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January 18, 2000

Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Suite 700
Washington, D.C. 20423

Re: Finance Docket No. 33388 (Sub-No. 92)
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

Dear Mr. Williams:

I enclose for filing in the above-referenced proceeding the original and ten copies of the Reply Of Norfolk Southern Railway Company To Petition Of The Brotherhood Of Maintenance Of Way Employes To Vacate Arbitration Award and of the Reply Of Consolidated Rail Corporation To Petition Of The Brotherhood Of Maintenance Of Way Employes To Vacate Arbitration Award.

Thank you for your attention.

Sincerely,

Jeffrey S. Berlin
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Donald F. Griffin
Richard S. Edelman
William A. Bon
Ronald M. Johnson
Nicholas S. Yovanovic
John B. Rossi, Jr.
Joseph Guerrieri, Jr.
Debra L. Willen

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 92)

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

REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY TO PETITION OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES TO VACATE ARBITRATION AWARD

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Dated: January 18, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 92)

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

REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY TO PETITION OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES TO VACATE ARBITRATION AWARD

Twelve days after the Board, in another case, denied the motion of the Brotherhood of Maintenance of Way Employes ("BMWE") to vacate a *New York Dock* arbitration award because it was rendered by William E. Fredenberger, Jr.,[1] BMWE has petitioned the Board to vacate a *New York Dock* arbitration award because it was rendered by William E. Fredenberger, Jr. The union's petition in this case, like its motion in the other case, is without merit and should be denied.

This is the Reply of Norfolk Southern Railway Company ("NSR") to BMWE's petition. Replies are also being submitted separately by CSX Transportation, Inc. ("CSXT") and Consolidated Rail Corporation ("Conrail").

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[1] *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry. (Arbitration Review)*, Finance Docket No. 29430 (Sub-No. 21), decision served December 15, 1999 (*TCU Arbitration Appeal*).

STATEMENT OF THE CASE

The January 14, 1999 arbitration award challenged by BMWE[2] was the product of a four-day hearing conducted in December, 1998. The award applied to NSR, CSXT, and Conrail, and to seven labor unions, including BMWE, and was intended to govern the rearrangement of maintenance of way forces -- approximately 3,000 employees in all -- in connection with NSR's and CSXT's commencement of operations over the rail properties of Conrail as authorized in the Board's Decision No. 89. Two of the affected unions, BMWE and the International Association of Machinists and Aerospace Workers ("IAM"), filed petitions for STB review of the award as it affected their interests. Both unions thereafter settled their disputes with the carriers, entered into voluntary *New York Dock* implementing agreements, and withdrew their review petitions. The Board dismissed the review proceedings by decision served on May 19, 1999.[3]

On June 1, 1999, NSR and CSXT began their operations over Conrail's rail properties. Each of the more than 3,000 maintenance of way employees of Conrail was allocated to either NSR, CSXT, or Conrail (as the Shared Assets Areas operator) -- more than 2,800 of

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[2] The January 14, 1999 award, including the implementing agreement imposed in the award, is reproduced as Exhibit 1 to this Reply. The copy of the award which BMWE has provided to the Board as an attachment to the union's petition is missing one page of the implementing agreement, which was attached to the award. That page was inadvertently omitted when Mr. Fredenberger originally mailed his award to the parties; Mr. Fredenberger immediately sent that page to the parties in a supplemental mailing, and we are therefore including the entire award here in the interest of completeness.

[3] None of the five other labor unions covered by the award -- the Brotherhood Railway Carmen Division of the Transportation Communications International Union; the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers; the International Brotherhood of Electrical Workers; the National Conference of Firemen & Oilers; and the Sheet Metal Workers' International Association -- sought STB review.

them leaving Conrail employment. Each employee was placed on an appropriate seniority roster and began working on the newly configured railroad.

The arbitration award was rendered by William E. Fredenberger, Jr., who had been designated by the National Mediation Board ("NMB") on November 13, 1998,[4] after BMWE refused to propose a referee or agree to the selection of any referee who might be proposed by any other party.[5] As this Board knows, on April 7, 1999, three months after rendering the award, Mr. Fredenberger, who had served the public and the rail industry for more than twenty years as General Counsel of the NMB and then as a professional neutral referee, pleaded guilty in federal court to one count of assisting in the preparation of a fraudulent personal income tax return; he was sentenced for his offense on July 1, 1999.

On December 27, 1999, more than seven months after the Board had dismissed BMWE's petition for review, and nearly six months after the railroads had consummated the Conrail transaction, BMWE filed its petition asking the Board to vacate the Fredenberger award on the basis of Mr. Fredenberger's conviction. BMWE contends that the NMB, which designated Mr. Fredenberger to serve as neutral referee, was aware that Mr. Fredenberger had been the subject of an investigation by the Internal Revenue Service more than a year before his designation (Pet. at 1-2, 6, 9-10); that it was improper for the NMB to appoint Mr. Fredenberger without first disclosing this information and obtaining BMWE's consent to the appointment (*id.* at 1-2, 9, 18); and that BMWE was prejudiced by assertedly "having to present a legal argument to a man who had no regard for the requirements of the law" (*id.* at 15). On those bases, BMWE

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[4] The NMB's letter designating Mr. Fredenberger is reproduced as Exhibit 2 hereto.

[5] This was explained on the hearing record. Transcript at 631 (transcript excerpts are reproduced as Exhibit 3 to this Reply).

urges the Board to issue an order declaring the award "to be void, without any precedential value and not to be cited in employee protection proceedings" (*id.* at 18).

ARGUMENT

Here are six reasons why BMWE's petition should be rejected:

I.

BMWE's petition is barred by the union's settlements with the carriers involved in the Conrail transaction.

Buried in BMWE's petition is the fact that on May 6, 1999, the union entered into a settlement with NSR, in which the union *adopted and agreed to* the implementing agreement imposed in the January 14, 1999 Fredenberger award, with certain modifications, as respects NSR's operations over Conrail property, and as respects Conrail; and BMWE entered into a settlement with NSR, CSXT, and Conrail, respecting the allocation of Conrail employees to the various carriers, which modified the imposed implementing agreement in certain respects but otherwise left it intact and binding. (BMWE also entered into an additional settlement with CSXT and Conrail, respecting CSXT's operations, which CSXT discusses in its own reply.) These settlements ended the union's dispute with the carriers over the terms of implementation of the Conrail transaction, and they bar the union's attempt to reopen the matter.

The overall settlement is a package consisting of several agreements, each involving BMWE and one or more of the carriers.

One document is a Memorandum of Agreement signed on May 6, 1999 by all three carriers and BMWE (reproduced as Exhibit 4 to this Reply). In that document, the parties agreed to modify the agreement imposed in the Fredenberger award (referred to by the parties as "the

January 14, 1999 Arbitrated Implementing Agreement") in certain respects relating to the bulletining of jobs and the allocation of Conrail maintenance of way employees to the various carriers. One modification (section 4), for example, permitted employees to request allocation to a different carrier on hardship grounds.

A separate letter agreement between BMWE and NSR (reproduced as Exhibit 5 to this Reply), provided that "BMWE adopts and agrees to the Arbitrated Implementing Agreement," as modified by (1) the three-carrier agreement previously referred to and (2) a Memorandum of Agreement entered into by NSR and BMWE. In the referenced Memorandum of Agreement (Exhibit 6 hereto), NSR and BMWE recited (at p. 1) that they "desire to reach a voluntary agreement by effecting certain changes to the arbitrated implementing agreement," and then proceeded to adopt a variety of terms, beneficial to BMWE-represented employees, relating to such matters as seniority and job classifications (*id.* at 2-7), recognition of employees' beneficial "prior rights" seniority preferences (*id.* at 7-8), continuation of Conrail's supplemental unemployment benefit plan (*id.* at 8-9), application of NSR's workforce stabilization agreement (the "February 7, 1965 agreement") (*id.* at 9), provision of relocation benefits in excess of those provided in *New York Dock* (*id.* at 9 & Addendum A), and recognition of prior Conrail service for purposes of NSR fringe benefits (Side Letter No. 1).

And one critical provision of the agreement between BMWE and NSR was that "BMWE will withdraw its Petition for Review and its Petition for Stay filed with the Surface Transportation Board insofar as those Petitions seek relief or modification of the January 14, 1999 Arbitration Award affecting Norfolk Southern Railway Company, the Conrail property to be operated by NSR, or Conrail." Exhibit 5.[6]

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[6] A similar provision exists in the CSXT/BMWE agreement.

So what occurred is that BMWE and the carriers reached an accommodation among themselves. Not only did the parties agree that BMWE would withdraw its review petition -- a commitment for which the carriers paid consideration and which BMWE fulfilled, and which (as we discuss below) independently bars the union's instant petition -- but they also agreed that the Fredenberger award would form the basis of the substantive settlement governing the implementation of the Conrail transaction as it affected maintenance of way employees. If the Fredenberger award were to be vacated, BMWE would predictably assert that there is little or nothing left of the settlement's essential terms as they relate to NSR. The union would assert that there is no longer a *New York Dock* Article I, section 4 implementing agreement to govern the allocation of Conrail's former 3,000 maintenance of way employees to the various carriers; to select and apply (as to NSR) the appropriate collective bargaining agreement; to permit NSR and Conrail to use contractors for maintenance of way construction work required for implementation of the operating plan; to permit (as to Conrail) the performance of maintenance of way production work by NSR, CSXT, or contractors. BMWE would predictably contend that, at least as to NSR and Conrail, there is no deal left. BMWE pretends now that the relief it seeks is merely to eliminate the so-called "precedential value" of the Fredenberger award (Pet. at 18); but it can be expected that if such relief is granted, the union would argue, at a time and place and in circumstances of its choosing -- and perhaps in the context of economic self-help -- that the action has actually eliminated the arrangement that permitted the Conrail transaction to go forward last year and that still permits continued operations by NSR over Conrail's properties, and continued operations by Conrail itself.

Accordingly, labor peace regarding the consensual deal that NSR and BMWE made on May 6, 1999 depends on the continued existence of the Fredenberger award's provi-

sions. BMWE is obligated not only to live by its deal, but to defend it. And BMWE cannot properly be heard to ask this Board to allow the union to revisit the deal.

The Board has a strong interest in preserving the parties' consensual agreement and insisting on their continued compliance with it. As the Board and its members have said on many occasions, voluntary agreement is the preferred route to resolution of disputes concerning the implementation of Board-authorized rail transactions.[7] The parties followed that preferred route here. Allowing BMWE to repudiate its agreement in this case would jeopardize the negotiation process under the protective conditions generally.

BMWE tries to justify its effort to violate the terms of its settlement by asserting that it entered into the arrangement only because the STB failed to issue a stay order and "[w]ith a need for some certainty in the lives of its members and the split date looming." Pet. at 2 n.2. That is an absurd contention, and a sham. The carriers paid for BMWE's agreement, modifying the arbitrated implementing agreement in many ways to confer benefits on BMWE-represented employees far beyond the requirements of *New York Dock*. Moreover, BMWE could certainly have stood fast on its litigating position, waiting for the Board's decisions on the union's pending petitions for stay of the award and for review. (As BMWE knows, the Board was, during this period, actively encouraging the parties to settle, and on May 5, 1999, after the initialing of BMWE's agreements with the carriers, the Board stayed the Fredenberger award as regards the interests of IAM, to encourage settlements with that union.) In this case, like all others in which settlements are reached, each side simply decided that the value *to it* of settling outweighed the likely return of a litigation outcome.

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[7] For example, in its May 5, 1999 order granting a two-week stay of implementation of the Fredenberger award as it affected the interests of IAM, the Board said that its order "reflects the Board's strong preference for resolution of differences by negotiation," and that "[t]he Board expects the parties to negotiate accordingly."

BMWE contends that its decision to settle should be nullified because the decision was made in ignorance of the referee's supposed "fundamental disregard for the requirements of law." Pet. at 2 n.2. The union asserts throughout the instant petition that the issues raised by its original petition for review were essentially issues of law, and therefore that the original petition would have had more force if it were known that the referee was, in BMWE's terms, "unfit to decide the matters in dispute." *Id.* That is perfectly ridiculous. The Board's review of issues of law is plenary; at the time the parties settled, no one had any doubt that in a case of this magnitude, the Board would have carefully studied the questions presented and made its own determination as to whether the demands of law (including the dictates of *Carmen III*) had been satisfied.

II.

BMWE gave up its right to seek STB review of the Fredenberger award when it withdrew its petition for review of the award.

On May 13, 1999, BMWE filed a "Notice of Withdrawal of Petition for Review and Petition for Stay of Arbitral Award" (reproduced as Exhibit 7 hereto), in which it recited that on May 6, 1999, the union and NSR and Conrail had reached settlement agreements "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" (and, similarly, that BMWE, CSXT and Conrail had finalized their settlement agreements on May 11, 1999). The union then said: "Accordingly, BMWE respectfully submits this notice of withdrawal of its petition for review and petition for stay filed in this proceeding." As we have explained, BMWE's withdrawal of its petition for review and petition for stay was a condition of the settlement agreements.

On May 18, 1999, the Board issued an order stating that BMWE had filed its notice "withdrawing its appeal and request for stay, stating that BMWE and the applicants have reached final settlement agreements." Accordingly, "[b]ecause both appellants [*i.e.*, BMWE and IAM] have withdrawn their appeals and all disputes have been settled, we will discontinue this proceeding and dismiss the appeals." The Board ordered that "[t]he appeals of BMWE and IAM are dismissed and this proceeding is discontinued."

BMWE timely petitioned for review of the Fredenberger award, but later made the decision to settle its differences with the carriers and forgo its administrative appeal. That was a final and voluntary decision, binding on the union. The union's later discovery of Mr. Fredenberger's criminal conviction does not change this result. There is no linkage between Mr. Fredenberger's wrongful conduct and the subject matter of the arbitration over which he presided in this case. When BMWE gave up its appeal, it knowingly gave up its chance to argue the substance of its appeal to the Board -- *i.e.*, that Mr. Fredenberger had misunderstood *Carmen III* (of course, he did no such thing). That argument was fully presented in BMWE's February 12, 1999 petition for review (and fully refuted in the carriers' replies) -- and the argument gained no additional force when BMWE subsequently learned of Mr. Fredenberger's troubles.[8]

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[8] There is no merit to BMWE's contention that the Fredenberger award acquired special significance as the first *New York Dock* implementing agreement award rendered after the STB decided *Carmen III*. Pet. at 20. The STB had previously issued its own decision in the wake of *Carmen III*, affirming a pre-*Carmen III* award, and the Board's decision had been introduced as an exhibit in the Fredenberger arbitration. That decision certainly informed the referee's conclusions as to the applicable legal principles. *Union R.R. and Bessemer & Lake Erie R.R. (Arbitration Review)*, Finance Docket No. 31363 (Sub-No. 3), served December 17, 1998.

III.

The Board has already decided, in *TCU Arbitration Appeal*, that Mr. Fredenberger's criminal conviction does not justify the vacation of an arbitration award rendered by him. The Board's decision in that case was correct, and there is no reason why the award rendered in this case should be treated any differently.

Not only was BMWE the moving party for vacation of the award on this ground in *TCU Arbitration Appeal*, but BMWE conspicuously chose to withhold its petition for the same relief in this case until *after* learning of the Board's disposition of the issue. The news about Mr. Fredenberger is old news; and BMWE has been talking about it for nearly half a year. On July 20, 1999, immediately upon discovering the fact of Mr. Fredenberger's July 1, 1999 sentencing, BMWE announced the news on its Web site. The union said it was "assessing" whether the conviction would provide "sufficient grounds to legally overturn" the award in this case.[9] On July 21, BMWE wrote to the NMB, asking that the agency "remove Mr. Fredenberger from its list of arbitrators" and "revoke any pending appointments made to Mr. Fredenberger in cases involving the BMWE."[10] Then, on September 1, BMWE filed its petition to intervene in *TCU Arbitration Appeal*, largely for the purpose of moving to vacate the award in that case on the ground that it was rendered by Mr. Fredenberger. But for months, BMWE did nothing at all in *this* case, where, as was not the fact in *TCU Arbitration Appeal*, the union's own interests were directly involved.

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[9] *Conrail Carve-Up Arbitrator Jailed!*, printed in "This Month--JULY--At the BMWE (As of 7/20/99)," posted on BMWE's official Web Site, URL: http://www.bmwe.org/nw/1999/07jul/04. htm (reproduced as Exhibit 8 to this Reply).

[10] Letter, Mac A. Fleming, President, to NMB, July 21, 1999 (as provided to us by BMWE) (reproduced as Exhibit 9 to this Reply).

BMWE says it refrained from acting until it learned that the NMB had known of the IRS investigation into Mr. Fredenberger's tax situation prior to designating him to serve as referee in this case. That is a smokescreen. As we show below, the pendency of the IRS investigation did not create a disclosure obligation. Moreover, if *conviction* for an offense does not require undoing an arbitrator's awards (and *TCU Arbitration Appeal* holds it does not), then *investigation* concerning a possible offense, which always precedes conviction, surely does not.

IV.

The Fredenberger award is not vulnerable to attack in any event, because there is no linkage between the subject matter of Mr. Fredenberger's criminal conviction and the subject matter of the arbitration case on which he ruled. The Board has already said, in *TCU Arbitration Appeal*, that it is "aware of no authority for the proposition that legal or ethical transgressions, even by public employees, invalidate decisions by the transgressing employees that have no relationship to the issues or subject matter involved in the transgressions." Slip op. at 3.

BMWE does not (and cannot) suggest that Mr. Fredenberger was convicted for any act or omission concerning the rendering of a decision in the case put to him by NSR and the other carriers, or in any other case. Nor can BMWE assert that the question of interpretation of the *New York Dock* conditions, as applied to this particular coordination of maintenance of way work, has anything to do with compliance with the federal tax laws.

BMWE is just wrong in contending that Mr. Fredenberger's criminal conviction casts doubt on the validity of his award. It is one thing to suggest that a subordinate government official who has committed a crime should be removed from office, as happened in BMWE's two cited cases, which involve administrative law judges who were removed from office for various

wrongdoings. It is quite another thing to suggest, and it is not true, that when someone is convicted of a crime committed in his private life, all of his *prior* actions that have official significance somehow become invalid. By way of analogy, we observe that several federal judges have been convicted of crimes, impeached, and removed from office by the United States Senate, and that numerous state court judges have likewise been convicted and removed from office. But we have not found a single reported case that even suggests that a decision rendered by one of these judges should be vacated because of the judge's conviction and removal.[11]

BMWE has certainly not advanced any reason why Mr. Fredenberger's conviction would merit review of the award, much less its vacation. The union says that an arbitrator who would violate the tax laws cannot be trusted to interpret and apply the Board's protective conditions. And the union says the Board must undo the Fredenberger award because it is wrong as a matter of principle to allow criminals to decide cases with legally enforceable impact. But, as we have shown and as the Board has held, it is settled that the discovery of lawbreaking even on

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[11] The United States Court of Appeals for the Seventh Circuit rejected the proposition in the case of a state court judge who had been removed from office, observing that "acceptance of [petitioner's] argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes." *Bracy v. Gramley*, 81 F.3d 684, 689 (7th Cir. 1996), *rev'd on other grounds*, 520 U.S. 899 (1997). *Bracy* was a habeas corpus case brought by a petitioner who had been convicted of capital murder before an Illinois state trial judge who later was convicted of accepting bribes in several unrelated murder cases. The Seventh Circuit affirmed the district court's decision denying the habeas petition, and denying petitioner's request for discovery, on the ground, *inter alia*, that petitioner had not demonstrated, and was unlikely to find evidence of, actual bias of the trial judge in petitioner's case. 81 F.3d at 687-91. The Supreme Court acknowledged that petitioner would have to show "actual judicial bias in the trial of his case" in order to obtain post-conviction relief, but reversed and remanded the matter to the trial court on the ground that petitioner had made a sufficient showing to warrant discovery for that purpose. 520 U.S. at 909. Here, of course, there is no suggestion, even by BMWE, that the arbitrator decided *any* cases corruptly, much less that the hearing of the NSR-CSXT-Conrail maintenance of way case was infected by actual bias.

the part of a federal judge does not warrant the reopening of already-rendered decisions. Moreover, BMWE's interests, and those of all parties regulated by the Board, were adequately protected by the appellate remedy which BMWE voluntarily gave up; if BMWE had pursued its appeal, it would have been the Board, not a referee, that made the determinative ruling on application of legal principles to the Conrail transaction. And, of course, the Board has adequate authority to specify, if it chooses, that persons should not serve as *New York Dock* referees after they are convicted of criminal offenses (although the selection of referees by mutual agreement of the parties is otherwise unrestricted); that is a different proposition, unthreatened by the proper action of leaving the Fredenberger award alone.[12]

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[12] BMWE asserts here, as it did in *TCU Arbitration Appeal*, that special considerations pertain because, in sitting as neutral referee, Mr. Fredenberger was supposedly a "special government employee" for purposes of federal conflict-of-interest law. Given that the past decisions of federal judges are not vacated upon criminal conviction, there is no argument at all for undoing the past decisions of subordinate agency employees; but in any event, BMWE's premise regarding Mr. Fredenberger's status seems clearly untrue. A special government employee is "an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, ..." 18 U.S.C. § 202(a). There is no evidence that the National Mediation Board considers *New York Dock* referees, whom it designates as a matter of comity with this Board, to be "employees" of the NMB. Even when the NMB itself compensates referees for their services under the Railway Labor Act, 45 U.S.C. § 153, it treats them as contractors and reports payments to them on IRS Form 1099 (applicable to vendors and independent contractors), not Form W-2 (applicable to employees). And *New York Dock* referees are certainly not employees of the STB, for any purpose.

In any event, the duties that Mr. Fredenberger was designated to perform were not the duties of a government official. They were the duties of an arbitrator, which, while directed toward producing an award which would be given legal effect and would be subject to Board review, were indistinguishable from the duties performed by private arbitrators in many other contexts. *See, e.g.*, 9 U.S.C. §§ 1-16 (Federal Arbitration Act provides for judicial enforcement of contracts to arbitrate disputes and for enforcement of arbitrators' awards); 29 U.S.C. § 185 (§ 301 of Labor Management Relations Act provides for suits to enforce arbitration awards rendered under collective bargaining agreements); *Richmond, Fredericksburg & Potomac R.R. v.*

(Continued . . .)

BMWE has not established a link between Mr. Fredenberger's personal wrongdoing and his January 14, 1999 award by raising objections to the scheduling and conduct of the arbitration hearing. BMWE now says that Mr. Fredenberger's conduct of the proceeding was not to the union's liking -- specifically, in that the referee scheduled the hearing sooner than BMWE would have preferred and that he supposedly did not allow the union a sufficient opportunity to present its case. Those assertions are absurd. First, the arbitration hearing took place well *after* expiration of the schedule prescribed in Article I, section 4 of the *New York Dock* conditions. Section 4 calls for the hearing to be held not later than 60 days after the carriers' initial notice under that provision; in this case, the hearing began 112 days after that notice -- well after expiration of the 90-day period within which *New York Dock* contemplates that the *entire* proceeding will have concluded with the rendering of an award. To be sure, BMWE did ask the referee to delay the hearing, which Mr. Fredenberger declined to do because the union's requested delay would not have permitted the arbitration proceeding to be concluded, and the award issued, in time to permit implementation of the Conrail transaction on the date then

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(Continued ...)
Transportation Communications Int'l Union, 973 F.2d 276 (4th Cir. 1992) (labor arbitrator's decision on question of law held binding on parties who submitted the question to him).

In *TCU Arbitration Appeal*, the Board held that Mr. Fredenberger was not a "special government employee." To be sure, in that case, Mr. Fredenberger had been selected by the parties, and not by the NMB. Selection by the parties obviously precluded his being classified as a "special government employee." But other factors did, as well. The Board explained that the fees and expenses of its referees are paid by the private parties to each arbitration, not by the government; and that its referees are not, in reality, officials of the Board; thus, when the Board does vacate an award, it sends the case back to the parties, not to the referee. *Id.*, slip op. at 2-3 n.1. BMWE contends that if *New York Dock* awards are not rendered by government employees, then the STB has no business reviewing them. Pet. at 13-14. But the Board has already decided, in *TCU Arbitration Appeal*, a proceeding seeking review of the award of a privately selected referee, that this is not so. The STB reviews arbitration awards without regard to how the referee was selected.

scheduled. BMWE suffered no prejudice by this; but in any event, the union's problem is with the *New York Dock* conditions, not this referee's handling of this case. The section 4 schedule is intentionally an expedited one; BMWE simply cannot be heard to complain now, on this score.

As for the referee's conduct of the hearing, the transcript clearly shows that what Mr. Fredenberger did was reject *BMWE's* effort to cut the *railroads'* rebuttal presentation short, while offering the union all the time it wanted in which to present each part of its case. For example, Mr. Fredenberger emphatically advised BMWE's counsel that "I will not cut you or anyone else off from saying something in a case that's this important that you feel you should say." Transcript 968.[13]

BMWE, curiously, asserts in its petition that Mr. Fredenberger apparently "used an assistant where none was authorized." Pet. at 17. The union's support for this is paragraph 4 of the Myron declaration, which asserts that Mr. Fredenberger "brought an apparent assistant to the hearings without consent of the parties." BMWE is just wrong about this. In fact, in a discussion on the last day of hearing, not on the formal hearing record, Mr. Fredenberger explained to the parties that the person in question (who, we believe, had shown up for the first time that day) was just breaking into the arbitration field and had asked to observe so that she could see how such matters were handled; he explicitly stated that she was not an assistant and was not going to participate in the preparation of his award in the case. No one objected to this person's presence. Mr. Myron was not present at the hearing that day and does not have any first-hand knowledge

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[13] Excerpts from the hearing transcript are reproduced as Exhibit 3 to this Reply. The hearing ran from Tuesday through Friday. On Friday, saying "what the parties feel they need is what's controlling," and "I'm not going to cut anybody off," Transcript at 969, Mr. Fredenberger offered to continue late into the night; to resume the hearing on Saturday; or to resume on Monday. BMWE refused to meet on Saturday or Monday, and finished its surrebuttal case late on Friday, and the hearing was concluded. Transcript 1021-22.

about Mr. Fredenberger's remarks; but even Mr. Myron admits that when BMWE asked the NMB about the matter (the carriers have not previously been aware of BMWE's inquiry), the NMB responded with an assurance "that the person was an observer and not an assistant." No one has any reason to believe today -- even if it could matter -- that Mr. Fredenberger had an "assistant" working for him in the preparation of this case.[14]

BMWE has no basis for serious argument on any of these supposed procedural points. In any event, the union included none of these points in its original petition for review of the Fredenberger award, and therefore waived its right to assert them.

V.

BMWE's complaint that it was entitled to disclosure of the IRS investigation by the National Mediation Board and Mr. Fredenberger is obviously without merit.

BMWE charges that the NMB breached its duty by failing to notify the parties that, more than a year before designating Mr. Fredenberger to hear this case, it had received an IRS summons seeking his pay records, and BMWE says that if it had been aware of the IRS investigation, it would have objected to Mr. Fredenberger's designation as referee in this case. Putting aside the question whether BMWE actually would have objected,[15] or whether there

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[14] In a separate *New York Dock* arbitration case, in which BMWE was not involved (but in which its counsel, Mr. Edelman, was), the referee originally designated by the NMB resigned his appointment after disclosing to the parties that he would not be able to complete his task on the expedited schedule prescribed in the protective conditions. (The NMB's letter informing the parties of the referee's resignation is reproduced as Exhibit 10 hereto.) That referee had also told the parties that he intended to use another lawyer to help him in the preparation of his award (presumably at the parties' expense) -- something the carrier parties did not consider appropriate. But, as the NMB explained, the reason for his withdrawal was his inability to meet the expedited *New York Dock* timetable. Mr. Myron was not involved in that proceeding and cannot speak about it from personal knowledge.

[15] BMWE asserts that it did make an "objection" to Mr. Fredenberger's designation anyway, (Continued ...)

would have been any force to such an objection (Mr. Fredenberger was not even charged with an offense until five months after his designation as referee and three months after he rendered his award), the simple fact is that the NMB was *barred by law* from disclosing that it had received an IRS administrative summons for records pertaining to Mr. Fredenberger.[16] And BMWE offers no evidence to support the proposition that Mr. Fredenberger even knew he was under investigation during the period in which he was handling this case.[17]

(Continued ...)
but what the union means by this is that it asked the NMB to provide a list of persons from which the parties could select a referee by alternating strikes -- an obviously impractical procedure in a case involving seven labor unions and three carriers -- and the NMB instead designated a single referee (which is what Article I, section 4 of *New York Dock* expressly calls for). Pet. at 3. No actual objection by BMWE to the designation of Mr. Fredenberger in particular was made known to the carriers, or documented in correspondence, or asserted anywhere in the arbitration record, at any time during the consideration of this case. If BMWE had really thought that Mr. Fredenberger was biased or otherwise unfit to serve, the union would certainly have said so, if for no other purpose than in order to preserve the objection for STB review.

[16] Section 6103(a) of the Internal Revenue Code prohibits federal employees from disclosing any "return information," including "whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing," *id.* § 6103(b)(2)(A). Unauthorized willful disclosure may subject an individual government employee to criminal penalty, *id.* § 7213(a)(1), and the government to civil liability, *id.* § 7431. According to the NMB documents obtained by BMWE, the IRS summons was on "Form 2039." This indicates that at the time the summons was issued, Mr. Fredenberger's case had not been referred to the Department of Justice for prosecution. *See* I.R.C. § 7602(d).

[17] BMWE asserts (Pet. at 2, 9) that Mr. Fredenberger was aware of the IRS investigation, but BMWE's only support for the proposition is the declaration of the union's own officer, Mr. Myron; and the Myron declaration says only that the NMB produced documents in response to a request from BMWE. As even Mr. Myron admits (at ¶ 7), those documents merely show that the *NMB* was aware of the IRS investigation; they do not show there was any communication between the NMB and Mr. Fredenberger about the investigation. In fact, the NMB was prohibited from telling Mr. Fredenberger about the IRS summons, for this would have constituted unlawful disclosure even though Mr. Fredenberger was the taxpayer involved (see footnote 16, above). The IRS itself was permitted, but not obligated, to inform Mr. Fredenberger that it was conducting an investigation. *See* I.R.C. §§ 7602(c)(3)(C), 7609(c)(2)(E). In any event, Mr. Fredenberger would have had no duty to tell BMWE about the investigation even if he had known
(Continued ...)

BMWE also says (Pet. at 19) that the NMB "failed miserably" when it designated Mr. Fredenberger to serve as referee, knowing of the IRS investigation. Apparently the union's position is that the NMB should have disqualified Mr. Fredenberger from all arbitration responsibilities immediately upon learning of the IRS investigation and kept the disqualification in effect indefinitely (Mr. Fredenberger was not charged until nineteen months after the last documented contact between IRS and the NMB, and his designation as referee in this case occurred fourteen months after that last contact). That cannot be the correct rule. It cannot responsibly be suggested that on the strength of having received an IRS summons which might or might not ever develop into a criminal prosecution or even a civil proceeding, the NMB should bar a referee from all government-appointed work, refusing to designate him as referee in new matters (and, presumably, removing him from existing arbitrator positions to which he had been appointed). The absurdity of BMWE's position is emphasized by the fact that, as we have explained (see footnotes 16, 17), the NMB would have been barred by law from telling carriers, unions, and Mr. Fredenberger why it was disqualifying him from arbitration duties.

VI.

The relief sought by BMWE would destabilize the already-consummated Conrail transaction and threaten the conduct of rail operations throughout the United States.

BMWE does not forthrightly state just what it hopes to accomplish by seeking vacation of the Fredenberger award. But the mischief caused by such action would be enormous. As we have explained, the Fredenberger award imposed an implementing agreement which

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(Continued ...)
about it.

prescribed the manner in which more than 3,000 former Conrail maintenance of way employees were to be allocated among NSR, CSXT, and Conrail/SAA. The railroads and BMWE agreed to modify the arbitrated implementing agreement's allocation procedure in certain respects, to the benefit of employees; but no separate agreement superseded the arbitrated agreement as regards allocation. When "Day One" occurred, on June 1, 1999, and the Conrail workforce was divided up, allocation took place in accordance with the general prescriptions of the arbitrated agreement.

The voluntary agreement between NSR and BMWE is built on the implementing agreement imposed by the Fredenberger award. NSR and BMWE made their agreement "by effecting certain changes to the arbitrated implementing agreement." Exhibit 6, at 1. BMWE expressly adopted and agreed to the arbitrated agreement, as modified. Exhibit 5. If the Fredenberger award were vacated, and the effect of that action were to nullify the arbitrated implementing agreement imposed by the award, we could readily predict that BMWE would take the position that performance under its May 6, 1999 agreements with NSR had been frustrated and that there no longer existed any basis for permitting NSR to operate on its allocated Conrail lines in accordance with those agreements. And the effect of *that* assessment could well be that the union would claim that it was free to exercise economic self-help to force the carriers to undo the coordination of maintenance of way forces, restoring Conrail operations to their pre-June 1, 1999 circumstances.

The situation on the Shared Assets Areas, still operated by Conrail, would be equally extreme. The arbitrated implementing agreement was adopted and agreed to by BMWE (see Exhibit 5 hereto) and governs the performance of maintenance of way work by Conrail today. Although, under the arbitrated agreement, the Conrail/BMWE collective bargaining agreement still applies to day-to-day maintenance of way work on the SAAs, the arbitrated agreement

allows Conrail to have NSR, CSXT, or outside contractors perform program maintenance, track construction, and transaction-related capital projects. And it is the arbitrated agreement that prescribed the creation of new SAA seniority districts in place of the pre-existing Conrail seniority districts. If the Fredenberger award were to be vacated, BMWE would predictably repudiate its agreement adopting the arbitrated implementing agreement, and contend that maintenance of way work on Conrail today must be conducted in accordance with the collectively bargained arrangements as they existed prior to June 1, 1999. Yet those arrangements are plainly incompatible with the performance of work on today's much-reduced Conrail property; the Fredenberger award correctly made the modifications to those arrangements that were necessary.

The difficulties that would be caused by any disturbance of the Fredenberger award are innumerable. In accordance with the NSR/BMWE agreements that are premised on the award, the Conrail system maintenance of way equipment shop has been closed and the work and employees of that shop dispersed. Some of that work has been transferred to an NSR facility (at Charlotte, North Carolina) where the employees who perform it (represented on Conrail by BMWE) are now represented by six other unions. Similar realignments of work have taken place in the field.

In accordance with the agreements premised on the award, NSR has put outside contractors to work on track construction projects on its allocated Conrail lines. In accordance with the agreements premised on the award, NSR is even now in the process of setting up its designated production gangs to perform work over NSR's allocated Conrail lines during this year's production season. And, of course, approximately 2,000 former Conrail maintenance of way employees are now in their eighth month as NSR employees, working under an NSR collective bargaining agreement, holding seniority on NSR seniority rosters, and drawing their

work assignments under NSR rules and under NSR supervision -- all as provided in the award and as agreed to by BMWE.

No one, other than a union that opposed the Conrail transaction from the start and would prefer to see the transaction undone today, could conceivably think it tolerable to subject NSR's already integrated workforce to the destabilizing effects that would be caused by a vacation of the Fredenberger award. As the Board well knows, NSR has worked long and hard since consummating the transaction to build efficient and reliable rail service for its customers. This is certainly not the time for NSR's continued ability to conduct its maintenance of way work over the former Conrail lines to be jeopardized.

So the relief sought by BMWE could open the door to a challenge to the already-implemented Conrail transaction. Whether BMWE actually means to reverse the transaction and attempt to restore pre-transaction Conrail, or just hopes to use new economic leverage to force the carriers to make a better deal with the union than the one to which BMWE agreed last May, the effort threatens the stability of rail transportation and is illegitimate.

* * *

BMWE's petition not only amounts to a back-door attempt to attack the Conrail transaction, but constitutes a discreditable attempt to use the Board's procedures in support of an unseemly personal assault on a neutral referee.[18]

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[18] BMWE begins its petition by announcing that "[i]n accordance with Style rules used by the *New York Times* and others," it will refer to the arbitrator only as "Fredenberger," without the honorific "Mr.," because he is a convicted felon. Pet. at 1 n.1. BMWE is seeking to justify another insult, but again the union has its facts wrong. The convention in most of the newspaper publishing industry is always to omit the honorific, so no one is ever referred to as "Mr." *See, e.g.*, N. Goldstein, *Associated Press Stylebook and Libel Manual* (1998 ed.) at 52. Uniquely, the *New York Times* almost always does use the honorific for second and subsequent references, and our copy of L. Jordan, *New York Times Manual of Style and Usage* (1976 ed.) says (at p. 131):

(Continued ...)

BMWE's petition has nothing to do with policing the exercise of *New York Dock* arbitral authority. BMWE does not treat the *New York Dock* arbitration process with the slightest deference -- to the contrary, the union contends that the process has been "hijacked" by this Board, Pet. at 14 n.4 -- but has been publicly gunning for this referee ever since he issued his award. Within hours of receiving the award, BMWE published a document calling Mr. Fredenberger a "biased, useless, government appointed hack"[19]; the union accused him of "anti-union animus" and said he was not "a fair or impartial arbitrator" and that the union would never have selected him to hear the case[20]; and it called his award "mean-spirited."[21] In the instant petition, BMWE goes out of its way to insult and humiliate a person whose official conduct had caused him to be respected throughout the rail industry for more than two decades. Mr. Fredenberger's personal story is a most unfortunate one, and the Board should not accept BMWE's invitation to make it worse. BMWE's petition is unconscionable and without any legal support, and the Board should reject it.

(Continued ...)
"We do not omit the *Mr.* in subsequent references to a person convicted of crime or having an unsavory reputation."

[19] Letter, Jed Dodd, General Chairman, BMWE, to "All Conrail and Western Maryland Committees," January 15, 1999 (reproduced as Exhibit 11 hereto).

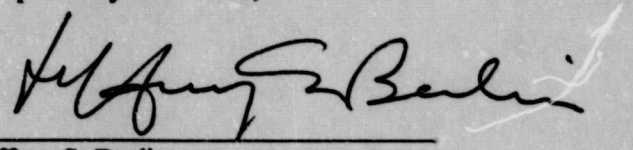
[20] BMWE Journal, Vol. 108, No. 2, March 1999 (reproduced as Exhibit 12 hereto).

[21] *Id.*; "This Month--MAY--At the BMWE (As of 5/14/99)," posted on BMWE's official Web site, URL http://www.bmwe.org/nw/1999/05may/03.htm (excerpt reproduced as Exhibit C hereto).

CONCLUSION

The Board should deny BMWE's petition to vacate the arbitration award.

Respectfully submitted,



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Dated: January 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have, this 18th day of January, 2000, caused copies of the foregoing Reply Of Norfolk Southern Railway Company To Petition Of The Brotherhood Of Maintenance Of Way Employes To Vacate Arbitration Award to be served upon the following, in the manner indicated:

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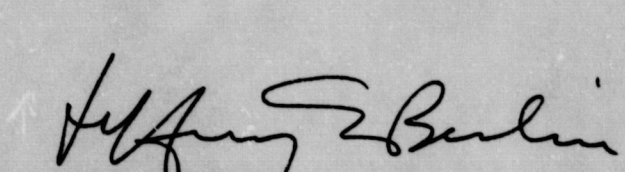

Jeffrey S. Berlin

EXHIBITS

1. January 14, 1999 arbitration award, including imposed implementing agreement.

2. Letter, November 13, 1998, NMB to William E. Fredenberger, Jr., designating Mr. Fredenberger as neutral referee.

3. Extracts from arbitration hearing transcript: 630-31; 967-70; 1021-22.

4. Memorandum of Agreement, CSXT, NSR, Conrail, and BMWE, dated May 6, 1999.

5. Letter agreement, NSR and BMWE, dated May 6, 1999.

6. Memorandum of Agreement, NSR and BMWE, dated May 6, 1999, including addenda and side letters.

7. BMWE's Notice of Withdrawal of Petition for Review and Petition for Stay of Arbitral Award, May 13, 1999.

8. *Conrail Carve-Up Arbitrator Jailed!*, printed in "This Month--JULY--At the BMWE (As of 7/20/99)," posted on BMWE's official Web site, URL: http://www.bmwe.org/nw/1999/07jul/04.htm.

9. Letter, Mac A. Fleming, President, BMWE, to NMB, July 21, 1999 (without enclosures).

10. Letter, NMB to K. R. Peifer, et al., December 8, 1998.

11. Letter, Jed Dodd, General Chairman, BMWE, to "All Conrail and Western Maryland Committees," January 15, 1999.

12. BMWE Journal, Vol. 108, No. 2, March 1999.

13. "This Month--MAY--At the BMWE (As of 5/14/99)," posted on BMWE's official Web site, URL: http://www.bmwe.org/nw/1999/05may/03.htm.

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 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	) DECISION

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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 wasan 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. BMWE's proposal could delay implementation of the transaction several months beyond what would be required under the Carriers' plan. Moreover, the BMWE'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 BMWE 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 BMWE 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 BMWE 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.

BMWE 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. BMWE 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 BMWE 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. BMWE argues that with limited modifications the CRC/BMWE agreement should apply. With the exception of CSXT's Northern District where the CRC/BMWE 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 BMWE applicable to the territory on which former CRC employees will work.

The basic argument advanced by BMWE 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/BMWE agreement as BMWE 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 BMWE agreements. As examples, the Carriers point out that BMWE has agreed with CSXT to apply the System Production Gang (SPG) agreement which has been

highly efficient and successful on that property and that BMWE 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/BMWE 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 BMWE. The undersigned believes that this determination r 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 BMWE's proposal it would be required to hire and then lay off substantial numbers of employees. Nor, emphasizes the Carriers, does BMWE'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 BMWE. 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 BMWE 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, BMWE 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/BMWE 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 BMWE 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 BMWE'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 BMWE 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, BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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. BMWE'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 BMWE. 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.

BMWE apparently has no objection to the consolidation of the shop work here at issue or with the dovetailing of seniority. However, BMWE'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, BMWE 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 BMWE 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

Attachment No. 1

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 EMPLOYES

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) BMWE 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

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:

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[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 BMWE 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 BMWE Agreement applicable at that facility.

Those CRC employees who remain in the Shared Asset Areas will continue to perform service under the applicable CRC/BMWE 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 BMWE 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 BMWE 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.

Attachment No. 2

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.

Attachment No. 3

AGREEMENT

BETWEEN

NORFOLK SOUTHERN RAILWAY COMPANY
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
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 BMWE 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.

Attachment No. 4

AGREEMENT

BETWEEN

NORFOLK SOUTHERN RAILWAY COMPANY
and its Railroad Subsidiaries

and

CONSOLIDATED RAIL CORPORATION

and

their Employees Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 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), 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 BMWE 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.

Section 3

The seniority dates of employees recorded on existing rosters will be accepted as correct. Where employees are dovetailed 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.

ARTICLE II

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.

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

November 13, 1998

Mr. William E. Fredenberger, Jr.
110 Greenfield Road
Stafford, VA 22554

RE: New York Dock Conditions - ICC Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company, Consolidated Rail Corporation, the Brotherhood of Maintenance of Way Employes, International Association of Machinists & Aerospace Workers, Sheet Metal Workers' International Association, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, International Brotherhood of Electrical Workers, Brotherhood Railway Carmen Division-TCU, and National Conference of Firemen and Oilers

Dear Mr. Fredenberger:

The National Mediation Board designates you as arbitrator ("neutral/referee member") for arbitration pursuant to the above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are ICC Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company, and Consolidated Rail Corporation and the Brotherhood of Maintenance of Way Employes, International Association of Machinists & Aerospace Workers, Sheet Metal Workers' International Association, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, International Brotherhood of Electrical Workers, Brotherhood Railway Carmen Division-TCU, and National Conference of Firemen and Oilers. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "born equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you

communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In Denver & Rio Grande Western Railroad Co., 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. The NMB's determination in Rio Grande applies to the circumstances of this matter:

> This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eight Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.'" Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Stephen E. Crable
Chief of Staff

Copies to:

See Attached List

SEC/cmc

Copies to:

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IBBM&BK
735 State Avenue, Ste 570
Kansas City, KS 66101

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

NORFOLK SOUTHERN RAILWAY COMPANY, CSX TRANSPORTATION, INC., and CONSOLIDATED RAIL CORPORATION,	
and	Referee
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.	William E. Fredenberger, Jr.

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

REVISED TRANSCRIPT

The above-entitled arbitration came on for hearing at 8:45 a.m. before:

WILLIAM E. FREDENBERGER, JR.

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

position is we never should have reached the point of having to select a referee in this matter because of the invalidity of your invocation of arbitration. What transpired following the invocation of arbitration was defective, but we never would have reached that point had the carrier negotiated in the manner that it's required to do under Section 4. We're not challenging Mr. Fredenberger's credentials. We're not challenging the fact that the mediation board gave him an appointment here.

MR. BERLIN: There were arguments made, Mike, that -- positions were taken in correspondence that the shop crafts, or some of them, were not afforded an adequate opportunity to participate in the selection of the referee, which did not result in the selection of a referee. If that's an issue, I want to address it. If it's not an issue, that specific question, then I won't have to deal with it. But I need to know whether that's still an issue before us.

MR. BUCHANAN: Yes, that is an issue.

MR. WOLLY: Yes, it is.

MR. BERLIN: All right, the specific issue as I understand it is that when a phone call was put together in

order to -- after the invocation of arbitration in order to afford the participating parties an opportunity to attempt to select a referee as contemplated by Section 4 of New York Dock, some of the shop crafts didn't participate in the phone call, and one or more of them may contend that they didn't have an adequate opportunity to do so.

In fact, as we said in our prehearing submission in Part 1 where we addressed this on behalf of all the carriers, there was a conference call. Some organizations did not participate. Some did. More than just BMWE participated. Some shop crafts did. During the phone call, the BMWE representative said in essentially these terms, that BMWE would not propose any referee candidate, nor would it agree to any referees proposed by the other parties.

Now it takes all of the parties, all the shop crafts, BMWE, and all the carriers to agree on a referee. And if there's not agreement, we have to go to the mediation board for the appointment of a referee. When one of the parties says it's not going to agree to any referee suggested by any of the other parties, there is no prospect that there will be a referee selected by agreement. At that point, it doesn't matter whether any of the other parties

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

NORFOLK SOUTHERN RAILWAY COMPANY, CSX TRANSPORTATION, INC., and CONSOLIDATED RAIL CORPORATION,	:	
and	:	Referee
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.	:	William E. Fredenberger, Jr.

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

between what we put to the STB and what the STB approved. It stands between STB's approval and the realization of the public interest benefits that the STB said we ought to have to serve the interests of the country.

I think that it is beyond serious debate that this is the opportunity for the imposition of an arbitrated agreement that will appropriately recognize what we have put forward as the legitimate interests that need to be served and make the adjustments that have been asked, and we ask that you approve the carriers' proposed implementing agreement in full, with the addition that we touched on earlier today.

Thank you very much.

MR. FREDENBERGER: Gentlemen?

MR. GRIFFIN: Obviously, we're going to present surrebuttal. Obviously, we need to some time.

MR. FREDENBERGER: Would you like to take a break?

MR. GRIFFIN: Before we go on break, I think it's safe to say that we do not intend to on for five hours of surrebuttal.

MR. FREDENBERGER: You take as much time as you think you need.

MR. GRIFFIN: Mr. Fredenberger, with all due respect, that's not the whole point. We believe we can provide a pared down surrebuttal. We're not going to need five hours, but at some point I'm asking you to say this proceeding will end at a time on the clock, and we will do our surrebuttal and to the extent that there's time on the clock left --

MR. EDELMAN: It seems to me they've talked for 16 hours. We'll put on our case, that's it, it's closed. I just think this is just -- I think the record should reflect we are already prejudiced in the way in which time has been used and our ability to respond and anybody's ability to do this. We'll put on our surrebuttal and then we're done.

MR. FREDENBERGER: All right, I'll tell you what the situation is going to be. Now you can either go forward now with your surrebuttal. I can set Saturday as a hearing date tomorrow. I can set Monday as a hearing date to come back here and complete this.

I will not cut you or anyone else off from saying something in a case that's this important that you feel you should say. I am trying to afford you all the due process that I can.

Now if you feel like you've been somehow prejudiced by the time situation, well I can't control that if that's your opinion. I would say that I have not constricted anyone with respect to time.

Now if you feel you can't make your argument tonight, if you feel you need to go to tomorrow, you need to go to Monday, well then we can do that. I'm willing to stay here as long you're willing -- for whatever time you need this evening, tonight, so we can end this thing tonight.

You wanted me to set a time, I want to end it tonight. Even if it's in the wee hours of the morning I want it over tonight. But what I want is not controlling. It's what the parties feel they need is what's controlling.

Yes, I could set some rigid rules and I could say everybody's going to be done by this and we can run it like the Supreme Court. I could put up my hand and that means the green light, the red light, the yellow light, whatever. I'm not going to do that. I'm not going to cut anybody off. But I'm going to give you every opportunity.

MR. GRIFFIN: We will proceed tonight because there's no point in coming in -- Saturday is an impossibility for me and besides --

MR. FREDENBERGER: I would have thought --

MR. GRIFFIN: May I finish, please?

MR. FREDENBERGER: Certainly.

MR. GRIFFIN: As I said, my fact people have pretty much attrited out because of plane schedules and otherwise. And as a practical matter, I can no more confer with them tomorrow, get them back here on Monday. It's an impossibility. So we will go ahead tonight.

MR. FREDENBERGER: Very well. It's your decision to go ahead.

MR. GRIFFIN: We would request a recess of --

MR. FREDENBERGER: Whatever you need.

MR. GRIFFIN: I don't want to set it --

MR. FREDENBERGER: We have a small group here. If you set a time and you feel that you can proceed ahead of that time, I'm sure that we can all get back together.

MR. GRIFFIN: It's just that I don't want to say 30 minutes and then everybody sort of vanishes.

MR. FREDENBERGER: We don't want to vanish out of here, folks, because it's hard to get back in the building if you go out front. I mean, I know some people may need to smoke, but I don't know what to tell you because it's very

thing, that signalmen construction gangs are just like SPGs. That's not quite right. They're much smaller. But they do about 30 percent of the work of the signalmen. And again, over our entire system we can use them, coordinate the work, go 200 miles onto anybody.

In the northern district, it's true, we are not coordinating at the district level CSXT and Conrail employees. However, this is a unique transaction. We're getting pieces of seniority districts up there. We're not getting a whole railroad. And we need the same type of efficiencies up there as we do on the rest of the railroad, and that's the basis of that proposal.

That concludes my remarks.

MR. FREDENBERGER: Off the record.

[Off the record.]

MR. EDELMAN: We could go back and forth some more, but we'll call it quits.

MR. FREDENBERGER: Anything else from the carriers?

MR. BERLIN: No, thank you.

MR. FREDENBERGER: Well, I would like to express my appreciation to the parties for the fine briefing they

have done and for the fine oral argument that they have presented. This has been a most difficult situation for everyone and it's been stressful. I expect it to be even more stressful from now until the 14th of January, on me anyway. But I do appreciate your help.

And it has been helpful. I have a lot of material to go through, but in my view that's better than having not enough material to answer the questions or to perform my function.

With that, if there is no further -- I'm trying to think if there are any housekeeping things we need to discuss, but I don't think so. With that, we will close.

[Whereupon, at 10:25 p.m., the hearing was concluded.]

MEMORANDUM OF 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 EMPLOYES

WHEREAS, the parties desire to address certain circumstances arising in the coordination of maintenance of way functions and rearranging of forces in connection with the allocation and operation of Conrail assets among the Carriers:

NOW, THEREFORE, IT IS AGREED that the January 14, 1999 Arbitrated Implementing Agreement (Attachment No. 1, Appendix A) is modified as follows:

SECTION 1 - The positions to be established on each of the respective Shared Asset Areas effective on Closing Date as well as the New Jersey District and Philadelphia District to be allocated to CSXT will be bulletined on March 25, 1999 to "available" employees as that term is used in Attachment No. 1, Appendix A. Bulletins (which detail title, department, location, and seniority district) will be sent by first class mail delivery to the last known address of each "available" employee and will be posted at all headquarters locations identified in Rule 3 of the CR/BMWE agreement. Bids must either be postmarked by April 3, 1999 or faxed (to a number identified with the bulletin) by 5:00 p.m. on April 4, 1999.

For purposes of this allocation process, positions will be awarded utilizing the terms of the Conrail/BMWE agreement. Bulletins will

be posted indicating such awards. Successful applicants will be allocated to the applicable Carrier and will have their seniority dovetailed onto that Carrier's applicable rosters.

The positions awarded pursuant to this Section will be effective on Closing Date and former Conrail positions located in the SAA will, at the same time, be eliminated.

Any positions that are not filled through this initial bulletin process will be filled in accordance with Appendix A.

SECTION 2 - The Youngstown, Toledo, Chicago and Harrisburg District employees to be allocated to CSXT will be determined by bulletining on March 25, 1999 the number of CSXT positions from each of those Districts, as determined by the Carriers, to "available" employees. Likewise, the Cleveland, Columbus and Southwest District employees to be allocated to NSR will be determined by bulletining on March 25, 1999 the number of NSR positions from each of those Districts, as determined by the Carriers, to "available" employees. Bulletins (which detail title, department, location, and seniority district) will be sent by first class mail delivery to the last known address of each "available" employee and will be posted at all headquarters locations identified in Rule 3 of the CR/BMWE agreement. Bids must either be postmarked by April 3, 1999 or faxed (to a number identified with the bulletin) by 5:00 p.m. on April 4, 1999.

For purposes of this allocation process, positions will be awarded utilizing the terms of the Conrail/BMWE agreement. Bulletins will be posted indicating such awards. Successful applicants will be allocated to the applicable Carrier and will have their seniority dovetailed onto that Carrier's applicable rosters.

The positions awarded pursuant to this Section will be effective on Closing Date.

Any positions that are not filled through this initial bulletin process will be filled in accordance with Appendix A.

SECTION 3 - It is the intent of the parties that the substituting of the bidding arrangement described in Sections 1 and 2 above will not result in relocation expense to the Carriers. Therefore, any application submitted by an employee that would result in relocation will not be considered.

SECTION 4 - Employees may, within ten days of notice of their allocation to one of the respective Carriers, advise the Carriers in writing of a bona fide hardship resulting from their particular allocation and, accordingly, request allocation to a different Carrier. The Carriers will make every reasonable effort to

accommodate such legitimate requests that do not require a relocation of residence, while giving consideration to operational necessity, employee seniority, and preservation of the ratio of employees initially allocated among the respective Carriers.

Signed at Washington, D.C. this 6th day of May, 1999.

FOR BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

General Chairman, BMWE

General Chairman, BMWE

General Chairman, BMWE

FOR CSX TRANSPORTATION, INC. And its Railroad Subsidiaries

Vice President Labor Relations

FOR NORFOLK SOUTHERN RAILWAY COMPANY And its Railroad Subsidiaries

Vice President Labor Relations

FOR CONSOLIDATED RAIL CORPORATION

Vice President Labor Relations

APPROVED:

Vice President, BMWE

NORFOLK SOUTHERN

Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

Robert S. Spenski
Vice President
Labor Relations
(757) 629-2684

May 6, 1999

CRA-8

Mr. M. A. Fleming
President - BMWE
26555 Evergreen Road, Suite 200
Southfield, MI 48076-4225

Dear Mr. Fleming:

This refers to and confirms our understanding relative to the January 14, 1999 New York Dock Arbitrated Implementing Agreement. BMWE adopts and agrees to the Arbitrated Implementing Agreement as modified by:

(a) the May 6, 1999 Memorandum of Agreement among NSR, CSXT, Conrail, and BMWE effecting adjustments to Appendix A of Attachment No. 1 to the January 14, 1999 Arbitration Award; and

(b) the May 6, 1999 Memorandum of Agreement between Norfolk Southern Railway Company and BMWE making certain agreements for the implementation of the January 14, 1999 Award.

Therefore, BMWE will withdraw its Petition for Review and its Petition for Stay filed with the Surface Transportation Board insofar as those Petitions seek relief or modification of the January 14, 1999 Arbitration Award affecting Norfolk Southern Railway Company, the Conrail property to be operated by NSR, or Conrail.

Very truly yours,

R S Spenski

I agree:

M. A. Fleming

M. A. Fleming, President, BMWE

MEMORANDUM OF AGREEMENT

BETWEEN

NORFOLK SOUTHERN RAILWAY COMPANY
and its Railroad Subsidiaries

and

Its Maintenance of Way Employees

Represented by

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WHEREAS, a New York Dock arbitrated implementing agreement was rendered on January 14, 1999 (the "Arbitrated Implementing Agreement" consisting of and referred to herein as Attachments No. 1, No. 2, No. 3, and No. 4) was rendered on January 14, 1999 relative to the rearrangement of forces and the coordination of maintenance of way functions associated with the acquisition of Control and the division of the use and operation of Conrail, Inc. and Consolidated Rail Corporation by Norfolk Southern Corporation (NS) and Norfolk Southern Railway Company and its railroad subsidiaries (NSR) and CSX Corporation (CSX) and CSX Transportation, Inc. and its railroad subsidiaries (CSXT);

WHEREAS, NSR and BMWE desire to reach a voluntary agreement by effecting certain changes to the arbitrated implementing agreement;

NOW, THEREFORE, IT IS AGREED that the January 14, 1999 Arbitrated Implementing Agreement is modified as follows:

SECTION 1 - SENIORITY GROUPS, CLASSES AND GRADES

Rule 2 of the "NW-WAB Agreement" (which, as provided in Article II, Section 1 of Attachment No. 1 will apply to Conrail territories allocated to and operated by NSR) is revised by adding the following to be applicable to the Conrail territories allocated to and operated by NSR:

Rule 2 - (h) This section 2(h) applies only to the portion of Conrail to be operated by NSR. The listing of the various classifications is not intended to require the establishment or to prevent the abolishment of positions in any classification. The listing of a given classification is not intended to assign work exclusively to that classification. It is understood that employees on one classification may perform work of another classification and that the indicated primary duties do not restrict the use of employees to perform other work as provided in the NW/WAB BMWE agreement.

The seniority classes and primary duties of each class are as follows:

Bridge and Building Sub-department

A. Inspector Roster:

Inspector

Inspect bridges, buildings and other structures

NOTE: Such former Conrail Inspector Roster positions occupied on the effective date of this provision will be attrited as the incumbents leave service as a result of promotion to non-agreement, voluntary exercise of seniority to a non-inspector position, retirement, resignation, dismissal or death. Once all these Inspector positions have been vacated this classification and roster will be eliminated.

B. Bridge and Building Roster:

1. B&B Foreman

2. Assistant Foreman

3. B&B Mechanic

Construct, repair and maintain bridges, buildings and other structures

4. B&B Helper

Assist B&B Mechanic

C. Plumber Roster:

1. Plumber Foreman

2. Assistant Foreman

3. Plumber

4. Plumber Helper

Assist Plumber

NOTE: Such former Conrail Plumber Roster positions occupied on the effective date of this agreement will be attrited as the incumbents leave service as a result of promotion to non-agreement positions, voluntary exercise of seniority to another position, retirement, resignation, dismissal or death. For each of these classifications, once all the positions have been vacated the classification and roster will be eliminated. Thereafter, to the extent remaining plumbing duties are performed by BMWE represented employees under the NW/WAB agreement, such work will done by B&B Mechanics or other employees on the B&B rosters.

D. Structural Welding Roster:

1. Structural Welder

Perform welding on bridges, buildings and other structures

2. Structural Welder Helper

Assist Structural Welder

Track Sub-department

A. Track Roster:

1. Foreman and Track Patrol Foremen

Inspect track and/or direct and work with employees assigned under his jurisdiction.

Note: Track inspection will be consistent with the practice under the NW-WAB agreement, Rule 2(f), and the July 29, 1991 Arbitration Award rendered by Arbitrator LaRocco.

2. Assistant Foreman

3. Trackman

Construct, maintain, repair, inspect and dismantle track and appurtenances thereto.

B. Machine Operator rosters (*):

1. Machine Operator-Class 3

Operate the following machines:

Boltmaster
Joint Straightener
Track Liner
Handyman
Automatic Anchor Spiker
Tie Spacer
Snow Flanger
Weed Burner or Rail Heater
Brush Cutter
Tie Bed Scarifier/Inserter
Tie Butt Pusher
Fairmont Tie Extruder - Large
Wide Gauge Rail Threader - Dual Rail Gang
Standard Gauge Rail Threader - Dual Rail Gang
Cribber - Dual Rail gang
Gauge Spiker - Dual Rail Gang
Rail Gang Air Compressor
Tie Destroyer
Snow Plow
Anchor Spreader
Anchor Adjuster
Plate Remover - Single
Plate remover - Dual
Scrap Loader
Automatic Rail Lifter
Norberg Grabber Spike Puller

2. Machine Operator-Class 2

Operate the following machines:

Bulldozer
Front End Loader
Backhoe
Crossing Machine - Speedswing
Tampers (without auto. Raising & lining)
Ballast Regulator
Road Grader
Tie Inserter or Injector
Yard Cleaner
Auto Track - Loram (Mannix)
Switch Undercutter
Plasser Cribber
Tie Handler
Tie Saw
Tie Shear
Brush Cutter (on track)
Audiogage
Jet Snow Blower
Double Broom
Ballast Compactor
Klipper Brushcutter
Tractor Brushcutter
Tie Exchanger
FEL w/Snow Blower
Adzers
Automatic Spikers
4-Head Tie Drill
Norberg Automatic Lag Driver

(*) Employees obtaining Machine Operator - Class 2 seniority shall also obtain seniority as Machine Operator-Class 3 if they do not already possess such seniority.

3. Machine Operator-Class 1

Operate the following machines:

Locomotive Crane
Burro Crane
Crawler Crane
Truck Crane
Gradall - Hydraxcavator
Pile Driver
Production Tamper (with auto. raising & lining)
Jordan Spreader
Undercutter/Cleaner
Jimbo Material Handler
Track Stablizer
Car Mover
Multi-Cranes
Beilhack Snow Blower
CAT Tamper

(*) Employees obtaining Machine Operator - Class 1 seniority shall also obtain seniority as machine Operator Class 2 and Machine Operator-Class 3 if they do not already possess such seniority.

C. Welder Roster:

1. Electric Welder

Perform welding on track components

2. Electric Welder Helper

Assist Electric Welder

3. Thermite Welder

Perform field welding for elimination of rail joints

4. Thermite Welder Helper

Assist Thermite welder

NOTE: On the effective date of this provision the Electric Welder and Thermite Welder rosters are established by giving employees the same earliest listing as they possess on any Conrail Welder rosters; the Electric Welder Helper and Thermite Welder Helper rosters are established by giving employees the same earliest listing as they possess on any Conrail Welder Helper rosters. Subsequently, new seniority established will be confined to the respective applicable roster.

D. Repairman Roster:

1. Repairman

Repair tools, machinery and equipment

2. Repairman Helper

Assist repairman

E. Vehicle Operator Roster:

Vehicle Operator

Operate Gang Boom Trucks, Buses, Semi-Tractor Trailer, Log-loaders, Boom Trucks, Dump Trucks, Fuel Trucks, Brandt Trucks and other large highway and/or rail/highway vehicles which may be agree to by the parties.

F. Bridge Roster:

Bridge Operator

G. Cook Roster:

1. Camp Cook

Prepare and serve camp meals

2. Camp Car Attendant

Assist Camp Cook

H. Lubricator Maintainer Roster:

Lubricator Maintainer

NOTE: Such former Conrail Lubricator Maintainer Roster positions occupied on the effective date of this provision will be attrited as the incumbents leave service as a result of promotion to non-agreement, voluntary exercise of seniority to a non-lubricator maintainer position, retirement, resignation, dismissal or death. Once all these Lubricator Maintainer positions have been vacated this classification and roster will be eliminated. Once the Lubricator Maintainer positions have been eliminated, that work will be done in accordance with the NW/WAB agreement and practices.

NOTE: Effective with the abolishment of these positions the following work classifications will be discontinued:

Inspector Scale
Structural Welder Foreman
Vent Cleaner
Welder Foreman
Repairman Foreman
Crossing Watchman

Rule 2 - (i) Conrail employees allocated to NSR under Article I of Appendix A, of Attachment No. 1 and employees subsequently entering service on the Conrail lines to be operated by NSR shall establish and accumulate seniority in the classifications identified in Rule 2 (h) in one of the following seniority designations:

SENIORITY REGION	SENIORITY DIVISION	DIVISION CONSIST
Northern	Dearborn	the lines of the Conrail Detroit, Cleveland, Chicago, Toledo, Michigan, Columbus and Southwest Districts that were allocated to NSR
Northern	Pittsburgh	the lines of the Conrail Youngstown, Pittsburgh and Allegheny A Districts that were allocated to NSR
Northern	Harrisburg	the lines of the Conrail Buffalo, Southern Tier, New Jersey, Philadelphia, Harrisburg and Allegheny B Districts that were allocated to NSR

Track Sub-department rosters (except Equipment Repair) shall be maintained for the Northern Region; designated Division shall be shown for identification with respect to Rule 13 and for Rule 2(ii). Separate Equipment Repair rosters and Bridge and Building Sub-department rosters shall be maintained for each of the respective Divisions.

Rule 2 - (ii) This rule 2(ii) has no application to DPG positions. Conrail employees allocated to NSR under Article I of Appendix A to Attachment No. 1 will be prior righted to positions on the Conrail lines allocated to and operated by NSR as detailed below.

1) Within the Northern seniority Region and the Dearborn, Pittsburgh and Harrisburg seniority Divisions, the lines of the former Conrail seniority Districts allocated to NSR will constitute respective prior rights territories, except that for the Dearborn Division the Detroit District lines, Cleveland District lines and the Southwest District lines are consolidated with the Toledo District lines; and for the Harrisburg Division the Buffalo District lines are consolidated with the Southern Tier lines. This will result in the following prior rights territories from former Conrail BMWE seniority districts for NSR allocated territory:

Southern Tier (including NSR allocated Buffalo District lines)
Philadelphia
New Jersey
Allegheny A
Allegheny B
Harrisburg
Pittsburgh
Toledo (including NSR allocated lines in Detroit, Cleveland and Southwest Districts)
Columbus
Chicago
Michigan
Youngstown

2) Such prior righted employees will have preference for positions established with fixed headquarters located on their prior rights territory. Such employees will have preference for Northern Region positions established without fixed headquarters located on their designated Division. Such employees will not be required to exercise seniority to a position without a fixed headquarters beyond their designated Division but may voluntarily do so. As a position without fixed headquarters moves off of the incumbent's designated Division, the incumbent must either continue with the position or exercise seniority per Rule 14 of the NW-WAB Agreement as if the position were abolished. Such prior righted employees who are on furlough at the time a position without fixed headquarters moves onto their designated Division are entitled to exercise seniority onto such position within ten days of the position first moving onto their designated Division.

3) Such prior righted employees may have only one prior rights territory and designated Division on the Northern Region rosters and only one prior rights territory on Division rosters. These prior rights territories and designated Divisions will be determined by the former Conrail District where the employee possessed the earliest seniority date and will be designated on the rosters. For any classification where an employee's seniority date on the former Conrail District corresponding to his prior rights territory was not

his or her earliest seniority date, such employee will be assigned, for prior rights purposes in that classification, his or her seniority date in that classification on the former Conrail Seniority district corresponding to his or her prior rights territory. An employee who did not hold seniority in one or more classifications on the former Conrail Seniority district corresponding to his or her prior rights territory will not have prior rights in such classification(s) on his or her prior righted territory. Notwithstanding the above, an employee who has a regional seniority date in a classification that is earlier than his or her district seniority date in that classification on the former Conrail Seniority district corresponding to his or her prior rights territory will be assigned that regional seniority date in that classification on the prior rights territory.

NOTE: New Northern Region and Dearborn, Pittsburgh, and Harrisburg Division Rosters will be posted as soon as practicable. In the event that an employee's residence is located in a different Division and/or prior rights territory than those designated for his seniority date on the rosters, such employee will have a one time opportunity to have his Division and/or prior rights territory on those respective rosters changed to the territory that includes the location of his residence. To obtain such a change the employee must notify the Supervisor-Administrative Services Office in Atlanta, GA in writing of his residence and corresponding Division and/or prior rights territory being requested, within 30 days of this initial posting of the rosters for the new seniority districts.

SECTION 2 - Monongahela Railroad and Passenger Agency Employees

Seniority rights conferred by Conrail to former Conrail employees currently employed on any passenger agency or former Monongahela Railroad employees will be recognized and said employee(s) will be permitted to exercise seniority in the same manner they could have, had the operation of portions of Conrail by NSR not occurred. Accordingly, former Monongahela Railroad employees will have prior rights for headquartered positions advertised on the former Monongahela property, shall use their 1993 former Conrail Pittsburgh Seniority District Dates for positions headquartered on the former Pittsburgh seniority district and their seniority dates and preferences to positions, as they existed on the Conrail Pittsburgh District, will be integrated in like manner into the NSR Northern Region and Pittsburgh Division rosters and their listing on the Conrail Pittsburgh Production Zone "bid and displacement" list will be dovetailed into the DPG roster with the CR Zone designation. Except as provided above, former Monongahela employees shall use their former Monongahela seniority for positions advertised to the Pittsburgh Division and/or Northern Region.

SECTION 3 - SUB Plan, February 7, as amended, Work Force Stabilization, and New York Dock Application

A. SUB Plan

In the application of the January 14, 1999 Arbitrated Implementing Agreement, NSR will continue the Supplemental Unemployment Benefit (SUB) Plan for eligible former Conrail employees represented by BMWE allocated to NSR under Article I of Appendix A to Attachment No. 1. SUB will not

apply to employees hired by NSR subsequent to Closing Date.

Former Conrail employees who have prior rights under Rule 2(ii) will only be obligated, for purposes of SUB, to protect, in the normal exercise of seniority, fixed headquarter positions that are within 60 miles of their residence and positions without fixed headquarters on their designated Division.

B. February 7, as amended, Work Force Stabilization

Former Conrail employees represented by BMWE allocated to NSR under Article I of Appendix A to Attachment No. 1 will have their prior Conrail service credited as employment relationship with NSR for the purposes of the February 7, 1965 Agreement, as amended. Former Monongahela employees represented by BMWE allocated to NSR under Article I of Appendix A to Attachment No. 1 will have their prior Monongahela and Conrail service credited as employment relationship with NSR for the purposes of the February 7, 1965 Agreement, as amended.

C. Eligibility for New York Dock benefits or February 7, 1965 benefits, as amended.

Former Conrail employees allocated to NSR must still fully exercise seniority and comply with all other obligations under the February 7, 1965 Agreement, as amended, New York Dock conditions, or any other protective agreement or arrangement.

D. Duplication of Benefits

There shall be no duplication of benefits received by an employee under SUB or any other protective agreement or arrangement. In the event an employee is eligible for benefits under SUB and any other protective agreement or arrangement, such employee shall at the time he or she is affected, make an election for continuance of SUB or election of such other protective agreement or arrangement. Once the election is made this shall stay any other obligations for eligibility for another protective arrangement. An employee who elects protection under one protective agreement or arrangement may, at the expiration of that protection, make a claim under any other applicable protective agreement or arrangement provided he or she is eligible under the provisions of such other protective agreement or arrangement.

SECTION 4 - Enhanced Relocation Benefit

If a former Conrail employee allocated to NSR under Article I of Appendix A to Attachment No. 1 is eligible for relocation benefits under New York Dock, he or she will be entitled to the enhancements provided for in Addendum A to this Memorandum of Agreement.

SECTION 5 - Contracting Out of Operating Plan Projects

This Section 5 does not limit any existing right NSR may have to contract out work in accordance with other agreements.

The additional right to contract transaction related projects described in Article I, Section 1 (h) of Attachment No. 1 ("additional contracting rights") will be confined on NSR (and the Conrail territories allocated to and operated by NSR), to a list of projects identified on Addendum B to this Memorandum of Agreement.

The additional contracting rights will not be utilized on a Division if there are furloughed employees available under the NW/WAB BMWE agreement (as modified by this agreement) on that Division in the Classifications required to perform the work to be contracted. NSR will make a good faith effort, to the extent practicable, to use qualified available BMWE forces on a Division before utilizing such additional contracting rights on that Division.

SECTION 6 - 401(k) Plan

Former Conrail employees allocated to NSR will be eligible to participate in NSR's agreement employee 401(k) Plan in the same manner as other BMWE represented NSR employees and their former Conrail service will be counted for purposes of the eligibility provisions of that Plan.

SECTION 7 - Commercial Drivers License

The CDL differential rate as specified in PLB 5542, Award No. 2, and amended by COLA increases as specified in SBA 1099 (Referee Zack), will apply for positions bulletined with a CDL requirement on the Northern Region (Dearborn, Pittsburgh, or Harrisburg Divisions) and for positions bulletined with a CDL requirement on all gangs established under the DPG arbitrated agreement.

SECTION 8 - Rates of Pay

The Rates of pay applicable to the portion of Conrail to be operated by NSR are detailed in Addendum C.

SECTION 9 - Dovetailing former Conrail Region Seniority

In application of Article II, Section 2, of Attachment No. 1 to the Arbitrated Implementing Agreement, employees when allocated to NSR will have their earliest Conrail seniority date in each classification, whether from a Region or a District roster (including Districts in which no territory was allocated to NSR) used in the dovetail to initially establish the new Northern Region rosters. Employees only having Regional seniority will obtain a designated Division based on location of their residence and will not obtain a prior rights territory within a Division.

SECTION 10 - Printing Agreement

NSR will make available to former Conrail employees, allocated to NSR under Article I of Appendix A of Attachment No. 1 to the Arbitrated Implementing Agreement, as well as current NSR employees covered by the NW-WAB BMWE agreement a copy of the July 1, 1986 NW-WAB Agreement Book, supplemented with the June 12, 1992 Arbitrated Agreement for DPG's, the January 14, 1999 Arbitrated Implementing Agreement, this March 17, 1999 modification to the Arbitrated Implementing Agreement, and certain side letters and national agreement provisions. By September 1, 1999, NSR will make available to NSR

employees covered by the NSR BMWE agreement certain side letters to that agreement and certain national agreement provisions.

The parties agree that they will cooperate in this effort and that the material to be distributed by NSR under this Section 10 will not be excessive or voluminous.

Signed at Washington, D.C. on this 6th day of May, 1999.

FOR BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

General Chairman, BMWE

General Chairman, BMWE

General Chairman, BMWE

General Chairman, BMWE

General Chairman, BMWE

General Chairman, BMWE

General Chairman, BMWE

FOR NORFOLK SOUTHERN RAILWAY COMPANY
And its Railroad Subsidiaries

Vice President Labor Relations

APPROVED:

Vice President, BMWE

Vice President, BMWE

ADDENDUM A - May 6, 1999 Memorandum of Agreement

Employees who a) accept a job offer under this agreement which would require a change in residence; b) who actually change their place of residence to a point closer to the new work assignment, and c) who would otherwise be eligible for benefits under Article I, Sections 9 and 12 of New York Dock conditions may elect one of the following options:

I. Accept the benefits as provided in Article I, Sections 9 and 12 of New York Dock conditions, except that such employee will be additionally entitled to the following:

- A $1,000 transfer allowance paid in advance. If an employee accepts this advance payment but does not relocate, the advance payment will be deducted from any monies due the employee. The Carriers will arrange to have the transfer allowance referred to herein issued two (2) weeks prior to the employee reporting to the new work location, provided the employee gives sufficient notification regarding his election as to whether the employee desires Option 1 or Option 2.

- Reimbursement of wage loss not to exceed five (5) days rather than three (3) days as provided in New York Dock.

- Reasonable lodging and meal expenses for their relocation up to a maximum of five (5) days, provided the employee provides receipts for reimbursement.

- The current automobile mileage rate established by the Carrier for its non-agreement employees for up to two (2) vehicles in connection with the movement of their personal vehicles to the new location.

- Reasonable charges for storage of all household furnishings for up to sixty (60) days.

II. In lieu of any and all moving expenses and benefits under Article I, Sections 9 and 12 of New York Dock, the employee may elect the applicable lump sum allowance(s) as more fully described below:

a. A $2,000 advance payment (in addition to any other payment that may be applicable under this Item II). If an employee accepts this advance payment but does not relocate, the advance payment will be deducted from any monies due the employee. The Carriers will arrange to have the transfer allowance referred to herein issued two (2) weeks prior to the employee reporting to the new work location, provided the employee gives sufficient notification regarding his election as to whether the employee desires Option 1 or Option 2.

b. A lump sum transfer allowance based upon the shortest highway mileage from the old work location to the new work location as follows:

Mileage	Amount
Up to 449	$5,000
450-899	5,500
900-1349	6,000
1350+	6,500

50% of the applicable lump sum amount called for by this Item II(b) will be paid when the employee actually relocates to the new work location; and (provided the employee has continued to work or to be available for work at the new work location) the remaining 50% will be paid in two installments at 90 day intervals thereafter.

c. An employee who owned a mobile home at the former work location will be paid an additional $3,000. A mobile home owner is defined as an employee who owns or is under contract to purchase a mobile home which was occupied as a principal place of residence immediately prior to the transfer. The employee must furnish evidence satisfactory to the Carrier to establish ownership of that mobile home.

d. An employee who owned a home at the former work location immediately prior to the transfer will be paid an additional $11,000. A home owner is defined as an employee who owns or was under contract to purchase a home which was occupied as a principal place of residence immediately prior to the transfer. The employee must furnish evidence satisfactory to the Carrier to establish ownership of that home.

ADDENDUM B - Operating Plan Contracting Out Projects

1. Buffalo, NY - Connection to Seneca Yard
2. Buffalo, NY - Bison Yard switching and storage yard
3. Buffalo, NY - Connection tracks at Blosdell and at Transco Wye
4. Buffalo, NY - Connection tracks at CP "GJ" and at Tift Yard
5. Buffalo, NY - Upgrade leased yard
6. Buffalo, NY - Construct new alignment at CP Draw
7. Boundbrook, NJ - Siding extension and crossover
8. Flemington, NJ - New siding
9. Read Valley, NJ - New siding
10. Clark, VA - Extend siding
11. Glade Springs, VA - Extend siding
12. Ft. Wayne, IN - Second main Piqua Yard to Hadley
13. Butler, IN - Connection track
14. Bement, IL - Storage tracks
15. Reddick, IL - Extend siding
16. Andrews, IN - Extend siding
17. Rockfield, IN - Extend siding
18. Detroit, MI - Upgrade track from Oakwood Yard to Rouge Yard
19. Philadelphia, PA - Intermodal Terminal at Navy Yard
20. Baltimore, MD - Intermodal Terminal
21. Bethlehem, PA - Intermodal Terminal
22. Harrisburg, PA - Relocate Intermodal Terminal
23. Mitchell, IL - Intermodal Terminal
24. Decatur, IL - Additional yard terminal
25. Harrisburg Division - TC installation Harrisburg to Norristown and on Lehigh Valley Line
26. Shelocta, PA - Construct new line and upgrade existing line
27. Elizabeth, NJ - Expand Intermodal Terminal at E-Rail
28. Croxton, NJ - Construct Bulk Terminal; Expand Intermodal Terminal
29. Port Jervis, NY - Mainline relocation
30. Kansas City, MO - Expand Intermodal Yard
31. Toledo, OH - Construct Intermodal Yard
32. Chicago, IL - Rebuild 63rd Street Intermodal Yard
33. Detroit, MI - Construct Intermodal Yard
34. Calumet, IL - Construct Intermodal Yard
35. Cleveland, OH - Construct Intermodal Yard
36. Baltimore, MD - Consol Loop Track (connections & yard changes)
37. Wilmington, DE - Shellpot Secondary (restore bridge & track)
38. Philadelphia, PA - ZOO - X-over
39. Clarksburg, PA - Keystone Lead 4.0 miles and upgrade
40. Haverhill, OH - Construct Loop Track
41. Kansas City, MO - Construct two (2) tracks at Mixing Center
42. Detroit, MI - Construct JIT Terminal (expand little dock)
43. Greencastle, PA - TCS Hagerstown Secondary
44. Detroit, MI - Ecourse Junction Connection
45. Cleveland, OH - Improve Cloggsville Route
46. Erie, PA - Relocate main line
47. Harrisburg, PA - CP Capital connection
48. Hagerstown, MD - Construct connection track
49. Wabash, IN - Construct connection track
50. Harrisburg, PA - Construct Intermodal Terminal
51. Chicago, IL - Expand 47th Street Intermodal
52. Columbus, OH - Expand Intermodal Terminal
53. Croxton, NJ - Connection to NY S&W
54. Chesapeake, VA - Auto ramp
55. Croxton, NJ - Expand support yard
56. Dayton, OH - Construct JIT Terminal
57. Ashtabula, OH - Construct connection track
58. Ft. Wayne, IN - Jefferson Street Connection
59. Chicago, IL - Mixing Center expansion
60. Mitchell, IL - Construct Intermodal Terminal

NORTHERN REGION RATES

Bridge & Building Sub-department Occupation	June 1, 1999 Hourly Rate	July 1, 1999 Hourly Rate
Bridge Inspector	$16.68	$17.26
B&B Foreman	$16.68	$17.26
Assistant B&B Foreman	$16.43	$17.01
B&B Mechanic	$15.97	$16.53
B&B Helper	$15.03	$15.56
B&B Plumber Foreman	$16.68	$17.26
Assistant B&B Plumber Foreman	$16.43	$17.01
B&B Plumber	$15.97	$16.53
B&B Plumber Helper	$15.03	$15.56
Structural Welder	$15.94	$16.50
Structural Welder Helper	$15.03	$15.56

Track Sub-department Occupation	June 1, 1999 Hourly Rate	July 1, 1999 Hourly Rate
Track Foreman - Section	$16.35	$16.92
Track Foreman - Extra Gang (40 men or more)	$16.44	$17.02
Track Foreman - Extra Gang (21 men and less than 40 men)	$16.35	$16.92
Track Foreman - Extra Gang (20 men and less)	$16.25	$16.82
Assistant Track Foreman - Section	$16.03	$16.59
Assistant Track Foreman - Extra Gang	$16.02	$16.58
Trackman - Section	$14.72	$15.24
Trackman - Extra Gang	$14.72	$15.24
Lubricator Maintainer	$14.72	$15.24
Welder	$15.94	$16.50
Welder Helper	$15.03	$15.56
Roadway Machine Repairman	$16.31	$16.88
Roadway Machine Repairman Helper	$15.05	$15.58
Bridge Operator	$14.72	$15.24
Camp Cook	$14.55	$15.06
Vehicle Operator	$14.97	$15.49
Machine Operators - Class 3	$15.36	$15.90
Boltmaster, Joint Straightner, Track Liner, Handyman, Automatic Anchor Applier, Tie Spacer, Snow Flanger, Wood Burner or Rail Heater, Brush Cutter, Tie Bed Scarifier/Inserter, Tie Butt Pusher, Fairmont Tie Extruder - Large, Wide Gauge Rail Threader - Dual Rail Gang, Standard Gauge Rail Threader - Dual Rail Gang, Cribber - Dual Rail Gang, Gauge Spiker - Dual Rail Gang, Rail Gang Air Compressor, Tie Destroyer, Snow Plow, Anchor Spreader, Anchor Adjuster, Plate Remover - Single, Plate Remover - Dual, Scrap Loader, Automatic Rail Lifter, Norberg Grabber Spike Puller		
Machine Operators - Class 2	$15.81	$16.36
Bulldozer, Front End Loader, Backhoe, Crossing Machine - Speedswing, Tampers (without auto. raising & lining), Ballast Regulator, Road Grader, Tie Inserter or Injector, Yard Cleaner, Auto Track - Loram (Mannix), Switch Undercutter, Plasser Cribber, Tie Handler, Tie Saw, Tie Shear, Brush Cutter (on track), Audiogage, Jet Snow Blower, Double Broom, Ballast Compactor, Klipper Brushcutter, Tractor Brushcutter, Tie Exchanger, FEL w/ Snow Blower, Adzers, Automatic Spikers, 4-Head Tie Drill, Norberg Automatic Lag Driver		
Machine Operators - Class 1	$15.89	$16.45
Locomotive Crane, Burro Crane, Crawler Crane, Truck Crane, Gradall - Hydraexcavator, Pile Driver, Production Tamper (with auto. raising & lining), Jordan Spreader, Undercutter/Cleaner, Jimbo Material Handler, Track Stabilizer, Soil Test Machine, Car Mover, Multi-Cranes, Beilhack Snow Blower, CAT Tamper		

NORFOLK SOUTHERN

Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

Mark R. MacMahon
Assistant Vice President
Labor Relations
(757) 629-2615

May 6, 1999

Side letter No. 1

J. Dodd
General Chairman
1930 Chestnut Street
Suites 607-609
Philadelphia, PA 19103

P. K. Geller
General Chairman
58 Grand Lake Drive
Port Clinton, OH 43452

S. A. Hurlburt, Jr.
General Chairman
Northeastern System Federation
P. O. Box 138
Mansfield, MA 02048

Gentlemen:

This confirms our understanding that former Conrail employees who become employees of NSR under the Arbitrated Implementing Agreement, as modified, shall have their prior Conrail service credited, in the same manner as though all such time spent had been in the service of NSR, for vacation, personal leave and other benefits that are provided to NSR agreement employees on the basis of qualifying years of service.

Very truly yours,

MRM

NORFOLK SOUTHERN

Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

Mark R. MacMahon
Assistant Vice President
Labor Relations
(757) 629-2615

May 6, 1999

Side letter No. 2

J. Dodd
General Chairman
1930 Chestnut Street
Suites 607-609
Philadelphia, PA 19103

P. K. Geller
General Chairman
58 Grand Lake Drive
Port Clinton, OH 43452

S. A. Hurlburt, Jr.
General Chairman
Northeastern System Federation
P. O. Box 138
Mansfield, MA 02048

Gentlemen:

This confirms our understanding with respect to the application of the note to paragraph 3 of Rule 2 - (ii), with respect to requests to change a prior rights territory within 30 days of the initial posting of the rosters for the new seniority districts.

In order for an employee to have his prior rights territory changed under this provision, the employee must have relocated his residence prior to February 5, 1999 and that relocation must be within the prior rights territory to which he is requesting to move his "prior rights" seniority. Any employee allowed to change prior rights territory in this manner will retain the seniority dates applicable to his original prior rights territory as his only "prior rights" seniority dates for use in the new prior rights territory.

Very truly yours,

MRM

AGREED:

J. Dodd

P. K. Geller

S. A. Hurlburt, Jr.

NORFOLK SOUTHERN

Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

Mark R. MacMahon
Assistant Vice President
Labor Relations
(757) 629-2615

May 6, 1999

Side letter No. 3

J. Dodd
General Chairman
1930 Chestnut Street
Suites 607-609
Philadelphia, PA 19103

P. K. Geller
General Chairman
58 Grand Lake Drive
Port Clinton, OH 43452

S. A. Hurlburt, Jr.
General Chairman
Northeastern System Federation
P. O. Box 138
Mansfield, MA 02048

Gentlemen:

This confirms our understanding with respect to seniority established on the system rosters for Lucknow Rail Welding Plant in the Foreman, Repairmen, Welder and Machine Operator classifications. Seniority on such rosters will be credited in the dovetail to initially establish the new Northern Region rosters. Likewise, such seniority will be credited to the Harrisburg prior rights territory. In this application of Lucknow seniority to the Northern Region rosters and Harrisburg prior rights territory, the Lucknow machine operator seniority dates will only be credited to the Class 3 Machine Operator classifications.

Very truly yours,

M. R. MacMahon

AGREED:

J. Dodd

P. K. Geller

S. A. Hurlburt, Jr.

May 6, 1999
SIDE LETTER No. 4

J. Dodd
General Chairman
1930 Chestnut Street
Suites 607-609
Philadelphia, PA 19103

P. K. Geller
General Chairman
58 Grand Lake Drive
Port Clinton, OH 43452

S. A. Hurlburt, Jr.
General Chairman
Northeastern System Federation
P. O. Box 138
Mansfield, MA 02048

Gentlemen:

This confirms our understanding with respect to the transfer of rail welding work performed at the Lucknow Plant for the allocated CRC lines operated by NSR to the NSR rail welding facility at Atlanta, Georgia and the rail welding work performed at the Lucknow Plant for the allocated CRC lines operated by CSXT to the rail welding facilities at Russell, Kentucky and Nashville, Tennessee.

As requested, Appendix A of Attachment No. 1 to the January 14, 1999 Arbitrated Implementing Agreement will be modified in that there will be no offer of opportunity for the current Lucknow employees to follow this work to NSR. Such employees will be allocated to NSR as non-transfers per Appendix A and their positions at Lucknow will be abolished prior to June 1, 1999 in order to provide for an exercise of seniority to positions outside the Lucknow Plant. This will not affect any entitlement to New York Dock benefits for which the employee would otherwise have been entitled. This agreement fulfills the written notice contemplated in Article I, with respect to Section 1 (f).

Very truly yours,

M. R. MacMahon

K. Peifer

W. M. McCain

AGREED:

J. Dodd

P. K. Geller

S. A. Hurlburt, Jr.

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

Donald F. Griffin
Brotherhood of Maintenance of Way Employes
10 G Street, N.E. - Suite 460
Washington, DC 20002
(202) 638-2135

William A. Bon
Brotherhood of Maintenance of Way Employes
26555 Evergreen Road
Suite 200
Southfield, MI 48076
(248) 948-1010

Counsel for Brotherhood of Maintenance of Way Employes

Of Counsel:

Richard S. Edelman
O'Donnell, Schwartz & Anderson
1900 L Street, N.W.
Suite 707
Washington, DC 20036
(202) 898-1824

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,

/Donald F. Griffin

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

This Month -- JULY -- At the BMWE

(As of 7/20/99)

Victory at Last! Travel Allowance Sustained by Arbitrator! On June 20, 1999, just short of three years after the signing of the National Agreement on September 26, 1996, Arbitrator Richard R. Kasher fully sustained the BMWE's position that Article XIV of the agreement applies to all traveling employees (not headquartered) ***not*** just regional and system gangs as the carriers tried to claim. For more, click here to see the advance copy of the article that will appear in the August issue of the BMWE Journal.

CDL Interest Arbitration Award. On June 30, 1999, Arbitrator Dana E. Eischen sustained the BMWE's position that a 30 cents per hour CDL differential, subject to applicable COLA adjustments, should be afforded to maintenance of way employees who are required to obtain CDLs on the Grand Trunk Western Railroad. While the award is restricted to Grand Trunk employees, it may have broader implications because it is based on classic wage determinants that should apply on all carriers. Members can see more by clicking **INFO** in the members' section and looking at Circular No. 577.

Conrail Carve-up Arbitrator Jailed! Remember Arbitrator William Fredenberger, Jr., the allegedly "fair and impartial neutral" who gave rail management all the goodies in the Conrail carve-up? The guy who cut your wages and doubled your seniority districts?

Perhaps he was distracted by his own apparent corruption at that time. But now he gets to share the joys of bunking with strangers, living under severe work rules and not being able to go home -- the very conditions he cheerfully imposed on many of our union kin.

Shortly after Fredenberger issued his Conrail decision, the IRS charged him with "false statements in aid of preparation of income tax forms" -- federal income tax evasion and possible fraud. On July 1, 1999, Arbitrator Fredenberger pleaded guilty to these felony charges.

His sentence:

five months in a federal penitentiary;

12 more months' probation, with five of these months on "electronic home monitoring" (bracelet);

financial activities monitored and/or approved by his probation officer;

pay federal income taxes for 1993 thru 1996;

pay $58,272 restitution to the Department of Veteran's Affairs.

The BMWE is assessing whether Fredenberger's admission of felonious and apparently fraudulent conduct shortly after deciding a major case is sufficient grounds to legally overturn his January 1999 Conrail decision that adversely affected thousands of gandies and B&B workers.

Even in prison, "Arbitrator" Fredenberger will enjoy better conditions than what he forced on us. The

minimum cell size set by courts for federal prisoners exceeds the space-per-occupant guidelines for camp cars imposed on CSX and NS employees by Fredenberger. And if he serves his time at Club Fed, the hardest work he can expect to do is practicing his golf stroke on tax supported links.

New Chairman of Rail Labor Division. Clarence V. Monin, president of the Brotherhood of Locomotive Engineers, this month succeeded Robert A. Scardelletti, president of the Transportation Communications Union, as chairman of the Railroad Labor Division of the AFL-CIO Transportation Trades Department. Unions comprising the Rail Labor Division besides the BLE and TCU are the BMWE, Boilermakers (IBB), Dispatchers (division of the BLE), Electrical Workers (IBEW), Firemen & Oilers (F&O/SEIU), Hotel and Restaurant Employees (HERE), Machinists (IAM), Sheet Metal Workers (SMWIA), Signalmen (BRS), Transport Workers (TWU), and the United Transportation Union (UTU).

Made in USA. You can keep up to date on the push for federal legislation to forbid use of the "Made in USA" label on clothing made in Saipan on the worldwide computer web. Check **www.unionlabel.org** and click on the "Hot Issues!" button. You can link up there to the site maintained by the "Take Pride in America Coalition" **(www.takepride.org)**.

Steelworkers Need Your Support. The United Steelworkers of America at the Kaiser Aluminum plant in Spokane, Washington, have been on strike/lockout for nearly a year. The strike and now lockout came after at least two years of record production, safety and profits. Now MAXXAM, the corporation that owns Kaiser, has started liquidating their assets to fund their fight against the very people who helped build their company, by taking concessions when times were bad. Kaiser wants to cut 800 jobs at five plants -- but the jobs would still be there, just held by contractors. Kaiser also wants to cut wages, benefits and pensions -- even though they have increased salaries for top management by as much as 200 percent over a three-year period. This labor dispute started September 30, 1998, with an unfair labor practices strike. Kaiser had hired scabs and housed them in trailers before they started bargaining; unlawfully withheld bargaining information; and threatened retaliation among other things. When the Steelworkers offered to go back under the old contract on January 14, 1999, Kaiser locked them out. You can help by posting "We Support Kaiser Steelworkers" signs, joing them on the picket lines, buying American, and/or sending contributions to USWA Outreach Committee, P.O. Box 6312, Spokane, WA 99217-6312. The Steelworkers say they are "fighting a Billionaire with a handful of pennies, but we have vowed to last one day longer than it takes."

Mac A. Fleming
President

William E. LaRue
Secretary-Treasurer

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

July 21, 1999

Stephen E. Crable, Chief of Staff
National Mediation Board
1301 K Street, N.W.
Suite 250 East
Washington, DC 20572

Re: U.S. v. Fredenberger

Dear Mr. Crable:

Enclosed are three documents, a "Statement of Facts," a "Plea Agreement," and a "Judgment in a Criminal Case" from U.S. v. Fredenberger, Criminal No. 99-134-A (E.D. Va.). In essence, these documents show that William E. Fredenberger, Jr., an arbitrator the Board maintains on its list of arbitrators and whom the Board has appointed to decide disputes under Section 3 of the Railway Labor Act and various employee protective conditions imposed by the Interstate Commerce Commission/Surface Transportation Board, pled guilty to a charge of "assisting in the preparation of a fraudulent personal income tax return, in violation of Title 26, United States Code, Section 7206(2)." Additionally, Mr. Fredenberger admitted that he had not filed a federal income tax return for the years 1985 through 1996.

There can be no dispute that Mr. Fredenberger's conviction and admission regarding his failure to file tax returns makes him ineligible to be appointed as an arbitrator by the Board. Accordingly, the Brotherhood of Maintenance of Way Employes respectfully requests that the Board remove Mr. Fredenberger from its list of arbitrators. The BMWE also requests that the Board immediately revoke any pending appointments made to Mr. Fredenberger in cases involving the BMWE.

President's Dept.
FAX 248-948-7150

Suite 200
26555 Evergreen Road
Southfield, MI 48076-4225
Telephone 248-948-1010

Secretary-Treasurer's Dept.
FAX 248-948-9140

If you have any questions regarding this letter, please contact me, General Counsel William Bon or Assistant General Counsel Donald Griffin.

Very truly yours,

Mac A. Fleming

President

enclosures

cc: all Rail Labor Chief Executives
J. Sweeney
J. Hiatt, Esq.
R. Allen (NRLC)
S. Powers
W. Bon
D. Griffin
J. Myron
W. LaRue

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

December 8, 1998

Mr. K.R. Peifer
Vice President Labor Relations
CSX Transportation Inc.
500 Water Street, Room 104
Jacksonville, FL 32202-4465

Mr. R.S. Spenski
Vice President-Labor Relations
Norfolk Southern Corp
Three Commercial Place
Norfolk, VA 23510-2191

Mr. William M. McCain
Vice President-Labor Relations
Conrail
Two Commerce Square
2001 Market Street, 15-A
Philadelphia, PA 19103

Mr. R A Johnson
President
Brotherhood Rwy. Carmen-TCU
3 Research Place
Rockville, MD 20850

Mr. J. Czuczman, Intl. VP &
Director Railroad Division
TWUA
80 West End Avenue
New York, NY 10023

Mr. Sonny Hall
Intl. President
TWUA
80 West End Avenue
New York, NY 10023

Gentlemen:

Mr Fred Blackwell, the arbitrator appointed by the Board to hear the above matter, advised me yesterday by telephone, confirmed in a letter today, that he will be unable to serve as the arbitrator in this case. In his letter, Mr. Blackwell indicated "[u]pon reconsideration, however, and charting the time that I could allot to this matter, I have concluded that I do not know with certainty that I will be able to invest the time that I consider necessary to carry out the assignment in a manner that I deem professionally appropriate..." Accordingly, Mr. Blackwell resigned as the arbitrator of record in this matter

The Board appreciates Mr. Blackwell's candor and cooperation. The Board will promptly provide the parties with the name of a substitute neutral.

Sincerely,

Stephen E. Crable
Chief of Staff

cc:
Mr Timothy C. Bishop
BRCD/TCU
P.O. Box 8
Cumberland, MD 21502

Mr. Jack W. Medley
2823 Williamson Road, NE
Suite 3
Roanoke, VA 24012

Mr. J.V. Wallet, Jr
BRC-TCU
127 Baron Circle
Corryton, TN 37721

Mr. Donald Grissom
General Chairman
BRCD-TCU
1401 Cedar Crossing Trail
Midlothian, VA 23112

Mr A I Wybraniec
General Chairman
BRCD-TCU
66 Wilson Avenue
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Richard S. Edelman, Esq.
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1900 L Street, NW, Suite 707
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Pennsylvania Federation

1520 Chestnut Street - Suite 607
Philadelphia, Pennsylvania 19103
Phone: (215) 563-1252
Fax: (215) 563-9078

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

January 15, 1999

To: All Conrail and Western Maryland Committees

From: Jed Dodd

Re: Conrail Split Up Implementing Decision

Dear Brothers and Sisters:

Enclosed is the decision of the arbitrator regarding how to split up Conrail between the Norfolk and Southern Railroad, CSX Transportation and the new Shared Assets Area (little Conrail).

The arbitrator ruled in behalf of management on virtually every point. The N&W and CSXT agreements will apply to the property. On the former Conrail property there will be one seniority district for each on the NSR and three for CSXT. The right to contract out work to support the transaction was provided. The Canton Shop will be dovetailed into Charlotte and Richmond and only those who are working in the shop will be permitted to make a bid to Charlotte. The SUB plan was preserved which is good but no one knows how this will work under the new arrangement. There is no choice as to what railroad you will be "allocated" to and once you are "allocated" you forfeit any other rights you may have elsewhere.

There is an appeal right to the Surface Transportation Board which we intend to make in the near future. In the past the STB has stayed the implementation of any transaction until after they have heard the appeal. The STB does not have to stay the transaction but in the past they have done this even when they rule against the Union later. The appeals do not take very long for the STB to decide but if they stay the transaction there is very little chance that the split will occur on March 1, 1999. The Union will definitely appeal this decision to the STB. The arbitrator went way beyond his authority and simply misapplied the standards to this case.

This is a very sad day for rail labor in general and for us in particular. Everything that we have worked to obtain over the last twenty years has been taken from us by this biased, useless, government appointed hack with the stroke of a pen. Like anything else we will simply have to pick ourselves up and face the future. The officers of the Federation will be meeting with the officers of the other affected Federations and the Grand Lodge officers to determine a future course of action.

We have as many questions about this decision as you will have after you have read it. We will write to the membership in general in the very near future about this decision. After this letter we will be putting out excensive question and answer letters as we have our questions answered about this document so the membership will be aware of our rights and obligations under this document.

Questions that you have should be directed to any of the Federation officers. As we collect the questions we will be putting out answers in writing as we are sure that everyone will have the same questions.

Recently we put out an opinion poll about what the membership desires to do in the event the arbitrator rules in favor of management. The majority of the membership did not have an opinion on this subject at the time of the poll. About 42% returned ballots. 700 members were in favor of a strike, even though it might be an illegal and might mean we will get fired and 100 members were opposed to a strike that might be an illegal strike.

No option has been rejected and no option has been decided. We will be making these decisions in the weeks to come.

In Solidarity,

Jed Dodd

Jed Dodd
General Chairman

B M W E

JOURNAL

THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES VOLUME 108 ■ NUMBER 2 ■ MARCH 1999

Arbitrator Gives Whole Conrail Pie to Carriers

Once again, a *New York Dock* arbitrator gave the carriers everything they wanted in an implementing agreement. On January 14, 1999, William E. Fredenberger, Jr. decided the *New York Dock* dispute between BMWE, Norfolk Southern, CSXT and Conrail by imposing the carriers' proposal word for word. The decision creates huge new seniority districts on CSXT and Norfolk Southern and permits the carriers to subcontract work without notice related to implementation of their Operating Plan.

"This unjust and mean-spirited decision," said President Fleming, "works a terrible hardship on BMWE members and appears motivated by anti-union animus in the arbitrator's assault on seniority district size and subcontracting."

The BMWE did not agree to select Fredenberger to hear the case; he was appointed over the BMWE's objections by the National Mediation Board. Instead, the BMWE asked the NMB for a list of seven arbitrators from which the union and the carriers would alternatively strike names. "If we had been given such a list and Fredenberger's name had been on it, we would have struck him," said President Fleming. "We do not consider him a fair or impartial arbitrator in this area," he added.

The BMWE appealed Fredenberger's decision to the Surface Transportation Board on February 12, 1999 and asked for a stay of the award on February 22, 1999. The carriers have until March 12, 1999 to respond to the appeal and request for stay.

"Grand Lodge and the involved systems are mobilizing to ensure that all affected employees receive every penny due them under *New York Dock*," said Fleming.

Recently, system officers of the involved roads met with Grand Lodge staff and mapped a strategy to respond to the Award. "The mobilizations around *New York Dock* claims and the filing of our appeal are only the first steps in BMWE's resistance to this unjust and mean-spirited award," said Fleming.

CSXT and Norfolk Southern recently announced they would carve-up Conrail on June 1, 1999.

At press time, BNSF has threatened to file a *New York Dock* notice if they lose an arbitration with BMWE designed to reduce the number of BNSF seniority districts from 47 to 9. They state flatly that if BMWE does not agree to such a reduction in seniority districts, EVEN IF BMWE WINS THE ARBITRATION TAKING PLACE UNDER THE COLLECTIVE BARGAINING AGREEMENT, they will simply file a notice with the STB based on the Fredenberger Award to get a second, more sympathetic, bite at the apple before a *New York Dock* arbitrator. They simply believe they have the right to ignore the contracts because the STB will allow them to do whatever they want.

This Month -- MAY -- At the BMWE

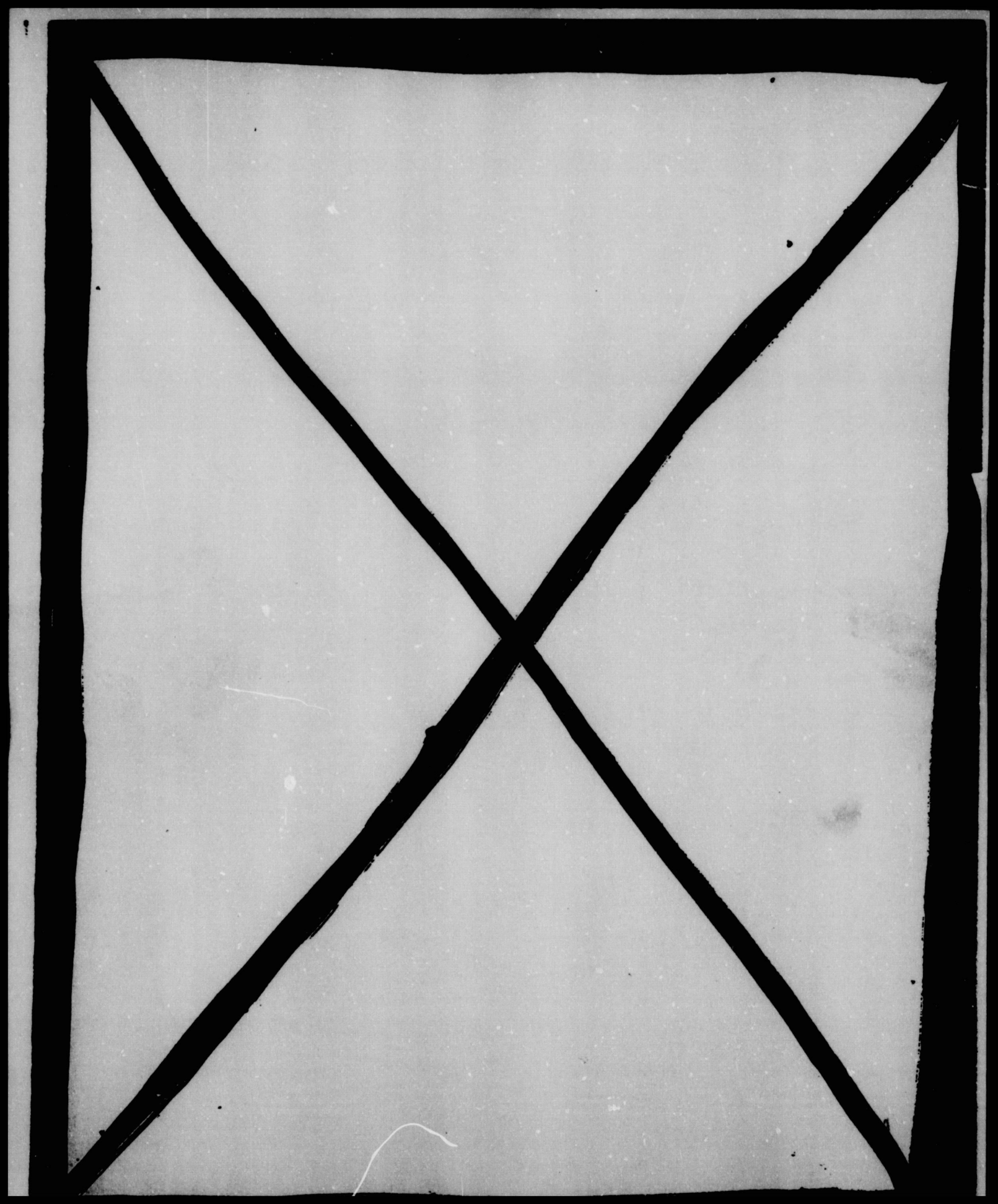
(As of 5/14/99)

Make your voice heard! June 1 is the deadline date for return of bargaining surveys -- just a little more than two weeks away. Don't let this opportunity to have your voice heard go by. Let your leadership know what is **most important** to you. Retrieve your April JOURNAL now, pull out the survey, complete it and mail it (don't worry about postage, it's already been paid). As of May 7 only 6% of the surveys have been returned. I know we can do better than 6% and we must do much better than that because it's imperative that the carriers know we are serious and committed to our issues in the upcoming 2000 round of bargaining.

Conrail Carve-up. When the ballots were counted on April 26 for CSX and May 3 for the former Conrail, BMWE members had ratified implementing agreements by 9-1 and 4-1 margins, respectively. The agreements came from negotiations held following the disastrous Fredenberger award (issued on January 14) which imposed the carriers' proposal word for word. "This unjust and mean-spirited decision" which included "the arbitrator's assault on seniority district size and subcontracting" placed BMWE bargainers in an extremely difficult position from which to negotiate but some improvements were won. On June 1, NS and CSX will begin to operate Conrail's routes and assets which they had carved up between them. NS will now employ some 34,000 people, have 21,600 miles of track and extend to 22 states as well as the District of Columbia and the province of Ontario. CSX will go from 29,000 to 34,500 employees, from 18,300 to 22,700 miles of track and run through an additional three states for a total of 23.

When is 9 MUCH BIGGER than 47? When BMWE members maintain over 35,000 miles of track divided into nine sections rather than 47. This is now the case on the Burlington Northern Santa Fe following the horrendous decision of arbitrator Mittenthal issued on March 11, which reduced seniority districts from 47 to nine. Weighing BNSF's "large operational need" against the "clear adverse impact on the work force," Mittenthal chose the carrier. He did, however, "add extra conditions until he felt the scale was balanced." Meetings were held with the BNSF on May 3 and 4 to discuss the application of the Mittenthal Award and further talks are scheduled in the near future.

STOP Linda Morgan! **Call 202-456-1414 and ask for the Vice President's office. Give your name and where you're from. Let the Vice President know that Linda Morgan must not be reappointed as STB Chairman because she has hurt working people by breaking their collective bargaining agreements.** (Click on **NEWS** for more information.) Prior to the issuance of the Mittenthal Award in their favor, the BNSF let it be known that if they lost, they were going to simply file a notice with the Surface Transportation Board based on the Fredenberger Award. They were going to do this because they believe, and have every reason to, that the STB will allow them to do whatever they want. Under the reign of Linda Morgan as Chairperson since 1995, the STB has approved highly detrimental mergers and/or acquisitions throughout the railroad industry. Huge mega-railroads have been created and in each of these transactions, the STB has approved conditions which permitted the railroads to alter, modify, or abrogate existing collective bargaining agreements. The harm done to BMWE members is incalculable. Going from very bad to worse, the STB has also interpreted the Interstate Commerce Act in a manner which forces arbitrators to make decisions which also result in the modification or abrogation of our agreements and short circuits the bargaining process as it should be under the Railway Labor Act. Rail Labor, and the BMWE in particular, have been fighting the Morgan anti-worker STB with every means available. Morgan's term expired



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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 92)

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

D

REPLY OF CONSOLIDATED RAIL CORPORATION
TO PETITION OF THE BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES TO VACATE ARBITRATION AWARD

This is the Reply of Consolidated Rail Corporation ("Conrail") in opposition to the petition filed December 27, 1999 by the Brotherhood of Maintenance of Way Employes ("BMWE"). BMWE's petition asks the Board to vacate a January 14, 1999 New York Dock arbitration award governing implementation of the transaction authorized in Decision No. 89. Norfolk Southern Railway Company ("NSR") and CSX Transportation, Inc. ("CSXT") are submitting separate replies setting forth numerous reasons why the Board should deny the union's petition. Conrail agrees with and adopts all of the reasons set forth in the NSR and CSXT replies.

BMWE adopted and agreed to the New York Dock implementing agreement imposed pursuant to the January 14, 1999 arbitration award (the "Arbitrated Implementing Agreement"), and should not be allowed to repudiate its agreements. Moreover, Conrail wishes to underscore the fact that if the Board were to take any action that would eliminate the

continuing effect of the Arbitrated Implementing Agreement on Conrail, there would be immediate and potentially disastrous operational consequences. The Arbitrated Implementing Agreement continues to govern maintenance of way operations on the Shared Assets Areas operated by Conrail.[1]

The Arbitrated Implementing Agreement changed Conrail's pretransaction maintenance of way arrangements in numerous ways, by providing for allocation of former Conrail maintenance of way employees among NSR, CSXT, and Conrail/Shared Assets Areas (Article II, Section 1 & Appendix A); by prescribing seniority arrangements suited to Conrail's more limited workforce and operations (Article II); and by providing authority for Conrail's expanded use of contractors and use of NSR and CSXT forces for maintenance of way services (Article I, Section 1(h)-(i)). As NSR and CSXT explain in their replies to BMWE's petition, the settlement reached with BMWE in May 1999 made certain modifications to the employee allocation mechanism prescribed in the January 14, 1999 award. But that settlement did not change in any way the other provisions governing maintenance of way operations on the Shared Assets Areas that the New York Dock referee found necessary to implementation of the Conrail transaction. Conrail's current arrangements governing completion of transaction-related capital projects (Arbitrated Implementing Agreement, Article I, Section 1(h)); major repair and renewal of track and structures (Section 1(i)(1)); supply of welded rail (Section 1(i)(2)); component reclamation and supply of prefabricated track work (Section 1(i)(3)); repair, maintenance, and refurbishment of maintenance of way equipment (Section 1(i)(4)); and repair and renewal of

[1] The January 14, 1999 award, including the Arbitrated Implementing Agreement, is reproduced as Exhibit 1 to NSR's Reply to BMWE's petition.

track and structures over and above routine maintenance (Section 1(i)(5)) all owe their origin and continued authority exclusively to the Arbitrated Implementing Agreement.

If BMWE were to succeed in having the January 14, 1999 award vacated, we expect that the union would attempt to interfere with operations on the Shared Assets Areas by contending that Conrail is once again bound by terms of pretransaction labor arrangements that were modified or superseded by the Arbitrated Implementing Agreement. We expect that BMWE would waste no time in making this new argument to Conrail, NSR, and CSXT, with a potential effect on the rail industry as a whole. Given Conrail's unique position in the United States rail network, a decision vacating the January 14, 1999 award could have a very destabilizing effect on nationwide rail operations. For that reason, as well as the many others explained in NSR's and CSXT's replies, the Board should deny BMWE's petition.

Respectfully submitted,

John B. Rossi, Jr. /JBR

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Dated: January 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have, this 18th day of January, 2000, caused copies of the foregoing Reply Of Consolidated Rail Corporation To Petition Of The Brotherhood Of Maintenance Of Way Employes To Vacate Arbitration Award to be served upon the following, in the manner indicated:

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January 18, 2000

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

Re: Finance Docket No. 33388 (Sub-No. ~~88~~ 92)

Dear Secretary Williams:

Enclosed for filing with the Board are the original and ten copies of the Reply of CSX Transportation, Inc. ("CSXT") to Petition of Brotherhood of Maintenance of Way Employes to Vacate Arbitration Award. An additional copy of the Reply is also included to be date-stamped and returned to the waiting messenger.

Also enclosed is a disk of the Reply of CSXT.

Thank you for your assistance.

Sincerely yours,

Jonathan Krell

Jonathan Krell

JK/db
Enclosure

cc: Richard S. Edelman
Donald F. Griffin
William A. Bon

J.S. Berlin
Mark R. MacMahon
John B. Rossi, Jr.
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (Sub-No. ~~88~~ 92)

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

REPLY OF CSX TRANSPORTATION, INC. TO PETITION OF BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES TO VACATE ARBITRATION AWARD

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Counsel for CSX Transportation, Inc.

January 18, 2000

I. INTRODUCTION

The Brotherhood of Maintenance of Way Employes ("BMWE") has filed a petition to vacate the arbitration award issued by William E. Fredenberger, Jr. BMWE's petition is without merit and should be rejected.[1]

The Board recently rejected similar arguments made here by BMWE in Norfolk Southern Corp. – Control -- Norfolk & Western Ry. Co. and Southern Ry. Co. (Arbitration Review), Finance Docket No. 29430 (Sub-No.21) (served Dec. 15, 1999) (hereinafter "NS Control"). In that decision, the Board held, consistent with all known legal precedent, that there was no basis for vacating another award by Arbitrator Fredenberger absent a showing that there was a nexus between the crime to which he pled guilty and demonstrated bias in the New York Dock arbitration. BMWE's allegations here similarly fail to meet that standard. Instead, BMWE tries to misdirect the Board by arguing that it was prejudiced, because Arbitrator Fredenberger allegedly conducted the arbitration hearing in a manner unfair to BMWE and could not possibly have adhered to legal precedents. These arguments are without merit.

Any argument that Arbitrator Fredenberger conducted the hearing in an unfair manner could have been, and should have been, brought by BMWE at the time it filed its February 12, 1999 Petition for Review of the Fredenberger Award in this Finance Docket. Any such procedural complaint did not depend on the subsequent discovery of Arbitrator Fredenberger's tax woes. Such arguments are foreclosed now, because the time to appeal the award has long passed. Moreover, BMWE voluntarily withdrew its petition after reaching settlements with CSXT, Norfolk Southern Railway Company ("NSR") and Consolidated Rail Corporation

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[1] Norfolk Southern Railway Company and Consolidated Rail Corporation are filing their own replies to BMWE's petition.

("Railroads"), and the Board accordingly dismissed BMWE's petition. Indeed, these settlements, reached with the Board's encouragement, estop BMWE's Petition to Vacate. In any event, there is no merit to BMWE's contentions regarding the conduct of the hearing.

BMWE's argument that Arbitrator Fredenberger was incapable of following Board and court precedents likewise has no connection to his subsequent guilty plea. Even assuming Arbitrator Fredenberger misapplied precedents in reaching his award (which he clearly did not), if he did so BMWE should have been aware of such errors, whether or not he properly filed tax returns. Indeed, BMWE's Petition for Review contended that Arbitrator Fredenberger misapplied Board and D.C. Circuit precedents. If BMWE felt so strongly about his alleged misapplication of legal precedent, it should have continued its appeal. It chose not to do so, instead reaching final and binding settlements with the Railroads and withdrawing its appeal. Having abandoned these same attacks on the Fredenberger Award, BMWE cannot resurrect them in the guise of its Petition to Vacate.

While BMWE cannot show that it suffered any prejudice, vacating the Fredenberger Award would seriously prejudice the Railroads. If the award were vacated "ab initio," and the settlement with NSR reopened, as may be intended by BMWE, the completed allocation of the nearly 3,000-employee Conrail maintenance of way workforce between CSXT, NSR and Conrail, operator of the Shared Assets Areas, would be in jeopardy. For example, the allocation methodology for all three Railroads must be identical or else the single workforce cannot be divided. While BMWE does not criticize its settlement with CSXT, that settlement included the allocation methodology from the arbitrated implementing agreement. There must be finality in order that parties can take such actions. This is the one of the reasons for the principle, followed by the Board in NS Control, that arbitrations are not to be disturbed merely because it is later

determined that the arbitrator committed an impropriety unrelated to the subject of the adjudication.

For these reasons, BMWE's Petition to Vacate must be denied.

II. FACTS

The Railroads were required by the employee protective conditions imposed on the Conrail Transaction to enter into the necessary implementing agreements with the labor unions before the Conrail Transaction could be implemented. Decision No. 89, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corp., Finance Docket No. 33388 (served July 23, 1998). In the maintenance of way area, the Railroads had to reach an implementing agreement with BMWE and certain shopcraft unions. Most maintenance of way employees are represented by the BMWE. However, employees who repair and maintain equipment used to lay rail and ties and maintain the roadbed, roadway mechanics, are variously represented by BMWE and the shopcraft unions on different railroad properties.[2]

As the Board knows, the Railroads reached negotiated implementing agreements with most unions. In fact, a number of these were reached before the Board approved the Transaction. The Railroads were not, however, able to negotiate an agreement in the maintenance of way area. Therefore, the Railroads on August 24, 1998 served notice under Article I, Section 4 of the New York Dock and other employee conditions on BMWE and the shopcraft unions to reach an agreement through arbitration. Section 4 specifies the procedure for

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[2] The shopcraft unions include International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers, Blacksmiths, etc., National Conference of Firemen and Oilers, Sheet Metal Workers International Association, Carmen Division of Transportation Communications International Union, and the International Brotherhood of Electrical Workers.

the selection of a neutral in such circumstances. William Fredenberger, an experienced New York Dock Arbitrator, was appointed by the NMB pursuant to Section 4 of the Board's conditions.

BMWE states that it "did not participate in the selection of Fredenberger . . . ." BMWE Pet. at 1. For this statement, BMWE refers to the Declaration of Joel Myron, Director of Research for BMWE, who, using identical phraseology, states that "BMWE did not participate in the selection of Fredenberger." Myron Decl. at ¶ 2. BMWE's contention, like many of its contentions, is misleading. In fact, BMWE did participate in the efforts under Section 4 to select an arbitrator. In that effort, BMWE refused to agree to any arbitrator suggested by the Railroads or the other unions. BMWE's single-minded refusal to agree on an arbitrator was detailed in a November 4, 1998 letter to the Railroads from the one of the shopcraft unions, International Association of Machinists and Aerospace Workers ("IAM"). IAM Submission, Exh. K-1 ("Upon questioning, the BMWE representative stated that he would not agree to any suggested names and wanted the National Mediation Board to appoint a Neutral.") (emphasis added).

Notwithstanding BMWE's assertion to the contrary, it is beyond dispute that BMWE participated in the selection process for an arbitrator. Ironically, BMWE guaranteed that the arbitrator would be selected by the NMB by refusing to agree to any arbitrator. Given BMWE's position, the Railroads had no choice but to request the NMB to appoint a neutral. BMWE states that Mr. Fredenberger "was imposed by government fiat." BMWE Pet. at 13. Certainly, Arbitrator Fredenberger was appointed by the NMB, but only after the parties failed to reach agreement on a neutral. There is nothing unusual about this. It is what Section 4 of New York Dock provides in the event the parties fail to agree on the selection of an arbitrator. Section 4 requires that in the event of such disagreement, "the National Mediation Board shall immediately

appoint a referee." Obviously, if there was no mechanism to select an arbitrator absent agreement, then one party would be able to frustrate the process. It is for this reason that Section 4 provides for NMB appointment of a neutral. The Washington Job Protection Agreement and Railway Labor Act similarly provide for the appointment of an arbitrator if the parties are unable to agree on one. See, e.g., 45 U.S.C. § 153, First (l). BMWE complains now (but not at that time) that the NMB appointed a neutral instead of providing a list of arbitrators. BMWE Pet. at 3. However, nothing in Section 4 of the New York Dock conditions imposes an obligation on the NMB to provide a list of arbitrators.

BMWE states that Mr. Fredenberger's appointment was "over BMWE's objection" and that, "if given a choice, BMWE would not have agreed [sic] have Fredenberger's [sic] hear the case, and it would not have consented to his appointment." BMWE Pet. at 9. CSXT is not aware that BMWE ever filed any objection to the appointment of Arbitrator Fredenberger. Neither BMWE or its declarant, Joel Myron, ever specify when, where or how BMWE's "objection" was noted. Certainly, BMWE did not claim then, nor does it claim now, that Arbitrator Fredenberger was biased against BMWE. BMWE admits, moreover, that its "objection" to Mr. Fredenberger pre-dated his guilty plea for assistance in filing a false tax return. Apparently, BMWE disfavored Mr. Fredenberger as an arbitrator, and clearly at least four other arbitrators who had been suggested by the Railroads or other unions, because it did not like some of their prior arbitration decisions. Thus, BMWE disfavored Mr. Fredenberger separate and apart from his subsequent plea to tax violation.[3] It is common that parties prefer some arbitrators over others. However, as noted by IAM, BMWE "objected" to anyone who was acceptable to any other party, union or carrier, in these Section 4 proceedings. When parties

cannot agree on an arbitrator, there is always a risk that you may not like the arbitrator appointed.

After a lengthy hearing, Arbitrator Fredenberger issued his New York Dock award on January 14, 1999. In his award, he imposed an implementing agreement based for the most part on the Railroads' proposed implementing agreement. Both BMWE and IAM filed petitions with the Board to review his award. BMWE raised various arguments that his award was contrary to precedents of the Board and D.C. Circuit and was not supported by adequate findings. For example, BMWE argued that "the Award is inconsistent with the controlling D.C. Circuit precedent and the decisions of this Board in Carmen III and in this proceeding." Pet. of the Bhd. of Maintenance of Way Employes for Review of Arbitration Award at 12 (filed Feb. 12, 1999). Although BMWE complains now that he conducted the arbitration hearing unfairly, BMWE did not raise any issues of procedural unfairness concerning how Mr. Fredenberger conducted the hearing in its Petition for Review. IAM, and later, BMWE, also requested the Board to stay the effectiveness of the Fredenberger Award.

While the unions' petitions for review were pending, the Railroads engaged in further negotiations with the BMWE and shopcraft unions in efforts to resolve disagreements over an implementing agreement without further litigation. The Board was aware of and encouraged the parties in their efforts. For example, in its order granting in part IAM's request for a stay, the Board stated that its decision to issue a two-week "stay to permit negotiation reflects the Board's strong preference for resolution of differences by negotiation." CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and

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[3] We note that other unions did not find Mr. Fredenberger objectionable. TCU, for example, agreed to his selection in the arbitration at issue in NS Control.

Operating Leases/Agreements – Conrail, Inc., and Consolidated Rail Corp. (Arbitration Review), Finance Docket No. 33388 (Sub-No. 88) (served May 5, 1999).

At this time, CSXT was also engaged in bargaining with BMWE to obtain a system-wide collective bargaining agreement. CSXT was party to a number of collective bargaining agreements with BMWE, which generally corresponded to the geographic areas of the former railroads that make up CSXT. CSXT ultimately reached a system-wide agreement with BMWE covering all of CSXT's rail system, including Conrail rail lines allocated to CSXT in the Transaction. In connection with this system-wide collective bargaining agreement, which became effective June 1, 1999, CSXT and BMWE also settled their differences over how the Transaction should be implemented on CSXT and Conrail. As part of this settlement, CSXT agreed to modifications in the Fredenberger Award as it applied to the coordination of CSXT territory and Conrail territory allocated to CSXT. In the May 11, 1999 settlement, BMWE agreed that it "adopts and agrees to the Arbitrated Implementing Agreement as modified by . . ." the parties' settlement. BMWE further agreed to pull down its appeal and stay request "insofar as those Petitions seek relief or modification of the January 14, 1999 Arbitration Award affecting CSX Transportation, Inc., the allocated Conrail property to be operated by CSXT, or Conrail." A copy of the settlement agreement is attached hereto as Exhibit A. An accompanying Memorandum of Agreement detailed the changes to the arbitrated implementing agreement. This Memorandum is attached as Exhibit B.

This settlement made several significant revisions to the implementing agreement adopted by the Fredenberger Award as it applied to CSXT. One of BMWE's principal objections to the Fredenberger Award as it related to CSXT was the size and number of consolidated seniority districts and the collective bargaining agreement that would apply in each

new district. See, e.g., BMWE Pet. for Review at 18, 22-23. Under the implementing agreement adopted by the Fredenberger Award, Conrail lines allocated to CSXT would have been combined with CSXT territory to form three new districts, Eastern, Western, and Northern. The CSXT (former B&O) agreement would have applied in the Eastern and Western Districts. The Conrail agreement would have applied in the Northern District. In place of this arrangement, the June 1, 1999 System Agreement basically preserved existing seniority districts and then created twelve service lane territories. The new System Agreement applies to all of these territories.[4]

NSR reached a settlement with the BMWE pursuant to which BMWE also agreed to withdraw its appeal of the Fredenberger Award. BMWE's settlement with NSR also resulted in withdrawal of BMWE's appeal of the Award as it related to Conrail as operator of the Shared Assets Areas. These settlements resulted in BMWE's total withdrawal of its appeal of the Fredenberger Award. The Railroads also reached settlements with IAM, which resulted in the withdrawal of its petition to review the Fredenberger Award. In view of the settlements with BMWE and IAM, the Board discontinued Finance Docket No. 33388 (Sub – No. 88) and dismissed the unions' appeals in an order served May 18, 1999.

Another issue raised by BMWE in its Petition for Review was the methodology to allocate Conrail employees to CSXT, NSR and Conrail. See BMWE Pet. for Review at 13-17. The Fredenberger Award had adopted the Railroads' proposed methodology. In a May 6, 1999 settlement with BMWE, the Railroads agreed to adjust the application of their methodology in

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[4] BMWE paints with a broad brush when it denigrates the Fredenberger Award. However, there were significant aspects of the Award with which BMWE did not take issue. For example, BMWE agreed with CSXT's proposals for system production gangs and the consolidation of roadway equipment repair and rail welding. See BMWE Pet. for Review at 17, 26.

some circumstances. Otherwise, the allocation methodology remained that adopted in the Fredenberger Award.

On June 1, 1999, the Railroads went on to implement the Transaction on the basis of the imposed implementing agreement as modified by these settlements.

BMWE suggests throughout its Petition to Vacate that Mr. Fredenberger was a felon at the time of his appointment and issuance of his award. See, e.g., BMWE Pet. at 18 ("decision . . . was decided by a criminal"). Any such suggestion is untrue. Mr. Fredenberger did not enter a plea until several months after his appointment and after he issued his award. At those times, under our system of justice, he was innocent until he was proven or plead guilty.

III. ARGUMENT

A. BMWE's Petition Is Estopped By Its Settlements With The Railroads

BMWE's arguments are without merit. But, the Board need not reach them. This is because BMWE is estopped by its settlements with the Railroads from challenging the Fredenberger Award.[5]

As explained, BMWE filed a petition for review of the Fredenberger Award. The Railroads filed replies. All of the alleged incidents of prejudice BMWE now complains about (Arbitrator Fredenberger's conduct of the hearing and his alleged refusal to follow precedent) were or could have been raised in its petition for review. With the encouragement of this Board, the parties sat down and reached binding settlements that resolved the litigation over the Award

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[5] BMWE is also barred by the doctrine of collateral estoppel from relitigating the same issue it has already argued to the Board. The Board's predecessor characterized collateral estoppel as "clearly complementary" with the "speedy mechanism for resolving differences concerning implementing agreements" under New York Dock. See St. Louis Southwestern Ry. Co. Arbitration Appeal, Finance Docket No. 28799 (Sub-No. 9) (service date August 15, 1995). The issue whether BMWE must show bias to vacate an arbitration award has already been litigated in NS Control.

and the imposed implementing agreement. There was give and take on all sides. As part of the bargain, BMWE agreed to withdraw its appeal. For example, in the May 11, 1999 settlement agreement between CSXT and the President of BMWE, BMWE agreed that it "will withdraw its Petition for Review and Its Petition for Stay filed with the Surface Transportation Board insofar as those Petitions seek relief or modification of the January 14, 1999 Arbitration Award affecting CSX Transportation, Inc., the allocated Conrail property to be operated by CSXT, or Conrail." In the related Memorandum of Agreement, BMWE agreed that "all issues" including "selection of forces" had "been resolved in the January 14, 1999 Arbitrated Implementing Agreement . . ." and that that agreement, as modified by the settlement, would govern the Transaction.

In the settlement between BMWE and NSR, BMWE likewise agreed to withdraw its appeal of the Fredenberger Award as related to NSR, Conrail lines allocated to NSR and Conrail.

BMWE has shown no basis for now being allowed to renege on its settlements. BMWE may be suggesting in footnote 2 of its Petition that it should not be held to its settlements, at least with respect to NSR, because "[a]t that time BMWE did not realize that the problem was not only that the award failed to follow the language of the conditions, and controlling precedent, but also that its author had a fundamental disregard for the requirements of law and was unfit to decide the matters in dispute." BMWE Pet. at 2 n.2. But, as explained in more detail infra at Part C, BMWE's allegations of prejudice were or could have raised in its Petition for Review. The Railroads in their replies to BMWE's Petition vigorously rebutted BMWE's contentions that the Fredenberger Award and imposed agreement failed to follow Board and court precedents or the Board's conditions. By withdrawing its Petition, and allowing its appeal to be dismissed, BMWE gave up its challenge to the arbitrated agreement and, more importantly, the appropriateness of Arbitrator Fredenberger's findings and conclusions.

BMWE has no cause to complain now about the basis of the bargain to which it agreed in the settlements. BMWE certainly evaluated the modifications to the arbitrated implementing agreement made by the settlements and determined that they were satisfactory to BMWE and its members or it would never have agreed to them. They were agreed to on their own merits, independent of whether the arbitrator had committed a tax violation or may have committed other violations of law totally unrelated to his award. Similarly, the forces driving the settlement cited by BMWE, "the need for some certainty in the lives of its members and the split date looming . . . ," were present without regard to Mr. Fredenberger's tax problems. BMWE Pet. at 2 n.2.

As explained, BMWE's Petition to Vacate violates its settlement with CSXT by, in effect, asking the Board to allow different terms for implementing the Conrail Transaction than those provided in the implementing agreement imposed by the Fredenberger Award, and as modified by the May 11, 1999 settlement agreement. The Board should enforce the New York Dock settlement by rejecting the Petition to Vacate. The settlement incorporates the arbitrated implementing agreement, as modified, which satisfies the Board's employee protective conditions imposed in Finance Docket No. 33388. The Board has previously refused to disturb settlements of matters before the Board, including in this very docket. For example, CP Rail sought greater rights than it received in a settlement with CSXT. Under that settlement, CP agreed to withdraw its responsive application. Subsequently, it sought to take advantage of better terms obtained in conditions imposed by the Board at the request of other parties. The Board held CP to its bargain, stating that "[w]e are reluctant to interfere with or discourage settlement agreements that are freely negotiated between the parties, and there is no reason to do so here." Decision No. 123, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp.

and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp., Finance Docket No. 33388 (Sub-No. 69) (served May 20, 1999), 1999 WL 320713 (I.C.C.). Like the settlement there, the settlement here was reached with the encouragement of the Board. Cf. Decision No. 109, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp., Finance Docket No. 33388 (Sub-No. 69) (served December 18, 1998), 1998 WL 884730 (I.C.C.) (holding that settlement agreement was binding on parties).

Given these settlements, BMWE is estopped from trying to undo the Fredenberger Award and the imposed implementing agreement as modified by those settlements.[6] The only possible legal basis for a challenge by BMWE to the implementing agreement at this point would be if BMWE could prove bias. As we next explain, BMWE does not claim or seek to prove that Arbitrator Fredenberger's guilty plea demonstrated any bias against BMWE in the arbitration proceedings.

B. BMWE Has Failed To Show Bias

Just twelve days prior to BMWE's present petition, this Board in NS Control rejected BMWE's similar request to vacate another arbitration award issued by Mr. Fredenberger because of the same personal misconduct. The Board held that "BMWE has not shown, or even argued, that Fredenberger's private tax violation created a bias against TCU pertaining to this

[6] In addition, BMWE's Petition to Vacate should be estopped, because BMWE has waited too long to file it. BMWE argues that its delay in filing is excused by the fact that the NMB did not complete its response to BMWE's Freedom of Information Act request for documents until November 17, 1999. However, BMWE was able to raise the issue of Mr. Fredenberger's guilt months ago in NS Control. There is no reason BMWE could not have also filed its Petition in this docket at that time.

arbitration." NS Control at 3. BMWE's ad hominem attacks on Mr. Fredenberger are no substitute for the Board's requirement that BMWE show such bias. The Board should similarly reject BMWE's present petition, because BMWE again fails to allege, much less prove, that Mr. Fredenberger's personal misconduct resulted in any bias against BMWE.

BMWE asks rhetorically "how will ... the courts view the Board . . . when they consider that the first award issued after Carmen III was written by [sic] felon and allowed to stand?" BMWE Pet. at 20. First, the Fredenberger Award was not "written by a felon." At the time he wrote his award, Mr. Fredenberger had not entered his plea.

Second, the courts would view the Board's rejection of BMWE's Petition to Vacate with approval. The Board's holding in NS Control is wholly consistent with relevant case law involving arbitrator misconduct. For example, in Remmey v. PaineWebber Inc., 32 F.3d 143 (4th Cir. 1994) ("Remmey"), the court refused to vacate an arbitration award issued by an arbitrator who had failed to disclose his prior discipline by the National Association of Securities Dealers ("NASD"). Prior to the arbitration at issue in Remmey, the NASD had fined the arbitrator for improper bookkeeping, among other things. See id. at 148. The court held that the petitioner "has not shown that these infractions affected [the arbitrator's] impartiality, thereby yielding an impermissible award." Id.; see also Toyota of Berkeley v. Automobile Salesmen's Union, 834 F.2d 751 (9th Cir 1987) (rejecting argument that arbitration should be vacated because a party to arbitration sued arbitrator, allegedly creating a bias in the arbitrator) ("It would be an odd result to hold that a party to arbitration can manufacture bias by naming the arbitrator in a suit to enjoin the arbitration.") ("Toyota").

NS Control is also consistent with analogous precedent involving judicial misconduct. For instance, in Bracy v. Gramley, 81 F.3d 684, 687-91 (7th Cir. 1996), rev'd on other grounds,

520 U.S. 899 (1997) ("Bracy"), a man who was convicted of capital murder sought a new trial, because the judge who presided over his case was later convicted of accepting bribes in murder cases. The Seventh Circuit Court of Appeals rejected the petitioner's request for a new trial, stating that he had not demonstrated, and was unlikely to locate any evidence of, actual judicial bias in his case. See 81 F.3d at 687-91. On appeal, the Supreme Court acknowledged that the petitioner could only obtain relief after showing "actual judicial bias in the trial of his case," but reversed and remanded the case, because the petitioner made a sufficient showing to warrant discovery for that purpose. 520 U.S. at 909. The Supreme Court stated, "[a] judge who accepts bribes from a criminal defendant to fix that defendant's case is 'biased' in the most basic sense of that word, but his bias is directed against the State, not the defendant." Id. at 905. If a person convicted by a judge who took bribes in murder cases must show "actual judicial bias" to receive a new trial, it stands to reason that the BMWE must show actual bias to vacate an award issued by an arbitrator who violated tax law.

As the Board noted in NS Control at 3, there is simply no authority for BMWE's petition in the absence of proof of bias.[7]

Recognizing that it cannot show bias, BMWE tries to dodge the Board's holding in NS Control by arguing the NMB's appointment of Mr. Fredenberger was improper. This argument is a red herring. First, courts have held that the NMB's function of appointing arbitrators under Article I, Section 4 of the Board's conditions is purely ministerial. See, e.g., Ozark Air Lines v.

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[7] BMWE itself admits it could find no contrary precedents. Neither of the cases cited by BMWE, McEachern v. Macy, 341 F.2d 895 (4th Cir. 1965) and Social Security Administration v. Burris, 38 M.S.P.R. 51, 1988 MSPB LEXIS 1354 (1988), involved attempts to vacate decisions after the fact because of misconduct.

NMB, 797 F.2d 557 (8th Cir. 1986). Ceretainly, the NMB was in no position to adjudicate the merits of the government's case against Mr. Fredenberger.

Second, questions regarding the appropriateness of the NMB's appointment of Arbitrator Fredenberger were rendered moot once he completed his task. See Maine Cent. R.R. Co. v. Brotherhood Of Maintenance of Way Employes, 657 F. Supp. 971, 988 (D. Me. 1987) ("Maine Central"). In Maine Central, the carrier challenged the constitutionality of a law that directed the parties to submit unsettled issues to binding arbitration, and sued the NMB, after it appointed an arbitrator pursuant to that law. See id. The court held as follows:

> The Court finds that the sole function of the Board under the Second Act was to appoint an arbitrator to resolve implementing issues. The Board has fulfilled this function, and the arbitrator has completed his task. Consequently, it appears that the Court can no longer grant the Railroad any of the relief it has requested against the Board. Such changed circumstances can render a once viable controversy moot.

Id. This Board cannot undo Mr. Fredenberger's appointment. In the circumstances presented by BMWE's petition, all the Board could do is vacate his award if there were evidence of bias in that award. As we have explained, BMWE has failed to show any bias by Mr. Fredenberger against BMWE.

Furthermore, BMWE has failed to show that the NMB's appointment of Mr. Fredenberger violated any applicable legal requirements.[8] This Board has already rejected

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[8] BMWE also argues that the NMB should have informed the parties about the investigation of Arbitrator Fredenberger. BMWE Pet. at 9. However, the NMB was legally barred from disclosing that it received an IRS summons regarding Arbitrator Fredenberger. See 26 U.S.C. §§ 6103 (prohibiting federal employees from disclosing "return information," which includes information about whether a taxpayer's return was, is, or will be investigated); 26 U.S.C. § 7213 (criminal penalty for unauthorized willful disclosure by a government employee); 26 U.S.C. § 7213 (government's civil liability for disclosure).

BMWE's argument that Mr. Fredenberger acted as a special government employee within the meaning of 18 U.S.C. § 202(a) in NS Control. See NS Control at 3, n.1. BMWE tries to distinguish NS Control by arguing that Mr. Fredenberger was selected by the parties in NS Control, but appointed by the NMB in the present matter. BMWE Pet. at 13. However, this is not a principled distinction. If a New York Dock arbitrator does not meet the definition of special government employee, this is true whether he was selected by agreement or appointment.

Finally, even if Mr. Fredenberger were considered a special government employee, the Board also made crystal clear in NS Control that such a conclusion was irrelevant to whether his award should be vacated. The Board there held, "even if Fredenberger could be viewed as having acted as a federal employee, his tax law violation had no connection whatsoever with the subject matter of the arbitration." NS Control at 3 (emphasis added).

C. BMWE Cannot Show Prejudice

Unable to allege any bias by Mr. Fredenberger against BMWE, BMWE argues instead that it was somehow prejudiced by Mr. Fredenberger's appointment in two different ways. First, BMWE argues that it was prejudiced by Mr. Fredenberger's "handling of the proceeding, which included an unfair and unusually rushed schedule, apparent use of an assistant where none was authorized (and another arbitrator had been removed on that basis) and disproportionate allocation of hearing time. . . ." BMWE Pet. at 17. Second, BMWE contends it was "prejudiced by having to present a legal argument to a man who had no regard for the requirements of the law." BMWE Pet. at 15. As previously explained, these arguments do not allege bias against BMWE. They are arguments BMWE made or could have been made when it appealed the Fredenberger Award. Moreover, as we next explain, they are without merit.

Turning first to BMWE's alleged shortcomings in the conduct of the hearing, BMWE fails to explain how the hearing schedule was unfair to BMWE, in light of the fact that all parties to the arbitration were governed by the same schedule.

BMWE's contention that it was prejudiced by Arbitrator Fredenberger's adherence to New York Dock time deadlines for issuance of an arbitrated agreement is not a little ironic given its contention that he has "no respect for the requirements of law."

BMWE's complaint of a "disproportionate allocation of hearing time" also is without merit. BMWE official Myron declares that Mr. Fredenberger ". . . drastically truncat[ed] the time available for BMWE's rebuttal." Myron Declaration at ¶ 4. This is not true, as the hearing transcript plainly shows. Arbitrator Fredenberger refused to cut short the presentations, rebuttals, or surrebuttals of any party. For instance, during the hearing on December 18, 1998, he stated as follows:

> MR. FREDENBERGER: . . . Now you [BMWE] can either go forward now with your surrebuttal. I can set Saturday as a hearing date tomorrow. I can set Monday as a hearing date to come back here and complete this. I will not cut you or anyone else off from saying something in a case that's this important that you feel you should say . . . . I would say that I have not constricted anyone with respect to time.

Hearing Tr. at 968-69 (excerpt attached as Exhibit D). More importantly, BMWE declined Arbitrator Fredenberger's offer to extend the hearing. Id. If anyone wanted to cut off arguments, it was BMWE. See id. at 968.

BMWE also offers no support for its allegation that Arbitrator Fredenberger had an assistant at the hearing. During a break in the proceedings, he did introduce a person who was interested in becoming an arbitrator. He specifically disclaimed, however, that she was assisting him in this proceeding. In any event, BMWE never explains how it would have been biased even if she had been assisting the Arbitrator in some capacity.

There is also no merit to BMWE's contention that it was prejudiced because it "had a right to have its case heard by someone who would give appropriate weight to controlling precedent and would respect the legal boundaries on his authority." BMWE Pet. at 18. By this contention, BMWE is clearly trying to reargue the petition for review that it withdrew and the Board dismissed. For example, BMWE made this same argument in its petition for review, contending that Arbitrator Fredenberger "cited (but did not follow) Carmen III in saying that his authority was limited . . . ." BMWE Pet. for Review at 4. It was and remains the Railroads' position that Arbitrator Fredenberger correctly applied the precedents of the Board, including Carmen III, and the D.C. Circuit. But in any event, BMWE is now foreclosed by its settlement and the withdrawal of its appeal from contending otherwise. BMWE is simply dissatisfied that Arbitrator Fredenberger ruled against it. If the loser in every arbitration or litigation could claim prejudice because the decision-maker ruled against them, then every contested decision could be set aside as the product of prejudice.

BMWE characterizes the Fredenberger Award as the "lead employee protection condition arbitration" in the Conrail Transaction. BMWE Pet. at 20 (noting that the New York Dock award issued by Arbitrator Kasher was decided "in part in reliance on the Fredenberger Award."). However, contrary to BMWE's erroneous contention, the other principal New York Dock award, by Arbitrator Kasher, expressly disclaimed reliance on the Fredenberger Award. Kasher Award at 40. Arbitrator Kasher independently determined that the Railroads' proposed implementing agreement for carmen employees should be adopted. BMWE has not attacked him as having "no respect for the requirements of law," even though the Kasher Award adopted Carrier proposals similar in approach to those adopted by the Fredenberger Award. Nor does BMWE allege that Mr. Kasher has shown a lack of respect for legal precedent and the boundary

of his authority. Many of the same kinds of issues in that arbitration were addressed in the Fredenberger Award. Yet, no one accused Arbitrator Kasher of a rush to judgment, even though he conducted a one-day hearing, in contrast to the four-day hearing held by Arbitrator Fredenberger.

In sum, BMWE has failed to show any prejudice or, more importantly, any bias against it in the conduct of the hearing or Arbitrator Fredenberger's Award.

D. Harm To Railroads And Transaction

BMWE is silent on the implication of the relief requested by its Petition. In fact, however, BMWE's requested relief could have serious consequences for the Transaction.

For example, the Fredenberger Award provided the basis for the allocation of employees between CSXT, NSR and Conrail. More than 3000 Conrail employees have been allocated and become employees of CSXT or NSR or remained Conrail employees. Employees have moved. Thousands of employees have been trained in the rules and procedures of their new employer. Their seniority has been merged with that of employees of other carriers. The Railroads have already commenced a new maintenance season. BMWE's requested relief could lead to the reopening of the allocation of employees, result in a reshuffling of the workforce, disrupt the Railroads' maintenance operations and plans, and add costs.

The arbitrated implementing agreement also provided the basis for coordinating the repair of roadway equipment. Pursuant to the agreement, Conrail's roadway equipment shop has been closed. The work done at that shop has been transferred to, respectively, CSXT's roadway equipment repair shop at Richmond, Virginia or NSR's shop at Charlotte, North Carolina. If the award were vacated, there would be new uncertainty how this repair work would be performed.

The arbitrated implementing agreement provides the basis for how maintenance of way

work is performed on Conrail. Under the agreement, CSXT or NSR perform production work, repair Conrail's roadway equipment, and perform other functions that Conrail no longer has the capacity to perform given its much reduced size. Again, the relief requested by BMWE could reopen and create uncertainty how maintenance of way work would be accomplished on Conrail. Any resulting disruptions in Conrail's operations would have significant ripple effects on the operations of CSXT and NSR.

All told, BMWE's request to vacate the award rendered by Arbitrator Fredenberger could disrupt, at this late date, the implementation by CSXT, NSR and Conrail of the Conrail Transaction creating substantial harm to the Railroads and the public.

CONCLUSION

For the reasons stated herein, BMWE's petition should be denied.

Ronald M. Johnson

Ronald M. Johnson
Jonathan Krell
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Counsel for CSX Transportation, Inc.

January 18, 2000

#345123

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Reply by overnight delivery to the following:

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Dated at Washington, D.C. this 18th day of January, 2000.

Jonathan M. Krell

US OFFICE PRODUCTS

INTERNATIONAL ASSOCIATION of MACHINISTS
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November 4, 1998

Via Fax and US Mail

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Vice President, Labor Relations
Norfolk Southern Corporation
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Norfolk, VA 23510-2191

Mr. K. R. Peifer
Asst. Vice President, Labor Relations
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Gentlemen:

This is in reference to your letter, dated October 28, 1998, and faxed to my office on October 29, 1998, advising that the Carriers were referring the subject matter of the August 24, 1998, Notice to arbitration under Article I, Section 4 of New York Dock. Further, the parties were advised that a joint telephone conference would be held on October 30, 1998, at 2:00 p.m. for the purpose of selecting a neutral referee.

At the beginning of the phone conversation, I stated objections for the record pertaining to the phone conference, which were that: The IAM & AW had only

Carriers' Exhibit A-6

attended one (1) meeting on September 24, 1998, in Washington. We had not attended or been notified to attend any additional meetings or negotiation sessions. The notice for the alleged conference was very short and in fact, President Directing General Chairman R. L. Reynolds, General Chairmen Coker, Cronk and Elmore had not received the notice and Reynolds, Cronk and Elmore were unavailable due to lack of notice and that one single arbitration was improper.

The Carrier noted our objections for the record and stated that we would and were holding the conference call to choose a Neutral Member in accordance with Article I, Section 4 of New York Dock. Therefore, we proceeded under protest due to our objections. Since no other craft would recommend a Neutral, I suggested two (2) names, which the Carmen agreed to either. However, the BMWE representative rejected both. The Carrier then presented two (2) names, which were rejected by the Organizations.

Upon questioning, the BMWE representative stated that he would not agree to any suggested names and wanted the National Mediation Board to appoint a Neutral. The Carrier stated that the conference was ended and the NMB would be contacted to appoint a Neutral. I advised that I did not feel that the process was correct or fair and that the BMWE should not have veto power on the majority. The Carrier stated that it would take full agreement of all the parties for a selected Neutral and the alleged conference ended.

I would like to take this opportunity to confirm the alleged conference and our objections. Further, the IAM & AW would like to clearly state that the process and procedures being used by the Carriers are totally improper and that the alleged conference held on October 30, 1998, was not proper and insufficient.

Upon full review of this matter, it is our position that this matter must be handled in a different fashion and recommend the following;

It should be determined that the Notice of Conference letter, dated October 28, 1998 was too short and the alleged phone conference improper.

The Carrier has been unable to finalize a master type Implementing Agreement with the BMWE, which must be completed prior to addressing the Canton to Charlotte issue. The Canton/Charlotte issue is really a transaction off of the finalized master type Implementing Agreement and does involve several different crafts. However, the main issue must be settled first.

The Carriers and BMWE should attempt to reach a master type Implementing Agreement and if so, then attempt to reach a supplemental Agreement with the IAM & AW pertaining to the employees and work performed on the former New York Central territory of Conrail. If an Agreement with the BMWE and/or a

supplemental Agreement with the IAM & AW cannot be reached, then at that point arbitration is in order. A timely notice should be given and a proper conference be held to select a Neutral for the adjudication of this dispute and if necessary, the dispute should proceed thru the arbitration process, with a clear understanding of such issues as "What is the issue or question being adjudicated," Who is the Board Member for each party, Where will the Board convene and What is the cost to each party?

After the completion of the foregoing. The Carriers, BMWE, IAM & AW and SheetMetal Workers of the CSXT Richmond Shop and the IAM & AW and other represented Crafts at the Charlotte Roadway such as the Blacksmiths, Carmen, Electricians, SheetMetal Workers and Firemen & Oilers should attempt to reach an Agreement on the transaction of closing the Canton, Ohio shop and transferring the work to Richmond and Charlotte. If an Agreement between the parties cannot be reached on this transaction, then at that point arbitration is in order. A timely notice should be given and a proper conference be held to select a Neutral for the adjudication of this transaction dispute and if necessary, the dispute should proceed thru the arbitration process, with a clear understanding of such issues as "What is the issue or question being adjudicated", Who is the Board Member for each party, Where will the Board convene and What is the cost to each party?

Of course the negotiation process could proceed simultaneously on both issues. However, the arbitration process must be separate from each other, as it is clear that the issues, involved parties and situations are very different.

Therefore, please be advised that the foregoing objections are reiterated and that the IAM & AW is totally opposed to proceeding on these issues under the procedures indicated by the Carriers. Further, if the Carriers do not agree with the suggested procedures set forth above for handling these disputes, we respectfully request that a Procedural Board be established to determine the proper procedures to be used in adjudicating these issues.

Please advise of your decision, within five (5) days of receipt.

Sincerely,

Joe R. Duncan
Asst. Pres./Dir. Gen. Chairman

C: R. L. Reynolds
M. Filipovic
Conrail Gen. Chairmen
CSX-T Gen. Chairmen

US OFFICE PRODUCTS

May 11, 1999

File: 2236-12

Mr. M. A. Fleming
President – BMWE
26555 Evergreen Road, Suite 200
Southfield, MI 48076-4225

Dear Mr. Fleming:

This refers to and confirms our understanding relative to the January 14, 1999 New York Dock Arbitrated Implementing Agreement. BMWE adopts and agrees to the Arbitrated Implementing Agreement as modified by:

(a) the March 17, 1999 Memorandum of Agreement among NSR, CSXT, Conrail and BMWE effecting adjustments to Appendix A of Attachment No. 1 to the January 14, 1999 Arbitration Award; and

(b) the March 23, 1999 Memorandum of Agreement between CSXT and BMWE making certain agreements for the implementation of the January 14, 1999 Award; and

(c) the May 11, 1999 Side Letters of Understanding to said March 23, 1999 Memorandum of Agreement.

Therefore, BMWE will withdraw its Petition for Review and its Petition for Stay filed with the Surface Transportation Board insofar as those Petitions seek relief or modification of the January 14, 1999 Arbitration Award affecting CSX Transportation, Inc., the allocated Conrail property to be operated by CSXT, or Conrail.

Very truly yours,

K R Peifer

K. R. Peifer
Vice President Labor Relations

I Agree:

M. A. Fleming /DFG

M. A. Fleming, President, BMWE

US OFFICE PRODUCTS

MEMORANDUM OF AGREEMENT

BETWEEN

CSX TRANSPORTATION, INC.
and its railroad affiliates

AND ITS EMPLOYEES REPRESENTED BY THE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WHEREAS, all issues relating to selection of forces, applicable collective bargaining agreements, seniority district organization, shop consolidations, subcontracting, Shared Asset Areas and disposition of the Conrail Supplemental Unemployment Benefit Plan have been resolved in the January 14, 1999 Arbitrated Implementing Agreement pursuant to New York Dock made with CSXT, NSR and CR through arbitration pursuant to Section 4 of the New York Dock labor protective conditions, and;

WHEREAS, the parties to this Memorandum of Agreement have, after reviewing the terms of said Arbitrated Implementing Agreement, wish to make voluntary adjustment to certain specific terms of said Arbitrated Implementing Agreement as it relates to CSXT;

IT IS THEREFORE AGREED:

Section 1. a. - As to CSXT the following provisions of the Arbitrated Implementing Agreement are replaced by the terms of this Agreement:

- Article I, Section 1 (h)
- Article II, Section 1, second paragraph
- Article II, Section 2, second "bullet point"

Section 1. b. – All other terms of the Arbitrated Implementing Agreement will remain applicable to CSXT.

Section 2 - The parties have agreed to a new single collective bargaining agreement with BMWE which will establish a consolidated workforce on the expanded CSXT System (Copy attached as Attachment "A"). By its terms, the new

CSXT System BMWE Agreement will be effective on "split date" which is expected to be June 1, 1999.

Section 3 - The employees on allocated CRC lines to be operated by CSXT will participate in the CSXT System Production Gang Agreement, commencing with the 2000 production season. Except by mutual agreement of the parties, no SPG will perform work on the former CRC territory until the former CRC employees have had an opportunity to bid on positions on such SPG. For the remainder of the 1999 production season only, existing zone and region gangs, working on lines allocated to CSXT on "split date" will continue to work on the allocated Conrail lines operated by CSXT with vacancies resulting from employees allocated to NSR or the SAA filled by available former Conrail employees allocated to CSXT and then offered to other available employees from other CSXT districts if there are not sufficient available bidders. These vacancies will be bulletined to all former CRC employees as a group without regard to former Conrail seniority districts. Employees holding seniority in the vacant classification will be awarded positions in order of earliest seniority in the applicable classification. This interim arrangement will not set a precedent.

Section 4. a. - Twelve (12) new "Service Lane Work Territories" ("SLWTs") are hereby established for "floating; i.e. other than point headquartered" Track and Bridge and Facility positions falling into the category between System Production Gang work and basic point headquartered maintenance work; e.g., an AFE gang that would perform work over multiple seniority districts. Such gangs consisting of any number of employees may perform any work covered by the scope of the new Maintenance of Way Agreement and may be established effective on "split date". It is recognized that as these gangs are established a corresponding number of positions in floating district or other similar type gangs may be abolished. It is also understood that the establishment of SLWT gangs will not diminish the carrier's right to retain or establish seniority district floating gangs where warranted. On the other hand the establishment of SLWT gangs will not be used as a device to eliminate basic maintenance forces (See Side Letter). A copy of a map and a listing of seniority districts contemplated in each SLWT are attached (Attachments "E" and "F"). Employees holding seniority on a seniority district that is split between more than one SLWT will only be obligated for protective benefit eligibility, including but not limited to SUB, to protect SLWT work on one SLWT, whichever is nearest in proximity to the employee's place of residence.

Section 4. b. - The seniority rosters of the involved seniority districts within each SLWT specified in Attachment "F" will be dovetailed for the purpose of establishing a "list" to be used solely to administer bids and displacements to SLWT gang positions.

Section 4. c. - These work territories may be modified on thirty (30) days written notice as organizational structures of service lanes and operating divisions are changed. If requested, the Carrier will meet with the Organization to discuss any changes and concerns associated therewith.

Section 4. d. - Weekend travel allowance for employees assigned to SLWT gangs will be a flat weekly allowance of $50 ($75 in cases of 300 or more miles actual roundtrip travel), in lieu of the benefits of Section 5 of CSXT Labor Agreement 12-81-97.

Section 4. e. - In the event the number of SLWTs are reduced to 10 or less, the production gang lump sum bonus (up to 5% of his compensation earned on such gang during the applicable calendar year – up to a maximum of $1,000 – subject to qualifying) will be allowed to all employees on such SLWT gangs.

Section 4. f. – In the event the number of SLWTs are reduced below 10, the weekend travel allowance then applicable to System Production Gangs under CSXT Labor Agreement No. 12-81-97 will be allowed to all employees on such SLWT gangs.

Section 4. g. - If the Carrier wishes to reduce the number of SLWTs below 8, agreement with the Organization will be required.

Section 5 – All CSXT BMWE represented employees will be permitted to participate in CSXT's Capital Builder 401(k) employee savings plan effective on "split date".

Section 6 – Effective "split date", former Conrail BMWE represented employees residing in Canada allocated to CSXT will be provided the Canadian Exchange Adjustment provided other CSXT BMWE represented Canadian employees.

Section 7 – In lieu of Article I, Section 1 (h) of the Arbitrated Implementing Agreement, the parties have agreed that three specifically identified projects on Conrail lines to be operated by CSXT may be completed with contractors, if necessary (See attached list of projects). Otherwise, the subcontracting provisions of the various collective bargaining agreements will govern any subcontracting that is proposed between the effective date of this agreement and "split date". Thereafter, the terms of the National Subcontracting Rule (May 17, 1968, as amended by subsequent national agreements) will govern subcontracting matters under the new CSXT System BMWE Agreement.

Section 8 – Conrail employees allocated to CSXT under Article I of Appendix A, of Attachment No. 1 and employees subsequently entering service on the Conrail lines

to be operated by CSXT shall be credited with prior service for vacation, personal leave and other benefits now provided under the CSXT System BMWE Agreement and which are granted on the basis of qualifying years of service in the same manner as though all such time spent had been in the service of CSXT.

Section 9. a. - The former Conrail Buffalo, Cleveland, Columbus, Mohawk, New England and Southwest seniority districts (or the remaining portion operated by CSXT) will be preserved as separate districts under the CSXT System BMWE Agreement.

Section 9. b. - The portions of the Conrail Philadelphia and New Jersey seniority districts operated by CSXT will be combined and will be known as the Philadelphia/New Jersey District under the CSXT System BMWE Agreement.

Section 9. c. - The portions of the Conrail Chicago and Youngstown Districts will be combined with the existing B&O Akron/Chicago West seniority district. The portion of the Conrail Toledo seniority district will be combined with the C&O Hocking seniority district.

Section 9. d. – Employees for the split former Conrail districts specified in Sections 9 b and c will be selected by the bidding procedure stipulated in the Memorandum of Agreement dated March 17, 1999.

Section 9. e. -- The portion of the B&O Ohio South seniority district at Chillicothe, Ohio will be combined with the C&O (Chesapeake) Northern seniority district. The portion of the C&O (Chesapeake) Hocking District at Gallipolis to Hobson and the portion of the B&O Ohio South at Belpre to Relief will be combined with the B&O Monongah West seniority district. The portion of the B&O Toledo East seniority district at Rossford Yard will be combined with the C&O (Chesapeake) Hocking seniority district. The C&O (Chesapeake) Newport News seniority district will be combined with the C&O (Chesapeake) Richmond seniority district. The portion of the SCL Florence/Savannah seniority district at Fernadina to Seale will be combined with the SCL Jacksonville/Tampa seniority district.

Section 9. f. – Positions in the Cincinnati, Ohio Coordinated Terminal will be awarded on the basis of seniority. Only employees who hold seniority on a seniority district that enters the Coordinated Terminal Area (i.e., B&O Toledo East, C&O Cincinnati/Chicago, and the L&N Cincinnati seniority districts) will be considered. For bidding and displacement purposes only for positions within the Coordinated Terminal Area, these three (3) rosters will be combined on a dovetailed "bid and displacement list" comprised of the enumerated rosters.

Section 9. g. – The Toledo Terminal district seniority rosters will be dovetailed into the C&O Hocking seniority district rosters. With this action the coordination arrangement previously in place is cancelled.

Section 9. h. - Employees on such combined rosters contemplated in Sections 9b, c, d, e and g above, (both Conrail and CSXT) will have their seniority dovetailed and will be given preference for positions established with fixed headquarters located on their prior rights territory. Employees with seniority on multiple rosters (except where those rosters are being combined) will be allowed to retain such seniority until recalled. Employees with seniority on multiple districts that are being combined will be granted a one time election of which seniority date and prior rights district they will retain.

Section 9. i. – In application of Appendix A, Section I.B.2(c), of Attachment No. 1 to the Arbitrated Implementing Agreement, employees allocated to CSXT having only Regional seniority will be given a designated home seniority roster standing based on the location of their residence. They will not, however, obtain prior rights to point headquartered positions. Notwithstanding the above, an employee who has a regional seniority date in a classification that is earlier than his district seniority date in that classification on the former Conrail seniority district, will be assigned that regional seniority date in that classification on the designated home seniority roster.

Section 10 – Seniority rights conferred by Conrail to former Conrail employees currently employed on any passenger agency will be recognized and said employee(s) will be permitted to exercise seniority in the same manner they could have, had the operation of portions of Conrail by CSXT not occurred.

Section 11 - For convenience, references to gender, if any, in this Agreement are made in the masculine gender. It is understood and agreed by the parties to this Agreement that references to the masculine gender include both the masculine gender and the feminine gender.

Section 12 - To the extent this settlement agreement is inconsistent with any Agreement entered into previous to this Agreement, the provisions of this Agreement will prevail.

Initialed at Strongsville, Ohio on the 23rd day of March 1999. Executed after ratification this 11th day of May 1999.

FOR THE BROTHERHOOD OF MAINTNENANCE OF WAY EMPLOYES

J. R. COOK
GENERAL CHAIRMAN

JED DODD
GENERAL CHAIRMAN

P. K. GELLER
GENERAL CHAIRMAN

S. A. HURLBURT
GENERAL CHAIRMAN

J. D. KNIGHT
GENERAL CHAIRMAN

L. L. PHILLIPS
GENERAL CHAIRMAN

FOR CSX TRANSPORTATION, INC.

K. R. PEIFER
VICE PRESIDENT LABOR RELATIONS

APPROVED:

M. A. FLEMING
PRESIDENT, BMWE

US OFFICE PRODUCTS

Page 966

you, the arbitrator, don't have the authority to apply the NW-Wabash agreement over there, because it's not a New York Dock transaction.

Well, that argument is just flatly wrong. It's refuted by this entire development of the case law that's been laid out for you in the materials submitted by us and in some of the materials submitted by BMWE. It's refuted by the principles that bring us here today. It's refuted by your charter under Section 4. It's refuted by Section 4 itself.

Section 4 itself says each railroad contemplating a transaction which is subject to the conditions and may cause the dismissal or displacement of any employees or rearrangement of forces should give at least 90 days written notice of such intended transaction, and so forth.

Well, we are participating and we intend to carry out a transaction that is subject to the New York Dock conditions. It's subject to them because we went to the STB and we asked for permission to do this. And they said you may, and you may do it subject to New York Dock. We must do it subject to New York Dock.

And here we are, carrying out what we think is the

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major final contested step, this is the biggest of the leftover cases. This is the major step now that stands between what we put to the STB and what the STB approved. It stands between STB's approval and the realization of the public interest benefits that the STB said we ought to have to serve the interests of the country.

I think that it is beyond serious debate that this is the opportunity for the imposition of an arbitrated agreement that will appropriately recognize what we have put forward as the legitimate interests that need to be served and make the adjustments that have been asked, and we ask that you approve the carriers' proposed implementing agreement in full, with the addition that we touched on earlier today.

Thank you very much.

MR. FREDENBERGER: Gentlemen?

MR. GRIFFIN: Obviously, we're going to present surrebuttal. Obviously, we need to some time.

MR. FREDENBERGER: Would you like to take a break?

MR. GRIFFIN: Before we go on break, I think it's safe to say that we do not intend to on for five hours of surrebuttal.

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MR. FREDENBERGER: You take as much time as you think you need.

MR. GRIFFIN: Mr. Fredenberger, with all due respect, that's not the whole point. We believe we can provide a pared down surrebuttal. We're not going to need five hours, but at some point I'm asking you to say this proceeding will end at a time on the clock, and we will do our surrebuttal and to the extent that there's time on the clock left --

MR. EDELMAN: It seems to me they've talked for 16 hours. We'll put on our case, that's it, it's closed. I just think this is just -- I think the record should reflect we are already prejudiced in the way in which time has been used and our ability to respond and anybody's ability to do this. We'll put on our surrebuttal and then we're done.

MR. FREDENBERGER: All right, I'll tell you what the situation is going to be. Now you can either go forward now with your surrebuttal. I can set Saturday as a hearing date tomorrow. I can set Monday as a hearing date to come back here and complete this.

I will not cut you or anyone else off from saying something in a case that's this important that you feel you

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should say. I am trying to afford you all the due process that I can.

Now if you feel like you've been somehow prejudiced by the time situation, well I can't control that if that's your opinion. I would say that I have not constricted anyone with respect to time.

Now if you feel you can't make your argument tonight, if you feel you need to go to tomorrow, you need to go to Monday, well then we can do that. I'm willing to stay here as long you're willing -- for whatever time you need this evening, tonight, so we can end this thing tonight.

You wanted me to set a time, I want to end it tonight. Even if it's in the wee hours of the morning I want it over tonight. But what I want is not controlling. It's what the parties feel they need is what's controlling.

Yes, I could set some rigid rules and I could say everybody's going to be done by this and we can run it like the Supreme Court. I could put up my hand and that means the green light, the red light, the yellow light, whatever. I'm not going to do that. I'm not going to cut anybody off. But I'm going to give you every opportunity.

MR. GRIFFIN: We will proceed tonight because

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there's no point in coming in -- Saturday is an impossibility for me and besides --

MR. FREDENBERGER: I would have thought --

MR. GRIFFIN: May I finish, please?

MR. FREDENBERGER: Certainly.

MR. GRIFFIN: As I said, my fact people have pretty much attrited out because of plane schedules and otherwise. And as a practical matter, I can no more confer with them tomorrow, get them back here on Monday. It's an impossibility. So we will go ahead tonight.

MR. FREDENBERGER: Very well. It's your decision to go ahead.

MR. GRIFFIN: We would request a recess of --

MR. FREDENBERGER: Whatever you need.

MR. GRIFFIN: I don't want to set it --

MR. FREDENBERGER: We have a small group here. If you set a time and you feel that you can proceed ahead of that time, I'm sure that we can all get back together.

MR. GRIFFIN: It's just that I don't want to say 30 minutes and then everybody sort of vanishes.

MR. FREDENBERGER: We don't want to vanish out of here, folks, because it's hard to get back in the building

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if you go out front. I mean, I know some people may need to smoke, but I don't know what to tell you because it's very difficult -- they've got a guard downstairs, I hope they still do, and hopefully she'll be able to let you back in.

Whatever you feel you need.

MR. GRIFFIN: 20 minutes.

MR. FREDENBERGER: That's fine. If that's what you feel you need, that's fine.

[Recess.]

MR. BERLIN: Could I do a housekeeping thing?

MR. FREDENBERGER: Yes.

MR. BERLIN: I created these charts while we were doing our rebuttal. They're, of course, the only copy that exists in this world. I would propose to put them into the record as carriers' exhibit and I'm trying to figure out what the last exhibit number is and don't know, but we'll figure it out. But of course, they don't have any copies. So I would offer to do is have them copied on Monday at some establishment that makes copies.

MR. FREDENBERGER: Reduces them.

MR. BERLIN: Yes, reduces it so it can go in the record. Would that be all right?

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MR. GRIFFIN: That's fine, and I'd even say it doesn't have to be Monday.

MR. BERLIN: Thank you very much. I may be still sleeping on Monday.

MR. FREDENBERGER: Sounds good to me. That's fine.

MR. BERLIN: Thank you.

MR. KRELL: Can I just make one other procedural request?

[Off the record.]

MR. FREDENBERGER: We have another housekeeping matter.

MR. KRELL: My name is John Krell. I'm speaking on behalf of CSXT and the currently under the weather Mr. Johnson. I'm referring to Carriers' A-7. We've spoken to the other side. This is the CSX operating plan, Appendix A, and in Tab A we are missing a number of pages. So we've proposed to number it CSX 32, corrected version, that has all of the pages.

MR. GRIFFIN: No objection.

MR. FREDENBERGER: Very good. It's admitted.

MR. KRELL: Thank you.

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MR. EDELMAN: The first thing I would like to do is I actually had some time this morning to attend to a matter that Mr. Berlin is concerned that I do, and I have revised versions of our submission with deletions of references objected to by NSR, based on my error in handling a piece of information that was not declassified. I have substituted a more general reference to the same effect taken from the public record in the case. The changes are entered by hand so you will know what was done. We will forward the changed pages to all parties who received the submission with a request that they return the originals.

Because I've changed to a more general reference -- it will be apparent when it's read -- there is no need to refer to Exhibit 16 and 17 of the BMWE package of exhibits any more. They should be removed in their entirety. I have no need to submit redacted versions. This was really almost surplusage in my citation here, and as I said, the only people who had the exhibits are in this room now. The other people didn't. Don has already ripped his out at my request. So here I have for those here the corrected pages, and the rest I will send to the appropriate people.

MR. FREDENBERGER: All right.

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SURFACE TRANSPORTATION BOARD,
Finance Docket No. 33388 (Sub No. 92)

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
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN
RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

PETITION OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES TO VACATE ARBITRATION AWARD

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December 27, 1999

Pursuant to 49 C.F.R. §§1115.8 and 1117, the Brotherhood of Maintenance of Way Employes ("BMWE") petitions the Board to vacate the arbitration award issued by William E. Fredenberger, Jr. ("Award") 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.

INTRODUCTION

The Award was issued in the arbitration involving BMWE, CSX Transportation ("CSXT"), Norfolk Southern Ry. ("NSR") and Consolidated Rail Corp. ("Conrail") in connection with the CSX/NS acquisition of control and division Conrail. BMWE submits that the Award must be vacated because BMWE was not made aware of an ongoing criminal investigation involving Fredenberger at the time he was imposed as arbitrator, and because the issues in the arbitration were largely controlled by express legal mandates and decisions of the ICC/STB and the Courts, but Fredenberger is a convicted felon, a liar, a thief, a tax evader, who has no respect for the requirements of law; he therefore was not qualified to hear this case, and indeed was incapable of giving due consideration to the obligations imposed on him by law.[1]

BMWE did not participate in the selection of Fredenberger (Myron Declaration ¶2) and the pendency of criminal fraud proceedings against him was never disclosed to BMWE by Fredenberger

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[1] As is explained more fully below, on April 7, 1999 Fredenberger entered a guilty plea with respect to a charge of knowing and willful submission false and fraudulent tax returns; the felony adjudication involved a plea bargain on that charge alone and not on other charges of tax evasion (failure to report income, and failure to pay taxes), and fraud against the United States Department of Veteran Affairs ("VA"). On July 1, 1999, Fredenberger was adjudged guilty of a charge of making false statements in aid of preparation of income tax forms in violation of 26 U.S.C. §7206(a), a felony, and had been sentenced to five (5) months confinement in a federal prison and one (1) year of supervised release with five (5) months of that release subject to home confinement subject to electronic monitoring; Fredenberger was also required to pay restitution to the VA in the amount of $58,272.00.Copies of materials documenting the charges against Fredenberger and the conviction are attached to the Declaration of Joel Myron as Myron Ex. 1.

In accordance with Style rules used by the *New York Times* and others, because Fredenberger is a convicted felon, BMWE has not used the honorific "Mr." when referring to him.

or the National Mediation Board ("NMB") which directly imposed Fredenberger as the arbitrator, even though both Fredenberger and the NMB were well aware of the criminal investigations before the appointment was made. Myron Declaration ¶s 2, 5. BMWE subsequently became aware of Fredenberger's crimes and began inquiries regarding the conviction and the NMB's knowledge of the investigation. Having recently completed those inquiries, BMWE now seeks vacation of the Award. Myron Declaration ¶s 1, 7. [2]

The same contempt for the law that was shown by Fredenberger regarding the Internal Revenue Code and illicit schemes to improperly convert assets was exhibited by Fredenberger in the Award. The principal arguments presented by BMWE to Fredenberger involved the requirements of 49 U.S.C. §11326(a) and judicial and ICC/STB precedent under that provision and its predecessor. BMWE argued that the statute and precedent imposed certain limitations on the decision Fredenberger was to make. Unfortunately, and unbeknownst to BMWE, it was presenting legal arguments to a man who had contempt for even the most basic legal requirements of American citizens, a man who was willing to perpetrate a fraud against the federal government with respect

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[2] BMWE obtained the information regarding Fredenberger's criminality only after the Award was issued and after its petition for review of the Award was withdrawn after settlements with CSXT and NSR. BMWE had filed a petition for review of the award on substantive grounds, but the Board failed to act on a petition for stay in advance of the division date for Conrail. With the need for some certainty in the lives of its members and the split date looming, BMWE entered agreements with CSXT and NSR; in CSXT's case a new agreement was negotiated, but in NSR's case the agreement merely made changes in the Award. At that time BMWE did not realize that the problem was not only that the Award failed to follow the language of the conditions, and controlling precedent, but also that its author had a fundamental disregard for the requirements of law and was unfit to decide the matters in dispute. Once this unfitness came to light, BMWE began the inquiries that led to this petition. Myron Declaration ¶7. BMWE submits that there is a need to vacate the award because the settlement with NSR was predicated on, and indeed only slightly modified an illegitimate award. Moreover, BMWE assumes that the Carriers will not agree that the settlements rendered the Fredenberger Award null and void and without precedential effect.

to his tax obligations and who was willing to participate in fraudulent conversion of Veterans' Administration benefits.

Since learning of Fredenberger's conviction, BMWE obtained a copy of the relevant criminal court papers. BMWE then served Freedom of Information Act ("FOIA") requests on the STB and NMB regarding their knowledge of the criminal proceedings prior to the NMB's appointment of Fredenberger. (*See* Myron Declaration ¶6 and FOIA requests dated August 12, 1999). While the STB quickly responded that it had no pertinent documents, disclosure by the NMB occurred over several months and was only completed by letter dated November 17, 1999. Myron Declaration ¶6. Having now accumulated all of the available documents regarding this matter, BMWE urges that this Board vacate the decision rendered by the criminal Fredenberger.

FACTS

A. FACTS REGARDING FREDENBERGER'S APPOINTMENT, THE ARBITRATION PROCEEDINGS AND THE AWARD.

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 that the Carriers claimed were necessary to carry out the division of Conrail among NSR, CSXT and Conrail/SAA. Negotiations between the parties were unsuccessful. The Carriers wrote the NMB for appointment of an arbitrator. On November 13, 1998, the NMB appointed Mr. Fredenberger, over BMWE's objection (BMWE had asked for a list of arbitrators from which an arbitrator could be selected, but the NMB refused to do so). Myron Declaration ¶2. The arbitration occurred on December 15 through 18, 1998. Award at 4. The Carriers and the BMWE each presented the arbitrator with a comprehensive proposal concerning the selection of forces and assignment of employees and other related issues. BMWE designed its proposal for the

allocation of Conrail's lines between NSR, CSXT and SAA, in a fashion that would the integration of the Conrail trackage into CSXT's and NS's existing operations; but would have the least impact possible upon pre-Transaction seniority rights and collective bargaining agreements ("CBAs"). BMWE relied heavily on the statute and ICC/STB and judicial precedent in this regard; including the D.C. circuit decisions in *Railway Labor Executives Ass'n v. U.S.*, 987 F.2d 806 (D.C. Cir. 1993) (*"Executives"*) and the cases that followed it, and the STB's decision in *CSX Corp.-Control-Chessie System and Seaboard Coast Line Industries (Arbitration Review),* F.D. No. 28905 (Sub-No. 22) (served September 25, 1998) (*"Carmen III"*). Award at 9,12, 1, 15.

On January 14, 1999, the arbitrator issued his decision that imposed, with one small exception, the Carriers' proposal. The arbitrator noted that the threshold issue in the proceeding was his "authority ... under Article I, Section 4 to override or extinguish, in whole on in part, the terms of the pre-Transaction CBAs." Award at 6. He cited (but did not follow) *Carmen III* in saying that his authority was limited in that (*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.

However, the arbitrator began his award granting the Carriers' proposal for allocating Conrail employees, noting that "[w]hile employee choice is a laudable goal, it cannot be placed ahead of efficient implementation of the transaction." *Id.* at 8. The arbitrator next adopted the Carriers' proposals for realignment of existing Conrail and CSXT seniority districts (even districts that would not be involved in any Conrail coordinations) , 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." Award at 11. 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; he changed CBAs even where the were no consolidations of territories of carriers that were separately controlled prior to the CSXT/NSR-Conrail transaction. Award at 12-13. Additionally, the arbitrator abrogated provisions of the Conrail CBA, as well as provisions in the existing CSXT and NSR CBAs that were being retained on CSXT and NSR and imposed on former Conrail territories, that restricted the Carriers' ability to contract-out work; he thus gave the Carriers relief from the CBAs that they themselves negotiated and then sought to have extended to the former Conrail. Award at 13-14.

B. FACTS REGARDING FREDENBERGER'S CONVICTION.

The facts regarding the crimes committed by Fredenberger are set forth in public court papers. Myron Declaration Ex. 1. On April 7, 1999 the United States Attorney for the Eastern District of Virginia filed a Criminal Information that William E. Fredenberger "knowingly, and willfully, aided, assisted in procured, counseled and advised in the presentation under the internal revenue laws of the personal income tax return of Shelby Fredenberger for the 1995 tax year, which was false and fraudulent as to a material matter...".This Criminal Information was filed pursuant to a Waiver of Indictment by defendant Fredenberger filed on that same day along with a Statement of Facts and Plea Agreement signed by defendant Fredenberger. *Id.*

The Statement of Facts explains that the wife of defendant Fredenberger held a power of attorney for her Aunt who was receiving VA benefits. After the Aunt died, she continued to receive benefits from the VA. Beginning in 1992 and through 1996, Mrs. Fredenberger wrote checks on her deceased Aunt's account using VA funds; those checks were paid to Fredenberger. *Id.* at 1-2 The Statement of Facts further stated that Fredenberger filed no tax returns for the years 1985 through 1996 and that Fredenberger knowingly prepared and filed false returns for his wife which did not

report the income received from the conversion of the VA checks. *Id.* at 3. The Plea Agreement (¶6) stated that it constituted an agreement between Fredenberger and the U.S. Attorney's office which recognized that if there was to be a trial there would be costs, expenditure of time, the ability of Fredenberger to invoke a privilege against self-incrimination and an uncertain outcome. The Plea Agreement also stated (¶9) that Fredenberger is to file tax returns for the years 1993-1996 and pay all taxes and interest due and (¶7) that Fredenberger's wife would enter a guilty plea to one count of "fraudulently obtaining benefits" from the VA. Both the Statement of Facts and the Plea Agreement were signed by Fredenberger and his attorney. On July 1, 1999 the District Court entered a criminal judgment against Fredenberger which sentenced him to the custody of the Bureau of Prisons for 5 months, and one year of supervised release of which 5 months would be spent in home detention with electronic monitoring; a fine was waived due to "inability to pay".

C. FACTS REGARDING THE NMB'S KNOWLEDGE OF THE INVESTIGATION OF FREDENBERGER'S CRIMINAL ACTIVITY.

Documents released by the NMB to BMWE over several months reveal that the NMB was aware of the investigation of Fredenberger many months before the Board appointed him to decided this important case that was clearly permeated throughout with legal issues. Myron Declaration Ex. 2 contains copies of certain documents produced by the NMB, many of the documents were duplicative and many were simply pay vouchers; BMWE will be glad to produce all of the records provide by the NMB at the request of the STB or nay other party. As early as May of 1997, investigators from the IRS' Criminal Investigations Division, not a Revenue Agent or tax auditor, showed up at the NMB's offices with a subpoena for records concerning Fredenberger. *Id.* Several months later, but also over a year before Fredenberger was picked by the NMB from among all of the many NMB panel arbitrators to hear this case, the Criminal Investigations Division sought

additional materials from the NMB. *Id.* It is therefore quite clear that the NMB was fully aware that there was a serious criminal investigation of Fredenberger ongoing at the time the NMB chose him to decide this case. The documents produced by the NMB do not show whether the NMB made any inquiry to Fredenberger or the Criminal Investigations Division about the investigation. Myron Declaration ¶6.

D. THE TASK ASSIGNED FREDENBERGER.

Because of ICC/STB decisions since 1983, the task assigned to Fredenberger was a highly sensitive one, fraught with conflicting legal arguments and of great consequence for the BMWE and its members as well the Carriers. The Carriers asked Fredenberger to essentially eliminate the Conrail CBA for thousands of employees by placing them under NSR and CSXT CBAs, to add new terms not contained in any existing agreement (by eliminating restrictions on contracting-out from all of the agreements involved) and to change the CBAs and alter seniority districts for CSXT employees not even affected by the division of Conrail who would remain CSXT employees. In essence, the arbitrator was asked to rewrite the rates of pay, rules and working conditions covering thousands of BMWE members.

BMWE argued that the Carriers' requests were well in excess of the jurisdiction of a *New York Dock* arbitrator, citing the language of the *New York Dock* conditions, the statute and ICC/STB and judicial decisions. BMWE asserted that the arbitrator was legally barred from doing what the Carriers requested. The Carriers disagreed and presented an argument on why they believed that the arbitrator had authority to issue the sort of award that they requested. Consequently, the arbitrator was required to make certain threshold decisions regarding the scope of his authority under law that would necessarily affect the scope of his decision. Award at 6. Thus, this case was not like other matters that might have been referred to Fredenberger by the NMB. This case was significantly

different from a discipline case, where he would be asked to decide whether discipline of an employee was reasonable under facts presented to him. It was also different from a contract interpretation case, where he would be asked to determine the interpretation or application of a particular contract term where the inquiry would necessarily be limited to the contract language used by the parties and their intent by the language used. And this case was different from an employe protection claims case where the issues are primarily factual.

In this case much of the decision would be controlled by external law, not the intent of the parties; the arbitrator for this case was required to render a decision in accordance with the statute, the conditions and controlling precedent. This is in part why arbitrators assigned to employee protection conditions cases have been described as agents of the ICC/STB or functional equivalents to ICC/STB Administrative Law Judges ("ALJs"). *See e.g.* CSX Transp. Inc. v. United Transp. Union, 86 F. 3d 346, 348 (4th Cir. 1996); Union Pacific/MKT Merger--UTU Implementing Agreement--Arbitration Review, ICC F.D. No. 30800(Sub-No. 28) (August 1, 1989), 1989 ICC LEXIS 2072 at 7 n.2; CSX Corp.--Control--Chessie System etc., F.D. No. 28905(Sub No. 22) (July 19, 1990), 1990 ICC LEXIS 216 at 21 n.2. Moreover, it has been held that decisions by employee protection conditions arbitrators are "order[s] of the Commission [Board]". *United Transp. Union v. N&W,* 822 F. 2d 1114, 1115 (D.C. Cir. 1987). Furthermore, the STB reviews their decisions for compliance with the conditions and applicable precedent and its standard for review in such cases is considerably less deferential than in general arbitration review cases. *Railway Labor Exec.s Ass'n v. United States*, 987 F. 2d 806, 812 (D.C. Cir. 1993); *United Transp. Union v. ICC,* 43 F. 3d 697, 700-701 (D.C. Cir. 1995); *United Transp. Union v. STB,* 114 F. 3d 1242, 1246 (D.C. Cir. 1995) .

ARGUMENT

A. THE CRIMINAL INVESTIGATION OF FREDENBERGER RENDERED HIS APPOINTMENT IMPROPER ABSENT CONSENT OF THE PARTIES.

Fredenberger was not designated as a *New York Dock* arbitrator by agreement between the parties, instead he was imposed by NMB appointment over BMWE's objection . Myron Declaration ¶2. Moreover, if given a choice, BMWE would not have agreed have Fredenberger's hear the case, and it would not have consented to his appointment. *Id.* At the time of his appointment, Fredenberger was aware of the ongoing criminal investigation as was the NMB. *Id.*¶5. Documents produced by the NMB show that a criminal investigations was opened at least as early as a May of 1997.

BMWE submits that while it may have been too much to expect Fredenberger to disclose the ongoing criminal investigation, the NMB, failed in appointing Fredenberger. The NMB is a federal agency responsible for the sensitive task of imposition of an arbitrator to decide an important and controversial (indeed highly charged) dispute, a dispute which involved legal issues which rail labor, rail management and the ICC/STB had heatedly contested over sixteen years; it failed abysmally in appointing a man that it knew was the subject of an extended criminal investigation.

Then the NMB failed again in not disclosing this information to the parties before the case was assigned to Fredenberger. Nor did the NMB inform this agency that the man it had appointed to act as the STB's agent was the subject of a criminal investigation. BMWE which already found Fredenberger objectionable, would certainly have opposed his appointment and/or sought his removal had it known of the criminal investigation. Myron Declaration ¶2.

Perhaps the NMB failed to respond to this rather obvious problem because it was intent on giving CSXT and NSR an arbitrator who was prepared to hear and decide such a complex case in a matter of weeks with hearings to be held just before the holidays in late December, and a decision

issued just after the first of the year. BMWE objected to such a fast timetable; it noted that practice under the *New York Dock* conditions was that their time deadlines were rarely adhered to, and argued that strict adherence to the time deadlines would be grossly unfair and indeed irresponsible given the complexity of the task and the nature of the issues. However, Fredenberger (probably pressed by the need for immediate receipt of substantial fees in order to pay for his legal defense and/or the cost of restitution for unpaid taxes and fraudulently converted funds) insisted on pressing ahead in an utterly unrealistic and unfair time frame despite practice, practicality, fairness and the demands of responsible adjudication. Myron Declaration ¶3.

But Fredenberger was appointed to decide a case under the New York Dock conditions in accordance with the STB's employee protective conditions and the statute. As is explained above, Fredenberger was properly considered an agent of the Board in implementation of its protective conditions. In that capacity he was a "Special Government Employee" under 18 U.S.C. §202(a) and 5 C.F.R. §2635.102(l). A Special Government is an officer or employee of the executive or legislative branch, or any independent agency of the United States retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period. 18 U.S.C. 202(a); 5 C.F.R. §2635.102(l). As a Special Government employee Fredenberger was bound by the ethics rules applicable to government officials. 5 U.S.C. §2635.101 *et seq.* Those rules provide that "To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section"; that employees to must "place loyalty to the Constitution, the laws and ethical principles above private gain"; and that "Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those — such as Federal, State, or local

taxes — that are imposed by law". 5. C.F.R. §2635.101(a), (b)(1) and (12). *See also* 5 C.F.R. §2635.809--"Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law".[3] The conviction papers clearly show that Fredenberger had nothing but contempt for those obligations.

Moreover, as is noted above, employee protective conditions arbitrators have sometimes been described as analogous to ALJs, and their order are deemed orders of the STB. It is therefore highly

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[3] The sections quoted in part above provide in full :

§2635.101 Basic Obligation of public service

(a) *Public service is a public trust.* Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) *General principles.* The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

* * * *

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those — such as Federal, State, or local taxes — that are imposed by law.

§2635.809 Just financial obligations.

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

pertinent to note that ALJs are subject to removal for conduct far less serious than the conduct engaged-in by Fredenberger, and that removals of ALJs for lesser acts in violation of law and of moral turpitude have been upheld. In McEachern v. Macy, 341 F. 2d 895 (4th Cir. 1965), it was held that an ALJ was properly removed from his position for eight instances of financial irresponsibility such as failure to pay debts. In Social Security Administration v. Burris, 39 M.S.P.R. 51, 1988 MSPB LEXIS 1354 (1988), it was held that an ALJ was properly removed when, among other things, he used government postage for personal purposes. 1988 MSPB LEXIS at 22. The Merit Systems Protection Board stated that misuse of "free mail privileges" can constitute good cause for removal, noting "Abuse of the free mail privilege is not only against the law, it can also constitute the basis for criminal charges. *See* 39 U.S.C. §3201 et seq. and 18 U.S.C. §1719. Therefore, when the respondent insubordinately abused those privileges, *he called into question his qualifications to serve in a judicial role and committed acts which could undermine the confidence of the public in the administrative adjudicatory process". Id.* at 23, emphasis added.

BMWE respectfully submits that Fredenberger's admission that he participated in a fraud against the United States, failed to file tax returns and pay taxes and knowingly prepared false returns, and his guilty plea to the last charge, show that Fredenberger would not have been eligible to hear this case had the conviction been known at the time of his appointment (in fact he was subsequently removed form te NMB list of arbitrators, Myron Exhibit 2. Moreover, had BMWE, or the STB been aware of the serious, ongoing criminal investigation he would not have been the arbitrator to hear this case. The cases cited by BMWE relating to criminal conduct by adjudicators show that Fredenberger's actions were grossly violative of the government employee ethics rules. If an ALJ with statutory "good cause for discharge " protection can be removed for matters such as those involved in *McEachern* and *Burris*, an arbitrator certainly must not be eligible to serve in the

role of Special Government employee acting as an ad hoc agent of this Board when that arbitrator has been convicted of a crime such as knowing and willful preparation and presentation of a false tax return and has admitted to failure to pay taxes or file tax returns for elever years and to participation in fraudulent conversion of government monies. Fredenberger's actions obviously show that he was not qualified to serve in a quasi-judicial role.

NSR responded to BMWE's assertions that Fredenberger was a Special Government Employees or functionally an agent of the STB in Finance Docket No. 29340 (Sub. No. 21), by noting that in that case Fredenberger was voluntarily appointed by the union and the carrier, and his selection and appointment were not reviewed or approved by any government agency. In its recent decision in that case, *Norfolk Southern Corp.-Control-Norfolk & Western Ry. Co. and Southern Ry. Co.(Arbitration Review)*, F.D. No. 29430 (Sub No. 21) (Served December 15, 1999) at 3, the STB largely accepted those contentions. Whatever the merits of those conclusions in that case, the Board can not reach such a conclusion in this case. Here Fredenberger was not appointed by agreement, he was selected and appointed by a government agency; if BMWE had any say in the matter it would have prevented Fredenberger's appointment, but he was imposed by government fiat. In that context it would be ludicrous to hold that Fredenberger was a private individual retained by the parties to resolve the dispute. Fredenberger was appointed by a government agency, the NMB, to render a decision in a dispute resolution process required by another government agency, the STB; he therefore can not be described as a private decision-maker. *Cf. Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F. 2d 94, 96 (7th Cir. 1986) . Moreover, if arbitrators like Fredenberger are merely deemed private persons engaged in dispute resolution, rather than agents of the agency, then the entire foundation for STB review of their awards must fail. In F.D. No. 29430 (Sub No. 21), the Board said that the fact that it reviews arbitration awards is of no consequence because it does not

remand the action to the arbitrator but instead returns it to the parties. Besides the fact that the Board's reasoning was utterly illogical, it is completely inconsistent with its stated rationale for reviewing the awards, to insure compliance with its interpretation of the conditions and even to avoid the potential "adverse" precedential effect of a decision that the Board dislikes. *See e.g.. UTU v. STB,* 114 F. 3d at 1246-47. If the NMB appointed employee protective conditions arbitrators are not considered agents of the STB then the STB has no business reviewing their decisions. The STB can not have it both ways, it can not disclaim responsibility for the actions and decisions of the arbitrators but also claim a right to review their decisions. [4]

Fredenberger's actions create a problem which must be resolved by this Board. It is clear that Fredenberger must be disqualified from acting as an agent of the Board in employee protection matters. The NMB has apparently acted to insure that he is not appointed to future cases since it has the responsibility of appointing employee protection case arbitrators, but this agency must deal with the affects on its processes, on its employee protective conditions, and on its enabling statute as a result of issuance of a decision by a criminal. Far more than did ALJ Burris, Fredenberger committed acts which necessarily have a much more significant impact on the confidence of the public in the administrative adjudicatory process than would misuse of free mailing privileges.

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[4] NSR also argued, and the STB agreed that there was some significance to the fact that Fredenberger's fee was paid by the parties not the government. But the fact that the STB requires the parties to pay for *New York Dock* arbitrations does not make the arbitrators agents of the parties. It is unfortunate enough that unions are required to spend their members' dues to pay for arbitrations which have become vehicles for eviscerating the rights of their members, it should not be that the NMB and STB can evade responsibility for the actions of arbitrators that are imposed by action of the agencies. Moreover, does the STB believe that the parties to a *New York Dock* arbitration can refuse to pay the arbitrator or state at the outset that they will not participate and will refuse to be bound if they have to pay? The fact that the Board makes the parties pay for an arbitration process that has been hijacked by the Board does not suggest that the arbitrators who are now subject to STB review are not acting as STB agents.

Fredenberger grossly abused the public trust and seriously compromised public confidence in the integrity of the processes of this agency. How will employees whose negotiated rates of pay, rules and working conditions were changed solely by action of an STB agent who is a tax cheat and who participated in swindling from the Federal government view the *New York Dock* and STB processes?

If Fredenberger would not be eligible for appointment based on his actions, he should not be allowed to render decisions as the Board's agent. Since Fredenberger most certainly would not have been appointed if the NMB had disclosed the criminal investigation, to either BMWE or the STB, his decision should not be allowed to stand. If he was unfit at the outset, the decision rendered by the unfit arbitrator must be vacated as void *ab initio* because he should not have been appointed due to his criminal conduct.

B. THE AWARD MUST BE VACATED BECAUSE BMWE WAS PREJUDICED BY HAVING TO PRESENT A LEGAL ARGUMENT TO A MAN WHO HAD NO REGARD FOR THE REQUIREMENTS OF THE LAW.

As this Board is well aware, resolution of the matters in dispute before Fredenberger turned substantially on legal arguments. For many years rail labor and rail management have argued those points of law from the ICC/STB up to the Supreme Court and down again with varying outcomes along the way. In fact, just before the Fredenberger hearings, the STB rendered its decision in *Carmen III*, which the Board said was an attempt to bring some closure to these issues. BMWE's presentation in the arbitration relied heavily on decisions of the District of Columbia Circuit and the *Carmen III* decision.

Among other things, BMWE cited the D.C. Circuit decisions in *Executives, supra* and in *American Train Dispatchers Ass'n v. ICC*, 26 F. 3d 1157, 1163 (D.C. Cir. 1994) in which 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'...." so the ICC could not modify a CBA "willy-nilly", and terms other than rights privileges and benefits can be overridden only when "necessary to effectuate a transaction"; that 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"; that there must be a public purpose to be secured by the transaction "that would not be available if the CBA were left in place", and 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"; and that 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". *Executives*, 987 F. 2d at 813-814. *ATDA v. ICC*, 26 F. 3d at 1164-1165. BMWE also cited *Carmen III* in which the Board adopted the rationale of *Carmen II,* 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". BMWE pointed-out that 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.

Thus, in this case much of the decision would be controlled by the statute, the conditions and applicable precedent. Indeed, as is discussed above, it is for that reason that protective conditions arbitrators have been described as agents of the ICC/STB or functional equivalents to ICC/STB ALJs; it is also for that reason that the ICC/STB asserted authority to review awards of employee protection conditions arbitrators. Moreover, the ICC/STB has viewed these decisions as so important, that its standard for review of the awards interpreting its conditions and applying the legal standards applicable to those conditions is not the highly deferential standard of review normally applied to arbitrators when they interpret agreements, or even applied by the ICC/STB to largely fact-based employee protection disputes like whether losses of earnings for an employee were sufficiently causally related to a transaction. The ICC/STB has recognized the special importance of decisions rendered by arbitrators in interpreting and applying the employee protective conditions and applicable law that it has devised a much less deferential standard for its review of such decisions. *E.g. RLEA v. U.S.*, 987 F. 2d at 812; *Brotherhood of Maintenance of Way Employes v. ICC*, 920 F. 2d 40 (D.C. Cir. 1990).

However, BMWE had to present its legal arguments to a man who had no respect for law; who refused to even file tax returns; who participated in defrauding the Veterans Administration out of tens of thousands of dollars. Fredenberger's handling of the proceeding, which included an unfair and unusually rushed schedule, apparent use of an assistant where none was authorized (and another arbitrator had been removed on that basis) and disproportionate allocation of hearing time (Myron Declaration ¶4), suggested a cavalier disregard for the adequacy of the hearings and lack of fairness to BMWE, but they gave no hint that Fredenberger was a criminal; that only became known later. Since Fredenberger had no respect for the most basic of legal obligations, he certainly was not likely to be concerned with legal limitations on his authority as a *New York Dock* arbitrator. BMWE had

a right to have its case heard by someone who would give appropriate weight to controlling precedent and would respect the legal boundaries on his authority. But instead, it got Fredenberger.

In F.D. 29430 (Sub.-No. 21) (at 3) the Board said that Fredenberger's conviction had no connection with the subject matter of the arbitration since the conviction involved "private financial affairs" and that the transgression did not show bias against TCU. But if the Board were to take the same position here it would view the tasks involved too narrowly. The Board has delegated to arbitrators the authority to issue orders of the Board in disputes that have become suffused with legal issues. But these individuals are not even subject to the sort of screening that is applied to the lowest level STB employees; and now one of the ad hoc decision-making agents of the Board has been revealed to be unfit to make the determinations which such arbitrators are now required to make. BMWE submits that it would be specious for the STB to say that Fredenberger action were a purely private matter in this context.

It is clear that the NMB failed miserably in its responsibilities here in appointing a man it knew was the subject of a serious and continuing criminal investigation. But that does not mean that the STB may ignore the consequence of the NMB's failure. The STB must recognize that the felon who was appointed by the NMB was acting as the STB's arbitrator. The STB is responsible for the substantive outcome of the case. Surely the STB would not have allowed a felon, a defrauder to act as its agent in this matter. But now the Board is faced with the problem that a decision that will be cited as precedent under the employee protective conditions was decided by a criminal; unless the Board is prepared to declare the Award to be void, without any precedential value and not to be cited in employee protection proceedings.

BMWE recognizes that it has not found cases addressing the effect of a decision on behalf of federal agency by a person who had committed crimes of moral turpitude against the federal

government, who was known to be under criminal investigation when appointed. Perhaps that is because it so rare that someone like Fredenberger would be imposed as the decision-maker on behalf of a federal agency, would be authorized to interpret the law and thereby decide the fate of thousands. Here a man whose qualifications and character were never reviewed by the STB in the first instance, who never was subjected to the sort of background check to which federal employees are subjected (certainly not the sort of investigation and review which ALJs undergo) was in a position to issue a decision on behalf of the agency; and it was later found that this man did not pay income taxes for over ten years and participated in fraud against the federal government. The extremity of the situation shows why there is an absence of precedent on point, but also why it must be addressed by this Board. This is not a simple case where the decision-maker was bribed by a party. But the consequences were still great and adverse for BMWE since much of its case depended on arguments that were of no consequence to the arbitrator. If he did not view himself as bound by the obligations to file income tax returns and pay taxes, if he had no compunction in stealing money from the VA, how seriously would he take the admonition that he was bound by the requirements of the employee protective conditions, the statute and ICC/STB and judicial precedent?

Again, the Board must consider the outside reaction to the integrity of its processes. How will the employees (many of whom are Veterans), whose negotiated rates of pay, rules and working conditions were changed solely by action of an STB agent who is a tax cheat and who participated in swindling from the Veterans' Administration, view the *New York Dock* and STB processes? And how will the Courts and Congress view an agency that allows the decision of a tax cheat and defrauder of the VA to stand as its decision regarding the legal issues raised in the lead employee

protection conditions arbitration in CSX/NS-Conrail transaction? [5] How does the Board feel, how will Congress and the Courts view the Board, and what will future arbitrators think when they consider that the first award issued after *Carmen III* was written by felon and allowed to stand? [*note United Transp. Union v. STB,* 114 F. 3d at 1246-STB had authority to revers arbitration decision because of concern for impact on STB administration of the Act and concern about precedential effects]. All of these questions must bear heavily on the Board's consideration of the impact on the public of failing to vacate the decision of the criminal Fredenberger.

CONCLUSION

By the Fredenberger appointment BMWE was prejudiced in its ability to obtain meaningful consideration of its key arguments under the *New York Dock* conditions. The Award is therefore the product of unfair and prejudicial proceedings and should therefore be vacated.

Respectfully submitted,

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[5] The only other case that went to arbitration (F.D. No 33388, Sub. No. 89) was decided in part in reliance on the Fredenberger Award and was later settled.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Petition To Vacate Arbitration Award by by overnight delivery to the following:

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Dated at Washington, D.C. this 17th day of December, 1999.

Richard S. Edelman

FREDENBERGER AWARD

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 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	) DECISION

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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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 wasan 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. BMWE's proposal could delay implementation of the transaction several months beyond what would be required under the Carriers' plan. Moreover, the BMWE'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 BMWE 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 BMWE 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 BMWE 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.

BMWE 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. BMWE 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 BMWE 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. BMWE argues that with limited modifications the CRC/BMWE agreement should apply. With the exception of CSXT's Northern District where the CRC/BMWE 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 BMWE applicable to the territory on which former CRC employees will work.

The basic argument advanced by BMWE 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/BMWE agreement as BMWE 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 BMWE agreements. As examples, the Carriers point out that BMWE has agreed with CSXT to apply the System Production Gang (SPG) agreement which has been

highly efficient and successful on that property and that BMWE 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/BMWE 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 BMWE. The undersigned believes that this determination r 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 BMWE's proposal it would be required to hire and then lay off substantial numbers of employees. Nor, emphasizes the Carriers, does BMWE'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 BMWE. 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 BMWE 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, BMWE 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/BMWE 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 BMWE 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 BMWE'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 BMWE 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, BMWE 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 BMWE 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 BMWE 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 BMWE 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 BMWE 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. BMWE'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 BMWE. 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.

BMWE apparently has no objection to the consolidation of the shop work here at issue or with the dovetailing of seniority. However, BMWE'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, BMWE 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 BMWE 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

Attachment No. 1

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 EMPLOYES

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) BMWE 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

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:

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[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 BMWE 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 BMWE Agreement applicable at that facility.

Those CRC employees who remain in the Shared Asset Areas will continue to perform service under the applicable CRC/BMWE 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 BMWE 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: