STB FD- 33388 ID-184826 12-15-97 D 52/60

7. OUTLYING VACANCY. An extra engineer who misses a call, lays off on call or ties-up for extra rest when such engineer stood for an outlying vacancy will, upon reporting for service, be required to relieve the engineer who accepted the call if such engineer is still occupying the outlying vacancy. The engineer's guarantee will be reduced by the amount he/she would have earned.

8(a). REGULATION. The number of employees assigned to the extra board shall be determined by the Carrier. Assignments to the guaranteed extra board shall be made in accordance with Schedule Rules and modifications thereto.

(b). Engineers added to the extra board shall not be removed therefrom for a period of 7 days but may apply for assignments or be displaced earlier.

EXAMPLE: Extra board is added to on May 1. Engineer assigned to the extra board on May 1 may not be removed until May 8.

9. DEADHEADING. Deadheading which results from the regulation of the extra board will not be paid for.

10. SHORT TURNAROUNDS. Extra engineers making a short turnaround trip out of the home terminal will be placed at the bottom of the extra board.

11. CONFLICTING AGREEMENTS. All other agreements, understandings etc. in conflict with this agreement are hereby superseded while this agreement is in effect.

12. PENALTY CLAIMS. The Company will not be penalized in any way in the application of this agreement.

EXHIBIT A"

EXAMPLES FOR PAYMENT OF GUARANTEE

An extra engineer:

1. WHEN FIRST-OUT (LAYING OFF AND MISSING A CALL).

   (a) Lays off or lays off on call: at 10:30 P.M. January 3 and marks up at 12:00 Noon January 4. The extra engineer will lose guarantee or the amount he/she would have earned for the calendar day January 3.

   If the extra engineer had not marked up until 12:01 P.M. January 4 he/she would have lost guarantee or the amount he/she would have earned for the calendar days January 3 and 4.

   If the extra engineer continues to lay off greater than 72 hours, he/she will have his guarantee suspended for that half.

   (b) Lay off: at 1:00 AM. January 3 and marks up at 1:00 PM. January 3. The extra engineer will lose guarantee for the calendar day of January 3.

   (c) Misses a call: at 11:00 A.M. January 3. The extra engineer will lost guarantee for January 3 or the amount he would have earned for January 3.

2. WHEN SECOND-OUT (MISSING A CALL).

   (a) Misses one call at the home terminal: at 11:00 A.M. January 3. He/she will lost one day's guarantee.

   (b) Misses two calls at the home terminal: at 11:00 A.M. January 3 and misses another call at 4:00 P.M. January 3 when first-out. The extra engineer will lost guarantee or the amount he/she would have earned for January 3.

   (c) Misses three calls at the home terminal: at 11:00 A.M. January 3 when second out, misses a second call at 4:00 P.M. January 3, and misses another call at 10:00 P.M. January 3. The engineer will lost his/her guarantee for the first-half pay period of January.

   NOTE: In examples 1(c) and 2(a)(b)(c) above, the extra engineer automatically drops to the bottom of the extra board at the time of the miss call.

ARTICLE II

SECTION C - EASTERN POWER PLANT OPERATIONS

Operations between the power plants at Waukegan and Pleasant Prairie and Clinton will be operated as follows:

a. Pool freight service between the power plants and Clinton will be handled by an exclusive unassigned service rotary pool (first in/first out) headquartered at Waukegan.

b. Employees transported to/from Waukegan to/from the power plants will be considered in continuous service, i.e., on-duty and under pay.

c. Employees working in this pool service will be from both the Eastern Seniority District No. 1 Roster and the Northeastern Seniority District 2 Roster. Equalization will be based on mileage and adjusted accordingly by BLE Representatives.

d. All CNW Rules and National Agreements not in conflict with this Section will apply to this pool.

e. Vacancies and/or extra service on this pool will be protected by the ~~now Chicago~~ appropriate road service extra board, ~~, which is explained in Side Letter 1, Section C of Article I.~~ Extra board employees protecting service on this pool will be provided auto mileage to and from Waukegan and Proviso Yard in Chicago. Add Note 1 from page 14.(Okayed by RDM and WSH on 9/7/95).

ARTICLE II
SECTION D - SOUTH MORRILL OPERATION

1. Effective with the serving of a five (5) day advance written notice by UP, UP crews called on duty at South Morrill may receive their trains up to twenty-five (25) miles westward (compass north) on the CNW from South Morrill. In turn, CNW crews called on duty at South Morrill may receive their trains up to twenty-five (25) miles eastward (compass south) on the UP from South Morrill.

2. The twenty-five (25) miles listed in sub-section 1 above, will run east from UP Milepost 156.8 to UP Milepost 131.8 and will run west from UP Milepost 166.0 to CNW Milepost 29.8 and UP Milepost 191.0.

3. Crews relieving trains or extra crews called for service on the operations identified in 1 above, will also be permitted to operate on the territories listed. However, nothing in this Section D will prevent the use of other employees to perform this work in any way permitted by applicable agreements.

4. Crews receiving their trains on the other seniority districts as set forth in this Section will be paid for all time consumed beyond South Morrill (as defined in Sub-Section 2) with a minimum payment of $69.35 (increase) ***.** Should time be used, UP employees will be paid at UP rates and CNW employees will be paid at CNW rates. This payment will be subject to the following:

a. It will be separate and apart from the normal subdivision train operation, i.e., there will be no offset for road arbitraries/mileage

b. All current employees as of the date of advance notice including those employees currently selected or in formal engineer training, will be entitled to the payment. (Okayed by WSH on 9/7/95).

c. The payment will be subject to future wage adjustments, including COLA.

5. Crews operating to the same objective terminal from South Morrill will not be entitled to terminal run arounds if one or more of the crews operate on the other seniority district as set forth in this Article. Crews will, however, be placed in proper order at the home terminal in the same order in which they were originally called at the home terminal.

6. CNW employees holding a permanent CNW coal line pool freight position or extra board assignment at South Morrill on the date of UP's notice and who are adversely affected by implementation of this Article will be covered by the wage protective conditions set forth in Article VII.

7. In the operation set forth in this Section D it is understood that initial terminal delay will end when the train actually starts on its initial road trip in the track where the train was assumed and will not again commence when the crew operates back into South Morrill after operating west or east, whichever is applicable. The operation back through South Morrill will be considered as an intermediate point.

8. The special operation described in this Section D shall terminate by the serving of a thirty (30) day advance notice from the UP. 9/7/95 RED - on table 9/7/95 okayed WSH TO REVIEW.
*On-off duty point South Morrow same as trainmen.
*25 miles zone -- departure only.
*Top/Bottom Roster -- no forced assignments -- prior rights. Percentage of run when run through South Morrow occurs.
*Possible transfers later -- if UTU will not cooperate.

ARTICLE III
EAST - WEST MAIN LINE OPERATION

TRANSACTIONS

Section A - North Platte - OMC

Section B - OMC - Chicago

ARTICLE III
SECTION A - NORTH PLATTE - OMC

Upon the serving of a thirty (30) day advance written notice by UP, pool freight operations between North Platte, Nebraska and the OMC will be changed as follows:

a. The current North Platte - Fremont and North Platte - Council Bluffs interdivisional pools will cease operation, with the understanding however that these pools may be re-established by the Carrier at a later time.

b. One (1) new interdivisional pool will be established between the OMC and North Platte, operated as a "double headed" pool with headquarter points at both North Platte and Council Bluffs. Second District UP employees at North Platte and First District UP employees at Council Bluffs will continue to operate trains in this corridor and all of the operating rule agreement conditions of the North Platte - Council Bluffs Interdivisional Agreement will apply to the new North Platte - OMC operation except as set forth below:

1. The pool freight service will entail a District mileage between North Platte and the OMC of 304 ~~295~~ miles.

2. All operations in this pool at Council Bluffs will be considered in the OMC irrespective of whether the employees are placed on-duty or relieved from service anywhere within the OMC. In other words, crews may be placed on duty or relieved from service at Fremont, Missouri Valley, Council Bluffs or points in between and in all cases, the employees will be transported from/to Council Bluffs in continuous service with payment currently at 304 ~~295~~ district miles. (OK by WSH).

NOTE: For employees headquartered in North Platte, transportation from/to Council

Bluffs under this Item 2 includes the lodging facility.

3. Initial terminal delay will be governed by applicable UPED Agreement and National Rules and will apply at Council Bluffs for the OMC as well as North Platte. Final terminal delay will be governed under National Agreement Rules.

4. Employees at the OMC transported to/from trains at locations other than Council Bluffs will be considered in continuous service, i.e., on-duty and under pay.

5(a). The equalization of mileage in the new North Platte/OMC operation between the UP/BLE First seniority district and the UP/BLE Second seniority district will be administered by BLE Representatives, with adjustments made at necessary times. For clarification, the CNW trackage and territory defined in the new OMC will be considered as UP/BLE First seniority district territory.

(b). Due to the stipulation of miles in this Section A there shall be no equalization of miles between UP and CNW employees.

ARTICLE III
SECTION B - OMC - CHICAGO

The current rule agreement conditions for CNW pool freight service between the OMC and Chicago will continue to apply with the exception that effective upon the serving of a thirty (30) day advance written notice by UP the following operating conditions and rules will govern.

1. General Conditions

   a. Basic day mileage, overtime, transportation and meal allowance and eating en route will be governed by the applicable National Agreements regarding interdivisional service. Rates of pay will be governed by CNW rates. (Okayed by WSH on 9/7/95).

   b. Held-away-from-home terminal time will be eight (8) hours in every twenty-four (24) hour period beginning after the first (16) hours. (IN DISPUTE).

   c. Each operation will consist of one (1) unassigned pool service rotary pool working first-in/first-out. Employees will be placed in their proper rotation (blue-printed) upon return to the home terminal if runsround either en route or at a terminal. No penalty claims will be applicable for such runarounds.

   d. The current basic day under the National Agreement will apply which is 130 miles as of September 1, 1995.

   e. Hours of Service relief for CNW crews will be as follows:

(1). Clinton - OMC (westbound):

a. ~~Arion~~ East Dunlap Milepost 304 ~~(CNW MP 293.1)~~ to the OMC by the UP OMC extra board.

b. Belle Paine (CNW MP 116.4) to East Dunlap Milepost 304 ~~Arion~~ by the CNW Boone extra board.

c. Clinton to Belle Plaine by the CNW Clinton extra board.

(2). OMC - Clinton (eastbound):

a. The OMC to Belle Plaine by the CNW Boone extra board.

b. Belle Plaine to Clinton by the CNW Clinton extra board.

(3.) Boone - OMC (westbound):

a. ~~Arion~~ East Dunlap to the OMC by the UP OMC extra board.

b. Boone to ~~Arion~~ East Dunlap by the CNW Boone extra board. (In DISPUTE).

(4). Boone - Clinton (eastbound):

a. Boone to Belle Plaine by the CNW Boone extra board.

b. Belle Plaine to Clinton by the CNW Clinton extra board.

(5). OMC - Boone (eastbound) and Clinton - Boone (westbound).

a. The OMC to Boone by the CNW Boone extra board.

b. Belle Plaine to Boone by the CNW Boone extra board.

c. Clinton to Belle Plaine by the CNW Clinton extra board.

(6). Chicago - Clinton (westbound) by the first-out rested Chicago pool crew at Clinton.

~~(7). Clinton - Chicago (eastbound) by the CNW Eastern 1 extra board at Chicago or the successor extra board at the CTC.~~ (OUT Okayed by WSH on 9/7/95).

(8). Nothing in this Sub-Section 1 will prevent the use of other UP and or CNW employees to this work in any way permitted by Agreements.

~~Any other provisions of other CNW agreements regarding these operations which conflict with this Sub-Section will not apply.~~ (OUT Okayed WSH on 9/7/95).

New CNW guaranteed extra boards for Boone, Clinton and Chicago will be established upon implementation of this Section B. The extra board conditions are set forth in Side Letter 1 of this Section.

(9). Crews performing hours of service relief under this Sub-Section 1e may ~~will~~ operate the trains to the objective terminal of the original run.

2. Specific Operating Service Conditions (OMC - Clinton).

a. The pool freight service will be Clinton as the home terminal and Council Bluffs in the OMC as the away from home terminal, the district miles for this operation will be 341 miles. (DISPUTE CNW).

b. All operations in this pool at Council Bluffs will be considered in the OMC irrespective of whether the employers are placed on-duty or relieved from service anywhere within the OMC. In other words, crews may be placed on duty or relieved from service at Fremont, Missouri Valley, Council Bluffs or points in between and in all cases the employees will be transported from/to Council Bluffs in continuous service with payment currently at 341 district miles. Payment will be actual miles run on the train plus a non-frozen arbitrary of $12.60 for ten years.

NOTE: Transportation from/to Council Bluffs under this Item 2b includes the lodging facility.

c. Initial terminal delay will be governed by the applicable CNW agreement rules and will apply at Council Bluffs for the OMC, as well as Clinton. Final terminal delay will be governed under National Agreement Rules.

d. Employees at the OMC transported to/from trains at locations other than Council Bluffs will be considered in continuous service, i.e. on duty and under pay.

e. Due to the stipulation of miles in this Section B2 there shall be no equalization of miles between UP and CNW employees.

3. Specific Operating Service Conditions (OMC - Boone and Boone - Clinton).

a. The pool freight service will be Boone as the home terminal for each pool with Council Bluffs for the OMC and Clinton as the away-from-home terminals.

b. All operations in the pool at Council Bluffs will be considered in the OMC irrespective of whether the employees are placed on duty or relieved from service anywhere within the OMC. In other words, crews may be placed on duty or relieved from service at Fremont, Missouri Valley, Council Bluffs or points in between and in all cases, the employees will be transported from/to Council Bluffs in continuous service. ~~with payment currently at 150 district miles.~~ Get what you run. (WSH)

NOTE: Transportation to/from Council Bluffs under this Item 3b includes the lodging facility.

c. Boone - Clinton crews will receive the basic day miles/overtime as provided in the National Agreements and CNW Agreements. (Okayed by WSH on 9/7/95).

d. Initial terminal delay will be governed by the applicable CNW agreement rules and will apply at Council Bluffs for the OMC, as well as Clinton. Final terminal delay will be governed under National Agreement rules.

e. CNW employees at the OMC transported to/from trains at locations other than Council Bluffs will be considered in continuous service: i.e. on duty and under pay.

~~**?**~~ ~~f. While it is agreed that the Boone - OMC and Boone - Clinton are seperate pools, employees may be used in the opposite pool without penalty in cases of emergency. Employees so utilized will be placed back into their proper blue print pool rotation upon tie up.~~ WRITE Penalty -- Make Whole (OK WSH).

g. Due to the stipulation of miles in this Section B3 there shall be no equalization of miles between UP and CNW employees.

4. Specific Operating Service Condi ns (Chicago (CTC) - Clinton).

a. Pool freight service between the CTC and Clinton will be operated by an exclusive CNW pool with the CTC Home terminal ~~with Proviso Yard in Chicago as the home terminal.~~ The mileage between the CTC and Clinton will be determined in accordance with existing CNW agreement rules and based upon the miles operated between the various locations in the CTC where trains may be received/delivered and Clinton. Miles of run (WHS OKAY).

b. All operations in this pool will permit UP to place employees on duty or relieve them from service anywhere within the CTC. However, in all cases, the employees will be transported to/from the CNW Proviso Yard in continuous service: i.e. on duty and under pay.

c. Initial terminal delay will be governed by applicable CNW agreement rules and will apply at Proviso Yard for the CTC and Clinton. Final terminal delay will be governed under National Agreement rules.

5. C&EI road crews operating into the CTC will have their on/off duty point remain as the lodging facility. UP may place these employees on duty or relieve them from service anywhere within the CTC, but in all cases the employees will be transported to/from the lodging facility in continuous service; i.e., on duty and under pay. Engineer will be paid additional $20.00 per trip when receiving or delivering train to a yard which we do not deliver or receive now. WSH and RDM offered. We asked for caucus. We accepted offer. Then, the argument started over the three hour call, and Carrier said that they were going to arbitrate.

b.

For A IC YEAR Period

Side Letter 1

Article II

Section B

GUARANTEED ENGINEER'S EXTRA BOARD
BOONE, CLINTON AND CHICAGO

A new guaranteed engineer's extra board will be established at Boone, Clinton and Chicago (excluding the CTC) and will be governed as follows:

1. OPERATION. The engineer's guaranteed extra board will operate on a rotary basis. Any engineer displacing on or marking up for service will be placed at the bottom of the board at the time of such displacement or mark-up. Engineers returned to the board after working will be placed at bottom of the extra board at tie-up time. If more than one engineer ties-up at the same time, previous board standing will govern.

2(a). GUARANTEE. Subject to the provisions of Article V Section A (Pay Differential) Engineers assigned to the extra board shall receive a semi-monthly guarantee equivalent to 1800 miles per pay period at the standard basic daily through freight rate applicable to the weight-on drivers bracket of 950,000 and less than 1,000,000 pounds. This rate is subject to future general wage adjustments including COLA. The guarantee shall be computed on a daily basis and shall not apply to any calendar day the extra engineer is absent from service or otherwise becomes not available for service or any following calendar day which an extra engineer continues to be absent or to be unavailable past 12:00 Noon.

NOTE 1: See "Exhibit A" for various examples.

NOTE 2: The 1800 miles has no bearing on the number of miles in a basic day and refers strictly to miles operated.

(b). All earnings received by extra engineers assigned to the extra board will be used in computing such guarantee. Extra engineers laying off on call, missing call or not available for call as a result of tying up for extra rest will have their guarantee reduced by the amount they would have earned had they not laid off on call or missed call, with a minimum of a guaranteed day. Extra engineers missing call when other than first-out will have their guarantee reduced by one day only. Extra engineers unavailable more than two (2) occurrences per pay period, or being unavailable more than 72 combined hours per pay period, will have their guarantee suspended for such pay period. This will include any unavailable status including extra rest, but will exclude absences for Company business or BLE local chairman, who must be absent for union business.

(c). Engineers added to the extra board will be paid guarantee for the day added provided they meet the availability requirements of this agreement and all earnings made on the day added will be included in the computation of guarantee. Guarantee will not be paid to an engineer on the day reduced from the extra board.

NOTE: See "Exhibit A" for examples of guarantee payment.

3. LAYING OFF OTHER THAN ON CALL (AT HOME TERMINAL). An extra engineer laying of for any reason and at any time other than on call will not be permitted to mark-up or twelve (12) hours from the time of such absence. Engineer must mark-up to resume service.

4. LAYING OFF (ON CALL) AT HOME TERMINAL). An extra engineer laying off on call will be held in until the tie-up of the respondent or twelve (12) hours from the time of the lay-off, whichever is later, and such engineer must mark-up to resume duty. It is understood that this provision does not prevent the Carrier from administering such discipline as it deems proper for a missed call.

5. MISSING CALL (AT HOME TERMINAL). An extra engineer missing call will be automatically marked to the bottom of the extra board at the time of such miss call.

6. MISSED CALL (AT FAR TERMINAL). For guarantee purposes, an extra engineer missing a call or laying off at the far terminal will be treated the same as an extra engineer laying off on call at the home terminal and will not be returned to the extra board until tie-up of the assignment such engineer missed call for.

7. OUTLYING VACANCY. An extra engineer ho misses a call, lays off on call or ties-up for extra rest when such engineer stood for an outlying vacancy will, upon reporting for service, be required to relieve the engineer who accepted the call if such engineer is still occupying the outlying vacancy. The engineer's guarantee will be reduced by the amount he/she would have earned.

8(a). REGULATION. The number of employees assigned to the extra board shall be determined by the Carrier. Assignments to the guaranteed extra board shall be made in accordance with Schedule Rules and modifications thereto.

(b). Engineers added to the extra board shall not be removed therefrom for a period of 7 days but may apply for assignments or be displaced earlier.

EXAMPLE: Extra board is added to on May 1. Engineer assigned to the extra board on May 1 may not be removed until May 8.

9. DEADHEADING. Deadheading which results from The regulation of the extra board will not be paid for.

10. SHORT TURNAROUNDS. Extra engineers making a short turnaround trip out of the home terminal will be placed at the bottom of the extra board.

11. CONFLICTING AGREEMENTS. All other agreements, understandings etc. in conflict with this agreement are hereby superseded while this agreement is in effect.

12. PENALTY CLAIMS . The Company will not be penalized in any way in the application of this agreement.

"EXHIBIT A"

EXAMPLES FOR PAYMENT OF GUARANTEE

1. WHEN FIRST-OUT (LAYING OFF AND MISSING A CALL).

(a) Lays off or lays off on call: at 10:30 P.M. January 3 and marks up at 12:00 Noon January 4. The extra engineer will lose guarantee or the amount he/she would have earned for the calendar day January 3.

If the extra engineer had not marked up until 12:01 P. M. January 4 he/she would have lost guarantee or the amount he/she would have earned for the calendar days January 3 and 4.

If the extra engineer continues to lay off greater than 72 hours, he/she will have his guarantee suspended for that half.

(b) Lay off: at 1:00 A.M. January 3 and marks up at 1:00 P.M. January 3. The extra engineer will lose guarantee for the calendar day of January 3.

(c) Misses a call: at 11:00 A.M. January 3. The extra engineer will lost guarantee for January 3 or the amount he would have earned for January 3.

2. WHEN SECOND-OUT (MISSING A CALL).

(a) Misses one call at the home terminal: at 11:00 A.M. January 3. He/she will lost one day's guarantee.

(b) Misses two calls at the home terminal: at 11:00 A.M. January 3 and misses another call at 4:00 P.M. January 3 when first-out. The extra engineer will lost guarantee or the amount he/she would have earned for January 3.

(c) Misses three calls at the home terminal: at 11:00 A.M. January 3 when second out, misses a second call at 4:00 P.M. January 3, and misses another call at 10:00 P.M. January 3. The engineer will lost his/her guarantee for the first-half pay period of January.

NOTE: In examples 1(c) and 2(a)(b)(c) above, the extra engineer automatically drops to the bottom of the extra board at the time of the miss call.

ARTICLE IV
ENGINEER FAMILIARIZATION TRIPS

1. Engineers who are assigned to runs with which they are not familiar will not be required to lose time or qualify on their own time. The Carrier will determine the number of familiarization trips needed with a minimum of three (3) round trips. Issues concerning individual qualifications will be handled with local Carrier operating officials.

2. Operating in the new CTC will obviously require UP to provide either pilot, engineers and or Carrier supervisors for familiarization trips. In this regard, UP commits that employees operating in this new enlarged CTC will be given ample familiarization trips and any issues concerning operation within this CTC, including any potential discipline matters with respect to operating rules, will be closely monitored between the parties and local Carrier operating officials.

ARTICLE IV
ENGINEER FAMILIARIZATION TRIPS

1. Engineers who are assigned to runs with which they are not familiar will not be required to lose time or qualify on their own time. The Carrier will determine the number of familiarization trips needed with a minimum of three (3) round trips. Issues concerning individual qualifications will be handled with local Carrier operating officials.

2. Operating in the new CTC will obviously require UP to provide either pilot, engineers and or Carrier supervisors for familiarization trips. In this regard, UP commits that employees operating in this new enlarged CTC will be given ample familiarization trips and any issues concerning operation within this CTC, including any potential discipline matters with respect to operating rules, will be closely monitored between the parties and local Carrier operating officials.

ARTICLE V
SECTION A - PAY DIFFERENTIAL

CNW engineer pay differential benefits which have been placed into the basic rate of pay and are applicable to over mile payments will continue to such employees holding seniority as a locomotive engineer on the date of this Agreement. Employees becoming engineers subsequent to this date will not be entitled to rates of pay enhanced by pay differential payments which have been included into the basic rates of pay and over mile payments.

ARTICLE VI
CONFLICTS OF AGREEMENT

Where any of the basic rules of the CNW and or UP (UPED, MP and/or C&EI) Schedule Agreement, understandings other side letters or agreements are in conflict with this Merger Implementing Agreement, the provisions of this Merger Implementing Agreement will apply. We agreed to reverse the language and WSH agreed that he would add language stating that the UP Upper Lines and C&EI Agreements were unchanged.

ARTICLE VII

PROTECTION

A. Except as otherwise provided in this Article, the provisions of New York Dock Conditions (NYDC) will apply to employees adversely affected by implementation of this Agreement for wage protection and relocation benefits.

B. As an alternative to the relocation benefits of NYDC, employees adversely affected by the application of this Agreement may elect to be governed by the following relocation benefits:

An employee in engine service who, as a result of this Implementing Agreement, is required to change the point of his/her employment and who is required to move his/her place of residence (as defined by NYDC) will be afforded one of the following options:

1. Accept a lump sum relocation allowance of $20,000 if on the date of the transaction the employees owns his/her home or is under contract to purchase a home.

2. Accept a lump sum relocation allowance of $8,000 if on the date of the transaction the employee does not own a home nor is under contract to purchase a home.

NOTE: If an employee elects Option 1 or 2 under this Section B, such election is in lieu of any and all relocation benefits to which the employee is entitled under NYDC.

C. For those employees who select either the relocation benefits provided by NYDC or Section B, above, the following will apply:

Before any of relocation benefits are paid, the employee must establish that a relocation has occurred. A contract to purchase a home at the employee's new location or a long-term (one (1) year) rental/lease agreement at the employee's new location shall constitute proof of relocation.

D. Employees who elect the lump sum relocation allowances under Option 1 or 2 of Section B will not be permitted to voluntarily transfer to another engineer position at another terminal (more than thirty (30) miles from the original terminal) for a period of three (3) years from the initial relocation.

E. The application form for Relocation Benefits is attached as Attachment "A".

F. The Separation Program and application form is attached as Attachment "B"

G. There shall be no duplication of benefits receivable by an employee under this Agreement and any other agreement or protective arrangement. In the event an employee is eligible for protection under the NYDC and other agreements or protective arrangements, such employee shall be furnished their NYDC test period earnings and protected rate in advance of the transaction and shall within thirty (30) days thereafter with copy to the General Chairman, make an election in writing as to whether they desire to retain the protection and benefits available under any of the other agreements or protective arrangements or receive the protection and benefits provided under the provisions of this Agreement. In the event the employee fails to make such election within the said thirty (30) day period, the employee shall be deemed to have elected the protection and benefits provided under provisions of this Agreement to the exclusion of protection and benefits under any other agreement or arrangement.

H. Employees referred to in this Article who elect the NYDC protection and benefits prescribed under this Agreement, shall at the expiration of their protective periods under this Agreement, be entitled to the remaining years of other protection and benefits under such other applicable protective agreements, provided they thereafter continue to maintain their responsibilities and obligations under the protective agreements and arrangements.

ARTICLE VIII
GENERAL

A. TERMINOLOGY

The provisions of this Agreement shall be applied to all employees covered by this Agreement without regard to race, creed, color, age, sex, national origin, or physical handicap, except in those cases where a bonified occupational qualification exists.

B. ENACTMENT

This Agreement shall be effective _____and is made consistent with the provisions of NYDC.

Signed at Omaha, Nebraska, this _____ day of

_____ 1995.

FOR THE ORGANIZATION:	FOR THE CARRIER:
_____	_____
B. D. MacArthur General Chairman, BLE	W. S. Hinckley General Director - Labor Relations Operating South
_____	_____
D. E. Penning General Chairman, BLE/UP/MPUL	L. A. Lambert General Director - Labor Relations Operating West
_____	_____
M. A. Young General Chairman, BLE/UP/UPED	R. D. Meredith General Director Employee Relations Planning
_____	_____
R. E. Dean Vice President, BLE	J. M. Raaz AVP - Labor Relations Operating CNW

ENGINEER RELOCATION PROGRAM
REQUEST FOR RELOCATION BENEFITS

In accordance with the terms and conditions set forth in the CNW/UP/MP/BLE Implementing Agreement, I hereby:

(Check One Option)

_____ Option No. 1 Relocation benefits provided under NYDC.

_____ Option No. 2 Owns home or is under contract to purchase a home as of August 1, 1995. Payment of relocation allowance in a lump sum of $20,000.

_____ Option No. 3 Renter as of August 1, 1995. Payment of relocation allowance in a lump sum of $8,000.

I acknowledge and understand the terms and conditions associated with the relocation benefits.

PLEASE PRINT

FULL NAME_____

SOCIAL SECURITY NUMBER_____ SENIORITY DATE_____

CURRENT POSITION AND LOCATION_____

NEW POSITION AND LOCATION_____

CURRENT HOME ADDRESS_____

NEW HOME ADDRESS_____

PHONE NUMBER _____

SIGNATURE_____DATE_____

MAIL/FAX TO:
JOE CVETAS
Union Pacific Railroad
Room 332, 1416 Dodge Street
Omaha, NE 68179
Fax Number (402)271-2077

SEPARATION ALLOWANCE PROGRAM

Section 1 - Separation Allowance

* This program provides the following separation allowance:

  Amount $85,000.00

* All payments made pursuant to this offering will be subject to all applicable Federal, State, and Railroad Retirement taxes.

* Accepted applicants will also be compensated for any earned or unused vacation remaining in 1995, and for any earned vacation for 1996. Accepted applicants must, upon receipt of lump-sum payments or first monthly installments, submit to Carrier a proper timeslip, with a photocopy of their signed release/resignation form attached, requesting payment for all vacation compensation due.

* Applicants must choose one of the following three payment options:

  (1) Separation allowance paid in one-time lump-sum payment.

  - or -

  (2) Separation allowance paid in equal monthly payments for up to twelve (12) months.

  - or -

  (3) Separation allowance paid in equal monthly payments for up to twenty-four (24) months for employees eligible to retire within two (2) years under the provisions of the Railroad Retirement Act.

  - or -

NOTE: All health and welfare benefits for those employees selecting payment option (2) or (3) above, will be continued during the period the monthly installments are in effect. However, in the event of the death of an employee receiving monthly payments under Option (2) or (3) of this offer, the employee's estate shall be promptly paid all remailing separation allowances monies and all health and welfare benefits shall terminate.

Section 2 - Application Period/Procedures

* The Carrier will receive applications for this offering for a period of not more than ten (10) days.

* Applications may be mailed U.S. Mail or sent via tee-fax (Fax number:(402) 271- 2077). Applications postmarked/faxed beyond the ten (10) day period will not be accepted.

Section 3 - Eligibility Requirements

* Employees who are inactive, in disabled status, on leave of absence account of medical or other such conditions, or have terminated their service rights in conjunction with a personal injury settlement are not eligible for this separation allowance.

* Employees employed by subsidiary companies, AmtraK or as Company officials are ineligible.

* Employees must be actively employed and working as an engineer.

Section 4 - Release Date

* Applicants will be required to continue working during the period between their application for separation and tender/receipt of their separation allowance as determined by the Carrier.

ENGINEER SEPARATION ALLOWANCE PROGRAM
REQUEST FOR SEPARATION ALLOWANCE

In accordance with the terms and conditions set forth in Attachment "B" of the UP/ONWI/BLE Merger Implementing Agreement, I hereby:

(Check One Option)

_____ Payment Option No. 1 (lump sum)

_____ Payment Option No. 2
Payment of separation allowance in _____ monthly installments (not to exceed 12 months)

_____ Payment Option No. 3
Payment of separation allowance in _____ monthly installments (not to exceed 24 months or until reaching age 62 whichever occurs first for employees eligible to retire within two (2) years.

I acknowledge and understand the terms and conditions associated with this separation offering and that the amount of my separation allowance will be subject to all applicable withholdings, deductions and adjustments set forth in the conditions described in Attachment "B".

PLEASE PRINT

FULL NAME_____

SOCIAL SECURITY NUMBER_____ SENIORITY DATE_____

POSITION AND LOCATION_____

CURRENT HOME ADDRESS_____

PHONE NUMBER_____ BIRTHDATE_____

SIGNATURE_____ DATE_____

MAIL FAX TO:
JOE CVETAS
Union Pacific Railroad
Room 332,1416 Dodge Street
Omaha, NE 68179
Fax Number (402) 271-2077

MERGER IMPLEMENTING AGREEMENT

between the

UNION PACIFIC/MISSOURI PACIFIC RAILROAD COMPANY
CHICAGO AND NORTH WESTERN RAILWAY COMPANY

and the

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

In Finance Docket No. 32123, the Interstate Commerce Commission (ICC) approved the acquisition and control of the Chicago and North Western Railway Company (CNW) by the Union Pacific/Missouri Pacific Railroad Company (Union Pacific or UP). In order to achieve the benefits of operational changes made possible by the transaction and to modify pretransition labor arrangements to the extent necessary to obtain those benefits, **IT IS AGREED:**

I. Seniority and Work Consolidation. To achieve the work efficiencies and allocation of forces that are necessary to make the merged Carrier operate efficiently as a unified system, the following seniority consolidations will be made:

A. St. Louis, Missouri

1. (a) The CNW employees assigned to CNW yard assignments at Madison, Illinois, on September 1, 1995, will be placed on the bottom of Missouri Pacific (MP) Merged Roster No. 1 and will have prior rights to the former CNW regularly assigned yard assignments at Madison. Should those former CNW assignments be abolished or consolidated with other MP assignments, the former CNW employees will have no prior rights. Any newly established assignment will not be subject to prior rights. The Carrier will not be required to assume any additional costs in the application of the prior rights requirement, including not having to use prior rights employees at the overtime rate of pay when non-prior rights employees are available at the straight time rate of pay.

(b) Both MP employees and former CNW employees may work all assignments covered by Merged Roster No. 1 and may work all assignments protected by the MP St. Louis extra board. All

employees and all assignments will work under the MP Agreement all in accordance with the employees' seniority on Merged Roster No. 1, subject to prior rights.

NOTE: Prior rights will not apply to assignments on nor operation of the MP Merged Roster #1 extra board at St. Louis.

2. (a) The CNW employee(s) assigned to the Monterey Mine assignment on September 1, 1995, will be placed on the bottom of the Chicago and Eastern Illinois (C&EI) road roster at St. Louis and will have prior rights to the Monterey Mine assignment, if regularly assigned. Should this assignment be abolished or consolidated with other C&EI assignments, the former CNW employee(s) will have no prior rights. Any newly established assignment will not be subject to prior rights. The Carrier will not be required to assume any additional costs in the application of the prior rights requirement, including not having to use the prior rights employee at the overtime rate of pay when a non-prior rights employee is available at the straight time rate of pay.

(b) Both C&EI and the former CNW employee may work the Monterey Mine Assignment, may work all assignments covered by the C&EI road roster and may work all assignments protected by the C&EI extra board at St. Louis. All employees and all assignments will work under the C&EI Agreement all in accordance with the employees' seniority on the C&EI road roster at St. Louis, subject to prior rights.

NOTE: Prior rights will not apply to assignments on nor operation of the C&EI extra board at St. Louis.

3. (a) The number of employees assigned to work South Pekin, Illinois, to St. Louis (in through freight only, excluding power plant operations) on September 1, 1995, will be transferred to St. Louis and will be placed on the bottom of the C&EI road roster at St. Louis and will have prior rights to a maximum of three positions in the new St. Louis to Chicago/South Pekin pool. Any newly established assignments will not be subject to prior rights. The Carrier will not be required to assume additional costs in the application of the prior rights requirement, including the use of a prior rights employee at the

overtime rate of pay when a non-prior rights employee is available at the straight time rate of pay.

(b) Both C&EI employees and former CNW employees may work all assignments in the new St. Louis to Chicago/South Pekin Pool, may work all assignments protected by the C&EI road roster(including the Monterey Mine assignment) and may work all assignments protected by the St. Louis extra board (including the Monterey Mine assignment). All employees and all assignments will work under the C&EI Agreement all in accordance with the employees' seniority on the C&EI roster at St. Louis, subject to prior rights.

NOTE: Prior rights will not apply to assignments on nor operation of the C&EI extra board at St. Louis.

B. Kansas City, Missouri

1. (a) The CNW employees assigned to CNW yard assignments at Kansas City on September 1, 1995, will be placed on the bottom of MP Merged Roster No. 2A and Merged Roster 2B and will have prior rights to the former CNW yard assignments. Should those former CNW assignments be abolished or consolidated with other MP assignments, those former CNW employees will have no prior rights. Any newly established assignments will not be subject to prior rights. The Carrier will not be required to assume additional costs in the application of the prior rights requirement, including the use of a prior rights employee at the overtime rate of pay when a non-prior rights employee is available at the straight time rate of pay.

(b) Both MP employees and former CNW employees may work all assignments covered by Merged Rosters 2A and 2B and may work all assignments protected by the Merged Roster 2A and Merged Roster 2B extra boards. All employees and all assignments will work under the MP Agreement all in accordance with the employees' seniority on Merged Rosters 2A and 2B, subject to prior rights.

NOTE: These prior rights will not be applicable to assignments on nor operation of the two MP extra boards at Kansas City.

2. (a) The number of CNW employees assigned to road service work between Kansas City and Des Moines (through freight only excluding extra board) on September 1, 1995, and who are headquartered at Des Moines, will be transferred to Kansas City. Those CNW employees, as well as the CNW employees currently assigned to work between Kansas City and Des Moines headquartered at Kansas City and the CNW employees on the CNW extra board at Kansas City, will all be placed on the bottom of the MP Merged Roster 2A and MP Merged Roster 2B and will have prior rights to their percentage in the new Kansas City to Omaha Metro Complex (OMC)/Des Moines pool. The percentage will be as follows: 50% for Merged Roster 2B and 50% for the former CNW employees. The percentage for the former CNW employees need not be maintained as those employees attrite or are unavailable. Any newly established assignments will not be subject to prior rights. The Carrier will not be required to assume additional costs in the application of the prior rights requirement, including the use of a prior rights employee at the overtime rate of pay when a non-prior rights employee is available at the straight time rate of pay.

NOTE: These prior rights will not be applicable to assignments on nor operation of the two MP extra boards at Kansas City.

(b) Both MP employees and former CNW employees may work all assignments in the Kansas City to OMC/Des Moines pool, may work all assignments protected by Merged Roster No. 2A and Merged Roster 2B may work all assignments protected by the Merged Roster No.2A and Merged Roster 2B extra boards. All employees and all assignments will work under the MP Agreement all in accordance with the employees' seniority on Merged Roster No. 2A and Merged Roster 2B, subject to prior rights.

C. Chicago, Illinois Complex

1. A new consolidated Chicago Terminal Complex (CTC) seniority roster will be established to protect all non-through freight, yard or extra board assignments headquartered within the CTC. The CTC is defined in Article III.

2. The new CTC seniority roster will consist of the following employees:

(a) All C&EI employees working in Chicago on September 1, 1995;

(b) All CNW employees on the Chicago Freight Terminal #7 Roster;

(c) The number of CNW Eastern #1 employees working in Chicago on September 1, 1995; and,

(d) The number of CNW Northeastern #2 employees working in Chicago on September 1, 1995.

NOTE 1: "Working in Chicago" is defined as holding an assignment (non-through freight, yard, or extra board) with an on-duty point within the territory of the new CTC as defined in Article III.

NOTE 2: One Eastern-1 extra board employee for each four Eastern-1 employees transferred to the CTC and one Northeastern-2 extra board employee for each four Northeastern-2 employees transferred to the CTC will also be transferred to the new CTC roster.

3. (a) Employees identified in Paragraph 2, above, will be placed on the new CTC seniority roster in the following manner:

(1) Employees identifies in 2(a), (c) and (d), above, will be dovetailed based upon the employees's engine service date. If this process results in employees having identical seniority dates, seniority will be determined by the employees's service date.

(2) The dovetailed list in (1), above, will be placed on the bottom of the CNW Chicago Freight Terminal #7 Roster creating the new CTC roster.

(b) Each employee placed on the new CTC roster will be provided prior rights to their former work now included in the CTC. Current assignments retained in the new CTC will not be rebulletined. Should any former assignments subsequently be abolished or consolidated with other CTC assignments, there

will be no prior rights to those assignments. Any newly established assignments will not be subject to prior rights. The Carrier will not be required to assume additional costs in the application of the prior rights requirement, including the use of a prior rights employee at the overtime rate of pay when a non-prior rights employee is available at the straight time rate of pay. The new CTC seniority roster will indicate prior rights in the following manner.

NOTE: Prior rights will not apply to assignments on nor operation of the CTC extra board.

EXAMPLE (assumes roster only has five people on it):

	Prior Rights to which Assignments				
Name	Roster Ranking	Chicago Freight Terminal#7	Eastern#1	North-Eastern#2	C&EI
Jones, I.	#1	X			
Smith, L.	#2	X			
Ames, G.	#3			X	
Bailey, T.	#4				X
Moore, K.	#5		X		

(c) _ All employees placed on the CTC roster may work all assignments protected by the new CTC roster and may work all assignments protected by the new CTC extra board. All employees and all assignments will work under the CNW Agreement all in accordance with the employee's seniority on the new CTC roster, subject to prior rights.

(d) New employees hired and placed on the CTC roster subsequent to the adoption of the CTC will be governed by the CNW collective bargaining agreement, but will have no prior rights to any assignments within the CTC; will have no rights to any CNW Eastern #1, CNW Northeastern #2 nor C&EI assignments outside of the CTC; will rank below all prior rights employees on the roster and will have seniority to all assignments headquartered within the CTC.

D. Omaha

1. UP/BLE Roster #1 will be expanded to protect all assignments headquartered within the Omaha Metro Complex (OMC) or which have the OMC as the source of supply. The OMC is defined in Article III.

2. The new UP/BLE Merged Roster #1 will consist of the following employees:

(a) All UP employees on the current UP/BLE #1;

(b) All CNW employees assigned to work between the OMC and Worthington, Minnesota (including assignments at Sioux City, Iowa; Sergeant Bluff, Iowa; and Dakota City, Iowa) on September 1, 1995;

NOTE: "Assigned to work between Worthington, Minnesota and the OMC" is defined as holding an assignment (through freight, non-through freight, yard or extra) with an on-duty point within the territory between Worthington and the OMC.

(c) All CNW employees working an assignment headquartered within the OMC on September 1, 1995;

NOTE 1: "Working an assignment headquartered within the OMC" is defined as holding an assignment (non-through freight, yard or extra board) with an on-duty point within the territory of the OMC.

NOTE 2: "Working an assignment headquartered within the OMC" is also defined as the CNW assignments working to Norfolk, Nebraska, from Fremont, Nebraska, and the CNW assignment at Norfolk.

(d) The number of CNW employees assigned to work on the east-west main line between the OMC and Clinton, Iowa, on September 1, 1995.

NOTE 1: "Assigned to work on the east - west main line between Clinton and the OMC" is defined as those

through freight assignments with either Clinton or Boone, Iowa, as the pre-implementation home terminal and with either Boone, Clinton, Fremont or Council Bluffs as the pre-implementation away-from-home terminal. Pre-implementation extra board assignments at Clinton and pre-implementation extra board assignments at Boone are also included in this definition.

NOTE 2: One extra board employee from the Boone extra board for each three Boone through freight service employees transferred to UP/BLE Merged Roster #1 will also be transferred to UP/BLE Merged Roster #1.

NOTE 3: One extra board employee from the Clinton extra board for each three Clinton through freight service employees transferred to UP/BLE Merged Roster #1 will also be transferred to UP/BLE Roster #1.

3. (a) Employees identified in Paragraph 2, above, will be placed on the new UP/BLE Merged Roster #1 in the following manner:

(1) Employees identifies in 2(b), (c) and (d), above, will be dovetailed based on the employee's engine service date. If this process results in employees having identical seniority dates, seniority will be determined by the employee's Company service date.

(2) The dovetailed list in (1), above, will be placed on the bottom of the UP/BLE Roster #1.

NOTE: Employees affected by the dovetailing of seniority in 6(a), above, will be transferred to the OMC in accordance with operational needs.

(b) Each employes placed on the new UP/BLE Merged Roster #1 will retain their current assignment (if operated) and will be provided prior rights. Prior rights will also include the new operations established in accordance with Article III, Section A, Paragraph (1), but prior rights will not apply to assignments on nor operation of the UP extra boards at the OMC. Should

any former CNW assignment be abolished or consolidated with UP assignments, the former CNW employees will have no prior rights to those assignments. Any newly established assignments will not be subject to prior rights; however, additions to pool freight service shall not be considered "newly established assignments" as used in this sentence. The Carrier will not be required to assume additional costs in the application of the prior rights requirement, including the use of a prior rights employee at the overtime rate of pay when a non-prior rights employee is available at the straight time rate of pay. The UP/BLE Merged Roster #1 seniority roster will indicate prior rights in the following manner:

EXAMPLE (assumes only five people on the roster):

	Prior Rights to which Assignments				
Name	Roster Ranking	UP/BLE Roster#1	CNW within OMC	CNW - OMC to Worth'ton	CNW East/West Main Line
Brown, J.	#1	X			
Green, S.	#2	X			
Black, C.	#3			X	
White, P.	#4				X
Blue, R.	#5		X		

(c) All employees placed on the UP/BLE Merged Roster #1 may work all assignments (regular or extra) protected by the new roster. All employees and all assignments will work under the UP Agreement in accordance with the employee's seniority on the new roster, subject to prior rights.

(d) New employees hired and placed on the new UP/BLE Merged Roster #1 subsequent to the adoption of this agreement will be governed by the UP Agreement, but will have no prior rights to any assignment protected by the new roster, will rank below all prior rights employees on the roster and will have seniority rights to all assignments protected by the new roster.

4. (a) The expanded UP/BLE Merged Roster #1 will enable the Carrier to address necessary operational efficiencies and economies in the territory and on the following trackage: the existing UP/BLE Seniority District #1; the OMC as defined in Article III; the east-west main line from the OMC to Clinton, including the trackage from Des Moines to Mason City; and the north-south main line from the OMC to Worthington, Minnesota, including the trackage to Dakota City.

(b) The inclusion of the trackage OMC to Clinton and the trackage Des Moines to Mason City will not preclude other seniority districts from performing service on that trackage.

E. Midwest

1. A new CNW Midwest seniority district will be created to address necessary operational efficiencies and economies on the following lines: Mason City, Iowa, to Butterfield, Iowa; Allendorf, Iowa, to Briceland, Iowa; Hartley, Iowa, to Emmetsburg, Iowa; Estherville, Iowa, to Eagle Grove, Iowa; Burt, Iowa, to Goldfield, Iowa; Forest City, Iowa, to Belmond, Iowa; Kanawha, Iowa, to Belmond, Iowa; Dows, Iowa, to Clarion, Iowa; Mason City, Iowa, to Somers, Iowa; Eagle Grove, Iowa, to Ames, Iowa; Ellsworth, Iowa, to Jewell, Iowa; Mallard, Iowa, to Grand Junction, Iowa; Albert City, Iowa, to Rolfe, Iowa; Royal, Iowa, to Laurens, Iowa; Coulter, Iowa, to Clarksville, Iowa; Iowa Falls, Iowa, to Alden, Iowa; Oelwein, Iowa, to Waterloo, Iowa; Marshalltown, Iowa, to Steamboat Rock, Iowa; Marshalltown, Iowa, to Powerville, Iowa; Marshalltown, Iowa, to Albia, Iowa; Hampton, Iowa, to Sheffield, Iowa; Des Moines, Iowa, to Yale, Iowa; Des Moines, Iowa, to Woodward, Iowa; and Des Moines, Iowa, to Bondurant, Iowa. In addition, trackage from Des Moines to Mason City and trackage from Grand Junction to Clinton is included in the new Midwest seniority district.

2. The new Midwest Seniority District will consist of the following employees:

(a) The number of CNW Southern #3 employees working in the Midwest territory on September 1, 1995 (less those transferred to other districts in accordance with this Agreement);

(b) The number of CNW Central #5 employees working in the Midwest territory on September 1, 1995 (less those transferred to other districts in accordance with this Agreement).

NOTE: "Working in the Midwest territory" is defined as holding an assignment (through freight, non-through freight, yard or extra board) with an on-duty point within the territory of the new Midwest seniority district.

3. (a) Employees identified in Paragraph 2, above, will be placed on the new Midwest seniority roster based upon the employee's engine service seniority date. If this process results in employees having identical seniority dates, seniority ranking will be determined by the employees' Company service dates.

(b) All employees placed on the new Midwest seniority roster may work all assignments (regular or extra) protected by the Midwest roster. All employees and all assignments will work under the CNW (proper) Agreement.

4. The inclusion of the trackage Grand Junction to Clinton and Des Moines to Mason City will not preclude other seniority districts from performing service on that trackage.

F. Seniority and Service Rights

The following will apply to employees transferring from CNW to UP (Sections A, B and D of this Article I) and to employees transferring from UP to CNW (Section C of this Article I):

(a) All engine service seniority with the employees' original railroad will be eliminated;

(b) Seniority with the employees' new railroad will be established in accordance with the provisions of this Article I; and,

(c) The employees will be treated for vacation, entry rates and payment of arbitraries as though all their time in engine service on their original railroad had been performed on their new railroad.

(d) Employees with train service seniority on their original railroad will forfeit that seniority. Train service on the employees' new

railroad will be established either following the same relative standing as on the original railroad or as provided for in the UTU National Agreement.

NOTE: Subparagraph (d) is contingent upon the implementing agreement for the other operating craft organization.

(e) The seniority consolidations provided for in this Article I will result in the elimination of CNW Southern #3 seniority district. CNW Freight Terminal #7 and the C&EI Chicago Yard seniority districts will also be eliminated and made part of the new CTC seniority district. The UP/BLE Seniority District #1 will also be eliminated and will become the basis for the new UP/BLE Merged Roster #1 seniority district.

(f) CNW employees placed on the bottom of a C&EI or MP roster under Sections A and B of this Article I will be placed on the roster in the same seniority order they held on the CNW.

(g) After the initial placement on a new roster in accordance with the procedures set forth in Article V, below, no additional employees hired prior to the date of this Agreement will be permitted to place on another roster under the provisions of this Agreement.

II. New Operations

A. The following new operations may be implemented in accordance with the provisions set forth in this Article II:

1. Under the UP Agreement with the OMC as the home terminal: OMC-Clinton, OMC-Boone, OMC-Ames, OMC-Nevada, OMC-Des Moines, OMC-Mason City, OMC- Worthington, OMC-Sioux City, OMC-Sergeant Bluff, OMC-North Platte, OMC-Grand Island (including the "picker" pool) and OMC-Marysville.

NOTE: The current North Platte-Fremont and North Platte - Council Bluffs doubleheaded interdivisional pools will cease operations (with the understanding these pools may be re-established by the Carrier) when replaced by an OMC-North Platte and North Platte-OMC operation.

2. Under the UP Agreement with Boone as the home terminal: Boone-Clinton.

3. Under the MP Agreement with Kansas City as the home terminal: Kansas City-OMC/Des Moines.

NOTE: This will be a single pool with alternative destinations (see Article I, Section B3).

4. Under the C&EI Agreement with St. Louis as the home terminal: St. Louis - Chicago/South Pekin.

NOTE 1: This will be a single pool with alternative destinations (see Article 1, Section A3).

NOTE 2: The current St. Louis-Chicago operation is a guaranteed pool. The guarantee and outset adjustments for the new pool operation will be paid and adjusted in accordance with Side Letter #1 of the Villa Grove Interdivisional Run Arbitration Agreement.

5. On the territory covered by the CNW Agreement:

(a) Twin Cities (home terminal) to Worthington (far terminal);

(b) Any Midwest Seniority District location to any other Midwest Seniority District location;

(c) Waukegan (home terminal) to Clinton (far terminal) with Waukegan as the on-duty point/off-duty point and transported to/from the power plants at Waukegan and Pleasant Prairie;

NOTE: Employees working in the Waukegan-Clinton pool freight service will be from both CNW Eastern #1 and CNW Northeastern #2. The equalization for the pool will be 71% for Eastern #1 and 29% for Northeastern #2. Either road extra board may be used to fill any vacancy in the pool or to perform hours of service relief.

(d) South Pekin (home terminal) to Clinton; and,

(e) Chicago (CTC) (home terminal) to Clinton/South Pekin.

NOTE: This will be a single pool with alternative destinations.

B. The terms and conditions of the new operations set forth in Section A above, are as follows:

1. Miles Run - The miles paid shall be the actual miles run.. Actual miles run to/from the OMC will be calculated in accordance with the chart found in Attachment A.

2. Basic Day/Rate of Pay - The provisions of the November 7, 1991, Implementing Agreement (BLE) will apply, to include applicable entry rates.

3. Overtime - Overtime will be paid in accordance with Article IV of the November 7, 1991, Implementing Document (BLE).

4. Transportation - Transportation will be provided in accordance with Section (2)(c) of Article IX of the May 19, 1986, National Arbitration Award (BLE).

5. Meal Allowance and Eating Enroute - Meal allowances and eating enroute will be governed by Section 2(d) and Section (2)(e) of Article IX of the May 19, 1986, National Arbitration Award (BLE), as amended by the November 7, 1991, Implementing Agreement.

6. Suitable Lodging - Suitable lodging will be provided by the Carrier in accordance with applicable agreements as identified in Article II.

7. Held-away-from-home terminal time will be up to a maximum of eight (8) hours in every twenty-four (24) hour period beginning after the first sixteen (16) hours.

8. All through freight service will be rotary pool freight service with blue print board provisions for placing employees in the proper order at the home terminal and at the far terminal. Under a blue print board operation, employees are not run-around if used on the train for which called.

NOTE 1: Item B7, above, will not apply to the OMC-North Platte nor the North Platte-OMC operation. The traditional HAHT payment for that operation will continue to apply.

NOTE 2: Item B2, above, will reflect the CNW rate of pay for those new operations governed by the CNW Agreement.

C. Work trains, local and road switcher service may be established to operate in turnaround service or to operate from any location to any other location within any seniority territory outlined in Article I. Should this service be desired by the Carrier and the desired service would cross seniority lines, such service may be implemented upon a five (5) day notice by the Carrier to the involved General Chairmen. The service will be manned by employees from the seniority territory where the home terminal of the assignment is located. The involved local chairmen may make arrangements for the equalization of work; however, such equalization must be cost neutral to the Carrier.

D. All pool freight and all other road service crews may receive and/or leave trains anywhere within the boundaries of the terminal of their runs in accordance with the provisions of all national agreements.

NOTE: "Anywhere within the terminal" is defined to include the CTC and OMC as those complexes are defined in Article III and to include the consolidated terminals of St. Louis, Kansas City and South Morrill.

E. 1. Turnaround service/Hours of Service relief for the new operations listed in Section A, above, may be performed as follows:

(a) When crews are heading toward the home terminal, the protecting extra board may be used.

(b) When crews are heading toward the far terminal, an extra board at that terminal, if available, may be used in any direction out of the extra board point. The first-out away-from-home terminal crew also may be used.

NOTE 1: Crews used for this service, whether extra or in the pool, may be used for multiple "dogcatches" during a tour of duty.

NOTE 2: When the first-out away-from-home terminal crew completes this service, the crew may be used for either a through train or for additional turnaround service/Hours of Service relief. Any crew used for two consecutive turnaround service/Hours of Service relief

jobs will be placed first out after rest for a through train or deadheaded back to the home terminal.

2. Nothing in this Section E prevents the use of other employees to perform work currently permitted by other agreements, including, but not limited to, yard crews performing hours of service relief within the road/yard zone, ID crews performing service and deadheads between terminals, traveling switch engines (TSEs) handling trains within their zones and using an employee from a following train to work a preceding train.

F. 1. The new operations listed in Section A, above, may be implemented separately, in groups or collectively, upon five (5) days' notice by the Carrier to the involved General Chairman.

2. The new operations listed in Section A, above, may be run by the Carrier in pool service, extra service or any other type of service necessary to meet the demands of the service and/or to meet customer requirements.

III. **Terminals/Complexes**

A. The following terminal and complex consolidations will be implemented on the Implementation Date of this Agreement in accordance with the provisions set forth in this Article III:

1. Kansas City

(a) The existing switching limits at Kansas City will now include the CNW rail line to CNW Mile Post 500.3.

(b) All road crews (MP, including former CNW, and UP) may receive/leave their trains at any location within the boundaries of the new Kansas City Consolidated terminal and may perform work anywhere within those boundaries. The Carrier will designate the on/off duty point(s) for road crews.

(c) All yard assignments in the new consolidated Kansas City terminal will be governed by the MP Agreement and manned by MP employees from MP Merged Roster 2, subject to the prior rights requirement of Article I.

NOTE: This provision will not alter the current work equity/seniority allocation for UP Seniority District #9 employees.

(d) All rail lines, yards and/or sidings within the new consolidated Kansas City terminal will be considered as common to all crews working in, into and out of Kansas City. All crews will be permitted to perform all permissible road/yard work. Interchange rules are not applicable for intra-carrier moves within the consolidated terminal.

2. St. Louis

(a) The existing switching limits at St. Louis will now include the CNW rail line to CNW Mile Post 144.

(b) All road crews (MP and C&EI, including former CNW) may receive/leave their trains at any location within the boundaries of the new St. Louis consolidated terminal and may perform work anywhere within those boundaries. The Carrier will designate the on/off duty point(s) for road crews.

(c) All yard assignments in the new consolidated St. Louis terminal will be governed by the MP Agreement and manned by MP employees from MP Merged Roster #1, subject to the prior rights requirement of Article I.

(d) All rail lines, yards and/or sidings within the new consolidated St. Louis terminal will be considered as common to all crews working in, into and out of St. Louis. All crews will be permitted to perform all permissible road/yard moves. Interchange rules are not applicable for intra-carrier moves within the consolidated terminal.

C. Chicago Terminal Complex

1. The new consolidated Chicago Terminal Complex (CTC) will be the entire area within and including the following trackage: Waukegan (CNW Mile Post 41.0 on the Kenosha Branch) southwest paralleling the EJE rail line to Geneva (CNW Mile Post 41.0 on the Geneva Subdivision), continuing on a parallel with the EJE line south through Normantown and East Joliet through Brisbane, Matteson, Chicago Heights (south to the current southern boundary of Mile Post 30.0 on

the C&EI) to Griffith, then north on a parallel with the EJE through Van Loon and Ivanhoe, and then east paralleling the EJE line through Kirk and Gary Yard.

2. All road crews (CNW and C&EI) may receive/leave their trains at any location within the boundaries of the new CTC and may perform any work anywhere within those boundaries. The Carrier will designate the on/off duty point(s) for road crews.

3. All yard and non-through freight assignments headquartered within the CTC will be governed by the CNW Agreement and manned by employees from the new CTC seniority roster, subject to the prior rights requirements of Article I.

   NOTE: This provision will not be applicable to C&EI non-through freight road assignments headquartered within the CTC which operate onto C&EI road territory.

4. All rail lines, yards and/or sidings within the new CTC will be considered as common to all crews working in, into and out of the CTC. All crews will be permitted to perform all permissible road/yard moves. Interchange rules are not applicable for intra-carrier moves within the CTC.

D. Omaha Metro Complex

1. The new consolidated Omaha Metro Complex (OMC) will be the entire area within and including the following trackage: Fremont (UP Mile Post 44.75 - west) to Omaha/Council Bluffs (UP Mile Post 473.1 - south) to Missouri Valley (CNW Mile Post 327.2 - east) and return to Fremont. At California Junction, trackage north to CNW Mile Post 10.2 will be included.

   NOTE: The Omaha Metro Complex described above is part of the larger UP/BLE Merged Roster #1 seniority district described in Article I.

2. All road crews (UP, including former CNW, and MP) may receive/leave their trains at any location within the boundaries of the new complex and may perform any work within those boundaries. The Carrier will designate the on/off duty point(s) for road crews.

3. All yard and non-through freight assignments headquartered within the complex will be governed by the UP Agreement and manned by employees from the new UP/BLE Merged Roster #1 seniority district, subject to the prior rights requirement of Article I.

4. All rail lines, yards and/or sidings within the new complex will be considered as common to all crews working in, into and out of the complex. All crews will be permitted to perform all permissible road/yard moves. Interchange rules are not applicable for intra-carrier moves within the complex.

5. In addition to the consolidated complex, the UP terminal at Omaha/Council Bluffs and the CNW terminal at Council Bluffs will be consolidated into a single terminal controlled by UP. The existing UP switching limits at Omaha/Council Bluffs will now include the CNW rail line to CNW Mile Post 345.0.

E. South Morrill

1. South Morrill will be a consolidated terminal with the following boundaries: UP Mile Post 156.8 to UP Mile Post 166.0. All road crews (UP and CNW) may receive/leave their trains at any location within the boundaries of the consolidated South Morrill Terminal and may perform any work anywhere within those boundaries.

2. The following will be applicable to achieve efficient operations in and around the common UP/CNW terminal of South Morrill, Nebraska:

   (a) UP crews (destined North Platte or Cheyenne) may receive their trains up to thirty (30) miles westward on the CNW from their existing far terminal of South Morrill. CNW crews (destined Bill) may receive their trains up to thirty (30) miles eastward on the UP (toward North Platte) or westward on the UP (toward Cheyenne) from their existing far terminal of South Morrill.

   (b) The thirty (30) miles listed in (a), above, will run east from UP mile Post 156.8 to UP Mile Post 126.8 and will run west from UP Mile Post 166.0 to CNW Mile Post 24.8 and UP Mile Post 196.0.

(c) Crews relieving trains or extra crews called for this service may also perform all work in connection with the train regardless of where the train is received.

(d) Crews performing this service will be paid the actual miles run.

(e) Initial terminal delay for crews performing this service will be governed by the applicable collective bargaining agreements and will not again commence when the crew operates into South Morrill. For the operation back through South Morrill, South Morrill will be considered an intermediate point.

(f) Departure and/or terminal runarounds will not apply for crews arriving/departing South Morrill under this Section.

3. Nothing in the Section E prevents the use of other employees to perform work currently permitted by other agreements, including, but not limited to, TSEs handling trains within their zone, an engineer from a following train to work a preceding train and the CNW extra board at South Morrill to perform service in all directions on both CNW and UP trackage.

NOTE: The UP extra board at South Morrill may be abolished by the Carrier.

F. General Conditions for Terminal/Complex Operations

1. Initial delay and final delay at Kansas City and St. Louis terminal and at the Chicago and Omaha complexes will be governed by the applicable collective bargaining agreements, including the Duplicate Pay and Final Terminal Delay provisions of the 1986 and 1991 National Agreements.

2. Employees will be transported to/from their trains to/from the designated on/off duty point.

3. The current application of National Agreement provisions provides for the following regarding work and Hours of Service relief under the Combined Road/Yard Service Zone, which shall continue to apply:

(a) Yard crews at Kansas City and St. Louis may perform such service in all directions out of the new consolidated terminals.

(b) Yard crews at the CTC may perform such service in all directions out of individual yards (switching limits) within the complex.

(c) Yard crews at the Omaha Metro Complex may perform such service in all directions out of the individual yards (switching limits) within the complex.

4. Nothing in this Section F will prevent the use of other employees to perform this work and/or relief in any way permitted by applicable agreements.

IV. Extra Boards

A. Terminals/Complexes

1. Kansas City -

The current Merged Roster #2B extra board will protect the work in the consolidated terminal. The current Merged Roster #2B extra board will protect the Kansas City - OMC/Des Moines operation. This service for these extra boards is in addition to other service protected by these extra boards.

2. St. Louis -

The current Merged Roster #1 extra board will protect the work in the consolidated terminal. The current C&EI road extra board at St. Louis will protect the Monterey Mine and the St. Louis - Chicago/South Pekin operations. This service for these extra boards is in addition to other service protected by these extra boards.

3. Chicago Consolidated Complex -

The current CNW Chicago Freight Terminal #7 extra board will become the CTC extra board and will protect the work (yard and non-through freight) within the CTC, including former C&EI, Eastern #1 and Northeastern #2 work. This service is in addition to any other service protected by that extra board. Prior rights will not be applicable to positions on or operation of this extra board.

4. Omaha Metro Complex -

The current UP/BLE Seniority District #1 combination extra board will protect the work in the complex and all assignments headquartered within the complex, including the new operations provided for in Article II. This service for this extra board is in addition to other service protected by this extra board.

5. Outlying Points -

(a) The Carrier may establish Side Letter #20 extra boards at locations governed by the UP Agreement on the new OMC seniority territory. The locations may include, but are not limited to, Boone, Clinton and Sioux City.

(b) The Carrier may establish Side Letter #20 extra boards at locations governed by the CNW Agreement on the new Midwest seniority territory. The locations may include, but are not limited to, Boone, Mason City, Eagle Grove and Estherville.

B. Nothing in this Article IV will prevent the use of other employees to perform this work in any way permitted by applicable agreements.

V. Implementation

A. The Carrier will give at least forty (40) days' written notice of its intent to implement this Agreement.

B. 1. Concurrent with the serving of its notice, the Carrier will post a description of those new merged seniority districts which will require former CNW employees to make a seniority election. Those seniority districts are MP Merged Rosters #2A and #2B, C&EI road roster at St. Louis, the new CNW Chicago Terminal Complex, the new UP Omaha Metro Complex and the new CNW Midwest.

2. The Carrier will determine the number of employees to be transferred to those new rosters in accordance with Article I.

3. Fifteen (15) days after posting of the information described in B, above, the appropriate Directors of Labor Relations, General Chairmen and Local Chairmen will convene a workshop to implement assembly of the merged seniority rosters. Employees on a roster

from where work is being transferred will be canvassed, in seniority order for each roster, and required to make an election as to which roster the employees wishes to be transferred or whether the employee wishes to remain on the current roster. (Staying will not be possible on those rosters which are being eliminated.) Positions on the new roster will be awarded on using the method as spelled out in the various provisions of this Agreement. Failure or refusal of an employee to make an election will result in the Carrier making the assignment for the employee.

4. At the end of the workshop, which will last no more than five (5) days, the participants will have finalized agreed-to rosters which will then be posted for information and protest in accordance with the applicable agreements. If the participants have not finalized agreed-to rosters, the Carriers will prepare such rosters, post them for information and protest, will use those rosters in assigning positions and will not be subject to claims or grievances as a result.

C. Once rosters have been posted, the Carrier will bulletin all positions covered by this agreement which require rebulletining for a period of five (5) calendar days. Employees may bid on these bulletined assignments in accordance with applicable agreement rules. However, no later than 10 (ten) days after the closing of the bulletins, assignments will be made

D. 1. After all assignments are made, employees assigned to positions which require them to relocate will be given the opportunity to relocate within the next thirty (30) day period. During this period, the affected employees may be allowed to continue to occupy their existing positions. If required to assume duties at the new location immediately upon implementation date and prior to having received their thirty (30) days to relocate, such employees will be paid normal and necessary expenses at the new location until relocated. Payment of expenses will not exceed thirty (30) calendar days.

2. The Carrier may, at its option, elect to phase-in the actual implementation of this Agreement. Employees will be given ten (10) days' notice of when their specific relocation/reassignment is to occur.

VI. Protection

1. Employees who are adversely affected as a result of the implementation of this Agreement will be entitled to the employee protection provided for in the New York Dock Conditions.

2. Employees currently eligible for other protective benefits must elect between those benefits and the benefits provided by this Agreement. This election must take place within ten (10) days after the adverse affect. No benefits will be paid until the employee has made an election.

3. There will be no pyramiding of benefits.

4. Health and Welfare benefits will be provided in accordance with the provisions of the applicable collective bargaining agreement.

VII. **Familiarization**

Employees will not be required to lose time or "ride the road" on their own time in order to qualify for new operations. The Carrier will determine the number of familiarization trips needed and may use high-rails to familiarize employees over a new territory. Issues concerning individual qualifications should be handled with local operating officers.

VIII. **Conflict of Agreements**

Should the provisions of any BLE Collective bargaining agreement conflict with the terms and intent of this Agreement, this Agreement will apply.

The Carrier may served the required notices at any time after the date of this Arbitration Award. Dated this ____ day of _____, 199_.

_____
John J. Mikrut, Jr.

ATTACHMENT A

Actual miles (miles run on the train) will be paid on the basis of the chart set forth below. The miles listed for some locations reflect the mileage payment required under existing greements. If a crew receives/leaves a train on mainline territory within a consolidated complex but outside a yard, the mileage paid will be based on the main line mile post nearest the train.

OMC (Council Bluffs)	- Clinton	341 miles
	- Boone	144 miles
	- Des Moines	199 miles
	- Mason City	251 miles
	- Worthington	185 miles
	- Sioux City	96 miles
	- Sergeant Bluff	88 miles
	- North Platte	282 miles *
	- Grand Island	144 miles *
	- Marysville	160 miles *
	- Kansas City	204 miles
OMC (Missouri Valley)	- Clinton	320 miles
	- Boone	124 miles
	- Des Moines	178 miles
	- Mason City	231 miles
	- Worthington	165 miles
	- Sioux City	76 miles
	- Sergeant Bluff	68 miles
	- North Platte	281 miles
	- Grand Island	145 miles
	- Marysville	180 miles
	- Kansas City	224 miles
OMC (Fremont)	- Clinton	357 miles
	- Boone	161 miles
	- Des Moines	215 miles
	- Mason City	267 miles
	- Worthington	202 miles
	- Sioux City	113 miles
	- Sergeant Bluff	105 miles
	- North Platte	244 miles
	- Grand Island	108 miles
	- Marysville	145 miles
	- Kansas City	238 miles

These miles are calculated with 4 additional miles working into Council Bluffs to MP 1. We pay 4 miles less working out of Council Bluffs.

These are the current miles and they are to be changed if additions or reductions in the mileage occur.

IMPLEMENTING AGREEMENT MODIFICATIONS

I. Seniority and Work Consolidation. To achieve the work efficiencies and allocation of forces that are necessary to make the merged Carrier operate efficiently as a unified system, the following seniority consolations will be made:

A. St. Louis, Missouri

1. (a) The CNW employees assigned to CNW yard assignments at Madison, Illinois, on September 1, 1995, will be placed on the bottom of Missouri Pacific (MP) Merged Roster No. 1 and will have prior rights to the former CNW regularly assigned yard assignments at Madison. Should those former CNW assignments be abolished or consolidated with other MP assignments, the former CNW employees will have no prior rights. However, should those former CNW assignments be reestablished within six (6) months of their abolishment or consolidation, prior rights shall apply. Any newly established assignments will not be subject to prior rights.

• • •

2. (a) The CNW employee(s) assigned to the Monterey Mine assignment on September 1, 1995, will be placed on the bottom of the Chicago and Eastern Illinois (C&EI) road roster at St. Louis and will have prior rights to the Monterey Mine assignment, if regularly assigned. Should this assignment be abolished or consolidated with other C&EI assignments, the former CNW employee(s) will have no prior rights. However, should those former CNW assignments be reestablished within six (6) months of their abolishment or consolidation, prior rights shall apply.

Any newly established assignments will not be subject to prior rights.

• • •

3. (a) The number of employees assigned to work South Pekin, Illinois, to St. Louis (in through freight only, excluding power plant operations) on September 1, 1995, will be transferred to St. Louis and will be placed on the bottom of the C&EI road roster at St. Louis and will have prior rights to a maximum of three positions in the new St. Louis to Chicago/South Pekin pool. Any newly established assignments will not be subject to prior rights.

• • •

B. Kansas City, Missouri

1. (a) The CNW employees assigned to CNW yard assignments at Kansas City on September 1, 1995, will be placed on the bottom of MP Merged Roster No. 2A and Merged Roster 2B and will have prior rights to the former CNW yard assignments. Should those former CNW assignments be abolished or consolidated with other MP assignments, those former CNW employees will have no prior rights. However, should those former CNW assignments be reestablished within six (6) months of their abolishment or consolidation, prior rights shall apply. Any newly established assignments will not be subject to prior rights.

• • •

2. (a) The number of CNW employees assigned to road service work between Kansas City and Des Moines (through

freight only excluding extra board) on September 1, 1995, and who are headquartered at Des Moines, will be transferred to Kansas City. Those CNW employees, as well as the CNW employees currently assigned to work between Kansas City and Des Moines headquartered at Kansas City and the CNW employees on the CNW extra board at Kansas City, will all be placed on the bottom of the MP Merged Roster 2A and MP Merged Roster 2B and will have prior rights to their percentage in the new Kansas City to Omaha Metro Complex (OMC)/Des Moines pool. The percentage will be as follows: 75% for Merged Roster 2B and 25% for the former CNW employees. The percentage for the former CNW employees need not be maintained as those employees attrite or are unavailable. Any newly established assignments will not be subject to prior rights.

• • •

C. Chicago, Illinois Complex

• • •

3. (b) Each employee placed on the new CTC roster will be provided prior rights to their former work now included in the CTC. Current assignments retained in the new CTC will not be rebulletined. Should any former assignments subsequently be abolished or consolidated with other CTC assignments, there will be no prior rights to those assignments. However, should those former CNW assignments be reestablished within six (6) months of their abolishment or consolidation, prior rights shall apply. Any newly

established assignments will not be subject to prior rights. The new CTC seniority roster will indicate prior rights in the following manner:

• • •

D. Omaha

• • •

2. The new UP/BLE Merged Roster #1 will consist of the following employees:

• • •

(d) The number of CNW employees assigned to work on the east-west main line between the OMC and Clinton, Iowa, on September 1, 1995.

NOTE 1: "Assigned to work on the east - west main line between Clinton and the OMC" is defined as those through freight assignments with either Clinton or Boone, Iowa, as the pre-implementation home terminal and with either Boone, Clinton, Fremont or Council Bluffs as the pre-implementation away-from-home terminal. Only the number of employees at Boone in through freight service that are necessary to protect their equity in OMC - Boone and OMC - Clinton operations will be transferred to the UP. Pre-implementation extra board assignments at Clinton and pre-implementation extra board assignments at Boone are also included in this definition.

• • •

3. (b) Each employee placed on the new UP/BLE Merged Roster #1 will retain their current assignment (if operated)

and will be provided prior rights. Prior rights will also include the new operations established in accordance with Article III, Section A, Paragraph (1), but prior rights will not apply to assignments on nor operation of the UP extra boards at the OMC. Should any former CNW assignment be abolished or consolidated with UP assignments, the former CNW employees will have no prior rights to those assignments. However, should those former CNW assignments be reestablished within six (6) months of their abolishment or consolidation, prior rights shall apply. Any newly established assignments will not be subject to prior rights; however, additions to pool freight service shall not be considered "newly established assignments" as used in this sentence. The UP/BLE Merged Roster #1 seniority roster will indicate prior rights in the following manner.

• • •

II. <u>New Operations</u>

A. The following new operations may be implemented in accordance with the provisions set forth in this Article II:

• • •

2. Under the CNW Agreement with Boone as the home terminal: Boone-Clinton.

• • •

B. The terms and conditions of the new operations set forth in Section A, above, are as follows:

• • •

8. All through freight service will be rotary pool freight service with blue print board provisions for placing employees in the proper order at the home terminal and at the far terminal. Under a blue print board operation, employees are not run-around if used on the train for which called.

• • •

NOTE 3: Existing UP and MP Inter-divisional Agreements are not impacted by this Agreement.

• • •

III. Terminals/Complexes

• • •

E. South Morrill

• • •

2. The following will be applicable to achieve efficient operations in and around the common UP/CNW terminal of South Morrill, Nebraska:

• • •

(d) Crews performing this service will be paid an additional one-half (½) day's pay for this service.

• • •

F. General Conditions for Terminal/Complex Operations

• • •

2. For all locations, road employees will be transported to/from their trains to/from the designated on/off duty point in accordance with applicable rules. Yard Extra Board employees in the Chicago Terminal Complex will report to Proviso and will be transported

to/from their assignment if the assignment is more than twenty (20) miles from the employee's home by the most direct highway route.

• • •

IV. Extra Boards

A. Terminals/Complexes

• • •

5. Outlying Points -

(a) The Carrier may establish Side Letter #20 extra boards at locations governed by the UP Agreement on the new OMC seniority territory where extra boards do not now exist.

(b) The Carrier may establish Side Letter #20 extra boards at locations governed by the CNW Agreement on the new Midwest seniority territory where extra boards do not now exist.

• • •

V. Implementation

• • •

E. Prior to implementation of this Agreement, the parties will meet for purposes of reviewing the operational implementation thereof. Questions and answers pertaining thereto should be prepared by the parties covering that implementation. Should the parties be unable to agree upon any item, that/those matter(s) is/are to be referred to this panel for resolution.

• • •

VI. Protection

• • •

1. Employees who are adversely affected as a result of the implementation of this Agreement will be entitled to the employee protection provided for in the New York Dock Conditions. With the following addition: Employees required to relocate under this Agreement will have the option of electing the relocation benefits provided for in the New York Dock Conditions or an in lieu allowance in the amount of $28,000.00 less applicable taxes.

• • •

VII. Familiarization

Employees will not be required to lose time or "ride the road" on their own time in order to qualify for new operations.

1. Employees will be provided with a sufficient number of familiarization trips in order to become familiar with a new territory. Issues concerning individual qualifications should be handled with local operating officers.

2. If road crew or extra board employees operating in CTC have not been in the Chicago Terminal Complex within six (6) months prior to assignment, Carrier will provide a local operating officer or pilot if requested. Issues concerning individual qualifications should be handled with local operating officers.

• • •
• • • • •

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NO. 31875

In the Matter of an Arbitration between CONSOLIDATED RAIL CORPORATION AND MONONGAHELA RAILWAY COMPANY and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	FINDINGS & AWARD

QUESTIONS AT ISSUE:

1. Does the implementing agreement proposed by the Carriers meet the criteria set forth in Article 1, Section 4, of the New York Dock conditions in effecting the coordination of work performed by employees represented by the International Association of Machinists and Aerospace Workers on the Monongahela Railway Company with that performed on Consolidated Rail Corporation in connection with the merger authorized by the Interstate Commerce Commission in Finance Docket No. 31875?

2. If the answer to 1 is "No," what implementing agreement is appropriate?

BACKGROUND:

On October 10, 1991, the Interstate Commerce Commission (the ICC or Commission) in Finance Docket No. 31875 approved the merger of the Monongahela Railway Company (the MGA) into the Consolidated Rail Corporation (Conrail) (collectively, the Carrier). The Commission found the Carrier proposal to be "a minor transaction."

In its decision, the Commission stated the following as concerns the increased efficiencies to be accomplished by merger of the MGA into Conrail:

> "MGA handles almost exclusively coal traffic. It operates a 162-mile line in West Virginia and southwestern Pennsylvania, consisting of two branches named West Division and East Division that meet at Brownsville, PA. The West Division extends west from Brownsville across the Monongahela River to West Brownsville and then generally southwest 55 miles to Blackville, WV. The

East Division, extends from Brownsville, south along the Monongahela River, and terminates at Fairview, a length of 79 miles.

* * * * * * *

The merger is intended to increase efficiencies between MGA and Conrail and thus to improve the combined system's ability to compete with NS and CSXT. The operating plan calls for: (1) removing the current MGA-Conrail interchange at West Brownsville on traffic to/from Conrail and moving the crew change point to Waynesburg to maximize the road train mileage; (2) consolidating maintenance-of-way and clerical functions; (3) centralizing the train and crew dispatching functions; (4) modernizing the MGA's maintenance of way equipment; and (5) constructing or rehabilitating certain rail line to improve capacity and speed operations. Applicants contend that these economies and efficiencies will enable Conrail to quote more competitive rates allowing more MGA-origin coal to be mined and sold.

* * * * * * *

MGA is essentially a coal carrier. In 1989 and 1990, 99 percent of MGA's traffic was coal. Of that, more than 80 percent was interchanged with Conrail in 1989. In 1990, 83 percent was interchanged with Conrail. Of the remaining 17 percent, 16 percent was interchanged with PLE and 1 percent with CSXT."

The Commission, in addressing Labor Issues related to the merger, declared that the conditions for protection of railroad employees described in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60, (1979), aff'd sub nom. New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979) (the New York Dock conditions), were appropriate to protect employees affected by this transaction "in the absence of need for greater protection, which is not sought or shown on this record."

The Carrier, on September 9, 1992, following informal discussion about the merger with representatives of the International Association of Machinists and Aerospace Workers (the IAM&AW), gave such representatives, for their review, advance copy of a notice which it said it intended to post pursuant to Section 4 of Article I of the New York Dock conditions. At the same time, the Carrier forwarded to the IAM&AW copy of what it called "a standard proposed implementing agreement."

On September 15 and on September 18, 1992, representatives for the IAM&AW and Conrail discussed in telephone conversations the content of the Carrier notice and the implementing agreement and exceptions which the IAM&AW representatives took to such matters.

Thereafter, on September 23, 1992, the Carrier gave formal written notice of the intended transaction. This notice reads:

> "Pursuant to the decision of the Interstate Commerce Commission in Finance Docket No. 31875, Consolidated Rail Corp. -- Merger -- Monongahela Railway Co., Monongahela Railway Company (MGA) will merge into Consolidated Rail Corporation (Conrail). Conrail will also assume MGA's position as lessee of the Waynesburg Southern Railway properties and of the CSXT's rail line between Cathwaba Junction, WV and Grant Town, WV.
>
> As a result of the Carrier's exercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Conrail and MGA.
>
> This coordination and/or consolidation will result in the retention of one (1) machinist position working in the Locomotive Facilities headquartered at South Brownsville, PA, two machinist positions in the Locomotive Facilities will be abolished. The four (4) machinist positions in the Maintenance of Way Shops will be retained. It is anticipated that this coordination and/or consolidation of work will occur on or about January 1, 1993, or earlier if an implementing agreement is reached or referee decision rendered. It is also anticipated that subsequent to this date all remaining machinist positions at South Brownsville, PA will be relocated to Waynesburg, PA.
>
> It is intended that all MGA employees represented by the International Association of Machinists and Aerospace Workers will, on the effective date of the unification, coordination and/or consolidation, be integrated into the Conrail-IAM Seniority District '0012A' roster with a Prior RR code 'MGA' and a Prior Roster code '0001', and that such employees will be available to perform service on a coordinated basis subject to applicable Conrail agreements.
>
> The I.C.C. order provides employee protection in accordance with the conditions for the protection of employees embodied in New York Dock Ry. -- Control -- Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), and these conditions will be provided. This notice is served pursuant to Article I, Section 4 of those conditions."

The parties met on October 15 and 16, 1992; they exchanged written proposals, but they were unable to reach mutual agreement on an implementing agreement. Joint meetings and/or telephone con-

ferences were subsequently held between the parties on November 6, 1992, January 5, 6, 11, and 13, 1993.

On January 27, 1993 the Carrier confirmed in a letter to the representative for the IAM&AW that it was "unwilling to accede to the Organization's demands and it was clear that the parties were at an impasse over their efforts to reach an implementing agreement." The Carrier advised that it was thereby withdrawing "the proposed side letters and all oral proposals previously offered in an effort to reach a mutually accommodative implementing agreement."

In its January 27, 1993 letter the Carrier proposed adoption of an implementing agreement which it attached to such letter; it announced its intent to submit the above stated Question at Issue to final and binding arbitration; and, it named Jeffrey M. Burton as its representative in the selection of a neutral referee.

On January 31, 1993 the representative for the IAM&AW responded to the Carrier letter, stating in part the following:

> "Please be advised, it is the Machinists position, that the Carrier's invoking the arbitration process at this time is premature and improper, as proper negotiations as required could not and cannot be conducted until the Carrier provides a full and adequate notice of the true proposed changes to be affected by the transaction.
>
> Therefore, I respectfully request that the Carrier provide a complete, full, and adequate notice to the Machinists. If the Carrier will provide the required notice and its representatives engage in good faith negotiations, I believe it is possible to reach an agreement that will be mutually beneficial and satisfactory to all concerned, without the need of arbitration."

In a February 23, 1993 five-page letter to the IAM&AW, the Carrier set forth why it believed a proper notice had been served; it recalled discussions which had taken place at past informal and formal meetings; and, it offered why it believed the parties were at an impasse. In this latter regard, the Carrier said:

> "It is the Carrier's position, as the foregoing so clearly indicates, that they have fulfilled the requirements of New York Dock, have negotiated in good faith, and indeed have attempted to meet the employees' concerns through offers to establish new positions and to supply information concerning prior earnings of IAM represented employees. Notwithstanding this, the Organization has not yielded in its position concerning precertification and now insists negotiations should continue.

It is quite clear that the parties are at an impasse over their attempts to reach an implementing agreement and that New York Dock requires that the parties resolve this dispute through arbitration. The Carriers further take the position that any dispute over the adequacy of the notice is referrable to the Arbitrator under Article I, Section 4.

Mr. Burton will call you shortly in an attempt to reach agreement on a neutral for arbitration."

On March 8, 1993 the IAM&AW, in a four-page letter, set forth why it was taking issue with several of the Carrier's past and current contentions and why it believed that the IAM&AW proposal should be the implementing agreement. In closing, the Organization said "if you are unable to give serious consideration to our positions and cannot meet most of the conditions required to reach an Agreement" that it would and did submit the names of arbitrators for consideration as a neutral member "to adjudicate our dispute."

The parties jointly selected Robert E. Peterson to chair the Arbitration Board.

The parties were requested to and did provide pre-hearing briefs to the Arbitration Board. Hearings in this matter were held in Philadelphia, PA on May 4, 1993. At such hearings the parties stipulated to the issue in dispute being that which appears above as the Question at Issue. Further, at such hearings both parties presented oral and rebuttal argument and introduced additional evidentiary documents.

POSITION OF THE CARRIER:

The Carrier asserts that its notice and the terms of its proposed implementing agreement meet all the necessary requirements of the New York Dock conditions.

In its brief, the Carrier described the implementing agreement it has proposed to basically provide as follows:

"1) The Conrail/IAM schedule agreement, including the union shop agreement, will be applicable to all former MGA employees. All MGA/IAM agreements will be terminated.

2) Employees holding seniority on the MGA/IAM seniority rosters will be dovetailed into the Conrail/IAM seniority district roster (for the adjacent and larger Pittsburgh Division) the Conrail-IAM seniority district '0012A' will be expanded to encompass the former territory of the MGA. Former MGA Machinists will hold

S.A.-0257

'prior rights' to Machinists' positions headquartered on the former MGA territory.

3) Former MGA employees will be credited by Conrail with their prior continuous MGA service and qualifying years, for the purposes of vacation, personal leave and other benefits granted on the basis of qualifying years of service.

4) An employee who is affected by the transaction may request an appropriate form to request a test period average and a displacement or dismissal allowance. Any claim for such protection must be made within 60 days of the adverse effect.

5) An employee who is deprived of employment and unable to secure a position may be offered a position in the Machinists craft at any location. When such offer is made, the employee at his option shall select to accept the offer, resign and accept a termination allowance, or be furloughed without protection.

6) Any dismissal allowance shall be reduced by outside earnings.

7) The implementing agreement will become effective upon the giving of five (5) days notice to the appropriate General Chairman of the IAM."

The Carrier says that a comparison of the proposed implementing agreement which it has submitted for the IAM&AW "is, in most respects, identical to the several agreements that have been voluntarily adopted by other crafts involved in the merger of the MGA into Conrail." In this respect, the Carrier submitted into evidence copy of implementing agreements governing other MGA employees in both the non-operating crafts (Electricians; Sheet Metal Workers; Firemen & Oilers; Train Dispatchers; and, Maintenance of Way Employees) and the operating crafts (Engineers; Conductors; and, Trainman).

The Carrier also offers that in disputes that were settled by arbitrated awards under Section 4 of the New York Dock conditions, one involving Engineers represented by the UTU(E), and the second arbitrated award involving Clerks represented by the TCU, that in each such instance it was determined that the Conrail collective bargaining agreement would be applied and the MGA agreements will be abrogated.

Further, the Carrier submits that in every negotiated agreement or arbitration award, the former MGA territory was incorporated into the adjacent Conrail Pittsburgh Division Seniority territory and the MGA seniority roster was merged into the Conrail Pittsburgh area seniority roster.

In response to the implementing agreement which is proposed by the IAM&AW, the Carrier says that although there are a few areas of basic agreement with such proposal, that there are several areas where there is fundamental disagreement. In this latter regard, the Carrier says the implementing agreement proposed by the IAM&AW goes beyond the requirements of the New York Dock conditions and also beyond the authority of this arbitration committee under Section 4 of Article I of the New York Dock conditions.

In its ex parte brief to this Arbitration Board, the Carrier provided the following description of the work currently being performed and to be performed following the full merger of the MGA into Conrail:

> "IAM-represented employees perform work in the Locomotive Shops and the Maintenance of Way Shops, both located in the same building in South Brownsville, PA. The locomotive shop employs three machinists: one lead machinist and locomotive inspector; one air brake inspector; and one machinist working in the air brake room/machine shop. These positions perform the normal machinist work associated with locomotive maintenance and repair. This work includes:
>
> > Service and Inspection (FRA) of Locomotives on Inspection Track. Adding oil, changing brake shoes.
> > Machine Shop work - Lathe, Milling, Saw Cutting Metal, Threading Stock.
> > All heavy and running repairs on Locomotives.
> > Maintenance of MofW Equipment and Vehicles.
> > Maintenance and rebuilding of air equipment - Locomotives.
> > Locomotive (FRA) Test Work.
>
> Following full merger and integration of the MGA into Conrail, all MGA locomotives will be integrated into the Conrail locomotive fleet. As such, all scheduled and heavy locomotive maintenance and repair work formerly performed by MGA employees will be performed at the Conrail Locomotive Shop at Conway, PA (about 25 miles from Pittsburgh and 94 miles from South Brownsville). Some heavy locomotive repair work will also be performed at the Conrail facilities at Altoona, PA.
>
> Once full coordination of the locomotive work is achieved, there will only be sufficient work to retain one Machinist position performing work on locomotives on the former MGA property. This position will primarily perform light maintenance and running repairs on locomotives in the Conrail fleet operating on the former MGA

territory.

Four machinist positions currently perform the work of maintenance and repair of maintenance of way equipment on the MGA and work in the Engineering Department, Maintenance of Way Shops at Brownsville. These positions are: one gang leader, two machine inspectors and one assistant machine inspector. These positions perform the following work:

> Electric and gas welding and cutting, repair of gasoline and diesel engines, hydraulic pumps, motors, etc., on all types of M. of W. Equipment. Repair of company vehicles with or without hyrail wheels. Rebuilding and installation of rail lubricators. Performance of road work.

Following the merger and coordination of work, Conrail plans on keeping all four IAM positions in the MW Department working on the former MGA territory. These employees will perform repair and maintenance duties connected with running repairs of MW equipment in the field. Major repairs or overhaul of MW machinery such as tampers, ballast regulators, tie removers, and spikers, among others, will be performed when necessary at the Conrail system MW facility at Canton, OH. This shop performs all such major repairs and rehabilitation of MW machinery used throughout the Conrail system."

Based upon the foregoing contentions the Carrier asserts that the procedural objections raised by the IAM&AW are without merit and that the proposed implementing agreement which attached to its letter of January 27, 1993 should be selected by the Arbitration Board in resolution of the Question at Issue.

POSITION OF THE IAM&AW:

The IAM&AW maintains that the notice of the intended transaction which the Carrier served did not fully meet the requirements of Section 4 of Article I of the New York Dock conditions. It bases this contention upon the following stated objections:

> "1. Notice did not contain a full and adequate statement of the proposed changes to be affected by such transaction.
>
> 2. Notice did not include the number of employees of each class or craft to be affected the intended changes.
>
> 3. Notice did not state the specific dates when the transaction would occur.

4 Notice did not specify what work would be moved and where.

5. Notice did not specify where the affected employees would be required to move to."

The IAM&AW offered a summary listing of what it calls "the needed and requested information that the Carrier refused to furnish the Organization in connection with this transaction." Basically, it said it should be provided the following information:

1. Estimated number of employees of each shop craft/class that will be affected by the intended change.

2. Drawings, prints, pictures, or any type of information concerning the new facility to be built at Waynesburg, PA.

3. A list of the equipment that the employees represented by the IAM&AW repair, rebuild, or rehabilitate.

4. A list of the shop equipment that the employees represented by the IAM&AW repair, rebuild, or rehabilitate.

5. A list of all the shop equipment contemplated on being moved from South Brownsville, PA to Waynesburg, PA.

Accordingly, the IAM&AW maintains that the notice which the Carrier served is procedurally defective and the arbitration process premature in the assertion that "proper negotiations as required could not and cannot be conducted until the Carrier provides a full and adequate notice of the true proposed changes to be affected by the transaction."

Additionally, the IAM&AW contends that the Carrier has failed to "engage in good faith negotiations and by doing so, has proposed an agreement to the Organization that does not adequately address the concerns, needs and rights of the employees and most certainly does not meet the requirements of New York Dock." In this same respect, the IAM&AW says the implementing agreement which has been proposed by the Carrier is inferior to agreements offered other crafts on the MGA.

In its ex parte brief to this Arbitration Board, the IAM&AW offered the following conclusionary statement of its position:

"In conclusion, the Organization only desires a fair and equitable Agreement for the Machinists employed by the MGA, that would protect their rights and entitlements and preserve the work currently performed by them. We

simply desire a Test Period Average for all the MGA Machinists, with no strings attached. We want to establish a separate seniority district for the MGA employees, containing rosters for Maintenance of Way and Maintenance of Equipment and for the four (4) Maintenance of Way Machinists to be allowed to maintain and perform all the work currently performed on the MGA. Also, that the (1) Maintenance of Equipment Machinist be allowed to maintain and perform all the locomotive work currently performed on the MGA that is not transferred to another location. Further, if the work is transferred to Canton, OH or other Conrail location, we want the Machinists to have the right to follow their work, with all protective benefits and to be able to dovetail their seniority. We do not want Machinists work assigned to another Craft that is not entitled to perform same.

In the event that the Carrier transfers running repair locomotive work to Conway and heavy repair to Altoona, we want the Maintehance of Equipment Machinists to have the right to follow their work, with all protective benefits and to be able to dovetail their seniority. In addition, we desire that the work on other equipment and highway vehicles be identified and retained for the former MGA Machinists and that the IAM be advised where the vehicles and equipment are being transferred to if not retained on the former MGA property and that the Machinists be allowed to follow the work if proper.

We further desire that all MGA Machinists positions at Brownsville be abolished and new positions be established and advertised for the respective locations to where the work is being transferred, including Waynesburg. Also we desire that the Machinists required to transfer to another work location be given a five (5) day moving allowance and a lace curtain allowance similar to what the Carrier provided in the Carman's Agreement.

The Organization has attached a proposed Implementing Agreement which we firmly believe is fair and suitable, and in conformity with the provisions of the New York Dock conditions established for handling of this transaction."

Accordingly, the IAM&AW says that if the Carrier notice is not found to be premature that the implementing agreement proposed by the Carrier should be rejected, and that the implementing agreement which the IAM&AW has offered into record should be adopted in a resolution of the dispute.

FINDINGS AND OPINION OF THE BOARD:

The Board will first address the procedural issues raised by the IAM&AW, i.e., (1) the validity of the Carrier notice; and, (2) the question of whether the impasse declared by the Carrier was premature.

The Notice:

Section 4 of Article I of the New York Dock conditions calls for the posting and serving of a written notice which shall contain "a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes."

The Carrier notice was not inconsistent with the requirements of Section 4. It was timely served and posted; it identified the decision issued by the ICC for merger of the MGA into Conrail; it announced that the conditions of protection of employees as embodied in the New York Dock conditions will be provided; it noted that "it is intended to unify, coordinate and/or consolidate facilities used an operations and services performed separately by Conrail and the MGA;" it gave a general description of the effect that the merger would have on employees; it identified the positions and departments where those positions work on the MGA which were to be retained or abolished; it gave an estimate of the number of employees to be affected; and, it indicated the expected coordination and/or consolidation of work would occur, "on or about January 1, 1979, or earlier if an implementing agreement is reached or referee decision rendered."

Although the Carrier subsequently found reason to change some aspects of the notice, that circumstance does not support a contention that the Carrier had not essentially met the notification requirements of the New York Dock conditions. Section 4 does not define what shall constitute a perfect notice. Rather, it seems to call for the serving of a notice that is sufficiently composed so as to alert both employees and their labor representatives to the intended transaction and thereby trigger the consummation of any necessary implementing agreement.

Further, nothing in the Section 4 notice requirements or other provisions of the New York Dock conditions appear to mandate the extent of information sought by the IAM&AW, namely, drawings, prints, pictures, and other information concerning a new facility which is to be built; a list of equipment that employees represented by the IAM&AW repair, rebuild or rehabilitate; or, a list of all shop equipment contemplated on being moved by the Carrier from one location to another location.

The above observations of the Arbitration Board notwithstanding, it would seem that those meetings and conferences which preceded and followed the serving of the Carrier notice, as well as the

implementing agreement provisions thereafter proposed by the IAM&AW, clearly demonstrate an overall awareness on the part of the IAM&AW representatives of the intentions of the Carrier as concerns the merger of employees, work, and facilities of the NGA into Conrail.

Accordingly, the IAM&AW protest that the notice was defective and did not meet the requirements of Section 4 of Article I of the New York Dock conditions is found to be without merit.

The Impasse and Arbitration:

The parties engaged in a number of informal and formal meetings and telephone conversations regarding the notice as well as the terms of an implementing agreement. That both parties insisted on remaining firm on a number of issues and were thereby not able to reach mutual accord is unfortunate. However, that the parties have not been able to amicably resolve their differences does not support a finding that there was a lack of good faith bargaining or that they had not in fact reached an impasse in negotiation of an implementing agreement.

Section 4 of Article I of the New York Dock conditions intends there be a speedy resolution of disputes involving an implementing agreement. It calls for "negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this Appendix [III]" to begin within five days of the receipt of a notice. And, Section 4 states that if at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment to arbitration.

As indicated above, informal discussions were conducted between the parties before the notice was formally served on September 23, 1992. The parties met on October 15 and 16, 1992, and exchanged written proposals. Subsequent meetings and telephone conferences were held on November 6, 1992 and January 5, 6, 11, and 13, 1993. It was not until some two weeks later, on January 27, 1993, that the Carrier declared an impasse and intent to submit the dispute to arbitration.

It being apparent the parties engaged in or had opportunity of negotiation for almost twice the period of time prescribed by the New York Dock conditions before one party, the Carrier, declared an impasse, there is no basis to hold there was a violation of Section 4 requirements of the New York Dock conditions that there be a 30-day period for negotiation of an implementing agreement before the declaration of an impasse and resort to arbitration.

The Arbitration Board thus finds no reason to conclude that the Carrier was premature in declaring an impasse and invoking arbitration for the resolution of the dispute.

Turning now to the merits of arguments advanced by both parties

as to the terms of an implementing agreement.

Schedule of Rules Agreement:

The parties are basically in agreement that the current Conrail-IAM&AW Schedule of Rules Agreement, effective May 1, 1979, be the surviving rules agreement when the MGA is merged into Conrail. However, the IAM&AW asks that such rules additionally include or provide as follows:

1. A continuation of language contained in a 1988 MGA letter agreement concerning training and tools.

2. A listing of all MW equipment presently maintained by IAM&AW employees and a list of shop equipment to be transferred to Waynesburg and agreement that those employees would continue to maintain the equipment in the future.

3. That a former Pennsylvania Railroad agreement concerning highway vehicle maintenance applicable to portions of Conrail territory (former PRR property) cover the MGA territory.

Given the few number of employees involved i.e., seven, and the rather limited geographical confines of the MGA as compared to the rather extensive size of the Conrail labor force and the extent of its system properties, both parties have wisely chosen to be in general agreement that the Conrail--IAM&AW Schedule of Rules Agreement be applicable when the former MGA employees are merged into Conrail, albeit, as indicated above, the IAM&AW would like to amend that Agreement to preserve certain MGA rules.

In the opinion of the Arbitration Board, to modify or amend the Conrail-IAM&AW Schedule of Rules Agreement to extend or preserve certain rights to former MGA employees would be to debase the principles of the basic understanding as to which agreement would survive the merger, and tend to impede, rather than foster the economies and efficiencies of the merger, even if it was to be held, which it is not, that there was merit to the aforementioned desires of the IAM&AW.

Seniority and Seniority Rosters:

Three of the total of seven active employees represented by the IAM&AW on the MGA work in the Locomotive Shop. The four other employees work in the Maintenance of Way and Signal Department. The employees are currently on two separate seniority rosters: (1) Machinists Seniority Roster No. 1, South Brownsville Locomotive Facilities, and (2) Machinists Seniority Roster No. 2, South Brownsville Maintenance of Way Shops.

The IAM&AW asks that on the date the implementing agreement is

made effective that: (1) a new Conrail-IAM&AW Seniority District Roster be established to encompass the former territory of the MGA, including South Brownsville and Waynesburg, PA; (2) two new rosters be created at Waynesburg, one for shop work and the other for maintenance of way work; (3) employees following their work and accepting transfers to other locations on Conrail where work on former MGA locomotives, roadway machines, equipment, etc., has been transferred have their names and MGA seniority dates dovetailed into the existing appropriate Conrail-IAM&AW Seniority District Roster; and, (4) in the event that employees accept transfer to a Conrail location where no MGA work has been transferred they shall have their name placed at the bottom of the appropriate Conrail-IAM&AW Seniority District Roster.

The IAM&AW also asks that the implementing agreement provide that employees who transfer to other Conrail-IAM Seniority Districts will retain seniority at South Brownsville and be subject to recall to a permanent vacancy known to be of at least 60 days duration, with the Carrier paying reasonable expenses in connection with an employee accepting recall and returning to South Brownsville.

The Carrier, on the other hand, proposes that all MGA employees represented by the IAM&AW be dovetailed into the Conrail-IAM&AW Seniority District "0012A" roster with a Prior RR Code "MGA" and a Prior Roster code "0001", and that such employees be available to perform service on a coordinated basis subject to applicable Conrail agreements. The Carrier has also proposed that on the effective date of the implementing agreement that Conrail-IAM&AW Seniority District "0012A" be expanded to encompass the former territory of the MGA.

In this latter regard the Carrier has stated that those IAM&AW Machinists who are designated to retain prior rights will have prior rights to all machinists positions subsequently advertised on the former MGA territory.

The Carrier asserts that its seniority proposal provides the MGA employees full integration of their seniority on the Pittsburgh area seniority roster, and that this is appropriate since it says the preponderance of locomotive work formerly done at Brownsville by IAM&AW represented employees will be performed at the Conway Diesel Shop because the MGA locomotive fleet will be integrated into the Conrail system locomotive fleet, while some unquantified amount of heavy repair work will be done at Altoona, PA.

Further, the Carrier says that the vast preponderance of the work on maintenance of way machinery will continue to be performed on the former MGA property, and that its proposal to assign MGA prior rights to positions headquartered on the former MGA assures that machinists who had performed the work will have first rights to continue to perform the work on the former MGA territory.

In support of the logic of its seniority proposal, the Carrier points up that in every implementing agreement reached by mutual agreement or under Section 4 arbitration, the appropriate Conrail Pittsburgh area seniority district has been expanded to encompass the former MGA territory, and that in no instance has the MGA been kept a separate seniority district as here requested by the IAM&AW.

The Carrier further submits, and the Arbitration Board believes rightly so, that the advertisement and awarding of positions should be basically pursuant to the applicable rules agreement, or, as here, the Conrail-IAM&AW Schedule of Rules Agreement. In this respect, it is noted that Section 5 of Article I of the New York Dock conditions prescribes that to eligible for a displacement allowance there must be "the normal exercise of seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced."

Accordingly, in consideration of the record and arguments of the parties, the Arbitration Board finds the Carrier proposal for the expansion of the Pittsburgh Seniority District to include the former MGA territory to be meritorious and appropriate for the protection of seniority rights and the assignment of employees made necessary by the merger of the MGA into Conrail.

The Test Period Average:

A test period average (TPA) is a meaningful measurement of past earnings of a displaced employee in the establishment of an affected employee's job protection allowance. It permits a determination to be made as to the extent, if any, that a displacement allowance is payable each month during the term of a protective period as a consequence of the employee having been adversely affected as a direct result of the transaction.

A TPA is not, however, something to which an employee is entitled account an indirect affect of the transaction, or on the basis of speculative belief that the transaction may be cause for reduced compensation or loss of a job at a future date.

For it to be concluded, as the IAM&AW asks, that a TPA be given to all MGA Machinists, "with no strings attached," would require this Arbitration Board to go outside the meaning and intent of the New York Dock conditions and give blanket certification to all employees. Such action would be in disregard of those provisions of the New York Dock conditions which condition entitlement to either a dismissal or displacement allowance on a showing that the transaction has had an adverse affect on an employee, or, as set forth in such conditions, that as a "result of a transaction" the affected employee "is deprived of employment" or is "placed in a worse position with respect to his compensation and rules governing his working conditions."

In this same respect, it would seem to the Arbitration Board that the certification of an employee solely on the basis of the implementation of a transaction, rather than the certification and construction of a TPA at the time the employee is in fact adversely affected, would be to prematurely commence the tolling of the protective period during which the affected employee would be entitled to a job protection or displacement allowance.

That the Carrier, in an implementing agreement with the Brotherhood of Maintenance of Way Employees, was agreeable to providing that employees on the MGA who are in active service on a date certain "will be certified as a 'Displaced Employee' adversely affected by the transaction" and "will be provided their test period averages," must be viewed in the light of that understanding being one of a voluntary nature in settlement of the merger notice and other pending labor matters, and also stipulating the following:

> "It is further agreed that notwithstanding the certification provided for above, any such employee adversely affected due to any of the following causes will not be entitled to receive either a dismissal allowance or a displacement allowance as a result thereof:
>
> o Employee's own choice (e.g. voluntarily bidding to a lower rated position).
>
> o Return of other (senior) employees from leave of absence, disability, injury or vacation.
>
> o Medical disqualification of the Claimant.
>
> o Emergency or work stoppage.
>
> o External statutory changes such as amendments to the Hours of Service Law or FRA regulations."

In any event, aside from the above understanding between the Carrier and the BMWE being one of a voluntary or collective bargaining nature, it is not, as here sought by the IAM&AW, the providing of a TPA "with no strings attached."

Arbitrator William E. Fredenberger, Jr. in a decision which he issued under date of January 12, 1983 in a dispute between the Brotherhood of Railway Carmen and the Baltimore and Ohio Railroad/Louisville and Nashville Railroad involving what shall be contained in an arbitrated implementing agreement, in holding that issues concerning displacement allowances were not properly justiciable in the proceeding before him, said:

> "The question of whether the Carriers are obliged to furnish test period earnings as well as the question of

> whether a particular employee meets the definition of a displaced employee are dependent upon individual circumstances. These questions are properly justiciable in a proceeding pursuant to Article I, Section 11 of the New York Dock Conditions rather than this [Section 4] proceeding."

In the light of the aforementioned considerations, and in keeping with the findings of many past boards, such as in the case before Arbitrator Fredenberger, this Arbitration Board finds no basis to conclude that an arbitrated implementing agreement may properly mandate a TPA provision in the manner requested by the IAM&AW.

Moving Allowance:

The IAM&AW initially requested that, in addition to those moving benefits contained in Article I, Section 9, of the New York Dock conditions, "employees electing to transfer to a new point of employment requiring a change of residence as a result of jobs offers" be provided "an allowance for any and all other expenses" in accordance with a schedule that would call for payment of $400 allowance on the date of transfer; a second $400 allowance at the end of 120 days of compensated work; and a third $400 allowance at the end of 190 days of compensated work. The foregoing notwithstanding, in its presentation to the Arbitration Board, the IAM&AW proposed that the machinists required to transfer be given a "lace curtain" allowance similar to that contained in the implementing agreement the Carrier entered into with the Carmen's Organization, i.e., a $500 allowance.

The IAM&AW also asks that the implementing agreement stipulate reimbursement of wage losses be five (5) days rather than the three (3) day reimbursement which is prescribed in the New York Dock conditions.

It is beyond the jurisdiction of an arbitration board, such as this, to award an increase in the prescribed moving allowance, absent the authority of the parties to make a determination on such a matter.

Section 9 of the New York Dock conditions specifically says that the affected employee shall be reimbursed for an actual wage loss "not to exceed 3 working days." No mention is made in those conditions of "other expenses" or a schedule of allowances for other expenses.

This finding notwithstanding, the Arbitration Board would be remiss if it did not say, as Arbitrator Scheinman said in a dispute involving this Carrier and the TCIU, and wherein the Carrier had agreed to permit the arbitrator to make a determination about moving allowances: "We believe it inequitable to provide a different level of benefits to former MGA employees who must move... as a result of this transaction."

The Arbitrator would hope that in final resolution of the instant dispute that the Carrier would reconsider its position and grant employees represented by the IAM&AW the same level of benefits it was willing to provide in pre-arbitration meetings and as is contained in certain letters of agreement with the other craft organizations, i.e., five (5) working days off with pay and a $500 transfer or lace curtain allowance.

Current Work Continuation:

The IAM&AW asks that the implementing agreement provide the four Maintenance of Way Machinists "be allowed to maintain and perform all the work currently performed on the MGA" and the one Maintenance of Equipment Machinist "be allowed to maintain and perform all the locomotive work currently performed on the MGA that is not transferred to another location." Further, it asks that if the work is transferred to Canton, Ohio or other Conrail locations, that the Machinists it represents have the right to follow such work.

The IAM&AW also desires that work on other equipment and highway vehicles be identified and retained for the former MGA Machinists and that it be advised where the vehicles and equipment are being transferred to if not retained on the former MGA property, "and that the Machinists be allowed to follow the work if proper."

Except as will be discussed below, this Arbitration Board finds no reason to hold that a newly created position at a location to which work formerly performed on the MGA may be transferred should be awarded to a former MGA employee on the basis that work attached to the creation of such position will be exclusively work of the former MGA. Certainly, when work of the nature here involved on the MGA is transferred and integrated into the Conrail system in implementation of the merger it will be difficult, if not impossible, to distinguish what work had previously been work restricted to or performed by former MGA employees.

The Conrail--IAM&AW Schedule of Rules Agreement, which, as stated above, is to be adopted by the parties as part of the implementing agreement, prescribes the manner in which new positions and vacancies will be advertised, posted, and announcements made as to the name of the successful applicant after the close of the advertisement.

Provision is also made in such Agreement for the awarding of advertised positions or vacancies as concerns employees having prior right seniority in the craft and class in which the vacancy exists to be given first consideration, even if working out of their craft or class. Thus, it would seem that the IAM&AW concerns are without merit and that the applicable and current rules of the Conrail--IAM&AW Schedule of Rules Agreement should apply and prevail with respect to the advertisement and awarding of

positions which may arise out of application of the implementing agreement.

The exception to the above findings is that the Arbitration Board believes the implementing agreement should include that Side Letter of Understanding which the Carrier had initially proposed to the IAM&AW, but withdrew when it declared an impasse, or, namely, a letter dated October 16, 1992, and presented to this Board by the IAM&AW as Employee Exhibit No. 32, and which will be attached to this Arbitration Board decision and hereinafter be identified as Side Letter No. 1 to the Implementing Agreement. This side letter concerns the anticipated transfer of portions of work from the MGA to Altoona, PA, and the right of former MGA employees to be initially awarded a position created as a consequence of such action. It is also evident from the record that the same situation may well apply with respect to a transfer or work from the MGA to Conway, PA. Thus, this side letter will be considered as likewise applicable to any position which initially involves the transfer of portions of work from the former MGA to Conway, PA.

Accordingly, in study of the record and arguments of the parties, the Arbitration Board finds that the Implementing Agreement which the Carrier has proposed for adoption, namely, Exhibit 13 to its written presentation, and here attached as Attachment "A", meets the criteria set forth in Article 1, Section 4 of the New York Dock Conditions in effecting the coordination of work performed by employees represented by the IAM&AW on the MGA in a manner as authorized by the ICC. Therefore, the Arbitration Board finds that such document, together with the addition of previously mentioned Side Letter of Understanding No. 1, shall be held to constitute the appropriate Implementing Agreement for the merger of MGA employees represented by the IAM&AW into Conrail.

AWARD:

The Question at Issue is disposed of as set forth in the above Findings of the Arbitration Board.

Robert E. Peterson, Arbitrator

June 21, 1993

IAM

ATTACHMENT 'A'
CONRAIL-IAM&AW
NY DOCK (MGA)

AGREEMENT MADE THIS DAY OF 1992, UNDER ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS, BETWEEN THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND CONSOLIDATED RAIL CORPORATION AND THE MONONGAHELA RAILWAY COMPANY IN CONNECTION WITH THE MERGER OF THE MONONGAHELA RAILWAY COMPANY INTO CONRAIL PURSUANT TO INTERSTATE COMMERCE COMMISSION ORDER IN FINANCE DOCKET NO. 31875

Whereas the Interstate Commerce Commission in Finance Docket No. 31875 granted approval of the merger of the Monongahela Railway Company (hereinafter referred to as MGA) into Consolidated Rail Corporation (hereinafter referred to as Conrail) subject to "New York Dock" Labor Protective conditions and that the ICC further approved the assignment of leases of the MGA to Conrail; and

Whereas, the Carriers intend to effect the coordination of work performed by employees represented by the International Association of Machinists and Aerospace Workers in connection with the merger, including the movement of maintenance of equipment work to Waynesburg and Conway, PA.

IT IS AGREED:

1. On the effective date of this agreement, the Collective Bargaining Agreement effective May 1, 1979, as

EXHIBIT 1
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amended, between Conrail and the International Association of Machinists and Aerospace Workers, will be applicable to the former Monongahela Railway Company employees covered by this Agreement, and Monongahela Railway Company Agreements are terminated.

2. On the effective date of this Agreement, all MGA employees represented by the International Association of Machinists and Aerospace Workers will be dovetailed into the Conrail-IAM Seniority District "0012A" roster with a Prior RR code "MGA" and a Prior Roster code "0001", and that such employees will be available to perform service on a coordinated basis subject to applicable Conrail agreements. On the effective date of this Agreement Conrail-IAM Seniority District "0012A" will be expanded to encompass the former territory of the MGA.

3. Employees affected as a result of this transaction will be afforded the benefits prescribed by the ICC as set forth in the New York Dock conditions which are, by reference, incorporated herein and made a part hereof.

4. Any prior continuous service and qualifying years with the Monongahela Railway Company shall be credited for vacation, personal leave and other benefits which are granted on the basis of qualifying years of service.

5. An employee who is affected by the transaction and entitled to benefits under Section 5 or 6 of the New York Dock conditions may file a written request on the form provided, with the Manager-Labor Relations, Suite 201 Conrail Building 424 Holiday Drive, Pittsburgh, PA 15220, for a statement of test period earnings for use in developing his or her displacement or dismissal allowance. A claim for protection must be presented on the form provided and must be submitted to Conrail's Manager-Labor Relations within sixty (60) days following the end of the month in which the adverse affect is claimed.

6. An employee who is deprived of employment as a Machinist as a result of this transaction may be offered a position as a Machinist at any location. Such employee shall be given thirty (30) days' written notice by certified mail (with copy to the General Chairman) of such offer and must elect in writing one of the following options prior to the expiration of the notice: (1) to accept the offer; (2) to resign from all service and accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May, 1936 (if a change in residence is required); or (3) to be furloughed without protection during the period of such furlough. In the event an employee fails to make such an election, he shall be considered to have exercised option 3. Employees accepting

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a job offer that would under existing agreements require a change in residence will be eligible to receive the moving expenses provided under paragraph 3 of this Agreement.

7. The dismissal allowance of any employee shall be reduced to the extent of any earnings made by the employee outside of the employment of Conrail. Employees receiving a dismissal allowance must, upon request, provide documentation attesting to the amount of such outside earnings. Failure to provide such documentation upon request, or upon evidence of any fraudulent submission of claims, shall result in a suspension of benefits.

8. This Agreement will become effective upon five (5) days advance notice to the involved General Chairmen of the International Association of Machinists and Aerospace Workers, unless otherwise agreed, and constitutes the required implementing agreement and fulfills all other

requirements of Article I, Section 4 of the New York Dock Labor Protective Conditions imposed by ICC Finance Docket 31875.

Signed this _____ day of _____, 1992, at

FOR THE EMPLOYEES:

_____
General Chairman
International Association of
Machinists and Aerospace Workers

FOR CONSOLIDATED RAIL CORPORATION:

_____
Vice President-Labor Relat:

APPROVED:

_____
International Association of
Machinists and Aerospace Workers

FOR THE MONONGAHELA RAILWAY COMPANY:

_____

SIDE LETTER NO. 1
CONRAIL-IAM&AW
NY DOCK (MGA)

----SIDE LETTER NO. 2---

October 16, 1992

Mr. Raymond J. McMullen
General Chairman
International Association of
Machinists and Aerospace Workers
RD #1, Box 756A
Altoona, PA 16601

Re: Monongahela Railway Company - Conrail Merger
ICC Finance Docket 31875

Dear Mr. McMullen:

This confirms the discussions held concerning the merger implementing agreement.

In our discussions and in the Notice previously provided the Carrier advised that IAM positions would be moved from Brownsville to Waynesburg concurrent with the coordination of MGA work with Conrail.

We further advised that we anticipate moving five of the seven current Machinists positions and abolishing two positions, as portions of the work now performed by those positions will be performed by Conrail forces and the Altoona Shops.

We agree that concurrent with the coordination of work and the movement of IAM positions to Waynesburg, Carrier will establish new positions at Altoona equal to the number of positions permanently abolished on the MGA. These positions will initially be advertised and filled on a seniority. MGA prior rights basis. Former MGA employees awarded these positions will be entitled to moving expenses and benefits in accordance with Article I Section 9 and 12 of New York Dock conditions. Employees following their work and accepting transfer in accordance with this Agreement shall have their names and MGA seniority dates dovetailed into the existing appropriate Conrail IAM Seniority District Roster, [illegible] rights.

S.A.-0277

EMPLOYEE EXHIBIT 32

Please indicate your agreement by signing in . provided.

Sincerely,

/s/ R. E. Swart

R. E. Swart
Vice President-Labor Relations

I concur:

_____
R. J. McMullen

JEB/mas
RJMSIDE2.JEB

EMPLOYES EXHIBIT 33

S.A.-0278

In the Matter of the Arbitration between:	Pursuant to Article I, Section 4 of the New York Dock Conditions
CONSOLIDATED RAIL CORPORATION AND MONONGAHELA RAILWAY COMPANY, Carriers,	ICC Finance Docket No. 31875
and	
UNITED TRANSPORTATION UNION(E), Organization.	OPINION AND AWARD

Hearing Date: September 24, 1992
Hearing Location: Pittsburgh, Pennsylvania
Date of Award: October 29, 1992

JOHN B. LaROCCO
ARBITRATOR
923 Second Street, Suite 300
Sacramento, California 95814-2278

STIPULATED ISSUES IN DISPUTE

(1) Does the Referee have the authority under New York Dock to determine whether the Conrail or the MGA Schedule Agreement will apply on the consolidated operation.

(2) If the answer to question (1) is yes, subsequent to the consolidation of the Monongahela Railway Company operations into Consolidated Rail Corporation, will the collective bargaining agreements applicable to Locomotive Engineers and Locomotive Firemen formerly employed by Monongahela Railway Company be:

(a) the collective bargaining agreements governing rates of pay and working conditions of Locomotive Engineers and reserve engine service employees on Conrail; or

(b) the collective bargaining agreements applicable to the employees on the Monongahela Railway Company prior to the consolidation?

OPINION

I. INTRODUCTION

On October 10, 1991, the Interstate Commerce Commission (ICC) approved the Consolidated Rail Corporation's application to merge the Monongahela Railway Company (MGA) into the Consolidated Rail Corporation (Conrail).[1] Consolidated Rail Corporation-Merger-Monongahela Railway, I.C.C. Finance Docket No. 31875 (Decision dated October 4, 1991). To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Conrail and the MGA pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347.

This arbitration is conducted pursuant to Section 4 of the New York Dock Conditions.[2] Pursuant to an agreement memorialized by an August 27, 1992 letter, the Carriers and the Organization appointed the undersigned as Arbitrator in this matter and stipulated to the issues in dispute which appear on the title page of this Opinion.

Both parties filed lengthy prehearing submissions. The Arbitrator entertained oral argument during the September 24, 1992 hearing. At the Arbitrator's request, the parties waived the thirty

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[1] The term "Carriers" in this Opinion refers to the MGA and Conrail.

[2] All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Arbitrator will only cite the particular section number.

day time limitation, set forth in Section 4(a)(3) of the New York Dock Conditions, for issuing this Award.

II. BACKGROUND AND SUMMARY OF THE FACTS

The MGA, which consists of 162 miles of track in Pennsylvania and West Virginia, was, for many years, jointly owned by Conrail, the Pittsburgh and Lake Erie Railroad (now the Three Rivers Railroad) and, one of the predecessor companies of CSX Transportation, Inc. Ninety-nine percent of MGA's revenue traffic is generated from coal hauling originating at coal fields along MGA's line. In 1990, MGA interchanged eighty-three percent of its coal traffic with Conrail. Besides connecting with Conrail at the north end of West Brownsville, the MGA interchanges with the former Pittsburgh and Lake Erie Railroad at Brownsville Junction and with the CSX at Rivesville, West Virginia.

The MGA is divided into two divisions, west and east. Both divisions meet at Brownsville, Pennsylvania the northernmost point on the MGA. The east division follows the Monongahela River south to Fairview, West Virginia while the west division runs from Brownsville southwesterly through Waynesburg, Pennsylvania to Blacksville, West Virginia.

In 1990, Conrail purchased 100% of the MGA stock and on August 14, 1990, the ICC approved Conrail's application to acquire the MGA. Consolidated Rail Corporation-Control Monongahela Railway Company, ICC Finance Docket No. 31630 (Decided on August 14, 1990) Although the ICC imposed the New York Dock Conditions to protect any employees adversely affected by the acquisition, the Conditions were never

triggered since Conrail did not commence integrating the MGA into Conrail until after the October, 1991 merger.

Pursuant to written notice issued under Section 4 of the New York Dock Conditions, the Carriers notified the Organization, on July 3, 1992, of their intent to consolidate, unify, and coordinate all the facilities and operations of the MGA into the Conrail. The Carrier's notice contemplated that Conrail would completely subsume the MGA, that is, there would no longer be any MGA operations, services, or facilities. In sum, the MGA, as presently constituted, would go out of existence because the entire MGA would accrete into Conrail.

At a meeting held on May 13, 1992, the Carriers presented th Organization with a detailed explanation of the impending consolidation. To fully understand the breadth of the operational changes and the effect of these changes on MGA Engineers, the Arbitrator must initially relate how trains are currently operated over the MGA. Coal producers located along the MGA place car orders with the Conrail. Conrail train and engine crews deliver a train of empty cars to the MGA-Conrail interchange point at West Brownsville, Pennsylvania. MGA train and engine crews report to duty at Brownsville and thus, the empty coal trains frequently sit idle for up to three hours at Brownsville while the MGA crew members are reporting to their on duty point, and being transported to West Brownsville. The MGA crew operates the empty train to the coal producer for loading. Since all MGA crew members are compensated at yard rates, a. if they are performing yard service, another MGA crew must relieve the

first crew during the loading operation to avoid paying costly overtime compensation to the first crew. The second crew completes the loading process and operates the train back to West Brownsville where it is interchanged with the Conrail. Under the Carriers' proposed consolidation every facet of current train operations will change substantially. The new on and off duty point for all crews will be Waynesburg, Pennsylvania, a more centralized point than Brownsville. Conrail will run empty trains, originating at either Conway Yard in Pittsburgh or Conemaugh Yard at Johnstown, through West Brownsville to either Waynesburg on the west division or Maidsville on the east division (apparently, crews reporting to duty at the new crew base at Waynesburg will be transported to Maidsville, which is reasonably close to Waynesburg). Since crews will take over the empty trains at Waynesburg, the Carriers predict that a single crew can deliver the empty train to the coal producer, load and return it to Waynesburg within eight hours. Moreover, the Carrier optimistically forecasts that some crews may be able to make two or more turns to some mines.

In addition to a substantial alteration in how trains will operate over the former MGA, many, if not all MGA support activities, will be integrated into similar activities performed on Conrail. Thus, supervision, train and crew dispatching, customer service, and other administrative functions will be totally integrated into Conrail's system wide or regional facilities which presently perform identical functions.

The parties met on May 27, 1992, to discuss the terms and conditions of a New York Dock implementing agreement. According to the Organization, MGA Engineers negotiated with the Carriers for only about thirty minutes because most of the day was spent on negotiations between the Carriers, and MGA Conductors and Trainmen.[3] Despite the short bargaining session, the Carriers and Organization, thereafter, reached a tentative agreement on all issues surrounding the Carriers' proposed consolidation of MGA operations into Conrail, except, the two issues presented to the Arbitrator. The parties deadlocked on whether the MGA Engineers should come under the collective bargaining agreement applicable to Locomotive Engineers on Conrail or remain under the MGA scheduled engineers' agreement.[4] The Carriers served the July 3, 1992 formal notice, under Section 4 of the New York Dock Conditions, to invoke arbitration. Throughout the handling of this dispute on the property, the Organization reserved the right to raise the threshold issue of whether or not this Arbitrator has the authority to determine which collective bargaining agreement will apply to the MGA Engineers subsequent to the coordination.

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[3] Negotiations between the United Transportation Union (E&T) and the Carriers were fruitful. On July 2, 1992, the UTU(E&T) and the Carriers entered into a New York Dock implementing agreement, which among other things provided that the Conductors and Trainmen would be placed under the collective bargaining agreement in effect between Conrail and the UTU(E&T). The MGA agreement applicable to Conductors and Trainmen was terminated.

[4] In anticipation of reaching an arrangement whereby the MGA engineers would come under the agreement applicable to Conrail locomotive engineers, Conrail and the Brotherhood of Locomotive Engineers entered into an implementing agreement, dated September 18, 1992, to cover the consolidation of train operations. The implementing agreement, permits MGA engineers to be governed by the agreement applicable to locomotive engineers on Conrail, and provides that Conrail Engine Service Seniority District 8 will be expanded to include the entire MGA property.

III. THE POSITIONS OF THE PARTIES

A. The Carriers' Position

The United States Supreme Court and the ICC have both interpreted the Interstate Commerce Act to permit an arbitrator to abrogate a collective bargaining agreements on rail properties effecting an ICC authorized merger.

The Interstate Commerce Act exempts Carriers from all laws necessary to carry out a merger transaction. 49 U.S.C. § 11341(a). In Norfolk Western Railway v. American Train Dispatchers, 111 S.Ct. 1156 (1991), the United States Supreme Court adjudged that the statutory exemption extends to all laws including a railroad's bargaining and agreement obligations under the Railway Labor Act. Recently, consistent with the Supreme Court's ruling, the ICC decided that a collective bargaining agreement cannot impede a railroad's implementation of an approved transaction. CSX Corporation-Control-Chessie System Inc. and Seaboard Coast Line Industries, 8 I.C.C. 2d 715 (1992). Thus, the ICC has firmly ruled that not only are arbitrators free to change provisions of collective bargaining agreements where those provisions impede an authorized merger but also, because the arbitrator is an extension of the ICC, the arbitrator is actually under a duty to abrogate collective bargaining agreements which impair implementation of a transaction. Norfolk Southern Corporation-Control-Norfolk and Western Railway and Southern Railway, 4 I.C.C. 2d 1080 (1988). Therefore, the NGA Schedule

Agreement must give way to the Carrier's necessity to effectuate the transaction.

Continuation of the MGA Schedule Agreement would not just impede, but would defeat the entire merger. The Scope Rule in the MGA agreement prevents Conrail engineers from manning trains beyond the current interchange point at West Brownsville. Unlike the Conrail collective bargaining agreement applicable to Engineers, the MGA agreement does not provide a reasonable and feasible method for the Carrier to establish a new terminal. Thus, Conrail would have to retain the inefficient West Brownsville terminal, more than 25 miles from the proposed Waynesburg crew base. Similarly, under the Carriers' proposed operational arrangement, all engineers will report to Waynesburg, regardless of whether the engineer will be operating on the east or west division, yet the MGA agreement calls for maintenance of extra lists at both South Brownsville and Maidsville. The MGA agreement continues to recognize the craft and class of firemen and so displaced engineers can presumably hold riding firemen positions.[5] On Conrail, the fireman's craft has been eliminated and in its stead, the UTU(E) and Conrail created the reserve engine service employment program. To establish interdivisional service on the MGA, the Carriers' must follow the negotiation and arbitration provisions of Article IV of the October 31, 1985 National Agreement. An arbitrator could impose conditions so onerous that Conrail would be precluded

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[5] There are 32 active Engineers on the MGA. Conrail proposes that MGA Engineers be governed by the collective bargaining agreement covering Conrail Engineers and that those employees listed on the MGA Firemen Roster, when not working as Locomotive Engineers, would be governed by the agreement between Conrail and the UTU(E) which covers the reserve engine service craft.

from instituting interdivisional service from Conway yard to Waynesburg. Under the Conrail agreement, if certain conditions are met, Conrail may unilaterally institute interdivisional service. Clearly, the Carriers could not achieve the goals of the transaction if the MGA agreement remains in effect. Therefore, concomitant with his ICC delegated authority, the Arbitrator must place the MGA Engineers under the applicable Conrail agreements.

Under the controlling carrier principle, the Conrail agreement applicable to Locomotive Engineers should apply to MGA Engineers subsequent to the transaction because MGA work and operations will have been completely integrated into Conrail. Railway Yardmasters of America and Union Pacific Railroad, NYD § 4 Arb. (Siedenberg: 5/18/83). Conrail, not the MGA, will operate all trains over the former MGA property. All MGA operations will cease. Conrail will not just be the controlling or dominant Carrier but the sole Carrier. Employees who are transferred to a controlling carrier, as part of a merger must leave their old collective bargaining agreement behind. Norfolk and Western Railway-Exemption-Contract to Operate Trackage Rights, (Decided June 27, 1989). I.C.C. Finance Docket No. 30582 [Interstate Railroad Company]. The MGA Agreement becomes obsolete with the advent of consolidated operations totally controlled by Conrail.

The Carriers alternatively argue that even if the New York Conditions, as interpreted by the ICC, do not mandate abrogation of the MGA agreement, it cannot survive on the merged system because the

Locomotive Engineers' contract on Conrail is the only permissible labor contract covering the craft of engineers on Conrail. The ongoing propriety of a single agreement applicable system wide to all Conrail Engineers is preserved by the status quo provisions of the Railway Labor Act. The Northeast Rail Service Act of 1981 carried forward, as Section 708(A), the provisions of the Regional Rail Reorganization Act of 1973, as amended, which appeared in Section 504(D). These provisions provide for one collective bargaining agreement system wide for each certified craft on Conrail. The Conrail Privatization Act of 1986, placed the one system wide agreement per craft provision within the status quo of the Railway Labor Act. Retaining the MGA agreement would establish more than one agreement for the same craft, on Conrail, in direct contravention of statutory law. None of the statutes permit multiple labor contracts covering the same craft in the event of a merger. If the Organization wishes for the MGA Engineers' agreement to survive, it must change the status quo through Section 6 of the Railway Labor Act.

In summary, the Carriers urge the Arbitrator to exercise his delegated authority to provide that the New York Dock implementing agreement contain a provision that the MGA Engineers will henceforth come under the applicable collective bargaining agreements between Conrail and its craft of Locomotive Engineers and Reserve Engine Service Employees.

B. The Organization's Position

The Organization questions whether or not an arbitrator adjudicating disputes under Section 4 of the New York Dock Conditions, has the authority to abrogate existing collective bargaining agreements unless the Carriers first exhaust the negotiation procedures mandated by the Railway Labor Act. Rather, the Arbitrator is limited to fashioning an implementing agreement which provides for a fair and equitable rearrangement of forces. Furthermore, Section 2 of the New York Dock Conditions preserves existing collective bargaining agreements.

In Brotherhood Railway Carmen v. Interstate Commerce Commission, the Court of Appeals for the District of Columbia Circuit decided that the statutory exemption in the Interstate Commerce Act did not empower the ICC to override collective bargaining agreements. 880 F.2d 562 (D.C. Cir. 1989). Early arbitration decisions issued under Section 4 of the New York Dock Conditions determined that arbitrators may not simply eradicate collective bargaining agreements. Norfolk and Western Railway Company and Railway Yardmasters of America, NYD § 4 Arb. (Sickles 12/30/81). Norfolk and Western Railway/Illinois Terminal Railroad and Brotherhood of Locomotive Engineers, NYD § 4 Arb. (Zumas; 2/1/82)

Conrail failed to show that it is necessary to apply its own work rules across the MGA territory. When feasible, employees in coordinated territories must continue to be governed by their own work

rules. Chesapeake and Ohio Railway/Baltimore and Ohio Railway and United Transportation Union, NYD § 4 Arb. (Cluster; 8/7/85).

Even if this Arbitrator has the authority to abrogate the MGA agreement, the absence of the MGA agreement would undermine an orderly selection of forces. Trying to equitably divide work between Conrail Engineers and MGA Engineers will be chaotic without the MGA agreement.

Since the MGA and the Organization recently renegotiated the MGA agreement, the Carriers obviously realized that leaving the MGA agreement intact would hardly impede the impending consolidation. Stated differently, if the MGA agreement is such an obstacle to the institution of consolidated and merged operations, the Carriers shoul not have negotiated a new schedule agreement back in March, 1992. Even though the Carriers have not shown that retention of the MGA agreement would thwart the establishment of consolidated operations, the Organization is willing to negotiate with the Carriers over existing rules in the MGA agreement to the extent that the rules might impinge on the institution of efficient consolidated operations. Changes in agreement language to accommodate specific operational problems can be negotiated without violently destroying the MGA agreement. The selection of forces should be done with as little intrusion into collective bargaining agreements as possible. Burlington Northern Railroad and United Transportation Union, MCC § 4 Arb. (Vernon; 3/29/91).

MGA Engineers would endure tremendous monetary hardship if they are placed under the agreement applicable to Conrail Locomotive

Engineers. In several respects including a higher reduced crew differential, the compensation for MGA Engineers in the MGA Schedule Agreement is greater than the compensation afforded to Conrail Engineers. Also, transferring the on and off duty point to Waynesburg will also cause personal hardships for many employees who have purchased residences based on reporting to work in Brownsville.

The Organization concludes that the Arbitrator lacks the authority to nullify the MGA agreement and, alternatively, and assuming that the Arbitrator holds such authority, the Arbitrator should retain the MGA agreement for current MGA Engineers.

IV. DISCUSSION

In 1991, the United States Supreme Court definitively resolved the decade long dispute over whether or not the ICC and arbitrators, who fashion implementing agreements under Section 4 of the New York Dock Conditions, had the authority to change, alter, or abrogate existing collective bargaining agreements. In Norfolk and Western Railway Company v. American Train Dispatchers/CSX Transportation Inc., v. Brotherhood Railway Carmen, the Court unequivocally ruled that Section 11341(a) of the Interstate Commerce Act permits the ICC and New York Dock arbitrators to exempt railroads from existing collective bargaining agreements to the extent necessary to carry out ICC approved transactions. 111 S.Ct. 1156 (1991).

The Court observed:

> "Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC approved transaction makes sense of the consolidation provisions of the Act, which were designed to

promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." Texas v. United States, 292 U.S. 522, 534-535, 54 S.Ct. 819, 825, 78 L.Ed. 1402 (1934). The Act requires the Commission to approve consolidations in the public interest. 49 U.S.C. § 11343(a)(1). Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to transferred employees" as well as "the loss of seniority rights," United States v. Lowden, 308 U.S. 225, 233, 60 S.Ct. 248, 252, 84 L.Ed. 208 (1939), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. 49 U.S.C §§ 11344(b)(1)(D), 11347; See also New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979). Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If § 11341(a) did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, e.g., Burlington Northern R. Co. v. Maintenance Employees, 481 U.S. 429, 444, 107 S.Ct. 1841, 1850 95 L.Ed.2d 381 (1987) (resolution procedure for major disputes "virtually endless"); Detroit & T. S. L. R. Co. Transportation Union, 396 U.S. 142, 149, 90 S.Ct. 294, 298, 24 L.Ed.2d 325 (1969) (dispute resolution under RLA involves "an almost interminable process"); Railway Clerks v. Florida East Coast R. Co., 384 U.S. 238, 246, 86 S.Ct. 1420, 1424, 16 L.Ed.2d 501 (1966) (RLA procedures are "purposely long and drawn out"). The immunity provision of § 11341(a) is designed to avoid this result.

"We hold that, as necessary to carry out a transaction approved by the Commission, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers. We affirm the Commission's interpretation of § 11341(a), not out of deference in the face of an ambiguous statute, but rather because the Commission's interpretation is the correct one." 111 S.Ct. 1165, 1166

After the Supreme Court handed down its decision, the ICC, as it had done several times in the past, determined that arbitrators working under the delegated authority of the ICC, may write implementing agreements which exempt approved transactions from the Railway Labor Act and collective bargaining agreements subject to the Railway Labor Act. CSX Corporation-Control-Chessie System Inc., and Seaboard Coast Line Industries, 8 I.C.C. 2d 715 (1992). In that decision, the ICC expressly commented on the standard for determining whether or not the statutory exemption should be applied to a particular transaction. The ICC wrote:

> "Furthermore, the "necessity" predicate is satisfied by a finding that some "law" (whether antitrust, RLA, or a collective bargaining agreement formed pursuant to the RLA) is an impediment to the approved transaction. In other words, the necessity predicate assures that the exemption is no broader than the barrier which would otherwise stand in the way of implementation. It constrains the breadth of the remedy, not the circumstances under which it applies. 8 I.C.C. 2d 715, 721-722 (1992).

The ICC has thus decided that collective bargaining agreements must yield to the extent that the agreement provisions are impediments to carrying out an approved transaction.[6]

As the Organization points out, several arbitration decisions issued under Section 4 of the New York Dock Conditions in the early 1980's, found that, in view of the language in Section 2 of the Conditions, collective bargaining agreements must be preserved even if continuation of the agreements rendered it is infeasible for a

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[6] Since the Arbitrator derives his authority from the ICC, the Arbitrator must strictly follow the ICC's pronouncements.

railroad or to realize the benefits (or efficiencies) of the transaction. However, the U.S. Supreme Court's holding, which overruled the D.C. Circuit Court of Appeals decision cited by the Organization, leaves no doubt that Section 4 prevails over Section 2.

Therefore, this Arbitrator is vested with the authority to decide the second question at issue, that is, whether the MGA Locomotive Engineers should remain under the MGA agreement or be placed under the agreement applicable to Conrail's Locomotive Engineers.

In this case, the Carriers presented overwhelming evidence that retention of the MGA agreement would effectively block the establishment of consolidated train operations and thus, completely undermine the ICC approved merger. Under the proposed consolidated operation, the prior distinction between MGA operations (and its employees) and Conrail operations (and its employees) will not just become blurred, but, rather, will be totally eliminated. MGA Engineers will be fully integrated into the Conrail system. They will no longer be identifiable (except to the extent that the Engineers might hold equity, preferential or prior rights over trains operating on the former MGA property).[7] Operations over Conrail and the former MGA will be homogenous. There will not be any interchange between Conrail and the MGA, because, pursuant to the ICC's authorization, they will henceforth constitute one railroad.

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[7] The MGA Engineers will also be identifiable for purposes of discerning New York Dock protective benefits.

The absence of separate and distinct MGA train operations militates against retaining the MGA agreement. The Carriers persuasively pointed out that the MGA agreement could operate in numerous ways to effectively bar the institution of merged operations. As part of its approval of the merger, the ICC permitted the Carriers to initiate operational efficiencies, based on economies of scale and improved equipment utilization, to better serve the coal producers along the MGA line. Leaving the MGA agreement intact would certainly prevent the Carriers from changing existing equipment utilization and the present rail traffic patterns. The MGA agreement could bar a Conrail Engineer from operating on the former MGA property, prohibit the establishment of a centralized crew base, and require the Carriers to duplicate many administrative functions already performed by Conrail. Contrary to the Organization's argument, this not a situation where only one or two MGA agreement provisions are hindering specific aspects of the Carrier's operating plan. Rather, because this merger involves the complete integration of the MGA into Conrail, the totality of the circumstances compel a total abrogation of the MGA agreement. Stated differently, it is impossible to accommodate the transaction by amending a few rules in the MGA agreement. Retaining even a residue of the MGA agreement will impede the impending transaction since the agreement, in and of itself, would maintain the MGA as a separate railroad property which is anathema to the complete integration of operations.

Conrail is the controlling Carrier in the merger and thus, it is most appropriate to place MGA Engineers under the Agreement applicable to Locomotive Engineers on Conrail. Southern Railway-Purchase-Illinois Central Railroad Line, 5 I.C.C. 2d 842 (1989). Complete integration of train operations makes it unwieldy for MGA Engineers to carry any portion of the MGA agreement with them to Conrail. Imposing multiple agreements on the former MGA territory would render the coordination not just awkward but would thwart the transaction.

The Conrail agreement governing Conrail's Engineers differs from the MGA agreement. The Organization asserts that the level of total compensation in the Conrail agreement is below the level of total earnings accruing to Engineers under the MGA agreement. Assuming that the Organization's monetary calculations are correct, the ICC imposed the New York Dock Conditions on the Carriers for the specific purpose of protecting employees who suffer a wage loss as a result of changes in operations stemming for the merger. The amount of compensation which MGA Engineers are currently receiving will be included in their test period average earnings. Subsequent to the introduction of consolidated operations, if a former MGA Engineer does not earn compensation equivalent to the Engineer's test period average, because of a merger related change in operations, the Engineer will be afforded a displacement allowance in accord with Section 5 of the New York Dock Conditions. In conclusion, the protective provisions of the New York Conditions are designed to protect employees from being placed in a worse position with respect to their compensation.

To reiterate, this Arbitrator has the authority, under Section 4 of the New York Dock Conditions, to determine which schedule agreement will apply to MGA Engineers following the coordination and, the Arbitrator rules that, the MGA Engineers must be placed under the collective bargaining agreements applicable to Locomotive Engineers and Reserve Engine Service Employees on Conrail.

AWARD AND ORDER

1. The answer to the first stipulated issue in dispute is Yes.

2. The answer to the second stipulated issue in dispute is the collective bargaining agreements governing rates of pay and working conditions of Locomotive Engineers and Reserve Engine Service Employees on the Consolidated Rail Corporation.

Dated: October 29, 1992

John B. LaRocco
Arbitrator

JBL/dm
e:\mgma\conrail.utu

ARBITRATION BOARD
ESTABLISHED PURSUANT TO ARTICLE I, SECTION 4
OF THE NEW YORK DOCK PROTECTIVE CONDITIONS
AS IMPOSED BY THE INTERSTATE COMMERCE COMMISSION
IN FINANCE DOCKET NOS. 28905, 30053, 31033, 31106, 31296, 31695 AND 32020

In the Matter of Arbitration Between:	)	
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
Carrier,	)	
	)	
and	)	
	)	Radio Repair Consolidation
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and	)	
	)	
	)	
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,	)	
	)	
	)	
Organizations.	)	

OPINION AND AWARD

Date of Hearing: March 18, 1997
Location of Hearing: Rosemont, Illinois
Date of Award: April 11, 1997

Appearances:

For the Carrier:

James B. Allred, Director, Labor Relations
Nicholas S. Yovanovic, Esq., Assistant General Counsel
Ronald M. Johnson, Esq., Akin, Gump, Strauss, Hauer & Feld, L.L.P.

For the International Brotherhood of Electrical Workers:

Glen A. Heinz, General Chairman
Daniel L. Davis, International Vice President
Michael S. Wolly, Esq., Zwerdling, Paul, Leibig, Kahn, Thompson & Wolly, P.C.

For the Transportation Communications International Union:

L. H. Tackett, General Chairman
Carl H. Brockett, International Vice President

Background: CSX Transportation, Inc. ("Carrier," "CSXT") is the result of several mergers authorized by the Interstate Commerce Commission ("Commission"), beginning with the decision on September 23, 1980, in ICC Finance Docket No. 28905, to permit CSX Corporation to control the railroad subsidiaries of Chessie System, Inc. ("Chessie") and Seaboard Cost Line Industries, Inc. ("SCLI").[1] At that time, the railroads controlled by Chessie included the Chesapeake & Ohio ("C&O"), the Baltimore & Ohio ("B&O") and the Western Maryland ("WM"). SCLI consisted of the Seaboard Coast Line ("SCL"), the Louisville and Nashville ("L&N"), the Clinchfield and several smaller carriers. This decision also authorized CSX Corporation to control the Richmond, Fredericksburg & Potomac ("RF&P"). In 1982, in Finance Docket No. 30053, the Commission approved the merger of L&N into SCL, with the resultant company being renamed Seaboard System Railroad. In 1987, in Finance Dockets 31033 and 31106, the Commission approved the merger of B&O into C&O, and then C&O into CSX. The Commission then approved the merger of WM into CSXT in 1988 (Finance Docket 31296, and the merger of Clinchfield into CSXT in 1990 (Finance Docket 31695). Finally, in 1992, in Finance Docket 32020, the Commission approved an agreement for CSXT to operate the properties of RF&P in the name and account of CSXT. In each of these transactions, the Commission imposed protective conditions as set forth in *New York Dock Railway — Control — Brooklyn Eastern District Terminal*, 354 I.C.C. 399 ("*New York Dock*").

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[1] *CSX Corp. — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980).

On January 23, 1996, pursuant to the above orders of the Commission, Carrier served notice upon the International Brotherhood of Electrical Workers ("IBEW"), the Transportation Communications International Union ("TCU"), the Brotherhood of Railroad Signalmen ("BRS") and the employees represented by these Organizations. This notice advised of the Carrier's intent to "consolidate at Louisville, Kentucky certain radio repair work which is currently being performed throughout the CSXT System and to have such work performed thereafter on a coordinated basis." According to this notice, Carrier intended to abolish a total of 44 positions at 24 different locations throughout the system and establish 17 new positions in a Centralized Radio Service Center at Louisville. The notice indicated Carrier intended this transaction to occur on or about April 22, 1996. The work involved would be the repair function for all radios with the exception of end of train devices (EOT's) and vehicle radios.

Subsequent to the service of this notice, the Carrier met with representatives of the three organizations with the objective of reaching an agreement to implement the transaction. When the parties were unable to reach agreement, the Carrier, on July 3, 1996, invoked the arbitration provisions of Article I, Section 4 of *New York Dock*. Receiving no response from the Organizations, the Carrier, by letter dated July 15, 1996, asked the National Mediation Board to appoint a neutral Referee pursuant to Section 4(1) of *New York Dock*. The National Mediation Board subsequently appointed a neutral Referee, who later found it necessary to resign the appointment. Consequently, by letter dated January 15, 1997, the National Mediation Board appointed Barry E. Simon to serve as the neutral Referee.

A hearing in this matter was scheduled for March 18, 1997, in Rosemont, Illinois. On March 13, 1997, the Carrier reached an agreement with the Brotherhood of Railroad Signalmen on this matter. It was therefore concluded that the BRS was no longer a party to this dispute. The hearing proceeded with the Carrier, the IBEW and the TCU.

Issues Presented:

The Carrier proposes the following Statement of Issue:

(1) Does the Implementing Agreement proposed by the Carriers on March 26, 1996, provide an appropriate basis for the selection of forces made necessary by the transaction described in Carrier's notice of January 23, 1996?

(2) If the answer to (1) above is negative, then what would be the appropriate basis for the selection of forces?

The IBEW, not taking issue with the proportional selection process for the initial filling of newly-created positions in the new Centralized Service Center as described in the Carrier's March 26, 1996, proposal, suggests the additional issue:

What collective bargaining agreement(s) should be applicable in the newly-created Centralized Radio Service Center in Louisville?

It is the Referee's decision that the issue proposed by the Carrier is broad enough to encompass the issue proposed by the IBEW. Accordingly, the Referee adopts the Carrier's Statement of Issue.

Position of the Carrier:[2] The Carrier notes that although the various railroads have been merged into the CSXT, the work forces on the former carriers, as well as the work they protect, have not yet been fully coordinated into a single system. It avers the continued operation of separate radio repair facilities on the former properties results in significant inefficiencies in the use of equipment, facilities and employees, impeding the Carrier's ability to provide the rail service required in today's highly competitive market. Without the coordination it seeks, Carrier asserts it is required to maintain duplicate facilities, parts inventories, tools and work benches. It contends that employees at some of these locations do not have sufficient radio repair work to keep them fully occupied, requiring them to perform other communications work during their workdays. Further, Carrier says it is required to maintain artificially inflated radio inventories due to the inconsistent and sometimes inefficient means of repairing radios and the logistical problems of having the operable radios where they are needed to run trains.

To remedy these problems, Carrier proposes to create a single radio service center that will inspect, evaluate, test and repair a wide range of radio equipment required for it to operate its transportation system. This consolidation, according to the Carrier, will permit it to repair radios more efficiently, reduce radio down time, return radios to customers on a more timely basis and allow it to reduce inventories and equipment. Carrier says its selection of Louisville as the site for this

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[2] To a large extent, the Carrier's submission, as well as its supplemental submission, dealt with issues that were raised only by the Brotherhood of Railroad Signalmen. To the extent that those issues were not raised by either the IBEW or the TCU, the Referee considers them no longer to be in dispute. Accordingly, this portion of the Discussion will synopsize only those issues that are still in dispute between the remaining parties.

facility will allow it to take advantage of the fact that United Parcel Service maintains its centralized distribution hub there. Any radio repaired at Louisville by 11:00 pm can be delivered to any location on the Carrier's system by the following day, according to the Carrier. These efficiencies and improvements, argues the Carrier, will enable it to reduce 27 positions. Some of these position reductions, says the Carrier, will be accomplished from blanked positions that have been vacant since the original notice was served.

The Carrier has proposed an implementing agreement that would, *inter alia*, have the effect of placing all of the radio repair positions at Louisville under the former L&N/TCU Agreement, which is the agreement currently governing radio repair work at Louisville. In this regard, the relevant provisions of the Carrier's proposed agreement, dated March 26, 1996, read as follows:

> 1. The work of evaluating, diagnosing and repairing of Locomotive Radios, RDUs (Receiver Display Units), Defect Detector Radios, MCPs (Mobile Communications Packages), Portable Radios, Vehicle and other Mobile Equipment Radios, except for peripheral repairs (knobs, microphones and antennas), circuit boards for BCPs (Base Communications Packages) and Base Station (Dispatcher) Radios, which is currently being performed throughout the CSXT System, will be transferred to and consolidated at Louisville, Kentucky, where such work will thereafter be performed on a coordinated CSXT basis by Carrier under the scope of the Schedule Agreement between former L&N and TCU. . . .
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> 2. It is further understood and agreed that the work covered by the scope and classification rules of the respective schedule agreements which is not being specifically coordinated in this Agreement will continue to [be] performed under such respective schedule agreements.
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> 4. Positions established in the coordinated shop will be initially filled according to the following procedures:
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(b) With respect to the IBEW represented properties (B&O, B&OCT, C&O Southern and SCL) the positions allocated to the IBEW represented employees shall be advertised to all active employees holding positions as Communications Employees on the districts listed above. The positions will be awarded to the senior qualified applicants from the applicable districts; i.e., 2 positions for the C&O Southern, 4 positions for the B&O, and 4 positions for the SCL. In the event one or all of the positions are not filled by employees from the C&O Southern, B&O or SCL respectively, the positions will be awarded to the senior qualified applicant(s) from the other IBEW represented properties, considered as a group, if any. If there are no qualified applicants the positions will be filled in accordance with paragraph (d) below.

(c) With respect to the TCU represented property (L&N) the positions allocated to the L&N represented employees shall be advertised to all active employees holding positions as Communications Employees on the former L&N. The positions will be awarded to the senior qualified applicants from the applicable district with preference being given to the incumbents of the positions abolished as a result of the coordination. In the event one or all of the positions are not filled by incumbents of the abolished positions, the positions will be awarded to the senior qualified employees making application. If there are no qualified applicants the positions will be filled in accordance with paragraph (d) below.

(d) In the event any of the positions referred to in (a),[3] (b) and/or (c) remain to be filled, they will be filled under the terms of the L&N TCU Communications Agreement.

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6. (a) Employees assigned to positions in the consolidated operation at Louisville pursuant to Section 4(a) or (b) of this agreement will have their seniority on the district on which working transferred to and dovetailed onto the former L&N System Communications Class 1 and 1-A Rosters and will have their names removed from their current district roster. Current L&N TCU Communications Employees assigned to positions in the consolidated operation at Louisville pursuant to Section 4(c) or (d), who have not previously established seniority in Class 1-A shall establish such seniority pursuant to the L&N TCU Schedule Agreement.

(b) In the event that two or more employees have the same seniority date the employee having the earlier employment date in the Communications Department with any of the CSXT affiliated carriers will be the senior of such employees in ranking for that class. If two (or more) such employees have the same employment date in the Communications

[3]Section 4(a) provides for the selection of forces from BRS represented properties, and is similar in construction to Section 4(b).

Department with the Carriers, their ranking in the class will be determined by their Julian calendar date of birth.

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8. Employees who accept positions in the coordinated CSXT Radio Shop will be credited with prior service under existing agreements applicable to them prior to the coordination for purposes of annual vacations, sick leave, pass privileges, personal leave days, job stabilization and other service-related benefits under the Schedule Agreement between former L&N and TCU.

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Side Letter No. 10

It was agreed that any IBEW or BRS represented employees transferring to the coordinated operation will be given the option of remaining under the coverage of the Supplemental Sickness Benefit plans applicable to them for a period of time equal to no greater than six years following their transfer. This election will be in lieu of the sick leave benefits they would have otherwise accrued under the former L&N TCU Communications Agreement.

This election must be made in writing at the time of transfer and will be irrevocable.

The Carrier asserts this agreement would not change the terms of its agreements with either the BRS or the IBEW on the other former properties. Although those agreements would cease to apply to the work being transferred and consolidated, Carrier points out they would continue to apply to radio repair work not included in the consolidation.

Carrier alleges placing the employees at the consolidated facility under the L&N/TCU agreement would not work a significant change in most of the rules under which these employees work. According to the Carrier, many of the terms of the various former property communications agreements are either the same or very similar. Some subjects, such as vacations and health and

welfare benefits, notes the Carrier, are covered by national agreements, to which all of the non-operating crafts are a party.

Notwithstanding this fact, the Carrier argues it would be unrealistic and impractical to operate a consolidated facility while maintaining several different working agreements for all the employees working there. Because of the disparity between some of the rules in these agreements, the Carrier asserts it would effectively have separate facilities under one roof if more than one agreement were to be applied. Furthermore, the Carrier contends there would be no way to distinguish what work belonged to a particular agreement. It insists it is essential to have a single working agreement if it is to realize the economies that are anticipated when the work is centralized and coordinated.

Carrier cites the decision of Referee LaRocco in *BRS v. NW/SR/CG* (February 9, 1989), involving the consolidation of shop signal repair work from the three carriers to a single facility at Roanoke, Virginia. It quotes Referee LaRocco as follows:

> When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroads. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operational efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements. The ICC has unequivocally ruled that existing collective bargaining agreements are superseded by the

necessity to implement the approved transaction. *CSX — Control — Chessie and Seaboard Cost Line*, F.D. 28905 (Sub-No. 22), ICC Decision issued June 25, 1988.

In line with the above decision, Carrier asserts that a single working agreement at the coordinated facility is plainly necessary for safe and efficient operations. It submits that its decision to propose the L&N/TCU Agreement was based upon the "controlling carrier concept," under which the work is placed within the scope of the agreement in effect at the location receiving the work. Carrier notes this concept was applied by Referee LaRocco in the above cited case. On this property, Carrier cites fifteen instances between 1985 and 1993 where employees were placed under different collective bargaining agreements when work was consolidated.

Carrier further cites the decision of Referee Ables in *CSX v. American Train Dispatchers Association* (November 11, 1988), in which Carrier was authorized to consolidate power distribution work at Jacksonville, Florida, with the work being performed by managerial employees. This decision, notes the Carrier, was affirmed by the Commission[4] and the Court of Appeals.[5]

Carrier also cites the decision of Referee O'Brien wherein this Carrier sought to combine the employees of various properties onto single seniority rosters of the Brotherhood of Locomotive Engineers and the United Transportation Union under the agreements applicable to the former B&O. While Referee O'Brien found the changes proposed by the Carrier were necessary to attain the public transportation benefits of the authorized transactions, he left it to the Commission to determine

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[4]*CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 23).

[5]*American Train Dispatchers Association v. I.C.C.*, 26 F.3d 1157 (D.C. Cir. 1994).

whether the proposed changes would be contrary to the condition that "rights, privileges and benefits" shall be preserved. Carrier asserts the Commission authorized the consolidation of rosters under single agreements,[6] and was upheld by the Court of Appeals.[7]

Carrier distinguishes this case from *Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company v. Brotherhood of Locomotive Engineers - ATDD Division*, (Referee Suntrup, May 25, 1994), cited by the IBEW. While Referee Suntrup found the work was being coordinated at a new dispatching center, Carrier denies it is proposing to build a new facility. It insists the existing facility for the radio repair shop at Osborn Yard on the former L&N at Louisville has been remodeled to handle the increased work and employees at that location. Carrier also avers Referee Suntrup's Award involved unique facts not present in the instant case. In particular, Carrier notes the SP train dispatchers who were going to the new facility were represented by the American Train Dispatchers Department of the BLE, while the DRGW dispatchers had been represented by an independent union, which had lost its status as representative when the National Mediation Board found that the SP and the DRGW constituted a single carrier and certified the ATDD as representative of all dispatchers. Carrier asserts Referee Suntrup was reluctant to put all dispatchers under the DRGW Agreement when the union had lost its status as representative. Carrier suggests Referee Suntrup's reluctance also came from

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[6] *CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995).

[7] *United Transportation Union v. Surface Transportation Board*, D.C. Cir., March 21, 1997.

his apparent belief that the SP was attempting to obtain an unfair bargaining advantage over the ATDD by forcing it to succeed to the independent union's non-traditional collective bargaining agreement.

Carrier argues that its proposed change meets the standard set by the Commission that it be necessary to realize the efficiencies of the approved merger. It submits the consolidation could not be accomplished if it had to continue repairing the radios on the former properties, or to have multiple sets of radio repairmen under one roof working under separate agreements.

Finally, the Carrier avers its offer of enhanced protective benefits, *e.g.*, separation allowances, moving expenses, etc., is contingent upon the work being coordinated under a single collective bargaining agreement. Otherwise, argues the Carrier, the Referee has no authority to grant protective benefits in excess of those contained in the *New York Dock* Conditions.

Position of the IBEW: The IBEW argues that employees it represents who transfer to Louisville should continue to be covered by their IBEW Agreements. It notes that 61% of the 44 jobs to be abolished (27 jobs) are held by IBEW members, and that 59% of the 17 new jobs (10 jobs) will be held by IBEW maintainers. It avers their average hourly wage is $16.48[4] plus a 65¢ per hour skill differential. It further says they enjoy significant protection against subcontracting and are covered by a supplemental sickness plan in lieu of sick leave. The IBEW concludes, therefore, that

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[4]$16.46 on the C&O, $16.48 on the B&O and B&OCT, and $16.51 on the SCL. At the hearing the IBEW acknowledged that the current IBEW rate of pay is lower than the TCU rate of pay.

these employees stand to lose much in the way of rights, privileges and benefits by not continuing to work under the IBEW Agreements. The IBEW insists there is nothing in its Agreements that could not be applied to their continued performance of radio repair work at the new location.

The IBEW disputes the Carrier's contention that the consolidation will take place at an existing facility. It submits the Centralized Radio Service Center is being created especially for this transaction, and currently has neither employees nor a collective bargaining agreement to cover work at the Center. It contends the building to be used could not accommodate the new facility without major modifications. It notes all of the current Louisville jobs will be abolished and all of the positions at the new facility are identified by Carrier as "new positions." It cites Carrier's submission as saying Carrier proposes "to create a single radio service center" and locate it at Louisville. This language, says the IBEW, is evidence the Center has not existed prior to this transaction.

The IBEW states the Carrier proposes to apply the L&N/TCU Agreement solely on the basis of geography, but the fact that the Center will be located within the confines of what was once the L&N is pure fortuity. It notes the L&N has not existed for years and that the work to be performed by the BRS and IBEW employees has not been done before on the L&N. It suggests allowing mere location to govern the terms and conditions of employment would enable the Carrier to manipulate its labor relations by relocating assignments across former property lines to avoid dealing with certain unions.

The IBEW argues Section 2 of *New York Dock* requires the existing IBEW Agreements setting forth "rates of pay, rules, working conditions and all collective bargaining and other rights,

privileges and benefits" be applied to the IBEW represented employees at the new facility. Citing *Railway Labor Executives' Assn. v. U.S.*[9] ("*Executives*"), the IBEW asserts §11347 of the Interstate Commerce Act (as well as its successor, §11326(a) of the ICC Termination Act) "clearly mandates that 'rights, privileges, and benefits' afforded employees under existing CBAs be preserved."[10] The IBEW concludes that *Executives* holds that a *New York Dock* Referee is prohibited from modifying those parts of collective bargaining agreements which establish "rights, privileges or benefits" for labor and allows the modification of other parts of agreements only when "necessary to effectuate a transaction."[11]

The IBEW argues Carrier is required to prove that the purported benefits of the proposed consolidation cannot be achieved unless the existing agreements are overridden. Absent such a showing of necessity, says the IBEW, the Carrier's position that those agreements should no longer apply to its members must be rejected. In support of its position, the IBEW cites *Norfolk & Western Railway Co. v. ATDA*.[12] That case, says the IBEW, also requires that any "decision to override the carriers' obligations [must be] consistent with the labor protective requirements of §11347."

The IBEW denies that the issue of which collective bargaining agreement will apply is a representation issue. It notes the National Mediation Board has distinguished its jurisdiction over the

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[9]987 F.2d 806 (D.C. Cir. 1993).

[10]*Id.* at 814.

[11]*Id.* at 814-815.

[12]499 U.S. 117 (1991).

resolution of jurisdictional issues from questions of continuing contract application. It concludes, therefore, that resort to the Mediation Board is not the appropriate forum for determining the continuing application of the collective bargaining agreements to the transferred positions.

The IBEW asks the Referee to ensure that transferred employees will have their "rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges and benefits . . . under . . . existing collective bargaining agreements or otherwise" preserved as required by Section 2 of *New York Dock*. This, says the IBEW, is the Referee's prime responsibility. Insofar as the Carrier's intent, argues the IBEW, is to subject the transferring employees to terms and conditions of employment inferior to those they now enjoy by virtue of agreement or otherwise, the Referee is authorized by Section 4 of *New York Dock* to direct preservation of the superior terms and conditions for these employees as a condition for implementation of the transaction.

The IBEW cites the decision of Referee Suntrup in *Rio Grande Industries, Inc., SPTC Holding Inc. and the Denver & Rio Grande Western Railroad Company - Southern Pacific Transportation Company v. Brotherhood of Locomotive Engineers - ATDD Division*, (May 25, 1994), wherein the employees, under the Carrier's plan, would have been covered by an agreement with the Dispatchers Steering Committee, which had represented dispatchers on the former Denver & Rio Grande Western Railroad. As in the instant case, says the IBEW, the dispatchers transferring to Denver, constituted the majority of the consolidated workforce and were working under the agreement with the American Train Dispatchers Association. The IBEW quotes Referee Suntrup, noting he was

> far from convinced . . . that sustaining the company's position on this matter would produce reasonable, harmonious labor relations. . . . [T]he SPL suggests that all dispatchers fall under a contract which the BLE-ATDD argues is either no contract at all [fn. omitted] and/or which was negotiated for a minority of the dispatchers at a location which is not even the dispatching location where the new dispatching center will be. For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver. . . .

The IBEW urges the Referee to follow the same approach as did Referee Suntrup, *i.e.*, direct that the existing agreements remain in effect, continuing to cover the employees they covered prior to the coordination until the parties reach a single collective bargaining agreement to cover all employees at the coordinated facility. According to the IBEW, a facility with joint union representation is not unprecedented on this property. It cites IBEW and TCU represented employees working side-by-side, performing essentially the same work, at Atlanta.

The IBEW further objects to the Carrier's proposal that would have all future vacancies arising at the new facility being filled through the L&N/TCU Agreement, which would foreclose other IBEW represented employees from opportunities for this work. Instead, the IBEW proposes that the implementing agreement provide that new positions that are created and vacancies that occur after the initial transaction be filled in a manner that retains the ratio of BRS/IBEW/TCU workers that existed initially. It suggests that openings that occur due to the retirement, separation or transfer of a former C&O, B&O, C&OCT or SCL maintainer be first bulletined to other IBEW-represented employees on that former property and, if not filled by that process, then be offered to other IBEW employees elsewhere on the system before being bulletined to other crafts.

The IBEW also asks that the implementing agreement ensure that in the event the Carrier has underestimated the amount of work to be performed at the new facility, work that cannot be done at the Center be performed on the property rather than contracted to outside vendors. If the Carrier has more work for the facility than the number of jobs it initially creates can do, the IBEW desires the Carrier to be obliged to either create additional positions in the same ratio as the original positions, or have the work revert to the locations where it formerly would have been done by the positions to which it formerly would have been assigned. It argues that work should in no event be contracted out, absent agreement of the union representing the affected employees at that former location.

Position of the TCU: The TCU supports the Carrier in its adoption of the "controlling carrier" principle. It avers that the Commission and the courts have long held that the Carrier is contractually obligated to assign work to the class and craft performing such work by virtue of the scope of the collective bargaining agreement in effect on the property to which the work is being assigned. The TCU cites several Referee decisions pursuant to *New York Dock* applying this principle. It concludes that the Referee must follow the Commission's authority, arbitral precedence and established jurisdictional/representational boundaries by placing all of the coordinated work under the collective bargaining agreement already in place at Louisville.

The TCU, at the hearing, raised objections to certain parts of Carrier's March 26, 1996, proposed implementing agreement. Specifically, it asserted Section 6(b) should determine ranking

of employees who have the same employment date in the Communications Department based upon date of birth, including year of birth. The TCU also objects to the requirement in Paragraph 5 of Side Letter No. 2 that the monthly dismissal allowance be reduced by $500 for each month needed by the employee to reach age 61.

At the hearing, the Carrier addressed three other objections raised by the TCU and reached a settlement with both Organizations. Specifically, Carrier agreed to delete the phrase "however no such claim for protective benefits shall be honored beyond ninety (90) days from the time specified in Sub-section (c) of this Section" from Section 7(e) in return for the TCU's waiver of its objection to Section 7(d). Additionally, Carrier and the Organizations agreed to delete the parenthetical phrase "except promotion to a non-contract position" from Section 9.

Findings: Neither the IBEW nor the TCU dispute the Carrier's right and need to consolidate the work of radio repair pursuant to the various ICC orders relied upon by Carrier, nor do they challenge the Carrier's selection of Louisville as the appropriate location for such consolidation. Additionally, they concur in the Carrier's formula for the allocation of personnel at the consolidated facility. The TCU further concurs with the Carrier's proposal to apply the L&N/TCU Agreement to all work and employees at the consolidated facility, although the IBEW does not. The TCU raises several objections to miscellaneous provisions of the implementing agreement, on which the IBEW was silent.

Accordingly, the Referee finds that the consolidation of radio repair work at Louisville constitutes a transaction pursuant to the various orders of the Interstate Commerce Commission within the meaning of Article I, Section 1(a) of the *New York Dock* Conditions. Carrier has complied with the notice requirements of Article I, Section 4, and has properly invoked arbitration. The Referee thus finds he has jurisdiction over the matter before him.

The issue dividing the IBEW and the Carrier is whether the Carrier's proposal to place all employees at the consolidated facility under the scope of the L&N/TCU Agreement is necessary to effectuate the transaction. The IBEW further suggests Section 2 of *New York Dock* places limitations upon the Referee, namely that he must preserve the rights, privileges and benefits existing under the collective bargaining agreements. This second point requires the Referee to consider what is meant by the Section 2 requirement.

It is the Referee's conclusion the Commission's intent in Section 2 has now been clarified. In *Railway Labor Executives' Assn v. U.S.*, the Court of Appeals wrote:

> The statute clearly mandates that "rights, privileges, and benefits" afforded employees under existing CBAs be preserved. Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor — an obviously absurd proposition — § 565 (and hence § 11347) does seem to contemplate that the ICC may modify a CBA.
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> At that level of generality, at least, the ICC's interpretation seems eminently reasonable, indeed indisputable. The Commission has not, however, addressed the meaning, and thus the scope, of those "rights, privileges, and benefits," that must be preserved, nor has it determined specifically whether the CBA provisions at issue here are entitled to statutory protection under that rubric. We thus remand for the ICC to make that determination in the first instance.
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> Regardless of how the ICC may read the above provision, however, it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission

> provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary to effectuate a covered transaction. *CSX*, 6 I.C.C.2d 715 (1990) ("We assume that any changes in CBAs will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute"). We agree that whatever else a "fair arrangement" entails, the modification of a CBA must at a minimum be necessary to effectuate a transaction. [footnotes omitted][13]

In that case, Referee Kasher awarded an implementing agreement that required the Springfield Terminal Railway Company, in operating leased lines, to apply the rates of pay, rules and working conditions contained in the lessor carriers' collective bargaining agreements. The Commission, finding that the preservation of the lessor carriers' rates of pay and work rules would effectively foreclose the transaction, stayed the Kasher Award and remanded that issue to the parties. Unable to reach agreement, the parties submitted the dispute to Referee Harris, whose Award modified the lessor carriers' agreements.

The Commission discussed the definitions of "rights, privileges and benefits" in its review of the Award of Referee O'Brien in the dispute involving this Carrier, the United Transportation Union and the Brotherhood of Locomotive Engineers. Because the Commission had not yet rendered a ruling on the remand in *Executives*, Referee O'Brien declined to rule on the issue of whether the Carrier's proposed changes would be contrary to existing "rights, privileges and benefits." The Commission then wrote:

> The history of the phrase "rights, privileges, and benefits" indicates that it has traditionally meant what it implies – the incidents of employment, ancillary emoluments or fringe benefits – as opposed to the more central aspects of the work itself – pay, rules and

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[13] *Railway Labor Executives' Assn. v. U.S.*, 987 F.2d 806, 814 (D.C. Cir 1993).

working conditions. The genesis of section 405 of the Amtrak Act was the Urban Mass Transit Act of 1962 (UMTA), which authorized federal financial assistance to state and local governments for the improvement of urban mass transit systems. Section 13(c) of that Act (now codified as 49 U.S.C. 5333(b)) required the Secretary of Labor to certify as "fair and equitable" arrangements to protect affected employees. The first requirement of section 13(c) for a "fair and equitable" arrangement was "the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise."

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

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

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

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

of the power of arbitrators under the Washington Job Protection Agreement of 1936 and pre-1976 labor conditions.

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

The unions argue that section 2 of New York Dock gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the B&O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd. – Exemption Acquisition and Operation – Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Ahnapee & Western Railway Company, Finance Docket No. 32035 (Sub-No. 1) (ICC served Dec. 19, 1994), slip op. at 7. Therefore, we find that the issue of which union is to represent WM engineers or receive them as dues-paying members does not involve a right that must be preserved under section 2 of New York Dock.[14]

The Commission's interpretation was found by the Court of Appeals to be reasonable and "exactly what was intended by Congress."[15] The Referee concludes, therefore, that the Carrier's proposed implementing agreement does not abrogate rights, privileges and benefits that Section 2 of *New York Dock* requires be preserved. The proposed agreement, in Side Letter 10, permits IBEW represented employees to elect to retain their coverage under the Supplemental Sickness Benefit plan during the protective period. The IBEW has cited no other "right, privilege or benefit," as those terms are applied, that might be abrogated by the proposed agreement.

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[14] *CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995) *slip op.* at 14-15.

[15] *United Transportation Union v. Surface Transportation Board*, D.C. Cir, March 21, 1997, at 10.

As the IBEW notes, the Carrier must demonstrate that its proposed changes are necessary to effectuate the transaction. The standard of "necessity" was defined in *Executives* as follows:

> What, then, does it mean to say that it is necessary to modify a CBA in order to effectuate a proposed transaction? In this case the Commission reasonably interpreted this standard to mean "necessary to effectuate the purpose of the transaction." If the purpose of the lease transaction were merely to abrogate the terms of a CBA, however, then "necessity" would be no limitation at all upon the Commission's authority to set a CBA aside. We look therefore to the purpose for which the ICC has been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the "necessity" for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease).[16]

As noted above, the Organizations here have not disputed the necessity of consolidating the work. Obviously, Carrier will realize greater efficiency by centralization, as evidenced by the fact that it will be able to use only 17 employees in the single facility while it requires 44 employees currently. Additionally, economies will be realized by maintaining only one facility and one inventory. Finally, turnaround time will be enhanced by the proximity to the United Parcel Service hub.

What Carrier must also demonstrate is the necessity of operating this facility under a single collective bargaining agreement, rather than multiple agreements as urged by the IBEW. The record reflects that there are three IBEW Agreements covering these employees, one of which covers only two of the employees. In this regard, Carrier convincingly cites the LaRocco Award, wherein the Referee wrote:

> When the shop signal repair work is commingled at Roanoke, any specific piece of work will not be readily identifiable as NW, SR or CG repair work even though the signal

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[16] *Railway Labor Executives' Assn. v. U.S.* 987 F.2d 806, 815 (D.C. Cir. 1993).

> devices repaired at the coordinated facility will originate on either the NW or the SR or their subsidiary railroad. As a result of the transaction, the NW will assume responsibility for accomplishing shop signal repairs for the entire NS system. Although the Organization acknowledges that the work at Roanoke will be commingled, it nonetheless urges us to carry forward some rules in the CG and SR Schedule Agreements and allocate Roanoke positions among the three railroads. However, complete integration of the fungible signal repair work renders it impossible for the employees who transfer from East Point to Roanoke to import any portion of the CG or SR Schedule Agreements with them. Imposing multiple schedule agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operation efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements.

In this case, as well, Carrier avers there would be no way to distinguish what work belonged to a particular agreement. It also notes there are significant differences in some of the basic rules of the agreements. The Referee concurs that it would hamper the efficiency and economy of the consolidation if Carrier were to be required to manage 17 employees under four (or even two[17]) different collective bargaining agreements. Carrier should be allowed to utilize the employees in the facility without being restricted by the artificial barriers imposed by different agreements. This is one of the objectives of the consolidation. The Referee finds it significant that the IBEW was unable to cite a single case, other than the Suntrup Award, discussed below, under *New York Dock* or any other protective condition where a Referee has imposed more than one collective bargaining agreement upon a consolidated work force. Thus, it is the Referee's conclusion that the adoption of a single collective bargaining agreement at the consolidated facility is necessary to effectuate the transaction.

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[17]The IBEW has, in fact, asked that the B&O/IBEW Agreement be applicable to all ten IBEW jobs because it covers the majority of the IBEW jobs affected.

The remaining question is whether the L&N/TCU Agreement is the appropriate agreement to apply. While the Referee is sensitive to the IBEW's concerns for its membership, the question must be addressed objectively. If one single agreement is going to apply, there must be some basis for selecting that agreement. The mere fact that the majority of the employees in the consolidated facility come from the IBEW craft is not persuasive. Because those ten employees are covered by three different agreements, it is evident that no single agreement covers a significant number of the employees relative to any of the others. In fact, the agreement covering the largest number of employees (five) is the L&N/TCU Agreement.

Nor is it appropriate to make qualitative judgments about the different agreements. First of all, that would not be possible in this case as the agreements were not put into evidence. Even if they were, it would be an impossible task to determine which agreement, taken in its entirety, is "the best." Some "better" provisions of one agreement may be outweighed by "better" provisions on different matters in another agreement. Furthermore, what may be beneficial for one employee may be immaterial to another. Even on the issue of sub-contracting, which was of particular concern to the IBEW, it is impossible to determine which agreement affords the greater protection to the employees because of the different factors involved.

It is apparent that the generally accepted practice among referees is to adopt the "controlling carrier" principle. In this case, the L&N is the controlling carrier as the consolidated facility is an expansion of an existing facility already subject to the L&N/TCU Agreement. This is not a new facility, as argued by the IBEW. While Carrier might have to perform substantial work to make it

ready, the fact remains that radio repair has long been performed at this site. Carrier may have been inartful in its choice of words in some of its notices, but this does not change the fact that there already is a radio repair facility at Louisville and Carrier is transferring more jobs there.

The Award of Referee Suntrup must be distinguished from the facts herein. In that case, the Referee clearly was faced with unique circumstances not present here. The Referee does not reject the principle of "controlling carrier." Instead, he wrote:

> . . . For the arbitrator to conclude that this is the proper route would lead, in his estimation, to extreme labor instability. It would also lead, as a matter of strategic advantage, to a major collective bargaining plus for the SPL as a mere side-effect of its coordination of dispatchers to Denver despite good faith promises by the company about a future contract which have been made before, but are not properly before, this forum and which, yet on the other hand, have not been tested in an actual Section 6 set of negotiations. To accept the SPL's arguments before this forum would be tantamount to nullifying the labor agreements which it has negotiated with about 85 percent of its dispatchers, with the collective bargaining agent which now represents one hundred per cent of its dispatchers, in favor of an agreement which it has with the other 15 percent under an arrangement with a collective bargaining agent which has lost any and all representation rights.

In the instant case, there is no evidence Carrier selected the Louisville site for any reasons other than those it has stated, namely that it is centralized within the system and that it can take advantage of the United Parcel Service hub. There is no suggestion that the applicable agreement was a consideration, or that the agreement is more advantageous to the Carrier than any of the others. There is, therefore, no basis for the Referee to reject the "controlling carrier" principle.

In reaching the conclusion to apply the L&N/TCU Agreement to the entire facility, the Referee need not address the issue of representation. In Finance Docket No. 28905 (Sub-No. 27),

the Commission held this was a matter for the National Mediation Board acting under the Railway Labor Act.[18]

The Referee is not satisfied there is a necessity to forever preclude IBEW employees from bidding on subsequent vacancies at the consolidated facility. Employees holding IBEW seniority on the respective districts as of the date of the transaction should be able to bid on the positions that will be filled by IBEW represented employees when those positions become vacant on a permanent basis. Additionally, a proportional number of new positions at the facility should be available to current IBEW employees through the exercise of seniority. Not giving these employees prior rights to such positions would make it possible for the Carrier to restore the remaining 27 abolished positions and make them available only to TCU represented employees. This would not be equitable. To afford the parties an opportunity to draft their own agreement to extend such prior rights, the Referee remands this issue to the Carrier and the IBEW. The Referee, however, shall retain jurisdiction over this matter and should the parties fail to reach agreement within sixty days following the date of this Award, either party may invoke arbitration.

Turning to the TCU's objections to the Carrier's proposed agreement, the Referee finds that the Carrier's Section 6(b) reference to Julian date as a basis for "breaking the tie" when two employees have the same seniority date is a fair procedure. Using birth date, without the year of birth, essentially yields a random number which is totally unbiased. Using the year of birth, as

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[18] *CSX Corp. — Control — Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27)(November 22, 1995) *slip op.* at 15.

suggested by the TCU, may expose the Carrier to liability under age discrimination laws. Therefore, such a provision would not be appropriate.

With respect to the TCU's request that dismissal allowances under a plan that permits an employee to maintain insurance coverage should not be reduced by $500 per month, the Referee finds he has no authority to grant the relief sought by the TCU. Even with the $500 per month reduction, the allowance to be paid is an enhancement to the benefits required under *New York Dock*. To eliminate the reduction would effectively further enhance the benefit. The TCU has not shown the Referee has the authority to grant any protective benefits above and beyond those required by *New York Dock*. Accordingly, the TCU's request must be denied.

Award: To the extent it is consistent with the above Findings, the Implementing Agreement proposed by the Carrier on March 26, 1996, with agreed upon modifications, provides an appropriate basis for the selection of forces made necessary by the transaction described in Carrier's notice of January 23, 1996. The issue of prior rights for IBEW represented employees is remanded to Carrier and the IBEW. The Referee retains jurisdiction over this issue and either party may invoke arbitration after sixty days following the date of this Award.

Barry E. Simon, Referee

Dated: April 14, 1997
Arlington Heights, Illinois

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

NORFOLK SOUTHERN RAILWAY COMPANY AND NORFOLK WESTERN RAILWAY COMPANY and BROTHERHOOD OF RAILWAY CARMEN DIVISION - TCU	I.C.C. Finance Docket Docket No. 29430 March 19, 1997

OPINION AND AWARD

BACKGROUND

On May 8, 1996, the National Mediation Board appointed the undersigned as Neutral for Arbitration pursuant to the Board's authority provided by the Interstate Commerce Commission's (hereafter "ICC") New York Dock (hereafter "NYD") Labor Protective Conditions.

This arbitration arises under Art. I, Section 4 of the Labor Protective Conditions adopted in New York Dock Ry.--Control--Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F. 2d 83 (2d Cir. 1979).

Pre-hearing submissions were received from both parties and extensive oral argument was presented at the hearing conducted on May 30, 1996 at the National Mediation Board, Washington, D.C. The Brotherhood Railway Carmen ("Organization" or "BRC") was represented by Mr. R. P. Wojtowicz, the president of the BRC. He was accompanied by two General Chairmen, Messrs. Jack Medley and J. V. Waller. The Norfolk and Western Railway Company ("NW") and

the Norfolk Southern Railway Company ("NSR") (a railroad under the common control of the Norfolk Southern Corporation) ("NS"), was represented by Jeffrey S. Berlin, Esq. He was accompanied by Mr. L. F. Miller, Jr., the NS principle representative, and other key personnel. The proceedings were transcribed; but, upon the request of the Organization (to which I agreed), the Award herein was based solely upon the parties' submissions, supporting documents and oral arguments. Post-hearing briefs were not filed.

STATEMENT OF FACTS

In 1982, the ICC approved the coordination of the operations of the NW and the NSR under the common control of the NS. As a part of its approval, the ICC imposed NYD labor protective conditions, which have been provided as appropriate over the following years. The initial 1982 coordination envisioned "operating benefits to the new system," including the elimination of redundant facilities. Many of these benefits already have been realized by consolidation and common control of certain facilities and functions.

In a continuing effort to achieve the basic objectives of the initial coordination, the Carriers involved herein decided to consolidate certain freight car work currently performed at their three major car repair shops. Accordingly, on April 3, 1995, the Carrier notified the BRC of its proposed coordination pursuant to Article 1, Section 4 of NYD. The planned coordination involved the transfer of nearly all of the car repair work currently performed

at NSR's Coster Car Shop ("Coster") in Knoxville, Tennessee, and the NSR's Hayne Car Shop ("Hayne") in Spartanburg, South Carolina. While part of Coster would remain operative, Hayne would be closed entirely. The 91 employees represented by the BRC at Coster and the 139 BRC represented employees at Hayne would be offered the opportunity to transfer as follows: 143 positions would go to NW's Roanoke, Virginia Car Shop ("Roanoke"), 51 positions would go to NW's Decatur, Illinois Car Shop ("Decatur") and 38 positions would go to the Linwood, North Carolina Car Shop ("Linwood").

The April 3, 1995 notification that certain of the Coster and Hayne work would devolve upon the other three facilities, as noted above, was accompanied by separate notices describing the work to be transferred and the applicable employee protective standards which would be applied.

On April 13, 1995, the BRC representatives met with the Carrier to begin the process of negotiating an Implementing Agreement to accommodate the orderly coordination. As is usual in these kinds of proceedings, the initial proposed Implementing Agreement was characterized as a "bare bones" approach, which provided that the Hayne-to-Linwood coordination would be under the 1965 Agreement (because both were NSR facilities) and that the remaining transfers, Coster-to-Roanoke and Hayne-to-Roanoke and Decatur, would be undertaken under NYD conditions. The Carrier enhanced the benefits in its proposed Implementing Agreement as the negotiations progressed. Basically, it proposed to place all of the transfers under NYD, to provide benefits that were parallel to

those contained in the 1982 Agreement and to "dovetail" the seniority of the transferred employees with the seniority list at the facilities receiving the transferees.

The parties were unable to reach agreement at the April 13, 1995 meeting, for a number of reasons and, therefore, met again on May 2, 1995. At that meeting, the parties again were unable to reach an agreement. The BRC did not provide a proposed Implementing Agreement at either of the negotiating sessions. Subsequently, the parties reached an impasse in their negotiations and concluded that the matter should be submitted to arbitration pursuant to the provisions of Article 1, Section 4, of NYD conditions.

On May 3, 1995, the Carrier wrote to the BRC that it had withdrawn all previous proposals. It then presented a new proposal to the BRC which it now asks the Neutral to impose as a result of these arbitration proceedings.

APPLICABLE AGREEMENTS

In addition to the parties' collective bargaining Agreement, two other existing Agreements were cited. Both are applicable to this dispute to varying degrees.

The first is the May 7, 1982 Implementing Agreement (the "1982 Agreement") that came about because of the NS acquisition of control of NSR and NW. In essence, the 1982 Agreement permits the Carriers to undertake certain transfers of work and employees within the consolidated NS system. It also provides certain

monetary benefits in addition to those provided by the NYD conditions. In Side Letter No. 4 to the 1982 Agreement, it was agreed that future coverage was limited to the relocation of twenty (20) or less employees.

The second Agreement relevant to these proceedings is the January 27, 1965 Mediation Agreement between the NSR and ERC (the "1965 Agreement"). Simply stated, the 1965 Agreement is the NSR and ERC version of the September 25, 1964 National Shopcraft Agreement. The 1965 Agreement would permit the NSR to transfer work and positions on its property.

ISSUES PRESENTED

The Organization proposed that the issue to be decided should be stated as follows:

> "Do the two (2) Implementing Agreements herein submitted [the 1965 Agreement and the 1982 Agreement] adequately address and fulfill the requirements of the New York Dock Protective Conditions for the proposed changes and consolidations of Coster Car Shop, Knoxville, Tennessee, and the Hayne Car Shop, Spartanburg, South Carolina, by providing for the selection of forces from employees represented by the Brotherhood of Railway Carmen affected by Carrier's proposed transaction?"

The Carrier proposed the following statement of the issue:

> "(a) Does the Implementing Agreement proposed by the Carriers (Carriers' Exh. 1) meet the criteria set forth in Article I, Section 4 of the New York Dock conditions in effecting the transfer of work from Coster Car Shop (Knoxville, Tennessee) to Roanoke, Virginia and from Hayne Car Shop (Spartanburg, South Carolina) to Roanoke, Virginia[;] Decatur, Illinois, and Linwood, North Carolina as more fully described in the Carrier's notice dated April 3, 1995?
>
> "(b) If the answer to (a) is 'no,' what rearrangement of forces is appropriate?"

POSITION OF THE PARTIES

Both parties have cited an array of administrative, arbitral and judicial opinions to support their respective positions. The following is believed to be an accurate abstract of their substantive positions in this dispute. The absence of a detailed recitation of each and every argument or contention presented does not mean that these and the supporting opinions were not fully considered by the Arbitrator.

The Carrier

The Carrier takes the positions that its proposed Implementing Agreement covering this transaction is fair, equitable and appropriate and meets the requirements of the NYD Conditions. Fundamental to its position is the assertion that it has the sole right to determine the number of positions to be established and location of the work to be performed in order to meet its business needs. It has cited a number of arbitral awards that uphold its basic position in this regard. For example, see Carmen and UP & MP, December 6, 1983 (Fredenberger).

The Carrier points out that the coordination here is part of the process that began with the 1982 ICC authorized coordination, as noted earlier. Therefore, the employees who may be adversely affected by the transfer of work from NSR to NW facilities would be afforded the benefits of NYD Protective Conditions. Moreover, the Carrier points out that, while it is not required to do so, it

was willing to extend the NYD benefits to those employees who may be adversely affected by the transfer of work between NSR facilities. It further notes that its proposed Implementing Agreement follows well-established mechanisms for integrating employees into the workforce at coordinated facilities. The Carrier further points out that its proposed Implementing Agreement is a simple means for carrying out the NYD requirement. Specifically, that employees relocate, if necessary, in order to follow their transferred work.

In summary, the Carrier argues that its proposed Implementing Agreement fully satisfies the requirements of the NYD Protective Conditions. Moreover, absent agreement by the parties, the Carrier contends that the Neutral party, "sitting under Article 1, Section 4 lacks the authority to impose benefit levels or items of benefits in excess of NYD levels."

The Organization's Position

Basic to the BRC position is its assertion that the Carrier's proposal is an attempt to "circumvent the collective bargaining Agreement by usurping bona fide NYD provisions to accomplish a transfer of employees from Coster and Wayne Car Shop to new locations without a transfer of their former work. One other result of the Carrier's action would be that the work remaining at Coster would be performed by others employees, rather than those represented by the BRC. Moreover, in many cases, the positions that the Carrier intended to establish at Roanoke, Decatur and

Linwood were for purposes of performing new work.

In support of its basic position in this matter, the Organization has provided specific representative examples for each of the work locations involved in the transaction. For example, in the Carrier's notice of April 3, 1995, concerning Coster, no reference was made to the "eight (8) Painters that are employed at Coster Shop." Therefore, the Organization argues the Carrier does not envision the transfer of car painting from Coster to Roanoke, even though the Painter's positions comprise a portion of the ninety-three positions to be abolished at Coster. The Organization added that, under the Carrier's proposed Implementing Agreement, these Painters would be required to transfer and become Carmen, although the Painters do not have Carmen seniority or experience repairing or inspecting rail cars.

Another example, of the many cited by the BRC, concerns four Carmen and one Painter employed at the Maintenance Department at Coster Car Shop. These five employees repair and maintain the facilities. The Organization contends that the work of the five employees is not being transferred because the facilities will remain occupied and, thus, employees other than Carmen or Painters will perform the work. This, the Organization contends, is "a direct violation of the BRC Collective Bargaining Agreement."

Thus, because there is a transfer of employees without their associated work, the Carrier is attempting to circumvent the provisions of Article 1, Section 6 of NYD. In this respect, the Organization maintains that Section 6 of NYD "provides the offer

of comparable employment to dismissed employees which does not require a change in residence." (Emphasis added.) The BRC asserts that the positions that the Carrier proposes to establish will, in many cases, perform new work. Thus, the offers actually are offers of comparable employment requiring a change in residence. Therefore, the Organization submits these offers are not employment opportunities contemplated by the provisions of Section 4 NYD.

The Carrier's action, moreover, by abolishing virtually all of the jobs at Coster and Hayne and transferring nearly all of its employees, would result in the Carrier being able to circumvent Article 11, Section 1, of the 1965 Mediation Agreement, which prohibits subcontracting of work where furloughed BRC employees are found to exist and able to perform the work. Further examples along the same lines were provided by the Organization in its submission, including the Wheel Shop, the Grit and Blast Oven, Piston Shop, as well as employees who operate Fork Lift and Fork Truck machines at Coster.

Additionally, there also would be situations where certain work being performed by Carmen at the facility losing employees is now performed by members of another craft at the facility gaining workers, a situation clearly violative of the parties' Agreement. BRC pointed out that the Carrier has not adequately addressed this issue in this coordination.

In summary, the BRC claims in its submission that the following nine points have been established:

"1) Carrier's notices of the closing of Coster Car Shop and Hayne Car Shop are inadequate and do not fulfill the

provisions of Article I, Section 4 of NYD;

2) [The] [r]ecord of subcontracting by the Carrier attests that both Coster and Hayne Car Shops are working at full capacity, further, that other car shop locations are working at full capacity;

3) There has been no showing by the Carrier that the locations receiving the transferred work have had their capacity expanded or enhanced to materially handle the influx of [E]mploye[s] and work;

4) Acceptance of Carrier's proposed Implementing Agreement would effectively abrogate the BRC collective bargaining agreement by producing scope rule violations;

5) Acceptance of the Carrier's proposed Implementing Agreement would provide the vehicle for further subcontracting of covered work prohibited under the 1965 Mediation Agreement;

6) The Employe[s]' Implementing Agreements will not impede the proposed transaction to any extent;

7) The Employe[s]' Implementing Agreements are a fair and equitable arrangement as prescribed by NYD;

8) Effectuation of the transaction will not be adversely affected by the Employe[s]' Implementing Agreements; and,

9) This Section 4 Committee is vested with the responsibility to provide both an adequate and fair arrangement for the transfer of forces which does not have a detrimental effect upon the collective bargaining agreement and [E]mploye[s]' rights."

DISCUSSION

Before addressing the substantive matters at issue, certain preliminary comments and holdings are necessary to put this dispute in its proper context.

A review of the 1982 ICC authorization of the common control of the NW, NSR and the NS establishes that the proposed coordination which caused this dispute to arise is of the type

which the ICC anticipated in its 1982 authorization. In other words, it is one of those "future transactions" which have as its purpose the creation of operational efficiencies.

There are a number of basic issues raised in this dispute, as will be noted, that have been well-settled by numerous arbitral awards and, therefore, substantively impact the discretion of the Arbitrator. These issues, as well as the others raised, for the most part are closely intermingled and need to be weighed as a whole. Nonetheless, for purposes of clarity, I have decided to discuss the major points of contention as shown by the record developed by the parties as well as their oral arguments at the hearing on May 30, 1995.

THE CARRIER'S NOTICES OF APRIL 3, 1995

The primary assertion by the Organization with respect to the notices is that they were not sufficiently precise. For example, concerning the Carrier's notice of April 3 that contemplated the closing of Coster, no reference was made to the Painters. Nothing was said to indicate that some of the work identified for transfer was assigned to another craft at the gaining facility, a violation of the Scope Rule.

However, I find that the notices satisfied the requirements of Section 4, Article 1, NYD. The standards that must be met is "a full and adequate statement of the proposed change in operations, including an estimate of the number of employees of each class affected by the intended changes, and a full disclosure

of all facts and circumstances bearing on the proposed discontinuous of position." See, e.g., Chessie/Seaboard vs. BRS, N.M.B. (LaRocco) January 3, 1985. I also note the nature of the notices generally contain the data and information that has been used in the past and accepted by the various parties on the property, including all of the other Unions involved in this coordination.

SELECTION OF FORCES

This issue is one of the primary points of contention. Although the BRC has raised some reasonable concerns that may properly be entertained here, its basic position challenges the Carrier's right to determine the type of positions that it creates and the assignment of work to those positions. However, a carrier's right to perform these activities has been upheld by numerous arbitral awards. See, e.g., Consolidated Rail Corp and International Brotherhood of Boilermakers, April 8, 1994 (Marx); Norfolk & Western Ry., et. al., and Brotherhood of Railroad Signalmen, February 9, 1989 (LaRocco).

The BRC also questions the Carrier's stated intent to create the number of jobs at Roanoke, Decatur and Linwood. However, the record shows that the Carrier has committed itself to do so. I note not only the notices of April 3, but also the detailed statement of Mr. William E. Honeycutt, the Vice President (Mechanical Car) for NS. This statement provides further substance as to the plans and intent of the NS with respect to the

coordination. It is also apparent --and I note certainly not unusual in matters such as this-- that all employees will not perform precisely the same tasks that they performed prior to the coordination. I find no arbitral or other support of what appears to be BRC's underlying premise that the specific tasks of the craft being performed by an employee must continue to be performed by that employee after a coordination. It is the body of the craft's work under the scope of the Agreement that is controlling, unless the parties have made other arrangements that provide otherwise, a situation not present in the record before me. For example, there is no arbitral support for the notion that an employee whose primary task at the losing facility was to inspect cars, would continue to perform that specific task at the gaining facility.

Related to this issue is the question of Collective Bargaining Agreement coverage at the gaining facility. Apparently, there is no basic disagreement between the parties that BRC work transferred is governed by the gaining facilities' BRC scheduled Agreement. A number of arbitration Awards under the Protective Conditions have confirmed that when work is transferred from one Carrier and integrated into the operations of another Carrier, the labor agreement of the Carrier receiving the work must apply. See, S.F., Conrail and Monongahela Ry. and United Transportation Union (E), October 29, 1992 (LaRocco), and Brotherhood of Locomotive Engineers and Union Pacific R.R., January 17, 1985 (Seidenberg).

However, the Organization has cited examples of work of its craft and classification that will be transferred which it asserts

is being performed at the gaining facility by members of another craft. Given the nature of these proceedings and the record that I have before me, I have no basis to hold on these claims advanced by the Organization. I note, however, that all Carmen whose positions will be abolished, will have the opportunity to follow the work. Accordingly, if Scope Rule issues arise and cannot be settled by the parties following movement of the work to the three facilities identified in this controversy, these disputes should be settled by use of the normal dispute resolution process of the Parties.

Circumvention of the BRC Collective Bargaining Agreement

This issue essentially goes to the matter of work of the craft that remains at the losing facility. The Organization has cited examples and situations where work will not be transferred and claims that this will then give the Carrier license to utilize outside contractors or employees of other crafts to perform the work of BRC represented employees. In this respect, it particularly notes that in the past when the Carrier gave notice, pursuant to the parties' Agreement, that it intended to employ outside contractors to perform the work of BRC represented employees, it justified the request on the basis that the car shops were operating "at or near capacity." Therefore, in order to complete the work in a timely manner, the Carrier would resort to hiring outside contractors. The Organization asserts that the Carrier now is using the NYD transactions as a means to use

employees not represented by BRC to do its work.

However, despite this claim, there is no evidence in the record before me to support the BRC allegations on this issue. In the event specific cases arise after the transaction, they should be pursued by use of the normal dispute resolution process, if they cannot otherwise be resolved by the parties.

PAINTER SENIORITY ROSTER

This issue is considered separately for a number of reasons. While painting work is a part of the craft, Painters are on a separate seniority roster and have been for years. The Carrier intends to dovetail the existing Painter's seniority roster into the Carmen rosters at Roanoke, Decatur and Linwood. The scope and purpose of the Protective Conditions "is to provide for fair and equitable arrangements to protect the interest of employees on railroads affected by actions taken pursuant to authorizations or approvals of this commission to which this Appendix has been imposed." Moreover, Article I, Section 2 provides as follows:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Carrier's proposed Implementing Agreement does not provide for retention of a separate seniority roster for the Painters. I find this violative of the basic intent of NYD Protective Conditions and Article 1, Section 2.

Accordingly, the Carrier is directed to retain separate Painter seniority rosters at the receiving facility to facilitate the immediate transaction unless the parties can agree to another accommodation beforehand. The parties are directed to resume negotiations on this issue within thirty (30) days after the effective date of the transfer of the Painter's work to reach an acceptable solution. In the event agreement cannot be reached on this particular issue, the parties will provide this Arbitrator with their proposed solution sixty (60) days after the effective date of the transfer.

The Implementing Agreements

Last, with respect to the proposed Implementing Agreement, the Organization, in its submission for this Arbitration, for the first time presented three proposed Implementing Agreements --one for the Coster-to-Roanoke transaction, one for the Hayne-to-Roanoke transaction and one for the Hayne-to-Linwood transaction. These proposals, as well as Carrier's Exhibit 1 to its pre-hearing submission, must be viewed in the context of my authority under Article 1, Section 4 NYD Conditions. It has been consistently held that an arbitrated Implementing Agreement may "not contain protective provisions in excess of the benefits expressly described in the New York Dock Conditions." See, e.g., Southern Railroad Company and the Norfolk and Western Railway Company and Brotherhood of Railway Airline and Steamship Clerks, Freight Handlers, Express

& Station Employees, July 17, 1984 (LaRocco), and Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. and Southern Ry., 4 I.C.C. 2d at 1087-88.

The Organization's proposed Implementing Agreement exceeds the benefits described in the New York Dock Conditions. Therefore, it cannot be imposed by a Neutral sitting under Article 1, Section 4. However, while the Carrier was within its rights to withdraw its earlier proposed Implementing Agreements when this matter proceeded to Arbitration, given the particular facts and circumstances that led to this arbitration, there are strong and obvious arguments which I support for it to reconsider that decision. Such a recommendation by a Section 4 referee does not break new ground. For example, see Consolidated Rail Corporation and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, April 8, 1994 (Mark).

AWARD

The Questions at Issue are resolved by the findings and opinion in the body of this Award.

Eckehard Muessig, Arbitrator

Date: June 15, 1995

In The Matter Of Arbitration Between: Norfolk and Western Railway Company Interstate Railroad Company, and Southern Railway Company and Trainmen and Conductors Represented by the United Transportation Union	Arbitration Pursuant to Action By the National Mediation Board and Notice of the Interstate Commerce Commission in Finance Docket Number 30582 (Sub-No. 1)

Arbitration Panel:

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

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

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

Appearing For
The Carriers:

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

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

ARBITRATION AWARD

Norfolk and Western Railway Company
Interstate Railroad Company
Southern Railway Company

and

Trainmen and Conductors Represented By
The United Transportation Union

OPINION

I. JURISDICTION

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

1. Issue

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

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

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

2. ICC Conditions

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

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

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

a. Section 2 Conditions

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

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

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

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

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

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

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

b. Section 4 Conditions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Arguments

The Carriers are the moving party. They argue that:

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

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

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

The Union argues that:

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

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

4. Arbitration and Court Decisions

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

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

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

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

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

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

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

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

5. Arbitration Panel Has Jurisdiction To Order Implementing Agreement

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

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

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

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

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

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

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

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

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

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

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

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

Actually, it seems that the Commission was just ducking.

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

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

An implementing agreement will be ordered.

II. IMPLEMENTING AGREEMENT

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

Labor protective conditions are in place.

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

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

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

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

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

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

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

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

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

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

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

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

AWARD

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

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

Robert J. Ables
Neutral Referee

Dated: September 25, 1985

David N. Ray
David N. Ray
Carrier Member

Dated: September 27, 1985

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

Dated: October 10, 1985

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

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

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

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

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

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

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

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	
NORFOLK & WESTERN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY and CENTRAL OF GEORGIA RAILROAD COMPANY,	Pursuant to Article I, Section 4 of the New York Dock Conditions
Carriers,	ICC Finance Docket No. 29430 (Sub-No. 1)
and	
BROTHERHOOD OF RAILROAD SIGNALMEN,	Roanoke Signal Shop Coordination
Organization.	OPINION AND AWARD

Hearing Date: October 11, 1988
Hearing Location: Norfolk, Virginia
Date of Award: February 9, 1989

MEMBERS OF THE COMMITTEE

Employees' Member: W. D. Pickett
Carrier Member: Mark R. MacMahon
Neutral Member: John B. LaRocco

APPEARANCES

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OPINION OF THE COMMITTEE

I. INTRODUCTION

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the Norfolk Southern Corporation's application to acquire the Norfolk and Western Railway Company (NW), the Southern Railway Company (SR) and their affiliated and/or subsidiary railroad enterprises. Norfolk Southern Corporation-Control-Norfolk and Western Railway. Co. and Southern Railway, F.D. No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982). The SR did and does own all Central of Georgia Railroad Company (CG) stock. To compensate and protect employees affected by the merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Norfolk Southern Corporation (NS), the NW and the SR pursuant to the relevant enabling statute. 49 U.S.C. §§ 11343, 11347; 366 I.C.C. 173, 229-231 (1982).

Although Section 4 of the New York Dock Conditions contemplates adjudication by a single arbitrator, the parties agreed to establish this tripartite Arbitration Committee to decide this dispute.[1] The Arbitration Committee was formed under Section 4 without prejudice to the Organization's position that this Committee lacks jurisdiction over this case.

[1] All sections pertinent to this case appear in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

The Committee received pre-hearing submissions from both parties and it entertained extensive oral argument during the October 11, 1988 hearing. The parties elected to file post-hearing briefs which the Neutral Member received on or before December 7, 1988. At the Neutral Member's request, the parties waived the thirty-day time limitation, set forth in Section 4(a)(3) of the New York Dock Conditions, for issuing this decision.

II. BACKGROUND AND SUMMARY OF THE FACTS

The NW operates a signal repair shop at Roanoke, Virginia. SR and CG employees perform shop signal repairs for their respective railroads at a shop located in East Point, Georgia. While SR and CG workers perform signal repairs under a common roof, the East Point shop is not a coordinated facility. SR signalmen (currently four) repair SR signal devices and are governed by the SR Schedule Signalmen's Agreement while a CG Relay Repairman (presently one position) performs repairs on CG signal mechanisms under the CG Signalmen's Agreement.

On April 13, 1988, the Carriers notified the Organization of their "...plan to coordinate the work performed by Central of Georgia and Southern Railway signal employees in the East Point, Georgia Signal Relay Repair Shops into the Norfolk and Western Signal Relay Repair Shop at Roanoke, Virginia." The Carriers estimated that the coordination would result in the elimination of two Signalmen positions. The Carriers will reap substantial savings and economic efficiencies by having all NW, SR and CG signal shop repair work performed at Roanoke. Besides the

economics of scale associated with the coordination, the Carriers will make more productive use of the NW's Roanoke shop which is much newer than the East Point facility and has ample capacity to absorb the influx of SR and CG shop signal repair work. The parties stipulated that the planned coordination was not expressly stated in the Carriers' application to the ICC in the 1982 control case.

The parties held three days of face-to-face negotiations.[2] They met on May 25-26, 1988 and June 30, 1988. At the initial conference, the Carriers proposed an Implementing Agreement which merely affirmed that the New York Dock Conditions would apply to employees dismissed or displaced due to the coordination. Either shortly before or at the June 30, 1988 meeting, the Carriers embellished their prior proposal by giving East Point workers an opportunity to follow their work to Roanoke; permitting those employees who transferred to Roanoke to retain their SR or CG seniority; providing that the seniority dates of CG or SR workers who go to Roanoke be dovetailed into the NW Eastern Region Signalmen's seniority roster; and promulgated a "prior rights" process for filling subsequent vacancies at the coordinated facility. Under the Carriers' prior rights proposal, subsequent vacancies on any Roanoke position occupied by a worker, who has transferred from the SR or the CG, would be advertised across the

[2] The Organization conducted negotiations with the Carriers but reserved the right to later raise its jurisdictional contention. In its April 27, 1988 letters replying to the Carriers' April 13, 1988 notices, the Organization asserted that Section 4 of the New York Dock Conditions was inapplicable to the transfer of shop signal repair work.

NS system. Employees from the vacating incumbent's seniority district would hold a preferential right to the vacancy. The process would apply to each successive vacancy but a position would lose its "prior rights" status if no employee from the incumbent's seniority district bid on and filled the vacancy.

Prior to the June 30, 1988 conference, the Organization proffered a proposed implementing agreement which not only incorporated the New York Dock Conditions but also contained terms covering a plethora of other subjects. The Organization's proposed implementing agreement included terms which would grant signal workers pecuniary benefits in excess of those prescribed in the New York Dock Conditions; preserve the applicability of SR, NW and CG scope rules to signal repair work performed at the Roanoke Shop (presumably based on the property where the work originated);[3] provide that CG and SR employees who move to Roanoke would continue to work under their present CG or SR Schedule Agreements; prohibit the Carriers from contracting out any work covered by the scope of any one of the three schedule agreements; force the parties to negotiate a contract to clarify the implementing agreement before the Carriers place the

[3] Nonetheless, the Organization acknowledged that CG and SR signal repair work will be commingled with similar NW work at the coordinated facility. [TR 66, 81, 124] Consequently, the coordination will render it impossible to preserve these separate scope rules. The Organization further conceded that a Section 4 arbitration panel could write an implementing agreement which allows work to cross scope rule boundaries but the concession should not be construed as a relinquishment of the Organization's right to raise (in court) its fundamental argument that the ICC's New York Dock Conditions cannot abrogate, change, amend or delete any collective bargaining provision or any collective bargaining right. [TR 50, 90-91]

coordination into effect; automatically certify that all Roanoke signal shop workers are affected by the coordination and entitled to New York Dock benefits;[4] impose certain notice requirements on the Carriers; vest employees with benefits under other protective arrangements in lieu of New York Dock entitlements; and permanently allocate coordinated shop positions to the NW, SR and CG. The Organization also attached a Memorandum of Agreement to its proposal granting signal employees the exclusive right to perform all signal case wiring and/or fitting work although the Organization contends that current NW, SR and CG scope rules already cover such work. However, the Organization raised the signal case wiring issue for two reasons. First, two Public Law Boards adjudged that the NW's and SR's purchase of pre-wired signal cases did not violate the NW and SR scope rules. [See Public Law Board No. 2044, Award No. 4 (Van Wart) and Public Law Board No. 3244, Award No. 21 (Schienman)]. Second, the Organization successfully tied a similar Memorandum of Agreement

[4] At the arbitration hearing, the Organization explained that it did not intend to automatically certify all NW, CG and SR signal shop workers. Instead, the Organization wanted assurances from the Carriers that, if they were detrimentally affected now or in the future, Roanoke signal shop workers would have access to New York Dock benefits and any additional benefits contained in the implementing agreement. [TR 145-146] However, Section 2(a) of the Organization's proposed implementing agreement states that all named employees "...will be considered as adversely affected as a result of the implementation of the provisions of this Memorandum of Agreement...." The clear and unambiguous Section 2(a) language would establish an absolute presumption that all workers at Roanoke and East Point (even those who decline to follow their work) are adversely affected by the coordination. Nevertheless, the controversy is moot because the Organization realizes that only employees who are actually and adversely affected by the coordination are entitled to benefits.

to an April 14, 1987 New York Dock implementing agreement it negotiated (not arbitrated) with CSX Transportation, Inc.

While there is a factual conflict over whether or not the Carriers bargained in good faith, the parties concur that they each deemed the other's proposed implementing agreement unacceptable. Thereafter, the Carriers invoked interest arbitration pursuant to Section 4 of the New York Dock Conditions. The Carriers withdrew their second proposed implementing agreement and now ask this Committee to adopt an implementing agreement which is substantially similar to its original proposal. The Carriers' third proposal would permit East Point employees to bid on whatever new positions the NW established at Roanoke as a result of the coordination. (If the coordination will result in the elimination of two positions, the Carriers will only be creating three new positions at Roanoke. If SR and CG employees at East Point transfer to Roanoke, their seniority would be dovetailed into the appropriate NW seniority roster. The Carriers' third proposal does not contain the retention of seniority and prior rights provisions found in their second proposal. Arbitration under Section 4 of the New York Dock Conditions is not final offer arbitration and, thus, the Carriers are free to retract proposals that they made in the quid pro quo spirit of negotiations. The Carriers are not estopped from urging this Committee to adopt their third proposal as the implementing agreement to cover this transaction. On the other hand, the Organization petitions us to adopt its implementing agreement which we described in the preceding paragraph.

III. STATEMENT OF THE ISSUES

This case raises three major issues:

1. Does this Committee have subject matter jurisdiction? Stated differently, is the Carriers' intended signal shop repair work coordination a transaction within the meaning of Section 1(a) of the New York Dock Conditions?

2. Did the Carriers negotiate in good faith with the Organization over the terms and conditions of an implementing agreement during the minimum thirty day bargaining period in accord with Section 4(a) of the New York Dock Conditions?

3. Assuming that this Committee has jurisdiction, what is the appropriate substantive content of an implementing agreement? An ancillary issue is whether transferring SR and CG employees will be governed by some or all the provisions of the SR or CG Schedule Signalmen's Agreements.

IV. THE POSITIONS OF THE PARTIES

A. <u>The Carriers' Position</u>

Although the instant signal shop repair coordination was not mentioned in the Carriers' application in the control case, it is the type of post-acquisition coordination which the ICC anticipated that the Carriers might implement subsequent to the ICC's approval of the acquisition. The ICC implicitly condoned future transactions which enhance operational efficiencies. The Commission understood that the Carriers would " ...realize a number of benefits related to coordination of shop and repair facilities...." 366 I.C.C. 173, 212. The ICC also observed that, "It is possible that further [employee] displacement may arise as

additional coordinations occur." [Brackets added for clarification] Id. at 230. In his November 26, 1980 verified statement, NW President Claytor informed the ICC that the Carriers might conduct future coordinations. The Organization quotes portions of the Carriers' application out of context. While the application suggested that the Carriers did not intend to coordinate signal work at Cincinnati, Ohio, they did not promise the ICC that they would never coordinate signal work elsewhere. In other railroad merger cases, the ICC has held that its approval in the control case extends to future coordinations which might reasonably be expected to flow from the original transaction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22), ICC Decision issued June 25, 1988. [See also, NW/SR v. ATDA, NYD § 4 Arb. (Harris; 5/19/87); affirmed, Norfolk Southern Corporation-Control-Norfolk and Western Railway Co. and Southern Railway, F.D. 29430 (Sub-No. 20), ICC Decision dated May 24, 1988.] In the Union Pacific merger case, the ICC refused to condition future transfers of work on the carriers' attainment of the ICC's express approval following notice and an opportunity for hearing. Union Pacific Railroad-Control-Missouri Pacific Railroad, 366 I.C.C. 462, 622 (1982). The Organization admitted at the arbitration hearing that if the Carriers formally asked the ICC for authorization to coordinate the two signal shops, the ICC would summarily grant their request.

The Carriers sincerely attempted to reach a negotiated implementing agreement with the Organization. By providing signal employees on the CG and SR with prior rights, the Carriers

thought that its second proposal had addressed most of the Organization's concerns. Contrary to the Organization's allegation, the Carriers did not use this Section 4 arbitration proceeding as leverage to force the Organization to execute the Carriers' proposed implementing agreement. Similarly, the Carriers did not mislead the Organization into believing that the coordination encompassed solely relay repair work. The Carriers' April 13, 1988 notice indicated that all work performed by the East Point Signal Shop employees would be shifted to Roanoke. The Organization's bad faith bargaining charge is insulting. Out of 240 coordinations, the Carriers have had to resort to interest arbitration in only five instances. Due to the Organization's intransigence, a negotiated agreement was not possible in this particular case. The Organization broke off negotiations because the Carriers rightly refused to consider its Memorandum of Agreement which would bar the Carriers from purchasing prewired signal cases.

The Organization misunderstands the essence of this coordination. Following the movement of work from East Point to Roanoke, there will no longer be any CG or SR signal repair work. All signal shop repairs will be NW work. Since the work will be commingled, any device, regardless of whether it originated on the NW, SR or CG, will be repaired by an NW employee in the signal shop. The Carriers, not the Organization, design the parameters of the coordination and decide which property will perform shop signal repair work. Under the controlling carrier concept, the work is placed under the collective bargaining

agreement in effect at the location receiving the work. RYA v. MP/UP, NYD § 4 Arb. (Seidenberg; 5/18/83). Section 4 compels the parties to submit their disputes to binding interest arbitration so that the approved transaction can be consummated despite restrictions in existing collective bargaining agreements or employee rights under the Railway Labor Act. Denver and Rio Grande Western Railroad Company-Trackage Rights-Missouri Pacific Railroad Company, F.D. No. 3000 (Sub-No. 18), I.C.C. Decision dated October 19, 1983; Maine Central Railway Company, Georgia Pacific Corporation and Springfield Terminal Railway Company, Exemption from 49 U.S.C. 11342 and 11343, F.D. No. 30532, ICC Decision dated August 22, 1985. This Committee is absolutely bound to follow the ICC's pronouncement since it derives its authority from the Commission. United Transportation Union v. Norfolk and Western Railway Company, 822 F.2d 1114 (D.C. Cir. 1987). If SR and CG signalmen carried their respective schedule agreements with them to Roanoke, the Carriers would have to apply three separate pay, discipline, displacement and bidding provisions effectively nullifying any savings generated from the transaction. Of course, the Organization may handle the representation of the transferring employees as it sees fit but it cannot import the SR and CG Schedule Agreements to Roanoke.

The Carriers vehemently object to virtually every provision in the Organization's proposed implementing agreement. The Organization's proposals concerning signal case wiring and a ban on contracting out work are outside the ambit of negotiation and arbitration under Section 4 of the New York Dock Conditions.

These subjects do not concern the rearrangement of shop signal forces or the equitable selection of employees to perform the coordinated work. If the Organization wants to bargain about signal cases or subcontracting, it should serve a Section 6 notice under the Railway Labor Act. The Organization improperly seeks relocation expenses for transferring employees under Article XII of the January 12, 1982 National Signalmen's Agreement in lieu of less favorable expense reimbursements in the New York Dock Conditions because Article XII applies solely to intracarrier transfers. The Organization's implementing agreement designates each Roanoke shop position as an NW, SR or CG job. Such a provision serves to incorporate SR and CG seniority districts into the Roanoke Shop which is equivalent to carrying forward the CG and SR Schedule Agreements. The Organization is also half-heartedly attempting to dictate the number of positions the Carriers must maintain in the coordinated facility. The Organization is again invading management's prerogative to determine the parameters of the transaction. Moreover, the Organization's proposal is unworkable since whenever a displacement occurs, say on the SR, the SR employee could bump a Roanoke Shop worker compelling him to move to a faraway point on the SR system. Sections 5 and 11 of the Organization's proposed implementing agreement are unacceptable because they would require the parties to reach another contract before the Carriers could effectuate the coordination. There is no language in the New York Dock Conditions allowing the Organization to postpone implementation of the coordination once

an implementing agreement is negotiated or arbitrated. Side Letter No. 1 and Section 6 of the Organization's implementing agreement would grant employees per diem relocation and real estate benefits well beyond those specified in the New York Dock Conditions. Finally, the Organization's proposal raises a number of issues which are within the exclusive province of a Section 11 arbitration committee. Section 11 insures that current employees are protected should this coordination affect them sometime in the future.

While the Organization's implementing agreement is highly inappropriate, the Carriers' proposal presented to this Arbitration Committee conforms to the requirements of Section 4. The Carriers' implementing agreement contains an equitable method for filling new positions at the coordinated facility. It specifically permits current East Point employees to bid on the new Roanoke positions. Since their work is being moved to Roanoke, East Point Signalmen should have an opportunity to follow their work. The Carriers' prior rights provision included in their second proposed implementing agreement is unnecessary to achieve an equitable rearrangement of forces at the coordinated facility.

B. <u>The Organization's Position</u>

Inasmuch as the Carriers failed to specifically mention the combining of SR, CG and NW shop signal work in their ICC application, the intended coordination is not a transaction as defined in Section 1(a) of the New York Dock Conditions. Section 1(a) unambiguously stated that a transaction is an activity

"...taken pursuant to authorizations of this Commission...." Simply put, the ICC never approved the coordination of East Point Shop signal repair work into the NW's Roanoke facility. Absent a transaction, the Carriers may not invoke the New York Dock Conditions as a vehicle to change existing collective bargaining agreements. SSR v. BMWE, NYD § 4 Arb. (Zumas; 8/20/83). In their application, the Carriers represented to the ICC that there would be no mass relocation of workers and that employee displacements would end about six months following the NS's acquisition of the NW and SR. The ICC, in its approval, confirmed that there would be "...no wholesale disruption of the carriers' work force...." 366 I.C.C. 173, 230. The Carriers further promised the ICC that, "No change in Southern's existing communications and signal facilities are planned." Id. at 204. SR President H. H. Hall, in his November 28, 1980 verified statement to the ICC, forecasted the complete coordination of NW and SR sales, finance, and public affairs offices but the NW and SR would otherwise continue to operate as separate entities. At the time of their application, the Carriers promulgated a table of positions to be transferred which notably makes no allusion to signalmen or signal repair shops. Based on the Carriers' representations, the ICC logically concluded that signal work would be unaffected by the acquisition. The CSX case relied on by the Carriers is of dubious validity since one Commissioner opined that the parties could not agree to vest a Section 4 arbitrator with subject matter jurisdiction. CSX-Control-Chessie and Seaboard Coast Line, F.D. 28905 (Sub-No. 22), ICC Decision

issued June 25, 1988 and dissenting opinion subsequently issued. It is ludicrous to characterize the coordination as a transaction arising under the 1982 control case because the Carriers served their notice more than seven years after the ICC's approval. It is equally ridiculous to imply that the Carriers originally intended to coordinate the signal shops back in 1982. Since they admittedly had no such intention, the ICC could hardly approve of the coordination by implication. Upon application, the ICC undoubtedly would authorize the signal shop coordination, but the Carriers must still abide by the ICC's admonition that "No change or modification shall be made in the terms and conditions approved in the authorized applications without the prior approval of the Commission." [Emphasis added.] 366 I.C.C. 173, 255. Since an approved transaction has not materialized, the New York Dock Conditions are inapplicable.

Assuming, arguendo, that the Committee decides that the coordination is a New York Dock transaction, exercising jurisdiction over this dispute is premature because the Carriers' bad faith bargaining prevented the parties from conducting meaningful negotiations over the terms and conditions of an implementing agreement. The Carriers stubbornly refused to discuss the Organization's proposal. Instead, they gave the Organization an ultimatum: either capitulate and agree to the Carriers' proposed implementing agreement or arbitrate. The Organization views the New York Dock Conditions as the floor or starting point for negotiations. If the employees were entitled to the minimal benefits set forth in the New York Dock Conditions

and nothing more, there would be no reason for the ICC to mandate a thirty-day period for negotiations. The Organization's proposed implementing agreement, albeit containing some items outside the ordinary purview of New York Dock Conditions, was designed to provide a reasonable level of protective benefits to the involved employees. The proposal was not out of line with New York Dock implementing contracts that this Organization has negotiated on other properties. Moreover, the Organization's negotiators were confused as to the precise parameters of the work to be transferred to Roanoke. The Carriers hinted that they were coordinating only signal relay repair work raising the Organization's legitimate suspicion that the Carriers planned to contract out other types of shop signal repair work. It is regrettable that the parties had to resort to arbitration because many of the areas of disagreement could have been resolved if the Carriers had simply been willing to consider some of the Organization's proposals. This Committee should order the parties to return to the negotiating table so they can endeavor to reach a negotiated implementing agreement.[5]

The Organization realizes that a Section 4 arbitrator may modify or override the terms of collective bargaining agreements

[5] This statement is the Organization's requested remedy for the Carriers' alleged bad faith bargaining. Presumably, the Organization contemplates that we would retain jurisdiction over this case and later determine the contents of an implementing agreement if good faith negotiations do not result in a negotiated implementing contract. The Organization did not argue that, in the absence of good faith negotiations for the period specified in Section 4 of the New York Dock Conditions, this Committee is deprived of its original jurisdiction over the case and that to reinstate the Section 4 process, the Carriers would have to serve new Section 4 notices.

to the extent necessary for the Carriers to consummate the transaction. 49 U.S.C. § 11341(a). However, the exemption from the Railway Labor Act is not limitless. In this case, the transaction can accommodate a continuation of some of the rules in the CG and SR Schedule Agreements. Specifically, carrying forward pay, discipline and other comparable provisions from the SR and CG Schedule Agreements would not bar the transaction. Preserving most of the CG and SR agreements and allowing transferring workers to maintain their status as CG or SR employees in the coordinated facility would not impede the Carriers from efficiently operating the Roanoke Shop just as CG employees and SR workers have been efficiently performing signal repair work under a common roof at East Point. Although the work at the coordinated facility will be placed under the NW scope rule, the implementing agreement should still provide some reciprocal terms to exclusively reserve the work for the signal craft. This Committee would be impermissibly narrowing the CG and SR scope rules if it forever took the work away from the employees on those properties. Thus, despite the commingling of shop signal repair work, the positions at Roanoke should be allocated to employees on the NW, SR, and CG. Each position can perform any signal repair work but SR and CG employees should have a continuing opportunity to work in the Roanoke shops especially since the genesis of some of the work will be within the SR or CG systems. More importantly, the Organization is concerned that the Carriers are using this coordination as a subterfuge to contract out signal repair work. If work is

currently reserved exclusively to signal workers by the scope rule in the SR agreement, the Organization fears that placing the work under the NW agreement will allow the Carriers to claim that such work is no longer reserved solely to the signal craft. Also, there is the possibility that work could be subject to the SR scope rule but be outside the boundary of the NW scope rule. A Section 4 arbitration cannot be utilized as a pretext for interest arbitration under the Railway Labor Act. SR v. BRS, NYD § 4 Arb. (Fredenberger; 10/5/82). Suffice it to say, the ICC has never taken the extreme position that the New York Dock Conditions can be used as a tool to extinguish existing collective bargaining agreements.

Finally, the Organization's proposed implementing agreement incorporates terms which will equitably govern the coordination. The Carriers should be obligated to notify employees of the possibility that they could be entitled to New York Dock benefits. The Carriers must inform signal employees about where and how to file claims so that the Carriers do not chill their entitlement to New York Dock benefits. If the Carriers correspond with an individual worker with regard to this coordination, it should send a copy to the Organization's General Chairman. The Organization is not advocating that the parties negotiate a second implementing agreement but it simply seeks an agreed upon clarification of the implementing agreement to avoid any future misunderstandings. Also, the Carriers must assure the Organization that if any NW, SR or CG signal worker is affected by this coordination, the employee will have access to protective