under Article I, Section 4.

BMW apparently has no objection to the consolidation of the shop work here at issue or with the dovetailing of seniority. However, BMW's proposal would seek to restrict the performance of transferred work to the particular facility to which transferred when existing applicable CBAs permit the Carrier more flexibility. Moreover, BMW apparently seeks a bidding pool even broader than that sought by the shopcrafts. Based upon foregoing holdings in this case, the undersigned believes that neither position has merit.

Accordingly, this Neutral Referee finds that the Carriers' proposal with respect to the closing of CSC shops and the transfer of maintenance of way work performed there and the employees performing it to NS and CSXT facilities is appropriate for application to this case and that the proposals of BMW and the shopcraft organizations are not.

Attached hereto and made a part hereof are arbitrated implementing arrangements the purpose of which is to resolve all outstanding issues and disputes raised by the parties in this proceeding.


William E. Fredenberger, Jr.
Neutral Referee

DATED: January 14, 1999

IMPLEMENTING AGREEMENT

BETWEEN

CSX TRANSPORTATION, INC.
and its Railroad Subsidiaries

and

NORFOLK SOUTHERN RAILWAY COMPANY
and its Railroad Subsidiaries

and

CONSOLIDATED RAIL CORPORATION

and

their Employees Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

WHEREAS, Norfolk Southern Corporation ("NS"), Norfolk Southern Railway Company and its railroad subsidiaries ("NSR"); and CSX Corporation ("CSX") and CSX Transportation, Inc. and its railroad subsidiaries ("CSXT"); and Conrail, Inc. ("CRR") and Consolidated Rail Corporation ("CRC") have filed an application with the Surface Transportation Board ("STB") in Finance Docket No. 33388 seeking approval of acquisition of control by NS and CSX of CRR and CRC, and for the division of the use and operation of CRC's assets by NSR and CSXT (and the operation of Shared Assets Areas by CRC for the exclusive benefit of CSX and NS the "transaction");

WHEREAS, in its decision served July 23, 1998 in the proceeding captioned Finance Docket No. 33388, 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, and related proceedings, the STB has imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979) ("New York Dock conditions") (copy attached) on all aspects of the Primary Application; Norfolk and Western Railway Company - Trackage Rights - Burlington Northern, Inc., 354 I.C.C. 653 (1980), on related authorization of trackage rights; Oregon Short Line Railroad - Abandonment - Goshen, 360 I.C.C. 91 (1979), on related abandonment authorizations; and Mendocino Coast Railway, Inc., - Lease and Operate - California Western Railway, 360 I.C.C. 653 (1980), on the related authorization of the operations by CSXT or NSR of track leases;

WHEREAS, the parties signatory hereto desire to reach an implementing agreement in satisfaction of Article I, Section 4 of the

New York Dock conditions and other aforementioned labor protective conditions;

NOW, THEREFORE, IT IS AGREED:

ARTICLE I

Section 1

Upon seven (7) days' advance written notice by CSXT, NSR and CRC, CSXT, NSR and CRC may effect one or more of the following coordinations or rearrangements of forces:

- (a) BMWWE represented employees will be allocated among CSXT, NSR and CRC as provided in Appendix A.
- (b) The work on the allocated CRC lines to be operated by CSXT will be coordinated and seniority integrated in accordance with the terms and conditions outlined in Article II of the agreement.
- (c) The work on the allocated CRC lines to be operated by NSR will be coordinated and seniority integrated in accordance with the terms and conditions outlined in Article II of the agreement.
- (d) Regional and System-wide Production Gang operations will be coordinated between the NSR lines currently covered by the June 12, 1992 Arbitrated Agreement, as amended, establishing Designated Programmed Gangs ("DPG's") (which includes the territories of the former Norfolk and Western Railway Company, the former New York, Chicago and St. Louis Railway Company ("Nickel Plate"), and the former Wabash Railroad Company) and the allocated CRC lines operated by NSR, by placing the allocated CRC lines operated by NSR under the coverage of the June 12, 1992 Arbitrated Agreement, as amended. The allocated CRC lines operated by NSR will constitute a newly established "CR Zone" added under Section 1 of that DPG Agreement. All CRC employees allocated to NSR will have their seniority dates on the CRC District Seniority Rosters covering Foreman, Assistant Foreman, Machine Operator and Trackman classifications, formerly applicable to the allocated CRC lines operated by NSR, dovetailed into the corresponding existing DPG rosters and given CR as their zone designation on such rosters.
- (e) System and regional production gang activities will be coordinated on existing CSXT lines and the allocated CRC lines operated by CSXT by placing the allocated CRC lines operated by CSXT under the coverage of the CSXT-BMWE System Production Gang Agreement, as amended, (the "SPG Agreement"). Likewise, CSXT will adopt its current practice of assigning roadway equipment

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mechanics to System Production Gangs and all roadway mechanics will be placed under the CSXT Labor Agreement No. 12-126-92 now in place on CSXT (the "Roadway Mechanics Agreement").¹

- (f) The rail welding work performed at the Lucknow Plant for the allocated CRC lines operated by NSR may be transferred to the NSR rail welding facility at Atlanta, Georgia. The work performed at the Lucknow Plant for the allocated CRC lines operated by CSXT may be performed at the CSXT rail welding facilities at Russell, Kentucky or Nashville, Tennessee.
- (g) The maintenance of any CRC roadway equipment allocated to NSR formerly maintained at the Canton Shop may be performed at Charlotte Roadway Shop and/or other locations on the expanded NSR system.² The maintenance of any CRC roadway equipment allocated to CSXT formerly maintained at the Canton Shop may be performed at the Richmond, Virginia Roadway Shop and/or other locations on the expanded CSXT system.³ This coordination may be accomplished in phases.
- (h) Contractors may be used without notice to augment CSXT, NSR, or CRC forces as needed to perform construction and rehabilitation projects such as initial new construction of connection tracks, sidings, mainline, yard tracks, new or expanded terminals and crossing improvements) initially required for implementing the Operating Plan and to achieve the benefits of the transaction as approved by the STB in Finance Docket No. 33388.
- (i) The parties recognize that, after the transaction, CRC will no longer have the system support it formerly had available. Therefore, to permit operation of the Shared Assets Areas in a reasonable and efficient manner:

¹ The coordination of MW roadway equipment repair work and employees on the CRC lines allocated to CSXT is addressed in the attached agreement signed by CSXT, CRC, BMWE, IAM and SMWIA, which is incorporated herein by reference.

² The coordination of MW roadway equipment repair work and employees at the Charlotte Roadway Shop is addressed in the attached agreement signed by NSR, CRC, BMWE, IAM, IBB, IBEW, BRC-TCU, SMWIA and NCF&O, which is incorporated herein by reference. The allocation and coordination of employees engaged in line-of-road equipment repair and maintenance work on certain lines to be allocated to NSR is addressed in the attached agreement signed by NSR, CRC, BMWE, and IAM, which is incorporated herein by reference.

³ The coordination of MW roadway equipment repair work and employees at the CSXT Richmond facility is addressed in the attached agreement referenced in note 1.

- (1) Major annual program maintenance such as rail, tie, and surfacing projects will be provided by CSXT and/or NSR in accordance with their respective collective bargaining agreements and/or practices.
- (2) CRC will purchase continuous welded rail ("CWR") from CSXT and/or NSR.
- (3) CRC will obtain from CSXT and/or NSR, in accordance with their respective collective bargaining agreements and/or practices, services such as component reclamation and pre-fabricated track work.
- (4) CRC will obtain from CSXT and/or NSR, in accordance with their respective collective bargaining agreements and/or practices, roadway equipment overhaul/repair that cannot be accomplished on line of road by CRC forces.
- (5) Changes, additions, improvements, and rationalizations that are over and above routine maintenance will be provided by CSXT and/or NSR in accordance with their respective collective bargaining agreements and/or practices.

Section 2

Coordinations in which work is transferred under this agreement and one or more employees are offered the opportunity to follow that work will be effected in the following manner:

- (a) By bulletins giving a minimum of five (5) days' written notice, the positions that no longer will be needed at the location from which the work is being transferred will be abolished and concurrently therewith the positions that will be established at the location to which the work is being transferred will be advertised for a period of five (5) days to all employees holding regular BMW assignments at the transferring location.
- (b) The positions advertised pursuant to paragraph (a) above will be awarded in seniority order and the successful bidders notified of the awards by posting same on the appropriate bulletin boards at the transferring location on the day after the bidding process closes. In addition, each successful bidder shall be notified in writing of the award together with the date and time to report to the officer in charge at the receiving location. The employees so notified shall report upon the date and at the time specified unless other arrangements are made with the proper authority or they are prevented from doing so due to circumstances beyond their control.

- (c) Should there remain unfilled positions after fulfilling the requirements of Article I, Section 2(a) and 2(b) above, the positions may be assigned in reverse seniority order, beginning with the most junior employee holding a regular assignment at the transferring location; until all positions are filled. Upon receipt of such assignment, those employees must, within seven (7) days, elect in writing one of the following options: (1) accept the assigned position and report to the position pursuant to Article I, Section 2(b) above, or (2) be furloughed without protection. In the event an employee fails to make such an election, the employee shall be considered to have exercised option (2).
- (d) Employees transferring under this section will have their seniority date(s) dovetailed in accordance with the procedures set forth in Article II on the appropriate roster(s) at the receiving location.

ARTICLE II

Section 1

Upon advance written notice by CSXT, NSR and CRC under Article I Section 1, CRC employees will be allocated to CSXT, NSR and CRC, as detailed in Appendix B, and each such employee will be employed exclusively by either CSXT or NSR or CRC.

Those CRC employees who are allocated to CSXT will be available to perform service on a coordinated basis. The agreement to be applied is as described in Appendix B. All employees holding a regular assignment will continue to hold that assignment under the newly applicable agreement unless or until changes are made under the advertisement and displacement rules or other applicable provisions.

Those CRC employees who are allocated to NSR will be available to perform service on a coordinated basis. The current agreement in effect on NSR between BMWE and Norfolk and Western Railway Company ("NW") dated July 1, 1986, as amended, (agreement currently applicable on former Norfolk and Western and Wabash lines) will be applied to cover all of the former CRC territories operated by NSR. All employees holding a regular assignment will continue to hold that assignment under the newly applicable agreement unless or until changes are made under the advertisement and displacement rules or other applicable provisions.

CRC employees who transfer from Lucknow to the NSR facility at Atlanta, Georgia will become employees exclusively of NSR and will be

subject to the current October 1, 1972 Southern BMW Agreement applicable at that facility.

Those CRC employees who remain in the Shared Asset Areas will continue to perform service under the applicable CRC/BMW Agreement, except as modified in accordance with the authorized transaction and elsewhere herein.

Section 2

Upon the date provided in the applicable notice under Article I:

- the seniority districts on the former CRC territories allocated to and operated by NSR will be consolidated and realigned to establish a new Northern Region seniority district under Rule 2 of the July 1, 1986 Agreement, as amended, and will correspond to three NSR operating Divisions - Dearborn, Pittsburgh and Harrisburg. The Harrisburg Division will consist of the CRC Albany and Philadelphia Division territories allocated to NSR; the Pittsburgh Division will consist of the CRC Pittsburgh Division territory allocated to NSR; and the Dearborn Division will consist of the CRC Indianapolis and Dearborn Division territories allocated to NSR.

The CRC employees allocated to NSR will have their seniority dates listed on the corresponding CRC District Seniority Rosters formerly applicable to the involved territories allocated to NSR dovetailed to establish new Northern Region seniority rosters for the Track Sub-Department. CRC employees having only Regional seniority will have their CRC Regional seniority dates dovetailed into the DPG seniority rosters and will establish a new Northern Region seniority date upon their first performance of service after the advance notice given under Article I. New Dearborn, Pittsburgh, and Harrisburg Division seniority rosters will be established in the same manner for the B&B Sub-Department and Roadway Equipment Repairmen.

- the seniority districts on the former CRC territories allocated to and operated by CSXT will be consolidated and realigned into three (3) consolidated seniority districts (the Eastern, Western and Northern Districts) as indicated in Appendix B. CRC employees having only Regional seniority will have their CRC Regional seniority date apply only for SPG service and will establish a seniority date on the Eastern, Western or Northern District upon their first performance of service after the advance notice given under Article I.

- the seniority districts in the Shared Assets Areas will be realigned to establish one seniority district for each of the respective Shared Assets Areas. Current work zones within each Shared Asset Area will be combined and realigned to provide that each seniority district will comprise only one work zone for the purpose of recall or automatic bidder rights in making assignments to positions on that respective seniority district.

Section 3

The seniority dates of employees recorded on existing rosters will be accepted as correct. When rosters are integrated or names are integrated into new or existing rosters, and as a result thereof, employees on such rosters have identical seniority dates, then the roster standing among such employees shall be determined as follows:

1. earlier hire date shall be ranked senior;
2. previous service with carrier shall be ranked senior;
3. employee with earlier month and day of birth within any calendar year shall be ranked senior.

Section 4

When seniority rosters are integrated, employees who hold a regular assignment on the NSR-operated or CSXT-operated territories at the time of the integration (i.e., "active employees," including employees on sick leave, leave of absence, promoted, suspended from service or dismissed employees who are subsequently restored to service) will be dovetailed using their seniority dates as shown on the respective rosters and their names listed in dovetailed order on the roster. Thereafter, employees' rights to exercise seniority will be governed by the applicable provisions of the collective bargaining agreement.

Section 5

Employees will be transitioned to the payroll cycles of their new employer where applicable. The transition may result in a change in pay day, pay hold back, and/or pay period for these employees, as well as a one-time adjustment in pay periods to convert to the new pay cycle.

ARTICLE III

The parties further agree that after the initial division of the use and operation of CRC's assets between CSXT and NSR pursuant to this agreement, if either CSXT or NSR serves a subsequent notice related to

the Application but limited to a coordination of its CRC allocated assets and not affecting the other railroads, then only that railroad needs to be the party to the subsequent implementing agreement.

ARTICLE IV

This Agreement shall fulfill the requirements of Article I, Section 4 of the New York Dock conditions and all other conditions which have been be imposed in Decision No. 89 by the STB in Finance Docket No. 33388.

Appendix A - ALLOCATION OF EMPLOYEES

CRC employees represented by BMWWE will be allocated to one of the three railroad employers (CSXT, NSR, and CRC (Shared Assets ("SAA"))) based upon position held on the date the applicable notice is served under Article I of this Implementing Agreement, (the "allocation date") as set forth below:

I. Available Employees

A. Employees assigned to a District position are allocated by their work location as follows:

1. Buffalo, New England, or Mohawk Seniority Districts all to CSXT
2. Southern Tier, Alleghany A, Alleghany B, Pittsburgh, or Michigan Seniority Districts all to NSR
3. Youngstown Seniority District to NSR, except positions at Lima to CSXT
4. Cleveland Seniority District to CSXT, except positions at Rockport Yard to NSR
5. Toledo Seniority District to NSR, except positions at Stanley Yard to CSXT
6. Chicago Seniority District to NSR, except positions on Ft. Wayne line and positions west of Ft. Wayne to CSXT
7. Columbus Seniority District to NSR, except positions at Crestline and Kenton and certain positions as determined by the railroads, at Buckeye Yard to CSXT
8. Southwest Seniority District to CSXT, except positions at Anderson to NSR
9. Harrisburg Seniority District to NSR, except certain positions as determined by the railroads, at Baltimore to CSXT
10. Detroit Seniority District to SAA until sufficiently staffed, as determined by the railroads, rest to NSR
11. New Jersey or Philadelphia Seniority Districts positions to respective Carrier acquiring headquarters point

B. Employees assigned to a Production Zone or Regional position are allocated by their respective earliest District seniority date as follows:

1. Zone employees
 - a. Southern Tier, Harrisburg, Pittsburgh, Alleghany A, Alleghany B, Youngstown, Michigan, Toledo, or Chicago all to NSR
 - b. Buffalo, New England, Mohawk, or Cleveland all to CSXT
 - c. Detroit to SAA until sufficiently staffed, as determined by the railroads, rest to NSR
 - d. New Jersey to SAA until sufficiently staffed, as determined by the railroads, rest to NSR and certain positions to CSXT, as determined by the railroads
 - e. Philadelphia to SAA until sufficiently staffed, as determined by the railroads, rest to NSR and certain positions to CSXT, as determined by the railroads
 - f. Columbus or Southwest to CSXT, except certain positions, as determined by the railroads, to NSR.

2. Regional employees
 - a. District seniority only on a single District
 - i. Buffalo, New England, Mohawk, Cleveland, or Southwest to CSXT
 - ii. rest to NSR
 - b. District seniority on Multiple Districts
 - i. use District having earliest seniority date
 - ii. Buffalo, New England, Mohawk, Cleveland, or Southwest to CSXT, rest to NSR
 - c. Only Regional seniority - apportion by residence

- C. Roadway Shop and Rail Plant employees
 1. Canton
 - a. 56 transferred to Charlotte (NSR)
 - b. 20 transferred to Richmond (CSXT)
 - c. non-transfers (all to NSR)
 2. Lucknow
 - a. 5 transferred to Atlanta (NSR)
 - b. non-transfers (all to NSR)

- D. Employees eligible for Sub-Plan benefits, on leave of absence, or disabled allocated as set forth above, treating the last position held as if it was the position held on allocation date:
 1. if was District position allocate as in Part A
 2. if was Production Zone or Regional position allocate as in Part B

3. if was Roadway Shop or Rail Plant position
allocate as in Part C

II. Unavailable Employees

Other CRC employees with BMWSE seniority will be placed on a list, in the order of their respective CRC District seniority, for new hire preference. An attempt to offer these employees available positions will be made prior to employing new hires.

CSXT Appendix B

I. CSXT Eastern Seniority District

A. Track and Bridge and Building operations and associated work forces of the former B&O, and portions of the former C&O, Conrail, RF&P and SCL will be merged into the newly formed operating district and seniority district hereinafter described:

The area from New York/New Jersey to south of Richmond, VA west to Charlottesville, VA, Huntington, WV, north to Willard, OH and Cleveland, OH.

The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals that lie at the end of a line segment except: North and South Jersey SAA.

B. All employees assigned to positions within the above-described district will constitute one common work force working under one labor agreement. The B&O labor Agreement, as modified by this implementing agreement, will apply in the Eastern District.

II. CSXT Western Seniority District

A. Track and Bridge and Building operations and associated work forces of the former B&O, and portions of the former B&O, B&OCT, C&O(PM), C&O, C&EI, Monon, L&N and Conrail will be merged into the newly formed operating district and seniority district hereinafter described:

The area from St. Louis, MO to Chicago, IL to a point east of Cleveland, OH and south to Cincinnati, OH and Columbus, OH and Louisville, KY and Evansville, IN.

The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals that lie at the end of a line segment except Detroit SAA.

B. All employees assigned to positions within the above-described district will constitute one common work force working under one labor agreement. The B&O labor Agreement, as modified by this implementing agreement, will apply in the Western District.

III. CSXT Northern Seniority District

A. Track and Bridge and Building operations and associated work forces of the former Conrail not included in either the above CSXT Eastern or Western Districts will be merged into the newly formed operating district and seniority district hereinafter described:

The area from New York/New Jersey east to Boston/New Bedford, MA north to Adirondack Junction, Quebec and west to Cleveland, OH.

The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals that lie at the end of a line segment except: North Jersey SAA.

B. All employees assigned to positions within the above-described district will constitute one common work force working under one labor agreement. The CRC labor Agreement, as modified by this implementing agreement, will apply in the Northern District.

AGREEMENT

BETWEEN

CSX TRANSPORTATION, INC.
And its Railroad Subsidiaries

and

CONSOLIDATED RAIL CORPORATION

and

their Employees Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

WHEREAS, CSX Corporation ("CSX"), CSX Transportation, Inc. and its railroad subsidiaries ("CSXT"); and Norfolk Southern Corporation ("NS"), Norfolk Southern Railway Company and its railroad subsidiaries ("NSR"); and Conrail, Inc. ("CRR") and Consolidated Rail Corporation ("CRC") have filed an application with the Surface Transportation Board ("STB") in Finance Docket No. 33388 seeking approval of acquisition of control by CSX and NS of CRR and CRC, and for the division of the use and operation of CRC's assets by NSR and CSXT and the operation of Shared Assets Areas by CRC for the exclusive benefit of CSX and NS ("the transaction");

WHEREAS, in its decision served July 23, 1998 in the proceeding captioned Finance Docket No. 33388, 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, and related proceedings, the STB has imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979) ("New York Dock conditions") (copy attached; on all aspects of the Primary Application; Norfolk and Western Railway Company - Trackage Rights - Burlington Northern, Inc., 354 I.C.C. 653 (1980) on related authorization of trackage rights; Oregon Short Line Railroad - Abandonment - Goshen, 360 I.C.C. 91 (1979), on related abandonment authorizations; and Mendocino Coast Railway,

Inc. - Lease and Operate - California Western Railway, 360 I.C.C. 653 (1980), on the related track leases;

WHEREAS, the railroads gave notice on August 24, 1998, of their intention to consummate the transaction and to coordinate certain maintenance-of-way work, including performing roadway equipment maintenance and repair work pursuant to Article I, Section 4 of the New York Dock conditions and other employee protective conditions.

NOW, THEREFORE, IT IS AGREED:

ARTICLE I

Upon seven (7) days advance written notice by CSXT and CRC, CSXT and CRC may affect this consolidation as set forth below.

ARTICLE II

CSXT will integrate its allocated former CRC roadway equipment mechanics into CSXT's Roadway Mechanic system under CSXT Labor Agreement 12-126-92, as amended, on a basis similar to the method used to integrate those employees who were present at the time of the original roadway equipment consolidation on CSXT. As such, CSXT will advertise all of the roadway mechanic positions on the allocated CRC lines to be operated by CSXT and the CRC allocated roadway shop positions to be established at CSXT's Richmond facility at the same time and follow the general principles of the original CSXT Labor Agreement 12-126-92. Once integrated, the former CRC employees will work under and be governed by the provisions of CSXT Labor Agreement 12-126-92, as amended.

ARTICLE III

This Agreement shall fulfill the requirements of Article I, Section 4, of the New York Dock conditions and all other

conditions which have been imposed in Decision No. 89 by the STB
in Finance Docket No. 33388.

AGREEMENT

BETWEEN

NORFOLK SOUTHERN RAILWAY COMPANY
and its Railroad Subsidiaries

and

CONSOLIDATED RAIL CORPORATION

and

their Employees Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
BROTHERHOOD RAILWAY CARMEN DIVISION - TCU
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION
NATIONAL CONFERENCE OF FIREMEN AND OILERS

WHEREAS, Norfolk Southern Corporation ("NS"), Norfolk Southern Railway Company and its railroad subsidiaries ("NSR"); and CSX Corporation ("CSX") and CSX Transportation, Inc. and its railroad subsidiaries ("CSXT"); and Conrail, Inc. ("CRR") and Consolidated Rail Corporation ("CRC") have filed an application with the Surface Transportation Board ("STB") in Finance Docket No. 33388 seeking approval of acquisition of control by NS and CSX of CRR and CRC, and for the division of the use and operation of CRC's assets by NSR and CSXT and the operation of Shared Assets Areas by CRC for the exclusive benefit of CSX and NS (the "transaction");

WHEREAS, in its decision served July 23, 1998 in the proceeding captioned Finance Docket No. 33388, 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, and related proceedings, the STB has imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979) ("New York Dock conditions") (copy attached) on all aspects of the Primary Application; Norfolk and Western Railway Company - Trackage Rights - Burlington Northern, Inc., 354 I.C.C. 653 (1980), on related authorization of trackage rights; Oregon Short Line

Railroad - Abandonment - Goshen, 360 I.C.C. 91 (1979), on related abandonment authorizations; and Mendocino Coast Railway, Inc., - Lease and Operate - California Western Railway, 360 I.C.C. 653 (1980), on the related track leases;

WHEREAS, the railroads gave notice on August 24, 1998, of their intention to consummate the transaction and to coordinate certain maintenance-of-way work, including work performed at CRC's Canton System Shop, pursuant to Article 1, Section 4 of the New York Dock conditions and other employee protective conditions; and

WHEREAS, the parties signatory hereto desire to reach an agreement to transfer certain work and employees of the CRC System Maintenance-of-Way Equipment Repair Shop at Canton, Ohio to the NSR Roadway Equipment Shop at Charlotte, North Carolina.

NOW, THEREFORE, IT IS AGREED:

ARTICLE I

Upon seven (7) days' advance written notice by NSR and CRC, NSR and CRC may effect this coordination in the following manner:

Section 1

(a) NSR will advertise positions to be established at the Charlotte, North Carolina Roadway Equipment Shop under the terms of the March 1, 1975 Southern Shop Crafts Agreement. The positions will be advertised by craft in proportion to the craft distribution of the existing Charlotte Shop workforce. The bulletin for each advertised position will indicate the location, craft and anticipated starting date. The positions will be advertised for a period of five (5) calendar days to all employees holding regular BMW assignments at the Canton, Ohio Roadway Shop.

(b) The positions advertised pursuant to paragraph (a) above will be awarded in seniority order to bidders having the requisite experience or qualifications, as determined by NSR. The successful bidders will be notified of the awards by posting same on the Canton, Ohio Roadway Shop bulletin boards on the day following the day the bidding period closes. In addition, the award bulletin shall notify the successful bidders of the date, time and supervisory officer to whom he should report at the Charlotte, North Carolina Roadway Equipment Shop. Concurrently with that specified reporting date, the successful bidder's position at Canton is abolished. The employee so notified shall

report at the date and time specified unless he makes other arrangements with the proper authority or is prevented from doing so due to circumstances beyond his control. Any remaining positions no longer needed at the Canton, Ohio Maintenance-of-Way Equipment Repair Shop as a result of the transfer of work will be abolished by giving a minimum of five calendar days notice.

(c) Should there remain unfilled positions after fulfilling the requirements of Article I, Section 1(a) and 1(b) above, the positions may be assigned in reverse seniority order, beginning with the most junior employee holding a regular assignment at the transferring location, until all positions are filled. Upon receipt of such assignment, those employees must, within seven (7) days, elect in writing one of the following options: (1) accept the assigned position and report to the position pursuant to Article I, Section 2(b) above, or (2) be furloughed without protection. In the event an employee fails to make such an election, the employee shall be considered to have exercised option (2).

(d) Employees transferring under this section will have their seniority date(s) dovetailed in accordance with the procedures set forth in Article II on the appropriate roster(s) at the receiving location.

ARTICLE II

Section 1

Employees transferring to the Charlotte Roadway Equipment Shop under Article I, Section 1 above will have their respective Canton Shop seniority date as shown on the respective roster dovetailed on the appropriate seniority roster of the respective craft and location in which they obtained a position. Thereafter, employees' rights to exercise seniority will be governed by the applicable provisions of the respective collective bargaining agreements.

Employees holding active positions at Canton Shop on the effective date of the Agreement who do not transfer to Charlotte under Article I, Section 1 above will establish seniority pursuant to Article II of the BMWE Master Implementing Agreement or other arrangement entered into under the employee protective conditions to govern the allocation of CRC BMWE-represented employees.

Section 2

The seniority dates of employees recorded on existing rosters will be accepted as correct. Where employees are dovetailed into existing rosters, and as a result thereof, employees on such rosters have identical seniority dates, then the roster standing among such employees shall be determined as follows:

1. earlier hire date shall be ranked senior;
2. previous service with carrier shall be ranked senior;
3. employee with earlier month and day of birth within any calendar year shall be ranked senior.

ARTICLE III

This Agreement shall fulfill the requirements of Article I, Section 4, of the New York Dock conditions and all other conditions which have been imposed in Decision No. 89 by the STB in Finance Docket No. 33388.

AGREEMENT

BETWEEN

NORFOLK SOUTHERN RAILWAY COMPANY
and its Railroad Subsidiaries

and

CONSOLIDATED RAIL CORPORATION

and

their Employees Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

WHEREAS, Norfolk Southern Corporation ("NS"), Norfolk Southern Railway Company and its railroad subsidiaries ("NSR"); and CSX Corporation ("CSX") and CSX Transportation, Inc. and its railroad subsidiaries ("CSXT"); and Conrail, Inc. ("CRR") and Consolidated Rail Corporation ("CRC") have filed an application with the Surface Transportation Board ("STB") in Finance Docket No. 33388 seeking approval of acquisition of control by NS and CSX of CRR and CRC, and for the division of the use and operation of CRC's assets by NSR and CSXT and the operation of Shared Assets Areas by CRC for the exclusive benefit of CSX and NS (the "transaction");

WHEREAS, in its decision served July 23, 1998 in the proceeding captioned Finance docket No. 33388, 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, and related proceedings, the STB has imposed the employee protective conditions set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 360 I.C.C. 60 (1979) ("New York Dock conditions") (copy attached) on all aspects of the Primary Application; Norfolk and Western Railway Company - Trackage Rights - Burlington Northern, Inc., 354 I.C.C. 653 (1980), on related authorization of trackage rights; Oregon Short Line Railroad - Abandonment - Goshen, 360 I.C.C. 91 (1979), on related abandonment authorizations; and Mendocino Coast Railway, Inc., - Lease and Operate - California Western Railway, 360 I.C.C. 653 (1980), on the related track leases;

WHEREAS, the railroads gave notice on August 24, 1998, of their intention to consummate the transaction and to coordinate certain maintenance-of-way work, including work associated with maintenance-

of-way equipment repair, pursuant to Article 1, Section 4 of the New York Dock conditions and other employee protective conditions; and

WHEREAS, the parties signatory hereto desire to reach an agreement providing for the selection and rearrangement of forces performing line-of-road maintenance and repairs to roadway equipment on the former New York Central lines of the allocated CRC territory to be operated by NSR.

NOW, THEREFORE, IT IS AGREED:

ARTICLE I

Section 1

Upon seven (7) days advance written notice by NSR and CRC, all work of line-of-road maintenance or repairs of roadway equipment performed on the allocated CRC territory to be operated by NSR, that prior to this transaction was contained within the scope of the agreement between CRC and IAM, will be placed under the scope of the agreement in effect on NSR between BMW and Norfolk and Western Railway Company ("NW") dated July 1, 1986, as amended (agreement currently applicable on former Norfolk and Western and Wabash lines), which is extended to cover all of the allocated CRC territory to be operated by NSR.

Section 2

On the date specified in the notice served under Article I, Section 1 of this Agreement, those employees located on the former New York Central lines of the allocated CRC territory to be operated by NSR, who are represented by IAM and performing work of line-of-road maintenance or repairs of roadway equipment (i.e., D. D. Hill, E. D. Walker, T. D. Dancer, B. R. Eckel, D. M. Stevens, J. K. Becker, and B. J. Keatts, or their successors holding such positions at the time of the Notice provided under Article I, Section 1) will become employees exclusively of NSR and will be available to perform service on a coordinated basis subject to the NW/Wabash Agreement dated July 1, 1986, as amended.

These employees will have their IAM seniority dates as shown on the applicable CRC roster dovetailed into the applicable BMW Agreement Roadway Machine Repairman Roster covering the Dearborn Division and will be removed from any IAM seniority roster applicable to NSR or CRC. Thereafter, employees' rights to exercise seniority will be governed by the applicable provisions of the collective bargaining agreement.

APPENDIX B

Distribution of Employees In Proposed Districts and Former Property

Eastern District

B&O	50%
C&O	38%
RF&P	4.5%
WM	4.4%
Conrail	2.5%

Western District

B&O	35%
Conrail	22%
C&O	18%
L&N	12%
C&ET	5%
BOCT	4%
Monon	3%
Toledo Term	<1%

ALLOCATION OF CONRAIL WORKFORCE

Distinct individuals on Conrail rosters	5,235
Available employees as of June 1998 Mancount ¹	3,061
Less: Scale Inspectors (to NSR as nonagreement)	(5)

Employees to be Allocated:

Employees occupying district positions	1,231
Employees occupying production zone gang positions	1,386
Employees occupying regional production gang positions	209
Employees at Canton	98
Employees at Lucknow	10
Employees on SUB Plan	<u>122</u>
TOTAL TO BE ALLOCATED	3,056

Allocation to NSR:

District, production zone, regional, SUB	1,785
From Canton (including 56 to Charlotte)	78
From Lucknow (including 5 to Atlanta)	10
58% of employees who have only regional seniority	<u>16</u>
Total to NSR	1,889

Allocation to CSXT:

District, production zone, regional, SUB	974
From Canton (to Richmond)	20
42% of employees who have only regional seniority	<u>12</u>
Total to CSXT	1,006

Allocation to SAA (Conrail):

District, production zone	161
---------------------------------	-----

TOTAL ALLOCATED 3,056

¹ All figures are approximate. June 1998 figures do not correspond exactly to current (12/98) populations.

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

----- x
NORFOLK SOUTHERN RAILWAY COMPANY, :
CSX TRANSPORTATION, INC., and :
CONSOLIDATED RAIL CORPORATION, :
 :
and : Referee
 :
BROTHERHOOD OF MAINTENANCE OF WAY : William E.
EMPLOYES; INTERNATIONAL BROTHERHOOD :
OF BOILERMAKERS, IRON SHIP BUILDERS, : Fredenberger, Jr.
BLACKSMITHS, FORGERS AND HELPERS; :
BROTHERHOOD RAILWAY CARMEN DIVISION :
- TRANSPORTATION COMMUNICATIONS :
INTERNATIONAL UNION; INTERNATIONAL :
BROTHERHOOD OF ELECTRICAL WORKERS; :
NATIONAL CONFERENCE OF FIREMEN AND :
OILERS; INTERNATIONAL ASSOCIATION :
OF MACHINISTS AND AEROSPACE WORKERS; :
and SHEET METAL WORKERS' INTERNATIONAL :
ASSOCIATION. :
----- x

National Mediation Board
1301 K Street, N.W., # 250-East
Washington, D.C. 20572
Friday, December 18, 1998

REVISED TRANSCRIPT

AFTERNOON SESSION

BRIGGLE & BOTT, COURT REPORTERS
10823 Golf Course Terrace, Mitchellville, MD 20721
(301)808-0730

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1 here he put in red -- and it's obviously why he put it in
2 red, because he thought it was important. And this relates
3 to our Attachment B, item 2(c). He said, after you analyze
4 our proposal, that this, 2(c) could become a separation
5 analysis bonanza, so to speak, for Conrail employees.

6 What we'd like to say now is, the carriers went
7 through our proposal and you know what? You're right.
8 There are parts that weren't right, wasn't perfect, and they
9 found a loophole. And it's not what we intended and right
10 now on the record I want to say, we want to take item (c)
11 out. It was not our intention -- as we said all along, we
12 want people to go to job, to exercise choice to fill real
13 positions. We were not looking to make some sort of
14 separation allowance bonanza under New York Dock in this
15 implementing agreement proposal.

16 So actually, that was very helpful what the
17 carriers did.

18 But the carriers also went through, Mr. Berlin
19 laid out this timeline and he said, the timeline is not
20 perfect. We've got to do a lot of things here and there.
21 And it's true, there are a lot of obligations here. But
22 they're obligations all working toward the idea of employee

1 choice and, we believe, getting employees to positions where
2 the carrier can actually use them.

3 Now part of this process, why there may be
4 glitches here and there in our proposal -- as we pointed
5 out, we saw glitches in the carriers' proposal yesterday and
6 I'm going to return to some of those that still seem to be
7 outstanding in the carriers' proposal -- is that bargaining
8 on the actual issue of allocation always was at cross-
9 purposes. The formal position on the record of the carrier
10 always was, no bidding whatsoever.

11 So we were at loggerheads from day one, and there
12 never was -- and it's no fault of anybody's, but there never
13 was, through the give and take of collective bargaining, any
14 movement on the record towards a fixing of just the carriers
15 method of allocation or the bidding. So you get proposals
16 that maybe have glitches in them.

17 And part of that may have been just when we're in
18 negotiation, we have talked before about how March 1st
19 suddenly appeared out of nowhere. Now Mr. Berlin just said,
20 well, March 1st didn't appear out of nowhere. It was in
21 some SEC filings on November 20th, so that's when the date
22 was released to the public.

1 Well, a couple of remarks to that. First off, we
2 generally don't monitor SEC filings. I guess maybe we
3 should on a more regular basis. But the November 20th date
4 is quite significant because that's after negotiations
5 between the parties had reached an impasse, and indeed,
6 that's a week after, Mr. Fredenberger, you were appointed as
7 an arbitrator in this case. That's the first date now that
8 the carriers acknowledge that the March 1st was available to
9 the public, and by implication, to the maintenance of way.

10 So earlier in the process when we had asked from
11 time to time, what's your timeline? We understand what
12 you're trying to do, but when are you intending to do it?
13 And we always got an answer, well, we don't know. It's very
14 hard when you're trying to fashion an implementing
15 arrangement and you don't know sort of what the D-day date
16 is. We're not saying that it was withheld in bad faith.
17 It's just a fact now that's in the record, the first time
18 the March 1st date was apparent was after the arbitrator was
19 selected in this case.

20 Now the carriers raised an argument about the bid
21 process and made a reference, for example, that our process
22 would result in 5,000 bidders. I think based on Carriers'

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

----- x
 NORFOLK SOUTHERN RAILWAY COMPANY, :
 CSX TRANSPORTATION, INC., and :
 CONSOLIDATED RAIL CORPORATION, :
 :
 and : Referee
 :
 BROTHERHOOD OF MAINTENANCE OF WAY : William E.
 EMPLOYES; INTERNATIONAL BROTHERHOOD :
 OF BOILERMAKERS, IRON SHIP BUILDERS, : Fredenberger, Jr.
 BLACKSMITHS, FORGERS AND HELPERS; :
 BROTHERHOOD RAILWAY CARMEN DIVISION :
 - TRANSPORTATION COMMUNICATIONS :
 INTERNATIONAL UNION; INTERNATIONAL :
 BROTHERHOOD OF ELECTRICAL WORKERS; :
 NATIONAL CONFERENCE OF FIREMEN AND :
 OILERS; INTERNATIONAL ASSOCIATION :
 OF MACHINISTS AND AEROSPACE WORKERS; :
 and SHEET METAL WORKERS' INTERNATIONAL :
 ASSOCIATION. :
 ----- x

National Mediation Board
1301 K Street, N.W., # 250-East
Washington, D.C. 20572
Thursday, December 17, 1998

The above-entitled arbitration came on for hearing
at 10:29 a.m. before:

WILLIAM E. FREDENBERGER, JR.

 BRIGGLE & BOTT, COURT REPORTERS
 10823 Golf Course Terrace, Mitchellville, MD 20721
 (301)808-0730

COPY

B-4

1 things that are more advantageous, there may be particular
2 rates of pay that are higher here as opposed to some of the
3 others, that doesn't answer the fact that there are losses
4 to the employees that are supposed to be protected. Also
5 they suggest we're cherry-picking in that the STB said you
6 can't cherry-pick you're agreements. We're not. We're
7 saying, preserve the agreement that the employees are under.

8 There's another agreement item and that concerns
9 contracting out and that will be addressed by Mr. Griffin.

10 MR. GRIFFIN: Yesterday, both of the carriers made
11 what, from our side of the table, we believe is a most
12 unprecedented and arrogant request. And what they asked for
13 was that you, acting as a delegate of the Surface
14 Transportation Board, in essence acting as an arm of the
15 government, should intervene in the collective bargaining
16 relationship between these parties and say existing rules
17 governing subcontracting of work are tossed out the window
18 as to some vaguely defined class of work that the carriers
19 want to do.

20 Now this, as I say, is unprecedented. I've looked
21 through and I haven't seen any New York Dock awards where,
22 in the context of a Section 4 arbitration the arbitrator

1 said, you, as part of this transaction, carrier, may
2 contract out work, notwithstanding whatever the rules or
3 practices might apply to that.

4 Quite frankly, this goes to the essence of the
5 contractual relationship between these parties. There is a
6 certain class of work that is reserved to employees that we
7 represent, subject to agreements between the carrier and the
8 union, that reserves in whole or in part, subject to various
9 rules and practices and types of work.

10 And for the government -- and that's what it comes
11 down to, because this is a New York Dock arbitration
12 pursuant to an order of the Surface Transportation Board.
13 For the government to come in and say, subcontracting rules
14 are out, you're dropping a hand grenade in the collective
15 bargaining relationship between these parties.

16 In essence, the relief the carriers are asking for
17 here would be a government agency endorsing and sanctioning
18 subcontracting of work that may well otherwise be reserved
19 to employees by collective bargaining. And the particular
20 irony of this situation is that such an order would come
21 from the government in an arbitration under conditions that
22 were designed to protect employees from transaction-related

1 harm.

2 Now that's just as a background to this. It's an
3 incredible request, and quite frankly, it's offensive to us.
4 Obviously, there is nothing that the carriers will not try
5 to take from us under an arrangement that's supposed to
6 protect the interest of employees. But nevertheless, the
7 point is, respectfully, you don't have the authority to
8 grant them the relief in any circumstances.

9 I think the first place to start in this is, as
10 Mr. Edelman has stated at great length today, whatever
11 authority you have to override a collective bargaining
12 agreement -- and we would argue this is something that could
13 never be overridden. But we don't have to get to that
14 particular point, because a threshold question that has to
15 be answered to see if you have authority to act at all is,
16 is this a transaction? I think that answer, simply put, is
17 no.

18 And I think the easiest way to put it is, the
19 carriers have, quite frankly, tried to weasel this
20 subcontracting proposal into this notice that, as we have
21 pointed out, contains elements of transactions but not all
22 of which involves transactions. They've tried to weasel

1 this in. But they can't do that.

2 The way to look at this analytically is to say,
3 what if the carrier served a notice under Article I,
4 Section 4 that we intend to subcontract out work, any work
5 we deem related to carrying out the transaction; here's
6 your 90-day notice. That's not a transaction. Where's the
7 rearrangement and consolidation of forces? It's an
8 elimination of forces. It's an elimination of collective
9 agreements.

10 It's not a transaction. It's a naked grab of the
11 contractual rights that this union has obtained for the
12 employees, and rights that these employees rely upon for
13 their livelihoods so that they can feed their families, pay
14 their mortgages. It's not a transaction. So we would
15 submit, that's really the beginning and the ending of this
16 process, and that should be the end of it.

17 But assuming, just for the sake of argument to
18 continue here, that somehow the carriers can gin this up, a
19 naked grab of work that might -- in their own words, might
20 otherwise be reserved to maintenance of way employees, they
21 can't show necessity under any circumstance.

22 The first place I'd like to point you is in our

1 volume of authorities at Tab 8 we reproduce the original New
2 York Dock decision. And what I'd like to do is --

3 MR. EDELMAN: The main document is already in
4 evidence. This is just an excerpt.

5 MR. GRIFFIN: This is an excerpt. This final New
6 York Dock decision, this was when, as I understand it, the
7 ICC sort of finally synthesized what they'd been working on
8 for a couple of years in trying to adapt what at that time
9 had been the most recent amendments to the Interstate
10 Commerce Act and they issued the New York Dock decision
11 in 1979.

12 There was a competing set of New York Dock
13 conditions proposed by the Railway Labor Executives
14 Association, and I'd like to draw your attention to page 77,
15 and I've highlighted a provision in Article I, Section 2.
16 This was a proposal by RLEA to add to Article I, Section 2
17 that would specifically preserve existing rules governing
18 subcontracting of work.

19 And the ICC rejected that proposal. If you look
20 at page 73 in the excerpt, the ICC rejected that and said
21 that Article I, Section 2 appears acceptable to all parties.
22 RLEA does propose an additional sentence dealing with the

1 effectiveness of subcontracting agreements subject to a
2 transaction. However, the section as now written preserves
3 all existing agreements, and therefore, the suggested
4 language is redundant and unnecessary.

5 I would suggest that if you're even into the
6 question of, is this a transaction, the ICC's pronouncement
7 on the question of subcontracting rules in the context of
8 Article I, Section 2, which they have never disavowed, which
9 was written under the ICC's decisions, this authority to
10 override agreement -- if you remember when you look back to
11 Carmen III they'll say, this override authority has been out
12 there since 1940, this necessity component. So therefore,
13 when they issued this decision in 1979, the override for
14 necessity grounds was part of the law, according to the ICC
15 and the STB.

16 So they could have said, it's preserved unless
17 it's necessary to override. They said, no, it's preserved;
18 it's redundant. You don't even need to have it in the
19 provisions. The ICC and STB have never pulled from that
20 particular statement.

21 Now even if you get past that, which I think if
22 the transaction doesn't stop you and the plain language

1 there from the ICC and New York Dock itself doesn't stop
2 you, the carrier can't get over the necessity test. And
3 they can't get over it for two reasons.

4 The first is, in the Executives decision at 987
5 Fed 2nd, 815, this is the type of transfer of wealth. This
6 is simply -- the transaction here is taking work away that
7 may be reserved to approve by existing agreements and
8 practices, and transferring it to somebody else. It's a
9 flat theft of work, taking it out of the bargaining unit.
10 Not even transferring it to other employees within the
11 carrier, but transferring it off the carrier.

12 The carriers also can't show necessity because
13 there is a remedy here. They have agreements in place with
14 the union and certain work that the individuals we represent
15 are covered by those agreements. If the carriers need more
16 people to get the work done, there's a simple remedy: they
17 hire them. That's what they do all the time. That's what
18 their contractual obligation compels them to do. But I
19 guess it's just inconvenient for them. They'd rather not.

20 Well, they have to hire people all the time. And
21 they'll put them on, and when these projects are done, there
22 will be natural attrition occurring during the time. At

1 that point, it's unfortunate, but if people don't have
2 seniority rights to hold a job then they will be furloughed
3 pursuant to the terms in the agreement. We're not happy to
4 see people furloughed. But I've got to tell you, we're a
5 lot more unhappy if the work is just being contracted out.

6 But it's not a question of whether we are happy or
7 not. It's a question of what authority you have to grant
8 them this unprecedented relief. And I would suggest,
9 they've made no necessity showing. They haven't even shown
10 this is a transaction. They can't and this request should
11 be rejected flat out of hand. It is absolutely
12 unbelievable.

13 Now I went through all of these implementing
14 agreements they like to trot out, and before yesterday I'd
15 gone through all of them and I hadn't found word one about
16 subcontracting. But as it always appears to be when you're
17 in negotiations with a carrier, they always seem to be able
18 to pull something out at the last minute, and they pulled
19 out the signalmen's agreement yesterday. And it was
20 characterized as permitting subcontracting.

21 You have to keep in mind, what the carriers are
22 proposing for our craft is, they just get to do it, period.

1 That's it. If there's any agreement rule that touches the
2 subcontracting, it's just gone for certain classes of work.
3 Which raises the next question, when does this end? Because
4 their defense is, oh, but it's transaction related, new
5 construction or whatever.

6 So what? Are we going to file a contracting claim
7 and go to the NRAB or a public law board and have the
8 carrier say, oh, no, this is covered by the exemption we got
9 here. So is it an Article I, Section 11 claim under New
10 York Dock. I mean, it's just ludicrous. This is ludicrous.
11 This is involving the STB, through the New York Dock
12 process, in the day to day relationship of the union and the
13 carrier, and that's not what New York Dock is supposed to
14 do.

15 But let's get back to this agreement with the BRS.
16 I parsed through it and as best I could find is the letter
17 that was referenced to Mr. McKenzie about subcontracting.
18 It's Carriers' Exhibit E-17, and it's in the middle of --
19 with no page number. If you'll indulge me, I'll read it to
20 you and it hopefully won't take too long. It's addressed to
21 Roland McKenzie who's a general chairman from the BRS. The
22 letter is dated December 14th, 1998.

1 It says, Dear Mr. McKenzie, It is recognized that
2 the organization has in the past offered to make special
3 accommodation to allow contracting when needed for a
4 limited, specified purpose when BRS forces are fully
5 staffed. Given the unique circumstances of the operation of
6 certain Conrail lines by Norfolk Southern Railway and the
7 pressing need to complete numerous projects, it is
8 recognized that there may not be sufficient forces at all
9 the required locations on the effective date of the
10 eliminating agreement.

11 In these situations, the carrier will notify the
12 general chairman of the need to contract with outside
13 vendors to timely complete the specified projects. The
14 general chairman will review all the facts, and when the
15 carrier is fully utilizing available BRS forces and where
16 there is a demonstrated need to contract the performance of
17 the work, the general chairman's concurrence will not be
18 unreasonably withheld.

19 It is further understood that gangs from other
20 divisions, regions, or shared asset areas will be utilized
21 under these circumstances, if available, to supplement
22 construction gangs before the use of contractors' forces.

1 The carrier will also make a good faith effort; i.e.,
2 recruit, process to hire, train, and assign qualified
3 candidates to fill all vacant BRS positions. While
4 contractors forces are used on a division, all BRS forces on
5 that division will be working on that division.

6 It was also understood that no contractor employee
7 would be utilized over 12 hours per day and that hot wiring,
8 cut-overs, and necessary BRS flagging will be performed by
9 BRS forces.

10 I could go on and on, but I think you get the
11 drift. This is a little bit different than, screw you,
12 we're going to contract out what we want to. And that's
13 what it boils down to.

14 Again, we ask you, just reject their proposal out
15 of hand. You have no authority to grant what they're
16 asking. If they want to subcontract out work, we'll deal
17 with it under the existing collective agreements. It's that
18 simple.

19 If I could have just a couple minutes to re-sort
20 the paper?

21 MR. FREDENBERGER: Yes.

22 MR. EDELMAN: Don is going to move on to rights,

1 privileges, and benefits.

2 MR. FREDENBERGER: Let's take a break.

3 [Recess.]

4 MR. FREDENBERGER: Okay, are we ready?

5 MR. GRIFFIN: Yes. The final item that we wish to
6 address involves rights, privileges, and benefits. There
7 was some discussion of this yesterday by the carriers, and
8 those are the items that are immutably preserved under
9 Article I, Section 2 of New York Dock conditions.

10 We look at this presentation as somewhat a
11 contingent one, I guess, because if the arbitrator imposes
12 our proposal, the question of preserving the rights,
13 privileges, and benefits really moots out because the
14 agreements would essentially stay in place and these
15 provisions won't be touched that much. But what I'd like to
16 do is to discuss them in brief and spend a little time with
17 the Conrail supplemental unemployment benefit plan which is
18 a significant one.

19 A labor relations officer for the Burlington
20 Northern Sante Fe came up with what I thought was an apt
21 description of rights, privileges, and benefits. He said
22 they're like a little backpack that the employees put on and

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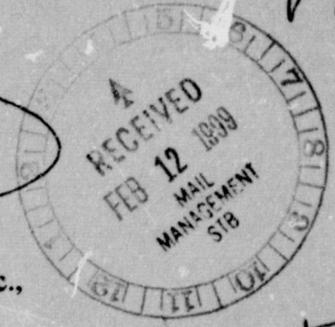
BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 33388 (Sub No. 88)



CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. and Norfolk
Southern Ry. Co.--Control and Operating
Leases/Agreements--Conrail Inc.
and Consolidated Rail Corporation
Transfer of Railroad Line by Norfolk
Southern Railway Company to CSX Transportation, Inc.

PETITION OF THE BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES FOR REVIEW OF ARBITRATION AWARD

BMW EXHIBITS VOLUME I
BMW PRE-HEARING BRIEF IN ARBITRATION

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Finance Docket No. 33388

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

ARBITRATION PURSUANT TO ART. 1, §4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS

Before William E. Fredenberger, Jr., Arbitrator

NORFOLK SOUTHERN RAILWAY COMPANY,)
CSX TRANSPORTATION, INC., and)
CONSOLIDATED RAIL CORPORATION)

and)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES;)
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,)
IRON SHIP BUILDERS, BLACKSMITHS, FORGERS)
AND HELPERS; BROTHERHOOD RAILWAY CARMEN)
DIVISION-TRANSPORTATION COMMUNICATIONS)
INTERNATIONAL UNION; INTERNATIONAL)
BROTHERHOOD OF ELECTRICAL WORKERS;)
NATIONAL CONFERENCE OF FIREMEN AND OILERS;)
INTERNATIONAL ASSOCIATION OF MACHINISTS)
AND AEROSPACE WORKERS; and SHEET METAL)
WORKERS' INTERNATIONAL ASSOCIATION)

PRE-HEARING BRIEF OF THE
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I. INTRODUCTION

This brief is submitted by the Brotherhood of Maintenance of Way Employees ("BMWE") in response to the *New York Dock*¹ notice served by CSX Transportation ("CSXT"), Norfolk Southern Railroad ("NSR") and Consolidated Rail Corp. ("Conrail") (referred to collectively herein as the "Carriers") on August 24, 1998. The notice sought an arrangement for selection of maintenance of way forces and assignment of maintenance of way employees in connection with the operational division of Conrail's assets among CSXT, NSR and residual Conrail, which will operate certain Shared Assets Areas ("Conrail/SAA"). CSX Corp. ("CSX") and Norfolk Southern Corp. ("NSC") acquired control of Conrail and authority to effect their planned division of Conrail operations among CSXT, NSR and Conrail/SAA through the decision of the Surface Transportation Board ("STB") in *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.-Control and Operating Lease Agreements-Conrail Inc. and Consolidated Rail Corp.*, Finance Docket No. 33388, Decision No. 89 (Served July 23, 1998) (referred to herein as "*CSX/NS-Conrail, Decision No. 89*", relevant portions reproduced in BMWE's Appendix of Exhibits as Exhibit 1). The combined acquisition of control of Conrail, division of its assets and

¹ *New York Dock Ry.--Control--Brooklyn Eastern District Terminal*, 360 ICC 60 (1979).

separate operations of its lines in conjunction with CSXT and NSR lines will be referred to herein as the "Transaction".

The Carriers basically propose: 1) to divide Conrail's maintenance of way workers among CSXT, NSR and Conrail/SAA based on where the workers are working on the division day; 2) to eliminate all existing Conrail seniority districts (regardless of whether they will be significantly affected, or even affected at all) by the division of Conrail, 3) to create huge new CSXT and NSR seniority districts or regions; 4) in the case of CSXT, to combine existing CSXT seniority districts covered by separate collective bargaining agreements ("CBA") that have no relation whatsoever to the acquired Conrail lines, into two single, huge consolidated seniority districts which will include only insignificant or relatively small amounts of Conrail property, and to combine all other Conrail seniority districts assigned to CSXT into a third single huge consolidated district which would include only former Conrail properties; 5) in the case of CSXT, in two of the three planned new districts to place all acquired Conrail lines and former Conrail maintenance of way employees under a CSXT (former B&O) agreement along with other CSXT employees who are not currently covered by the B&O agreement; 6) in the case of NSR, to place all acquired Conrail lines and former Conrail maintenance of way employees in a huge new seniority district comprised of all Conrail territory to be operated by NSR, under an NSR CBA, even though no NSR seniority

districts or employees are being combined with Conrail seniority districts or employees; 7) to create new arrangements for their regional and system production gangs (e.g. large, heavily mechanized, programmed gangs such as rail and tie gangs) to operate over both their pre-Transaction and post-Transaction properties; 8) to create single Conrail/SAA seniority districts which would remain under the Conrail CBA; and 9) to move roadway equipment maintenance and repair work and employees and rail welding work and employees to CSXT and NSR facilities under CSXT and NSR CBAs. *See Carriers' New York Dock notice, BMWE Appendix 2* (highlighting on maps added by BMWE).

BMWE has responded by proposing: 1) modifications of the existing Conrail seniority districts which are to be divided among the three Carriers so that the existing districts are realigned in a manner consistent with the division of Conrail properties among the Carriers; 2) to allow employees in split and realigned districts, and employees working away from their original home districts under BMWE-Conrail CBA rules, to choose their districts; 3) to permit CSXT and NSR to run their regional and system production gangs over the Conrail properties that they will operate and to do so under the CSXT and NSR CBAs with BMWE concerning such gangs; 4) to permit CSXT and NSR to move roadway equipment maintenance and repair work and employees and rail welding work and employees from Conrail facilities to CSXT and

NSR facilities under CSXT and NSR CBAs; 5) to retain the BMW-
Conrail CBA for all former Conrail maintenance of way workers
performing division and section work (track, bridge and building
and field roadway equipment work) on former Conrail lines
following realignment of pre-Transaction Conrail seniority
districts. Thus, BMW would allow consolidation of system
operations such as regional and system production gangs and shops
under the CBAs of CSXT and NSR, but would retain the Conrail CBA
for all division and section maintenance of way work confined to
the lines that formerly were Conrail lines, within seniority
districts that would comport with existing Conrail districts
except for modifications necessary to align the districts with
the manner in which Conrail is to be divided.

The foregoing brief summary of the background of this
proceeding and the positions of the parties demonstrates three
important points about this case.

First, the Carriers' notice involves something that is
unprecedented: the break-up of a Class I carrier and the division
of most of its properties between two other Class I carriers,
with retention of the remaining properties by the first carrier
which will nonetheless be controlled by the other two carriers.
The Transaction involves a three-way split of a carrier with each
employee assigned to one of the Carriers effective on the first
day of divided operations. The Carriers may attempt to argue that

this case is a run-of-the-mill *New York Dock* case involving consolidations of previously separate carriers and previously separate maintenance of way work forces. And they may cite prior *New York Dock* arbitration decisions as precedent. But it is clear that this is not a simple consolidation of separate carriers, that the vast majority of the Conrail maintenance of way workers will not be consolidated with CSXT or NSR maintenance of way workers and that nothing like this has ever happened before.

Second, the Union's response is unusual because BMWWE does not argue for complete retention of existing seniority districts and CBAs as they currently are, but instead concedes certain seniority district and CBA changes to permit consolidated system operations and facilities under the agreements of the operating carriers, while insisting on retention of the existing Conrail CBA and most of the existing Conrail seniority district structure for day-to-day division and section maintenance of way work. BMWWE has responded to the Carriers' plans for actual consolidations of CSXT and former Conrail territories and employees, and NSR and former Conrail territories and employees, by acceding both to the proposed system consolidations described by the Carriers in their submissions to the STB (e.g. regional and system production gangs and shop facilities) and to application of the CSXT and NS agreements to all employees involved in those consolidated forces.

Third, BMW's approach contrasts with the approach of the Carriers which is an arrogant and greedy misuse of the *New York Dock* process. The Carriers seek to use the *New York Dock* Article I §4 implementing agreement process, which is designed for selection of forces and assignment of employees when forces are rearranged in transaction-related consolidations, to combine Conrail seniority districts that are not being consolidated with CSXT or NSR seniority districts (and CSXT seeks to combine some of its own current seniority districts that will not be consolidated with Conrail seniority districts); and they seek to combine seniority districts where there will be no integration of Conrail forces with CSXT or NSR forces. They further seek to place thousands of Conrail maintenance of way employees under CSXT and NSR CBAs, notwithstanding the mandate of Article I §2 of the *New York Dock* conditions that rates of pay, rules and working conditions shall be preserved, even though those employees will not be combined with employees who are covered by CSXT or NSR CBAs. Finally, the Carriers are intent on eliminating certain rights of Conrail maintenance of way workers that are immutable rights, privileges and benefits under Article I §2.

BMW will show that the Carriers can not demonstrate, and that it certainly can not be found, that their plans with respect to division and section forces are proper under the Article I §4 implementing agreement process or are permissible under

Article I §2. BMWE will also show that there is no coordination and no need for selection of forces or assignment of employees here, other than for division of the Conrail workers among the carriers and for the regional and system production gangs and the roadway equipment and welding shops. The substitution of NSR and CSXT agreements for the Conrail agreement is not a transaction or a coordination or a consolidation; it is not permissible under the employee protective conditions. BMWE will further show that the agreement abrogations planned by the Carriers are not necessary to the Transaction in any meaningful sense of the word "necessary", are contrary to applicable appellate precedent and are inconsistent with recent STB decisions regarding Sections 2 and 4 of Article I of the *New York Dock* conditions. And BMWE will also show that its proposals would allow division of the Conrail forces and implementation of the system consolidations planned by the Carriers in a manner that provides a fair arrangement for employees and insures preservation of the pre-Transaction CBA rights of Conrail employees to the maximum extent possible without impeding the Transaction or preventing realization of efficiencies related to consolidations of the CSXT and CSXT operated former Conrail properties or of the NSR and NSR operated former Conrail properties.

II. BACKGROUND

A. Conrail and Its Acquisition By CSX and NS

Conrail was created in 1973 out of the ashes of the Penn Central and a number of other troubled northeastern and midwestern railroads. *In Re Penn Central Transp. Co.*, 384 F. Supp. 895, 903-904, (Sp. Ct. R.R.R.A. 1974); *Hinds v. Consolidated Rail Corp.*, 581 F. Supp. 1350, 1353-54, (Sp. Ct. R.R.R.A. 1974). Conrail was privatized in 1987 and it became a profitable corporation. Between 1973 and 1987 thousands of railroad workers lost their jobs and thousands of others made many sacrifices in connection with the reorganization of the northeastern railroads into Conrail and with making Conrail an efficient, effective and profitable railroad. *Hinds*, 518 F. Supp. at 1354; *Railway Labor Exec.'s Ass'n v. U.S.*, 575 F. Supp. 1554, 1556 (Sp. Ct. R.R.R.A. 1983); *United Transp. Union v. Consolidated Rail Corp.*, 593 F. Supp. 697, 702-03, (Sp. Ct. R.R.R.A. 1982).

In October of 1996, CSX entered into an Agreement and Plan of Merger (Merger Agreement), with Conrail, Inc. pursuant to which Conrail and CSX would merge as equals. In response to that news, Conrail's stock rose from its Friday, October 11, 1996, price of \$71 a share to about \$85 per share on Tuesday October 14, 1996. *Journal of Commerce*, Oct. 16, 1996. Faced with the possibility of a Conrail-CSX alliance, NS attempted to

purchase all outstanding Conrail voting stock at \$100 a share. For the next several months. In April of 1997, the battle over Conrail culminated when CSX and NS agreed to a joint acquisition of Conrail. CSX and NS paid an unprecedented \$115 a share for Conrail stock.

B. The Transaction As Described In The CSX/NS Application To The STB

CSX and NS sought to acquire control of Conrail and to split-up operation of portions of its territory among CSXT, NSR a Conrail/SAA. Conrail would generally be divided into its pre-reorganization parts. CSXT would operate the former New York Central lines and NSR would operate the Pennsylvania Railroad lines, except that the commonly controlled Conrail/SAA would operate large terminal areas and related lines in Northern New Jersey, Southern New Jersey/Philadelphia and the Detroit area (but CSX and NS will also operate and serve shippers and terminals within the SAAs). CSX/NS Application ("Appl.") Vol. I at 34-41, BMW Ex. 3. Conrail facilities would generally be allocated between CSXT and NSR in a manner consistent with the allocation of lines.

The Applicants made a number of claims that approval of the Transaction will be in the public interest because of alleged improvements in service. In the "Public Interest Justification" portion of the Application (Appl. Vol. 1 at 16-17), Applicants cited increased competition, greater service options and improved

rail networks as the public transportation benefits of the Transaction. They expressly cited claimed benefits of "more single line service", "reduced terminal delay", "improved equipment utilization and availability", "savings from facility consolidations and lower overheads [citing the operating plans]" and "increased capital investments". *Id.* at 22-24. More specifically they referred to new single line service, reduced interchange, efficient expanded networks, and development of more direct routes, as well as subsidiary benefits of better equipment utilization, reduced fuel consumption, faster service, movement of freight from trucks to rails, and increased intramodal and intermodal competition. *Id.* These claims were echoed in the Applicants' Operating Plans. NS cited alleged public benefits of new and expanded routes (Appl. Vol. 3B (BMW Ex. 4) at 14-18), better routes and more flexible routings (*id.* at 41), better blocking of trains (*id.* at 44), more single line service with the ability to avoid terminals (*id.* at 31-35, 44-45), and the consolidation of yards (*id.* at 53-57). CSX cited alleged public benefits of extension of its network reach (Appl. Vol. 3A (BMW Ex. 5) at 8), increased single line service (*id.* at 14, 35-52), improved yard and terminal operations (*id.* at 18), better equipment utilization (*id.* at 31-32), better routes and networks (*id.* at 35-52), and yard consolidations (*id.* at 18-20).

In discussing the asserted effects of the Transaction on the adequacy of transportation, Applicants again cited more single line service, new and improved routes, more reliable service, improved equipment utilization and reduced terminal delay. Appl. Vol. 1 at 22-23. In addition to these claims which, if correct, relate rather directly to provision of fast and effective transportation service, the Applicants also self-servingly cited reducing their own costs and minimizing administrative difficulties as public benefits of the Transaction. *See, e.g.*, Appl. Vol. 1 at 4, 13, 24; Transcript of deposition of Labor Relations Vice Presidents Peifer and Spenski ("Peifer/Spenski Tr.") at 162-168, (BMWE Ex. 6); Transcript of deposition of CSX Operating Plan witness Orrison (BMWE Ex. 7) at 677-678; Transcript of deposition of NS Operating Plan witness Mohan (BMWE Ex. 8) at 503, 510. CSX Operating Plan witness John Orrison specifically referred to the perceived need to make CSXT generally more efficient and that CSXT was currently working to "modernize" its CBAs and that CSXT had to be responsive to the stock market where investors expect a return on their investment. Orrison Tr. at 676-678. As will be discussed more fully below, reducing the Carriers' costs and easing their administrative problems are private rather than public benefits.

C. Applicants' Operating Plans as They Relate to Maintenance of Way Work

CSX and NS provided the STB with proposed Operating Plans which both described the manner in which they planned to operate the Conrail lines if the Board approved their Application and made claims that the planned operations would be in the public interest.

With respect to maintenance of way work, CSX's Operating Plan witness John W. Orrison stated that "[t]he addition of Conrail lines, properties, equipment and work forces in the CSX system will provide opportunities for coordination and improvement of maintenance-of-way programs". Appl. Vol. 3A (BMWE Ex. 5) at 71. Mr. Orrison cited several perceived improvements in operations as a result of the addition of Conrail lines to the CSX lines. He stated that CSX could incorporate the Conrail lines into its production gang programmed maintenance work for track, tie and surfacing projects, thereby allowing greater use of such gangs, deployment of such gangs all year round, and greater scheduling flexibility for such gangs. Another efficiency improvement cited by Mr. Orrison was the ability to consolidate work equipment repair at the CSX Richmond shops. He also cited the ability to use CSXT's computerized track maintenance program, the ability to take advantage of increased "on-line" sources of materials and Conrail's ability to transport large track and switch panels to be installed on CSXT lines. *Id.* at 71-73.

The actual CSXT Operating Plan contained a section titled "Coordination of Maintenance of Way" which referred to "opportunities for more efficient maintenance of the combined network's physical plant". *Id.* at 306. CSXT cited "productivity gains in programmed rail and tie renewal and surfacing operations", *i.e.* production gang work, by use of system production gangs to cover the combined system and the ability to use such gangs year round. CSXT also cited the ability to do year round scheduling of "non-track" programmed maintenance such as vegetation control, yard cleaning rail grinding, rail testing and ballast cleaning. CSXT claimed that consolidation of work equipment maintenance and rail welding for the combined system would improve productivity and efficiency. And CSXT asserted that it would benefit from use of Conrail's equipment for transport of large prefabricated track and switch panels. The Operating Plan asserted that "[c]onsolidation of maintenance operations and work forces at roadway shops, bridge fabrication shops and other such facilities will improve quality and productivity of those activities". *Id.* at 306-310. Both Mr. Orrison's statement and the actual Operating Plan were silent as to a perceived need to coordinate day-to-day division and section maintenance work, and as to perceived benefits from changes in the way such work is done on the Conrail lines.

NS' Operating Plan witness, Michael Mohan, described NS' claimed improvements in maintenance of way work as flowing from implementation of uniform engineering standards, elimination of the Conrail rail welding and work equipment shops with consolidation of their work at NSR shops as asserted benefits of the Transaction. Appl. Vol. 3B (BMW Ex. 4) at 61-62. Under the headings of "Coordination of Maintenance of Way" and "Maintenance of Way and Structures" (*id.* at 330, 337) NS described its plans for such work on the combined system. NS stated that it would apply its production gang policies to the Conrail lines, that it would operate with gangs performing work on both current NS lines and Conrail lines to be operated by NS, and that this would enhance efficiency, productivity and safety. *Id.* at 337. NS also asserted that there would be benefits flowing from the consolidation of Conrail and NS work equipment and coordination of work on such equipment at the NS shops at Charlotte, from consolidation of rail welding work at NS' Atlanta shops and use of NS' in-house production of pre-fabricated trackwork. *Id.* at 271-272. NS also said that it would apply on Conrail its practice of performing day-to-day track, structures and equipment maintenance work on the "division level" and that it would establish three divisions for such work within the former Conrail region. While indicating that this approach would comport with practice on NSR, NS did not state or imply that any benefit or

transaction related efficiency would flow from such a change in the territories for day-to-day, division and section maintenance of way work on the former Conrail lines. *Id.* at 338.

D. Applicants' Statements Regarding The Impact Of The Transaction On Maintenance Of Way Employees

The Carriers stated that the maintenance of way craft would be one of the crafts most adversely affected by the Transaction, with a net loss of somewhere between 450 and 600 jobs and with transfers of about 100 employees. Additionally, the Carriers discussed their plans for consolidations of work and for allegedly related changes in seniority and in CBAs.

1. CSXT Statement Regarding The Impact Of The Transaction On Maintenance Of Way Employee Seniority and CBAs

CSX stated that "In order for the expanded CSX system to realize the benefits and efficiencies afforded by the Operating Plan, a significant rearrangement of the districts for the train and engine, maintenance of way, signal, clerical, mechanical and other employees will be necessary. The Operating Plan also requires a repositioning of the combined workforce." *Appl. Vol. 3A (BMWE Ex. 5)* at 485. CSX asserted that it would be necessary to create three new large seniority districts a Northern District (comprised solely of Conrail lines between Boston, New York/New Jersey, Quebec and Cleveland), an Eastern District (comprised of B&O, C&O, RF&P, SCL lines and a short segment of Conrail in New Jersey, Pennsylvania, Maryland, West Virginia,

Virginia, North Carolina, West Virginia and Ohio), and a Western District (comprised of C&I, B&O, Pere Marquette, C&EI, Monon, L&N and Conrail lines in Ohio, Indiana, Illinois, Missouri and Kentucky). *Id.* at 490-91. CSX further asserted that it would be necessary to have single CBAs applicable in each of these new districts, indeed having single CBAs in these districts was described as "indispensable" to the Transaction. *Id.* However, CSX did not specify why it believed that these new large consolidated seniority districts were necessary to advance any public transportation purpose, or why the inclusion in the new districts of CSXT properties that did not even remotely touch Conrail lines was necessary. Nor did CSXT relate the alleged need to create the new districts to any component of its Operating Plan. While CSXT did assert that it wanted to create districts covering all CSXT lines in a "common geographical area" (*id.* at 490), CSXT did not explain how it arrived at the rather large common areas described, or how those areas had anything to do with the joining of former Conrail lines with CSXT lines.

CSXT also asserted that it used system production gangs, that it planned to use such gangs over the combined CSXT-CSXT/former Conrail system and that it would be necessary to arrange to allow such gangs to operate over the combined system. *Id.* at 491-92. This plan was consistent with the CSX Operating Plan which called for such gangs and described them as improving

efficiency and productivity in a manner that would constitute a public transportation benefit of the Transaction. Moreover, this plan involved a coordination of the heavy programmed maintenance work of both the CSXT and the former Conrail properties.

Similarly, CSXT asserted that it was necessary to consolidate roadway equipment work and rail welding at CSXT facilities under CSXT CBAs. *Id.* at 492-93. This plan too was consistent with the CSX Operating Plan which called for such consolidations and described them as improving efficiency and productivity in a manner that would constitute a public transportation benefit of the Transaction; and it too involved coordination of CSXT and former Conrail work.

2. NS Statement Regarding The Impact Of The Transaction On Maintenance Of Way Employee Seniority and CBAs

NS asserted that "to realize the productivity improvements and transportation benefits from the transaction, as envisioned in the Operating Plan" it would be necessary to apply NS' Norfolk & Western/Wabash--BMWE CBA and N&W production gang agreement to allow rail and tie and surfacing gangs to operate over N&W, Wabash, Nickel Plate and former Conrail properties. *Appl. Vol. 3B (BMWE Ex. 4)* at 369. This plan was consistent with the NS Operating Plan which called for such gangs and described them as improving efficiency and productivity in a manner that would constitute a public transportation benefit of the Transaction. Moreover, this plan involved a coordination of the heavy

programmed maintenance work of both the NS and the former Conrail properties.

NS also asserted (*id.* at 369-70) that "[t]o permit operation of the expanded NS system (including the Conrail lines) in a practical and efficient manner, as envisioned in the Operating Plan, and to establish a logical and rational arrangement to address new operating patterns and achieve the transportation and productivity benefits contemplated by the transaction" NS would establish a new managerial "region" comprised of the Conrail lines to be operated by NSR, which would have three separate divisions (for day-to-day work, *id.* at 338) and which would be placed under the N&W/Wabash CBA. However, unlike the changes involving production gangs, NS did not explain how this plan related to any asserted transaction related transportation benefit to be derived from the Operating Plan other than to claim that these changes were rational and practical. Nor did NS demonstrate that there would be any coordination of N&W/Wabash maintenance of way work or employees with the maintenance of way work and employees for the former Conrail lines to be operated by NSR; indeed NS' statement indicated that the former Conrail maintenance of way region would be separate and distinct from any pre-Transaction NS maintenance of way territory.

Like CSX, NS asserted that it was necessary to consolidate roadway equipment work at its own facilities under NS CBAs. *Id.*

at 370-71. This was consistent with the NS Operating Plan which called for that consolidation and described it as improving efficiency and productivity in a manner that would constitute a public transportation benefit of the Transaction. And such consolidation involved coordination of both NS and former Conrail work.

3. CSX/NS Statement Regarding The Impact Of The Transaction On Maintenance Of Way Employee Seniority and CBAs in SAAs

CSX and NS submitted a joint statement regarding Conrail/SAA maintenance of way work, indicating that Conrail seniority districts covering the SAAs would have to be changed so that they conformed to the territories of the SAAs, that the BMW-Conrail CBA would continue to apply in the SAAs except that programmed rail, tie and surfacing work for the SAAs would be done by CSXT or NSR production gangs, continuous welded rail would be purchased from CSX or NS and that roadway equipment work that the SAAs are unable to perform would be the responsibility of CSX or NS. Appl. Vol. 3B at 393-94.

E. The Carriers' Responses To Union Discovery

BMW participated in the STB proceedings on the Transaction with a group of other rail unions referred to collectively for that case as the Allied Rail Unions ("ARU"). The ARU propounded written discovery requests to the Carriers and deposed CSX Labor Relations Vice President Kenneth Peifer and Robert Spenski (a

joint deposition), CSX Operating Plan witness Orrison and NS Operating Plan witness Michael Mohan. In written and oral responses to ARU the Carriers and their representatives addressed ARU inquiries regarding their plans with respect to seniority district changes and CBAs, as well as their purported justifications for those plans.

The Carriers generally stated that they had not computed any dollar value to savings to be obtained by changes in CBAs and that the financial benefits to the Transaction that they described to the STB did not include savings from CBA changes. Ans. to ARU Int. #1 (BMW Ex. 9). They further stated that they had not identified any particular rules or working conditions that they wanted to change, they merely defined areas they wanted to combine and decided that single agreements of their choice should be applied in each such area. Ans. to ARU Int. #6 . They asserted that this would allow assignments without regard to the former railroads of the employees involved and would be minimize administrative problems. Ans. to ARU Int. #16. Although the Carriers said that they wanted uniformity of agreements in the territories they planned to combine, they were not amenable to unions choosing the agreements, rather they would choose the agreements. Ans. to ARU Int. #17 (BMW Ex. 10).

Both Labor Relations V.P.s acknowledged that they currently operate their existing systems with multiple agreements, but insisted that they could not add the Conrail agreements to the

mix covering the sizable Conrail territories that they would respectively come to operate because they believed that the most efficient arrangement would be to have single agreements covering the territories they each defined in order to minimize administrative problems with respect to such items as payroll, grievance handling and contract administration. Peifer/Spenski Tr. (BMW Ex. 6) at 161-177. They said that they had not reviewed the Conrail CBAs or otherwise identified problematic contract provisions; they merely felt that it would be most efficient to have single agreements and that "the acquiring carrier" should decide. Peifer/Spenski Tr. at 176-177. Mr. Spenski said NS would use a contiguous area/physical location approach; NS would apply the NS agreement where the work would be done, or the NS agreement nearest the Conrail territory in question.

Peifer/Spenski Tr. at 216-19. Mr. Peifer said that CSX would apply the agreement which currently covered the preponderant number of employees in the location or area in question. *Id.*

The Carriers also provided individual responses on these subjects.

1. CSX Responses Regarding Seniority Districts and CBAs

CSX stated that it desired to create three large seniority districts: the Northern which would consolidate multiple Conrail seniority districts into a single district; the Eastern which would consolidate a small segment of Conrail with CSXT lines

that were still under separate agreements that related to pre-CSXT railroads (the B&O, C&O, RF&P and SCL); and the Western which would consolidate Conrail lines with CSXT lines that were still under separate agreements that related to pre-CSXT railroads (the B&O, C&O, Monon, C&EI, and L&N). CSX said that it sought these consolidations because there were Conrail and CSXT lines located in the same geographic areas (such as Conrail and B&O Chicago-Cleveland lines and Conrail and B&O E. St. Louis-Columbus lines [apparently the same geographic area could mean several states]). Ans. to ARU Int. #86 (BMWE Ex. 10). CSX claimed that placing these large regions into single districts under single agreements was "indispensable" to the Transaction because that would make CSXT more efficient by allowing better utilization of equipment, standardization of practices, less disruption in train operations with less costs associated with train delays, payments to crews and fuel costs. Ans. to ARU Int. #86-87 (BMWE Ex. 10 and 9). CSX also argued that there would be a benefit to linking maintenance of way districts with train and engine service districts. Ans. to ARU Int. #83-84 (BMWE Ex. 9). CSX claimed that those considerations supported inclusion of SCL and L&N lines in the new districts [even though those lines are not remotely near any Conrail lines]. *Id.* Mr. Peifer acknowledged that CSXT currently has 11 CBAs with BMWE in its entire system and that all of the thousands of miles of Conrail

lines assigned to CSX were covered by a single agreement, but he said CSXT did not want to become responsible for administering another BMWE agreement; CSXT wants unified operations under single CBAs.

However, CSX Operating Plan witness Orrison stated the Conrail lines would be integrated into the CSX system in the same manner as the former Chessie and Seaboard System lines with old boundaries eliminated [but where separate pre-CSXT (e.g. C&O, B&O, SCL, and L&N) remain]. Orrison Tr. (BMWE Ex. 7) at 649-51. Mr. Orrison stated that the three planned districts were based on train operations and train crew districts, but that he did not tell CSXT labor relations that the maintenance of way districts should be the same as the train and engine service districts, and that he did not know whether there was congruity among maintenance of way and train and engine districts elsewhere on CSXT. Orrison Tr. at 656-659. When asked two separate times whether he could identify any transportation benefit to having congruent maintenance of way and train and engine districts, Mr. Orrison could cite only coordination of track curfews for track maintenance work. Orrison Tr. at 656-659; 697-98. Mr. Orrison also acknowledged that CSXT currently has multiple agreements for maintenance of way workers. Orrison Tr. at 671. When he was asked whether he had any input into CSX's statement that having uniform agreements with unified work forces in the three large districts

was indispensable to achieving the efficiencies of the transaction (Appl. Vol. 3A (BMW Ex. 5) at 491), Mr Orrison said he did not other than to generally say that it was important to coordinate workers and work forces and have a "unified effort", and he cited as an example the need to combine train service between Indianapolis and Nashville and the advantage of coordinating the maintenance of way curfew work on those lines. Orrison Tr. at 724-25, 697-699. He also stated that he had not specified particular CBAs to the CSX labor relations office or stated that particular agreement terms were unacceptable except as to those that would prevent coordinated operations and facilities. Orrison Tr at 653-655.

2. NS Responses Regarding Seniority Districts and CBAs

NS stated that it wanted to establish its Conrail lines as a new region similar in status to its two existing regions (generally the former N&W/Wabash/Nickel Plate region and the former Southern/Central of Georgia region). Mohan Tr. (BMW Ex. 8) at 498-499, 541. The new region composed of former Conrail rail lines [to be called the Northeastern region] would be separate from the other regions. *Id.* NS asserted that it would establish three divisions within the Northeastern region; the region would be a seniority region for trackmen and the boundaries of the divisions would be the boundaries for rosters for bridge and building forces and equipment repair employees;

however, NS stated that "as a practical matter many forces responsible for day-to-day maintenance work report to a fixed headquarters point throughout the year and generally cover only a fraction of their seniority district or region". Ans. to ARU Int. #100,101 (BMWE Ex. 9, 10 and 11). Mr. Mohan stated that from an Operating plan perspective, and from the statement in the Plan that day-to-day maintenance of way track, structure and equipment work is managed on a division basis with forces dedicated to work in each division, he could not say whether the divisions would be seniority districts within the new region, but that he could not identify any reason why they would not be seniority districts. Mr. Mohan also acknowledged that, from a operations perspective, there was value in a method of assignment of maintenance of way employees who have a greater degree of familiarity with the sections of track that they are responsible for maintaining. Mohan Tr. at 542.

NS specifically stated that it had chosen to apply the N&W/Wabash agreement for the former Conrail track that NS would designate as the Northeastern Region, even though no N&W or Wabash lines or employees were being combined with former Conrail lines or employees. Ans. to ARU Int. #105 (BMWE Ex. 9). According to Mr. Spenski, the N&W/Wabash agreement was picked because it contained a DPG provision which allowed for regional production gangs and because that portion of NS territory was contiguous with the Conrail lines to be operated by NSR. Peifer/Spenski Tr.

(BMWE Ex. 6) at 358. In response to questions regarding its perceived need to apply the N&W/Wabash agreement to a new region that would not be integrated with the N&W/Wabash region, NS responded that applying that agreement to the new (former Conrail) Northeastern region was necessary to the Transaction because that would allow for a uniform payroll system, a common training facility, and ease of contract administration and grievance handling by virtue having a single agreement for the two administratively separate but physically adjoining (but not meshed) regions; NS contended elimination of potential administrative difficulties was a public benefit of the Transaction. Ans. to ARU Int. #105. When Mr Spenski was questioned as to why NS was unwilling to retain the Conrail CBA for a region that would be wholly composed of former Conrail track and employees, Mr. Spenski also cited administrative convenience (Peifer/Spenski Tr. at 161-177) and he repeatedly replied that NS wanted one company, one operation, one agreement. E.g. Peifer/Spenski Tr. at 365.

NS' Operating Plan witness Mohan said that he and his team did not tell labor relations that the Operating Plan required any particular agreement, and stated that he did not author or have input into NS' statement in the Operating Plan (Appl. Vol. 3B (BMWE Ex. 4) at 358) that the desired operational changes would not be feasible unless there was a single agreement, he and his

team merely advised that they needed the ability to use a hub and spoke system for train and engine service employees and to have system production gangs. Mohan Tr. (BMWE Ex. 8) at 501-04, 510-11. Mr. Mohan also cited reduction of potential administrative problems as supporting the decision not to retain the Conrail CBA on the region composed solely of former Conrail track and former Conrail employees, but he could not identify any Operating Plan problem with retention of the Conrail CBA. Mohan Tr. at 507-08, 592.

When Mr. Mohan was questioned regarding the Transaction benefits identified in the Application: more single line service, reduced classification, improved routings, better blocking, routing flexibility, reduced interchanges, network extension and yard consolidations, he could not identify how application of the N&W/Wabash agreement on the former Conrail territory would advance any of those goals; instead he fell back on the claim that elimination of the Conrail CBA and CBA terms would enhance productivity and efficiency and reduce labor costs. Mohan Tr. at 508-12, 530-32, 543-45. However, he too conceded that NS currently has multiple CBA for most of the crafts on its pre-Transaction properties. Mohan Tr. at 508.

The Carriers also addressed the seniority district and CBA change issues in a Rebuttal Verified Statement ("RVS") (BMWE Ex. 12) submitted by Messrs. Peifer and Spenski. On behalf of CSX they responded to the ARU assertion that it could not be

necessary to place all of the former Conrail employees on lines allocated to CSX under CSXT agreements because CSXT already had multiple agreements covering the various crafts on its pre-Transaction properties. They stated that while CSXT did indeed operate successfully with multiple agreements for each craft, "it does not usually administer multiple agreements at a facility or in a territory which has been coordinated pursuant to Board or ICC authorization. Peifer/Spenski RVS (BMW Ex. 6) at 23. They also cited several specific examples of rules that allegedly would create problems if two agreements were maintained in a coordinated area, such as seniority rules as they relate to bidding, assignment and displacement; classification of work rules, citing inconsistent provision of BMW and BRS agreements on B&B work and inconsistent BRS and IBEW rules on switch heater maintenance; and rules covering the operating crafts on classification of trains en route, deferments (delayed starts) and lap back (return of train to a passed location) all of which have penalty pay under the Conrail agreement but not on CSXT. They also again cited "administrative efficiencies from being able to apply a single labor agreement to employees performing consolidated work". Peifer/Spenski RVS at 31-35.

For NS the RVS asserted that "[t]he carrier cannot simply step into the role of employer under the previous owner's labor agreements". Peifer/Spenski RVS at 36. They said that the BMW districts and work zones on Conrail would be split and so could

not be retained, moreover it was asserted that retention of the Conrail CBA would prevent NS' use of regional/system production gangs. Peifer/Spenski RVS at 37, 42. Also discussed was NS' perceived need to utilize a hub and spoke system for train operations which would not work if crew changes at the borders of Conrail train and engine service districts were maintained. NS also asserted that retention of the Conrail shopcraft CBAs would interfere with NS' plan to do all General Electric locomotive work at the NS Roanoke shop and all General Motors locomotive work at the former Conrail Altoona shop. Peifer/Spenski RVS at 41. Finally, NS too responded to the ARU rejection of the Carriers' reliance on administrative convenience as justifying elimination of the Conrail CBA. It was noted that NS "currently administers (and will continue to administer) more than one agreement per craft", but that "with few exceptions" consolidated facilities and territories are under single agreements. Peifer/Spenski RVS at 44. NS claimed that administrative cost savings from having uniform rules was not trivial; that differences in crew calling rules, claims handling procedures, and assignment and bidding rules would "necessitate duplicate computer programming, additional staffing levels and unnecessary complication and confusion, while producing no corresponding benefit". Peifer/Spenski RVS at 45.

Messrs. Peifer and Spenski also argued that it was not feasible to compare agreements and that it could not be said that

one agreement was overall better or worse than another.

Peifer/Spenski RVS at 46-7, 50.

F. Applicants' Projected Savings From Reductions In Employment And Applicants' Projected Employee Protection Expenses

CSX projected that its planned reductions in agreement positions would result in annual "savings" \$30.3 million. NS projected that its planned reductions in agreement positions would amount to savings of \$44.1 million See Ans. to ARU Int. Nos. 209-212 (BMW Ex. 13 and 14). CSX projected its total employee protection obligations for agreement personnel to be \$66 million for agreement employees. Klick V.S. Vol. I at 443 (BMW Ex. 14). NS projected its total employee protection obligations for ^{all} ~~agreement~~ personnel to be ^{\$317} million. Ingram V.S. Vol. I at 591 (BMW Ex. 15) [REDACTED]

[REDACTED] (It appears that Conrail CEO David LeVan will receive approximately \$22 million and 77 top executives will receive combined payments averaging \$1.5 million a piece).

Significantly, neither CSX nor NS plans on making employee protection payments to agreement employees after year 3. Review of Applicants' projected employee protection costs and reduced employment savings produces the following information:

- CSX's total employee protection obligation for agreement employees will be \$66 million.

- CSX will save \$30.3 million from reduced employment of agreement employees each year after consummation of the transaction.
- NS' total employee protection obligation for *all* ~~agreement~~ employees will be [redacted] million.
- NS will save ^{\$79.9} [redacted] million from reduced employment of agreement employees each year after consummation of the transaction. ^{\$317}
- By year three, both CSX and NS will save more from reduced employment of agreement employees than *it* they will pay in total employee protection payments for agreement employees. *NS will save more from reduced employment generally than it will ever pay in total employee protection payments by year three.*

~~_____~~
~~_____~~
~~_____~~

This analysis refutes any claim by the Carriers that STB approval for their planned changes in agreements is some form of *quid pro quo* compensation for their employee protection obligations. This is not only bad history (*United States v. Lowden*, 308 U.S. 225, 233-34, 237 (1939) holding that employee protection is a *quid pro quo* for elimination of jobs and reductions in compensation), but it is also erroneous given actual analysis of employee protection payments and job elimination savings; the latter easily pay for the former.

G. BMW's Position Before The STB

BMW and the other ARU unions opposed the Transaction because of its impact on employment and because of the Applicants plans to change seniority districts and CBAs. BMW contended that

the Applicants had failed to demonstrate that the Transaction should be approved under the applicable public interest standards given all of the relevant factors to be considered. The unions also argued that CSX and NS were improperly seeking to use the Transaction and the *New York Dock* implementing arrangement process to pursue labor relations goals. Among other things the ARU asserted that CSX and NS were seeking massive changes in CBAs unrelated to any actual coordinations of territories in manner wholly at odds with the Railway Labor Act ("RLA"), and that their plans were even directly contrary to the *New York Dock* conditions (Article I §2) which require that rates of pay, rules and working conditions and other rights privileges and benefits of transaction-affected employees must be preserved.

ARU further argued that CSX and NS had not demonstrated that the changes in seniority districts and CBAs that they planned promoted any public transportation interest or that the sweeping changes that they proposed were in any way "necessary" to the Transaction. The ARU asserted that the Applicants statements and discovery responses revealed that they could not articulate a necessity justification for their plans as to CBAs and seniority districts. They had not demonstrated how the elimination of Conrail CBAs and how creation of the large seniority districts they planned were related to or would advance any of the public transportation benefits described in the Application (such as

more single line service, better routings, reduced interchanges, extended network reach); rather they had only asserted that elimination of the Conrail CBAs would be administratively convenient. The ARU contended that CSX and NS were using the Transaction to obtain goals that they had been unable to obtain, or did not want to seek to obtain, through collective bargaining.

However, the ARU argued that, if the Board nonetheless approved the Transaction, the approval should be accompanied by declarations that: (1) rates of pay, rules, working conditions and other rights, privileges and benefits under existing agreements must be preserved; (2) other provisions of CBAs may not be changed unless the carriers first show that the change is necessary to effectuate a public transportation benefit; (3) Applicants failed to make such a necessity showing; and (4) the Board did not explicitly or implicitly sanction the CBA changes discussed in Applicants' Operating Plans.

The ARU reiterated these assertions in the oral argument in this case, restating the unions' opposition to the Transaction, but also arguing for the requested declarations if the Transaction was approved. Oral argument Tr. (BMWE Ex. 18) at 197-203. With respect to the fourth declaration, ARU explained that because of past agency decisions, carriers had argued to arbitrators that approval of a transaction constituted implicit approval of every proposed CBA change in the operating plan, and

that arbitrators were accepting that argument. *Id.* at 203-04. Chairman Morgan inquired about that point and ARU further explained that because *New York Dock* arbitrators have been described as delegates of the Board, some have felt that they were not in a position to reject a carrier-proposed CBA change that was set forth in the operating plan when it was argued that the change would promote efficient operations, and ARU cited the example of a decision by arbitrator Edwin Benn to that effect. *Id.* at 224-226 and Benn award (BMW Ex. 19).

H. The STB's Decision

The STB issued its decision (BMW Ex. 1) on July 23, 1998. It approved the Transaction subject to certain conditions, including conditions relating to labor.

In describing the "public benefits" of the Transactions, the Board said that "[t]he most important public benefit of the transaction will be a substantial increase in competition by allowing both CSX and NS to serve where only Conrail served before." Decision at 129. The Board also found that the expansion of the NS and CSX systems would allow them to provide more single line service, more direct routes, to render improved service and to use equipment more efficiently. *Id.* at 130. The Board said that these features of the Transaction would improve operating efficiency, reduce transit times and terminal delays. The Board also cited logistics savings and improved competition with truck

which would take trucks off the roads and provide other environmental benefits as well as safety benefits. *Id.* at 130, 134.

With respect to employee issues, the Board imposed the *New York Dock* employee protective conditions as a condition of its approval of the Transaction, as it was required to do under 49 U.S.C. §11326. Decision at 125-26, 184. The Board also held that its "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; arbitrators are free to take whatever findings and conclusions they deem appropriate with respect to CBA overrides under the law". *Id.* at 126-27. See also separate statement of Chairman Morgan: "the Board has made clear in its decision, as requested by rail labor, that the Board's approval of the application does not indicate approval or disapproval of any of the involved CBA overrides that the applicants have argued are necessary". *Id.* at 188, emphasis in original.

**III. THE CARRIERS' NEW YORK DOCK NOTICE, THE PARTIES
NEGOTIATIONS AND PROPOSALS**

A. The Carriers' New York Dock Notice

On August 24, 1998 the Carriers served and posted a notice to the BMW, International Brotherhood of Boilermakers and Blacksmiths, Brotherhood Railway Carmen/TCU, International Brotherhood of Electrical Workers, National Council of Firemen

and Oilers/SEIU, International Association of Machinists and Sheet Metal Workers' International Association, and to their employees represented by those organizations, stating that they planned "to exercise authority conferred by the Surface Transportation Board in" *CSX/NS-Conrail, Decision No. 89*. See Notice (BMWE Ex. 2) [highlighting on maps added by BMWE]. The Notice further stated that the carriers intended to allocate employees represented by BMWE and maintenance of way equipment repair employees represented by the shopcraft unions among NS, CSXT and Conrail and to integrate them into "appropriate seniority rosters" for NS, CSXT and Conrail/SAA.

NS stated that it planned to establish the entire Conrail territory allocated to it as a new region with three divisions, track forces would be placed on a region-wide roster and bridge and building and equipment repair forces would be placed on division-wide rosters. NS would place all of these employees under the N&W/Wabash agreement. NS also stated that it planned to use production gangs called designated programmed gangs ("DPG") on the new region, under an N&W/Wabash production gang arbitrated agreement. NS also proposed an open-ended revision of rules on contracting-out for construction and rehabilitation work "initially required as a result of the authorized transaction".

CSXT stated that it planned to create three new track and bridge and building forces "consolidated seniority districts"

which were identified on a map at Appendix B to the Notice. Although not stated in the Notice, these new districts would include current CSXT properties along with allocated Conrail properties. Indeed the new Eastern district includes only a small segment of Conrail track; the remainder of the district would be composed of pre-Transaction CSXT track currently under several different CBAs (agreements applicable to the former B&O, C&O, RF&P, and SCL). The new Western district contains mostly pre-Transaction CSXT track; several different CBAs are currently in effect on those lines (agreements applicable to the former C&O, B&O, L&N, Monon, and C&EI). The Northern District contains only Conrail track. CSXT indicated that it proposed to apply the Conrail agreement in the Northern district but that the current CSXT lines in the Eastern District would all be placed under the B&O agreement, and that the current CSXT lines in the Eastern District would all be placed under the B&O agreement. CSXT also said that it planned to perform programmed production work on the former Conrail lines under the CST System production Gang Agreement ("SPG"). As to CSXT, the Notice did not invoke any STB or ICC decision other than CSX/NS-Conrail, Decision No. 89. CSXT too sought an open-ended right to contract-our work "initially required as a result of the authorized transaction".

The Notice also stated that the Carriers planned to consolidate work equipment repair work and rail welding work at

NS and CSXT facilities under NS and CSXT agreements with the shopcraft unions.

With respect to the SAAs, the Notice stated that existing Conrail seniority districts in the SAA areas would be consolidated into three single SAA districts which would continue under the Conrail CBA, except that certain programmed maintenance work, work equipment repair and rail welding work would be done by CSXT or NS under their agreements.

BMWE made counter-proposals to the Carriers and the parties met for negotiations but no agreement was reached.

B. The Parties' Proposals

1. The BMWE Proposal

The BMWE proposal (BMWE Ex.20) is designed to implement the proposed transaction, i.e., the allocation of Conrail's lines between NSR, CSXT and SAA in a manner that concedes those CBA changes that are "necessary" to implement the transaction. However, our proposal also is designed to create the least impact possible upon pre-transaction seniority rights of *all* employees involved in the transaction.

The BMWE proposal contains two basic stages. The first stage concerns those changes that must be made to the present Conrail seniority rosters and seniority districts *before* the parties engage in the actual selection of forces and assignment of employees to positions following the allocation. The second

stage of our proposal begins after the Conrail property is realigned in the first stage and after the carriers provide written notice of their intent to carry out the allocation of the Conrail trackage. Under our proposal all existing CBAs are preserved, except that regional and system gang operations on the allocated lines operated by NSR are governed by the Designated Program Gang agreement of June 12, 1992 ("DPG Agreement") and the same type of operations on the lines allocated to CSXT are governed by the System Production Gang agreement ("SPG Agreement"). Additionally Roadway Equipment Repairmen on CSXT, including former Conrail employees, will work under the system-wide Roadway Mechanic's Agreement. Any Conrail employees transferred to locations off the former Conrail lines, i.e., Charlotte, Richmond and Atlanta, will work under the CBAs applicable to the work performed at those locations.² Additionally, BMWWE would guarantee that under any circumstances, certain CBA provisions that involve rights, privileges and benefits of employees.

The BMWWE proposal can be summarized as follows:

Pre-allocation changes to Conrail rosters and districts

²On December 3, 1998, BMWWE informed the carriers that it would agree to CSXT's proposal to integrate Conrail MW Repairmen under CSXT Labor Agreement 12-126-92 ("Roadway Mechanic's Agreement"). BMWWE also informed NSR that it agreed in principle with the carrier's proposal to transfer employees to Charlotte, North Carolina provided certain changes were made to the advertisement procedure used to select employees for the transfer.

- freezing of the Conrail East and West Seniority Rosters and the integration of all employees on those rosters into existing District seniority rosters;
- adjustment of the existing Conrail seniority districts so that fragments of existing districts are not allocated to either CSXT or NSR; see color coded revisions to existing Conrail seniority district maps (BMW Ex.21), the maps assign each district to the carrier to which the lines of the district are assigned; where parts of a district are allocated to different carriers, the district is assigned to the carrier allocated the predominant portion of the district and the lines not allocated to that carrier are moved to an adjacent district that is assigned to the other carrier;

Selection of Forces and Assignment of Employees

- the carriers will advertise all fixed headquarter and mobile gangs they will operate on the allocated lines after the allocation is effected (includes NSR, CSXT and SAA);
- positions will be awarded to employees based upon their relative Conrail seniority on existing rosters;
- on implementation day, all pre-implementation jobs will be abolished and employees will begin service on their new positions working for the carrier operating the allocated lines;
- Conrail employees will be integrated onto the DPG and SPG rosters as applicable;
- otherwise, existing Conrail seniority rosters will be used for district operations on NSR and CSXT and work on the allocated lines will be performed under the Conrail-BMWE CBA; see maps detailing realigned former Conrail seniority districts within the territories allocated to CSXT and NSR respectively; BMW Ex. 22 for NSR and BMW Ex. 23 for CSX; the maps indicate revised districts and revised production zones within the allocated former Conrail territories for each carrier;
- other than the changes to the DPG and SPG Agreements and the job transfers to Richmond, Atlanta and Charlotte, there are no changes to other NSR or

CSXT seniority rosters or collective bargaining agreements; employees involved in day-to-day division and section work will continue to be covered by the agreement between BMW and Conrail;

- limited flowback rights -
 - o former Conrail employee may exercise seniority to another carrier if they possess seniority rights on a roster on the other carrier and the employee cannot hold a position (except for regional or system gangs) on his or her "home" road;
 - o the October 14, 1982 implementing agreement between BMW, Conrail and New Jersey Transit permitting Transit employees to flowback to Conrail expressly preserved.

Agreements

BMW would preserve the BMW-Conrail CBA on all former Conrail territories for division and section work. CSX and NS would apply their SPG and DPG agreements for their respective regional and system production gangs to operate on former Conrail properties. CSX and NS would apply their CBAs at the work equipment and rail welding shops to which Conrail work and employee would be transferred. BMW would preserve the CSXT-BMW agreements applicable on portions of CSXT that CSXT improperly proposes to include in new seniority districts through this proceeding.

Rights, Privileges and Benefits

BMW would guarantee that under any circumstances, certain CBA provisions that involve rights, privileges and benefits of employees, i.e. the Conrail Supplemental Unemployment Benefits ("SUB") Plan, the Conrail Agreement Employees' Savings Plan (a 401K plan), New Jersey Transit "Flowback Rights", the Conrail Continuing Education Assistance Plan, the L&N Laundry Allowances, the Conrail Safety Shoe Allowance.

2. The Carriers' Proposal

The Carriers' proposal (BMWE Ex. 24) provides for no employee involvement in the selection and assignment process. Essentially, employees are allocated to NSR and CSXT based upon the employees' current positions with Conrail. NSR proposes the elimination of the BMWE/Conrail CBA the lines it will acquire. Instead, those lines will become a new region within the current BMWE/N&W-Wabash CBA. CSXT's proposal preserves the BMWE/Conrail CBA in a new consolidated Northern District; however all existing Conrail seniority districts in that new area are eliminated. Otherwise, CSXT proposes the creation of two other "consolidated" seniority districts, the Eastern and Western. Each district will operate under the BMWE/B&O CBA and all other CBAs in the districts are eliminated as are all pre-transaction seniority districts. The SAA would continue to operate under the BMWE/Conrail CBA.

The Carriers' proposal can be summarized as follows:

- upon 7 days advance written notice Conrail employees will be allocated to NSR, CSXT and SAA based upon their work locations (headquarters) or current class of service (mobile gangs);
- employees allocated to NSR, CSXT or SAA will become employed exclusively by that carrier;
- DPG Agreement will govern regional and system work on lines allocated to NSR, SPG Agreement will govern regional and system work on lines allocated to CSXT;
- NSR and CSXT granted unrestricted right to subcontract maintenance of way work to perform "construction and rehabilitation;"

- Conrail lines allocated to NSR become new Northern Region under BMW/N&W-Wabash CBA;
- CSXT creates Eastern, Western and Northern seniority districts from Conrail lines allocated to it as well as all presently owned CSXT lines from St. Louis on the west, Louisville and Richmond on the south and north to the Canadian border and east to the Atlantic coastline.

Agreements

NS would eliminate the BMW-Conrail CBA on all Conrail properties allocated to NSR. CSX would retain the BMW-Conrail CBA in the proposed Northern seniority district, would eliminate the BMW-Conrail CBA and all CSXT non-B&O CBAs in the proposed Western seniority district, and would eliminate all CSXT non-B&O CBAs in the proposed eastern seniority district.

Rights, Privileges and Benefits

CSX and NS would not preserve certain CBA provisions that involve rights, privileges and benefits of employees

C. Invocation of Arbitration

On October 28, 1998 the Carriers wrote to the National Mediation Board requesting appointment of an arbitrator to resolve the matters in dispute under their August 24, 1998 *New York Dock* Notice. This Arbitrator was appointed by the NNB pursuant to Article I §4 of the *New York Dock* conditions.

D. The Effects Of the Parties' Proposals On CBAs

CSX and NS would simply eliminate the BMW-Conrail CBA; they make no effort whatsoever to comply with the requirements of Article I §2 of the *New York Dock* conditions that rates of pay rules and working conditions and other rights privileges and benefits **shall** be preserved; nor do they recognize any obligation

to accommodate the policies of the RLA. By contrast while BMWE would address the Carriers' professed needs by accepting application of the NS and CSXT agreements for actually coordinated facilities and for coordinated regional and system production gang work, BMWE would preserve the BMWE-Conrail CBA for the large number of employees who will continue to perform regular division and section maintenance of way work and non SPG or DPG production work on the former Conrail lines. Additionally, CSXT would eliminate the existing CBAs for many of its current employee who work under several present CSXT CBAs on lines that CSXT gratuitously and improperly seeks to include in the new seniority districts it would create.³

The loss of the Conrail agreement and the loss of the several CSXT agreements for many current CSXT is not a mere paper loss. It is obvious that changing the agreement coverage of all former Conrail maintenance of way employees, and many CSXT employees, where there is no real coordination of Conrail work with CSX and NS work is at odds with Article I §2 and the RLA. And BMWE will show that there is no necessity for the blanket elimination of the BMWE Conrail CBA planned by CSXT and NS. BMWE is not required to demonstrate the loss of particular rates of pay, rules and working conditions that would occur under the

³ Copies of the various agreements involved in this proceeding are contained in an appendix titled "Collective Bargaining Agreements".

Carriers' proposals, but it will briefly do so to illustrate the problem.

BMWE has prepared a comparison of rates of pay under the various agreements involved. BMWE Ex. 25. For example, under the Conrail CBA: 1) Production Foremen are paid \$17.45 per hour while the comparable rates are \$16.44 per hour under the N&W/Wabash agreement and \$16.56 per hour under the CSXT(B&O) agreement; 2) Conrail Foremen are paid \$17.01 per hour while the comparable rates are \$15.25 per hour under the N&W/Wabash agreement and \$16.28 per hour under the CSXT(B&O) agreement; 3) welders are paid \$16.58 per hour on Conrail and \$15.94 on N&W and \$16.56 on the former B&O; 4) Class 1 machine Operators are paid \$17.09 per hour on Conrail and \$16.23 per hour under the B&O agreement and Class 2 machine Operators are paid \$16.60 per hour on Conrail and \$15.85 per hour under the B&O agreement; under the N&W/Wabash agreement backhoe operators are paid \$15.81 per hour and crane operators are paid \$15.89 per hour. The Carriers may argue that these differences will be compensated under the *New York Dock* conditions, but at the end of their protective periods the employees involved will be paid at lower rates.

Additionally, CSXT employees on the territories that CSXT plans to combine under the B&O agreement, under guise of coordination with the former Conrail lines, would also lose advantageous pay rates. For example, C&O production foremen are

paid \$16.89 per hour whereas B&O production foreman are paid \$16.56 per hour; C&O foremen are paid \$16.78 per hour whereas B&O foreman are paid \$16.38 per hour; C&O A Operators are paid \$16.55 per hour whereas B&O A Operators are paid \$16.23 per hour; and C&O welders are paid \$17.42 per hour whereas B&O welders are paid \$16.65 per hour. For more detail see BMW exhibit 28 for examples involving agreements other than the C&O and B&O agreements.

BMW has also prepared a comparison of job classification on Conrail with job classifications under the N&W/Wabash and CSXT(B&O) agreements. BMW Ex. 26. These charts show that there are more job classifications under the BMW-Conrail CBA. The loss of job classifications has several effects. First it means that employees would be moved into different classifications, often at lower rates of pay. Second, the existence of more classifications provides greater job security to employees because their seniority protects them within their classifications; if an employee is placed in a more generic classification he loses the advantage of accumulated seniority in a specialized area. Third, some of the job classifications eliminated are higher paid positions than the broader job classifications on the other carriers; this means that current holders of such positions would lose the higher pay rates and that junior employees would lose the opportunity to advance to higher pay rates in more specialized classifications.

Additionally, BMWWE has prepared a chart (BMWWE Ex. 27) which compares certain Conrail rules with rules under the N&W/Wabash CBA and the CSXT(B&O) CBA. That chart shows that in losing the Conrail agreement, maintenance of way employees would lose: accumulated seniority in existing home districts and relative seniority standing within those districts; the ability to work in geographically manageable districts instead of the CSXT and NS proposed districts that would require employees to travel hundreds and perhaps a thousand miles to work sites; job security established in Conrail job classifications (*see above*); guaranteed lodging when away from home; travel expense allowances that cover more of the cost of travel to away from home work sites than the N&W and B&O; higher rates of pay (*see above*); a \$.30 per hour differential for employees required to hold a commercial driver's license; Supplemental Unemployment Benefits (*see also below*); and the ability to be subject to recall, and the limited requirement to exercise seniority, within work zones as opposed to much larger districts proposed by CSX and NS. See BMWWE Ex. 27 for more detailed discussion.

BMWWE has also prepared a chart demonstrating the adverse effects on present CSXT maintenance of way employees if the CSXT plan to coordinate some of its current properties under this proceeding is permitted even where there is no coordination with Conrail work. See BMWWE Ex. 28. CSXT's proposal would create new

huge seniority districts replacing the current more manageable districts on these CSXT properties. CSXT' proposal creating the large districts would also prevent employees from receiving the higher (\$110 per week) non-SPG production gang travel allowance, instead they would receive the lower rate of \$25 per week or \$50 per week when round trip travel exceeds 400 miles. Under CSXT's plan various advantageous rules would be lost; such as the C&O Southern rule that foremen be assigned to work with contractors, the Toledo Terminal rule reserving blacktopping to maintenance of way employees, and the L&N rule against contracting-out welding work. CSXT would also eliminate job classifications that are present under its agreements other than the B&O agreement. And CSXT would eliminate advantageous rates of pay on under the agreements applicable on the former C&O, L&N, Seaboard and B&OCT. See BMWEx. 28 for more detailed discussion. Additionally, both CSXT and NS would eliminate rules under all agreements that place restrictions on contracting-out for construction and rehabilitation described as "initially required as a result of the authorized transaction".

Thus it is clear that the elimination of the BMWEx-Conrail CBA would have certain definite adverse impacts on employees covered by that agreement.

E. The Effects Of the Parties' Proposals On Employee Rights, Privileges and Benefits

In eliminating the BMW-Conrail CBA, CSX and NS would also eliminate certain CBA rights of Conrail employees that are within the STB and judicially approved definition of rights, privileges and benefits that are "immutable" under Article I §2 of the *New York Dock* conditions and thus may not be changed for any reason. This is discussed more fully in the argument portion of the brief but among the rights, privileges and benefits that would be lost by the Conrail maintenance of way employees under the proposals advanced by CSX and NS are: the Supplemental Unemployment Benefits Plan (BMW Ex. 29); the Conrail Agreement Employees' Saving [401K] Plan (BMW Ex. 30); the New Jersey Transit agreement flowback rights (BMW Ex.31); the Conrail Continuing Education Assistance Plan (BMW Ex.32); and the Conrail Safety Shoe Allowance (BMW Ex. 34). Additionally, under the CSX proposal, employees on the former L&N line who would be placed under the B&O agreement would lose a Laundry Allowance (BMW Ex. 33). The Carriers proposals would eliminate these immutable rights/benefits. BMW's proposal would preserve these rights/benefits. Indeed, BMW asserts that the arbitrator must preserve these rights/benefits.

V. ARGUMENT

EMWE'S PROPOSALS PROVIDE A FAIR AND APPROPRIATE ARRANGEMENT FOR SELECTION OF FORCES AND ASSIGNMENT OF EMPLOYEES THAT IS WITHIN THE SCOPE OF THE ARBITRATOR'S AUTHORITY, WHEREAS THE CARRIERS PROPOSALS ARE NOT FAIR, APPROPRIATE OR WITHIN THE SCOPE OF THE ARBITRATOR'S AUTHORITY

This is an arbitration under Article I §4 of the *New York Dock* conditions imposed by the STB in *CSX/NS-Conrail, Decision No. 89* and it consequently concerns creation of an appropriate and fair arrangement for selection of forces and assignment of employees in connection with the coordinations and rearrangement of forces planned by the Carriers in implementing the Transaction. The scope of Article I §4 proceedings and the authority of arbitrators in such proceedings has been the subject of much litigation between rail labor and rail management over the years, especially over the last fifteen years.

Although the language of Article I §4 is directed solely to selection and assignment issues, *i.e.* integration of previously separate work forces and distribution of work, rail management has argued that such proceedings must address changes in CBAs related to those issues, including general changes in CBA coverage. Rail labor has long argued that CBA changes are beyond the scope of authority of Section 4 arbitrators and that such changes must be made under the Railway Labor Act. Recent decisions affirmed by the D.C. Circuit have held that arbitrators may authorize selections of forces and assignments of

work that would otherwise be prohibited under scope and seniority rules of applicable CBAs, and that CBA provisions creating employee rights, privileges and benefits are "immutable". However, the scope of arbitrator authority with respect to other matters remains subject to dispute. BMWWE will first review and explain the scope of this Arbitrator's authority in this case and will then show that BMWWE's proposal is fair and appropriate and within the scope of his authority, whereas the Carriers' proposal is not.⁴

A. Overview

In 1967, when the ICC explicitly added Article I Section 4 to its conditions, the Commission said that Section 4 was designed to develop fair arrangements for integration of forces and distribution of work and that CBAs could be modified in connection with such arrangements only to the extent that seniority and scope type provisions would conflict with the arrangements deemed appropriate. *Southern Ry.-Control*, 331 I.C.C. 151, 169 (1967) (BMWWE Appendix of Authorities, "Auth.", 1). The Commission said that while such arrangements could supercede

⁴ As is noted above, in this case the union has not advanced the absolutist position that the implementing arrangement may not authorize any actions or practices inconsistent with any pre-existing CBA terms. BMWWE's proposal would permit a selection of forces and assignment of employees that would otherwise be prohibited under applicable CBAs, the use of SPGs and DPGs on former Conrail lines under CSXT and NSR agreements and consolidation of work equipment maintenance and rail welding at CSXT and NSR facilities under CSXT and NSR agreements.

contrary CBA provisions relating to work assignment, other rights under CBAs were separate and should be addressed through RLA processes. *Id.* at 169-171.

In 1976, Congress amended the ICA to require that the employee protective conditions explicitly mandate preservation of pre-transaction rates of pay, rules and working conditions and other rights, privileges and benefits. Article I §2.

In 1983 and 1985, the ICC issued decisions holding essentially that its approval of a transaction automatically permitted a general override of any CBA, citing 49 U.S.C. §11341(a) [now Section 11321(a)], which can immunize carriers from compliance with other laws when necessary to the carrying out of an approved transaction. This began a period of intense litigation which involved additional ICC/STB decisions, several appellate decisions and two Supreme Court decisions. As is discussed more fully below, none of these decisions fully resolved the issues.

The ICC/STB charted a zig-zag course from 1983 through the present. From 1983 through 1990, the ICC showed no respect for, and gave no weight at all to, the RLA or Article I §2. However, in 1990 in *CSX Corp-Control- Chessie System, Inc. et al.*, 6 ICC 2d 715 (1990) ("*Carmen II*") (Auth. 2), the Commission zagged back, holding that the 1983 and 1985 decisions had gone too far, and that Art I §2 does preserve CBA rights. The ICC said that

some CBA overrides were necessary for implementation of approved transactions and that arbitrators under the Washington Job Protection Agreement ("WJPA") had presumably allowed some changes which were otherwise prohibited by CBAs, particularly those related to selection of forces and assignment of employees, while generally respecting the parties' rights under CBAs, and that such an approach reflected a proper balancing of employee rights and carrier needs. *Id.* at 733-35, 747-49. The Board said that the practice of WJPA arbitrators was the proper reference for determination of the scope of arbitral authority with respect to creation of arrangements at odds with CBA rights.

In 1991, in a case from which *Carmen II* also arose, the Supreme Court affirmed the ICC's view of Section 11341, but noted that any immunity might nonetheless be limited by Article I §2. *Norfolk & Western Ry. v. American Train Dispatchers Ass'n.*, 499 U. S. 117 (1990) ("*Dispatchers*") (Auth. 3). The case was remanded to the ICC to address that question. Years past. In the meantime, in other cases, the ICC/STB zigged back taking an expansive view of its ability to override CBAs, and arbitrators felt compelled to follow along and began to authorize virtually any changes sought by carriers in the name of efficient post-transaction operations; when they failed to do so they were reversed by the ICC/STB. During this period, the D.C. Circuit Court of Appeals

upheld arbitrator and STB decisions which overrode seniority and scope provisions of CBAs.

This Fall, the STB issued several decisions which are relevant to the issues here. First, as is noted above, in this case the STB held that its approval of the Transaction did not constitute implicit approval of the CBA changes desired by the Carriers or specified in their Operating Plans, and that arbitrators are to make their own determinations as to CBA overrides that are deemed necessary in connection with fashioning arrangements for selection of forces and assignment of employees. *CSX/NS-Conrail, Decision No. 89* (BMW Ex.1) at 126-27. Then the Board finally issued its decision on remand from *Dispatchers: CSX Corp-Control- Chessie System, Inc. et al.*, F.D. No. 28905 (Sub No. 22) (served September 25, 1998 ("Carmen III") (Auth. 4). In *Carmen III* the Board zagged back toward the views expressed in *Carmen II* and toward greater respect for CBA rights. And recently the STB issued a decision in this case, *CSX/NS-Conrail, Decision No. 101*, in which it clarified that a Section 11321 override was limited so that it would operate only "to the extent necessary to permit the CSX/NS/Conrail transaction to go forward. In other words, our preemption was only to the extent that [a right obtained under another law] could be read to block this transfer" (Auth. 5).

As will be more fully developed below, BMWWE submits that, based on the language of the statute and of the *New York Dock* conditions, applicable precedent and STB decisions with respect to this Transaction, the Arbitrator's job here is to fashion an arrangement dealing with the rearrangement of forces made necessary by the division of Conrail, to provide a fair and appropriate arrangement for selection of forces and assignment of employees from among the employees involved in the actual coordinations planned by the Carriers. To the extent that current CBA provisions involving scope and seniority would interfere with such an arrangement, those provisions may be overridden as necessary to implementation of the coordinations, to carry out the division of Conrail and to permit the planned coordinations of work on former Conrail territory with CSXT and NSR work. Thus, the arbitrated arrangement may override scope and seniority rules that would prevent an appropriate division of Conrail maintenance of way employees among the Carriers and that would block the planned CSXT-former Conrail and NSR-former Conrail consolidations of work. Additionally, BMWWE has agreed to application of the CSXT and NSR CBAs at the consolidated work equipment and rail welding shops and for the coordinated regional and system gangs.

In other words, this Arbitrator can create an arrangement that divides Conrail maintenance of way employees among the Carriers in accordance with the division of the Conrail lines

among them, permits CSXT and NSR to operate regional and system production gangs on the former Conrail lines under the CSXT SPG agreement and the N&W Wabash DPG agreement, and allows them to move work equipment repair work and rail welding work to their own facilities under their own CBAs, despite contradictory provisions in applicable CBAs. However, the Arbitrator may not authorize CBA overrides unrelated to coordinations of work. The Arbitrator therefore lacks authority to change or eliminate Conrail seniority districts and the Conrail CBA where the changes do not arise from the Transaction, and may not eliminate Conrail seniority districts and the Conrail CBA in territories where the maintenance of way work will not be coordinated with CSXT or NSR work. Thus, the Arbitrator lacks authority to authorize seniority district changes (other than those necessary to align Conrail seniority districts with the division of Conrail territories among the Carriers), or to change the CBAs, for employees performing division and section maintenance of way work. The proposals advanced by BMWWE are consistent with the arrangement to be fashioned under Section 4 and within the scope of the Arbitrator's authority under the language of the statute, the conditions and applicable precedent, the proposals advanced by the carriers are not.

B. The Scope Of This Proceeding And Of The Arbitrator's Authority

1. The Statute And The Conditions

The *New York Dock* conditions were promulgated pursuant to former Section 11347 of the Interstate Commerce Act, now 49 U.S.C. §11326 (Auth. 6). Under Section 11326, the STB is required to condition approvals of mergers and acquisitions of control of Class I carriers by requiring the applicant rail carriers "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 section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) of [title 49]" 49 U.S.C. § 11326(a).⁵

The key provisions of the *New York Dock* conditions (Auth. 8) in this case are Article I §4 and Article I §2. Article I §4 provides in pertinent part:

Each transaction which may result in a dismissal or displacement or rearrangement of forces shall provide for the selection of forces from all employees involved on a basis accepted as appropriate 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 Section 4 [or failing agreement, through arbitration].

⁵In *New York Dock Ry. v. U.S.*, 609 F.2d 83, 92 (2d Cir. 1979) (Auth. 7), the Second Circuit held that "the plain language of 49 U.S.C. § 11347 requires that the ICC, in formulating a new set of employee protective conditions combine those benefits provided under both the 'New Orleans conditions' (as clarified in *Southern Ry.- Control*) and the Appendix C-1 conditions." *Id.* at 94.

Article I §2 provides that

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The language of Article 1, Section 2 is quite clear: **"The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . shall be preserved."**⁶

2. The Obligation of the STB To Consider The Mandates and Policies Of The Railway Labor Act

The Supreme Court has repeatedly held that the ICC/STB must consider the commands and policies of other laws and attempt to accommodate other laws by limiting its decisions so that it does not "trench upon" other laws, and by minimizing any conflicts that cannot be prevented. *McLean Trucking Co. v. U.S.* 321 U.S. 67

⁶ In the ICC proceedings on the conditions, the Railway Labor Executives' Association ("RLEA") had requested the Commission to add a sentence to §2 designed to protect employees' agreement rights against the subcontracting of their work. The ICC rejected the proposed language as "redundant and unnecessary" (360 I.C.C. at 73; italics supplied):

Article I, section 2 appears acceptable to all parties. RLEA does propose an additional sentence dealing with the effectiveness of subcontracting agreements subsequent to a transaction; however, the section, as now written, *preserves all existing agreements* and, therefore, the suggested language is redundant and unnecessary.