UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

ORAL ARGUMENT

IN THE MATTER OF:
CANADIAN NATIONAL RAILWAY:
v. AMERICAN TRAIN DISPATCHERS:
ASSOCIATION (ATDA): Docket No.

FD 33556 (Sub-No. 5)

Thursday, May 12, 2011
Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

DANIEL R. ELLIOTT III Chairman
ANN D. BEGEMAN Vice Chairman
FRANCIS P. MULVEY Commissioner

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On Behalf of Canadian Nat'l Railway

Neal R. Gross & Co., Inc.
202-234-4433
CHAIRMAN ELLIOTT: Good morning, welcome. Today we'll hear oral arguments on two separate cases here at the Board. Before we begin, I'd like to welcome our new member, Ann Begeman. She just came on two weeks ago, and so we're very excited to have her here to have a full panel. And, I assume she's excited after going through the process to be here.

VICE CHAIRMAN BEGEMAN: I'm glad I made it through.

CHAIRMAN ELLIOTT: Yes. First of all, we'll proceed with Canadian National Control Transaction of IC, Finance Docket Number 33556, Sub-Number 5. This case concerns a challenge by CN to an arbitration award that the company says would block a planned consolidation of its Troy, Michigan and Homewood, Illinois dispatching facilities.

The American Train Dispatchers
Association, or ATDA, opposes the challenge saying, "The arbitrator correctly found that CN has not upgraded its dispatching system and trained its dispatchers in a way that would allow the consolidation to proceed."

In an effort to move things along, the Board members will not be making opening remarks this morning, but I wanted to cover a few procedural matters before we begin. We've asked each party to make a short statement of its argument. The counsel should be prepared to answer questions from the Board at any time during your allotted time.

I assure you that we have read all of your pleadings and there's no reason to repeat every argument. Each side has been allotted a total of 20 minutes. As the party filing the appeal, CN will open. CN has requested 15 minutes on opening, ATDA then will have 20 minutes, and CN has reserved five minutes for rebuttal.

If you wish to make a change to
your reserved rebuttal time, please advise us when you begin your opening presentation. Any party making a PowerPoint presentation or using similar hard copy aids using materials previously placed in the record, should have provided those materials in hard copy to opposing counsel and the Board.

We will have any pages used today in such presentations bound into the transcript of this proceeding. Speakers, please note the timing lights are in front of me. You will see a yellow light when you have one minute remaining and a red light when your time has expired. The yellow one-minute light will be accompanied by a single chime and the red light signifying that your time has expired will be accompanied by two chimes. Please keep to the time you have been allotted. When you see the red light and hear the double chime, please finish your thought and take a seat. In addition, just a reminder to everyone, please turn off your
cell phones.

We will now proceed. Counsel for CN, please step up to the podium, introduce yourself, indicate if you wish to change your time for rebuttal, and then begin.

MR. HAWKINS: Thank you, Mr. Chairman. My name is Robert Hawkins. I represent the Canadian National Railway Company and the other petitioners in this matter. And, we will stick with the five minutes for rebuttal.

This is a petition for review of a labor arbitration award reached pursuant to the New York Dock Labor Protective Conditions. As we point out in the petition for review, this Board should review and vacate that decision because the decision of the arbitrator both implicates industry-wide issues of recurrence and because the arbitrator committed multiple egregious errors in the decision.

The fundamental defect in the
award in this case is it expressly refuses to permit CN to consolidate the dispatching function of the Grand Trunk and the Illinois Central at Homewood, Illinois. This was discussed at the regional application and then the Board's approval of the control transaction.

And, as we stand here today, CN continues to maintain two separate dispatching centers simply because there's an arbitration award that compels it to do so. The employees in question used the same equipment, and this Board has been advised previously in connection with other transactions that the equipment has been upgraded to a common platform. That information is in the record and it is undisputed.

In addition, the arbitrator in this case created an entirely new separate set of labor protective conditions that do not draw their essence from New York Dock and that are separate and apart and above what the New
York Dock conditions require.

At the outset, it's important to recognize what the arbitrator did not hold. We have identified in the papers before you a number of public benefits that are not available simply by relocating the work without consolidating it and mixing and matching as I would say between the different groups of employees.

The arbitrator did not say that you could get to those efficiencies through means other than what we have proposed in the implementing agreement or in the implementing agreement proposed by the arbitrator himself. He said that the company should not be permitted to achieve those public benefits.

In doing so, he undermined this Board's decision in granting the control transaction. In substantial measure, this Board relies on the public benefits, including the efficiencies of a transaction when deciding to approve a transaction. That --
CHAIRMAN ELLIOTT: Could you elaborate on what those public benefits would be? I know you --

MR. HAWKINS: Yes, sir.

CHAIRMAN ELLIOTT: -- in some of your earlier pleadings, you focused on the actual move and the closing down of the facility in Troy, and then -- so those are pretty clear cut. And, I think the arbitrator would allow that. But after that, over and above just the way the transaction or the consolidation is set up right now, what other benefits would there be, other than the closing down and I guess the combining of management?

MR. HAWKINS: Okay. The incidental, the incidental expense reductions are one thing, but number one, you can reduce the number of dispatchers only by consolidating the work. If you pick up the dispatchers lock, stock, and barrel, and simply move them and continue to have a wall
between the Grand Trunk and the IC dispatchers, then you fail to have the efficiencies that allow you to move work from one desk to another and expand the size of certain desks in the Chicago area.

So the arbitrator mistakenly thought, it appears, that you could move the work and reduce the number of dispatchers. You can't do that. CN does not employ dispatchers at Troy that it doesn't need.

So if the work cannot be interwoven, consolidated, in a true New York Dock sense with the Illinois Central work, then you have to have the same number of dispatchers. And, that's one.

CHAIRMAN ELLIOTT: With respect to that, I noticed in your pleading you said that there would one desk shut down in the Chicagoland area. Why do you need to have six positions shut out if there's only one desk shutting down?

MR. HAWKINS: Relieve positions and
other vacancies in similar --

CHAIRMAN ELLIOTT: So you just think the six would follow because of the efficiencies of consolidating the two, so there'd be guys to fill in other spots?

MR. HAWKINS: Exactly.

CHAIRMAN ELLIOTT: Okay.

MR. HAWKINS: And, there is no contrary record evidence. I mean, that is the estimate of six positions, so that benefit, which is a public benefit as this Board has recognized many times, the ability to perform the same work with fewer people reduces cost. And, that cost reduction ultimately redounds to the benefit of shippers in a highly competitive industry such as this.

CHAIRMAN ELLIOTT: And, you're not arguing that this is a single transportation system now the way it's set up.

MR. HAWKINS: No. That would be an argument that an organization may petition a different Board for.
MR. HAWKINS: We're not arguing that, and the Board has never said that is required to have a single transportation system to achieve efficiencies of a control transaction. The cases are replete with references where a carrier that has control over multiple entities will move support functions, clerical, dispatching, other types of support functions from one entity to another, consolidate them, achieve the public benefits of the transaction.

The issue of whether there's a common or a single transportation system is a completely different inquiry and it's not required for this decision.

CHAIRMAN ELLIOTT: I just have one more followup. My understanding of this transaction when it occurred originally is it was basically an end-to-end transaction, and then around the Chicago area that's where they somewhat overlap. My concern here is IC is a
large railroad, probably about 3,000 miles.

MR. HAWKINS: Right.

CHAIRMAN ELLIOTT: And, GTW is about 600 miles, and it only seems like they overlap in this one small area in Chicago. Why do you need to merge the whole system together for dispatching, and to override the entire agreement? Couldn't you just leave it consolidated in the Chicago area and then leave the other external parts alone?

MR. HAWKINS: To achieve the efficiencies, you need to be able to move the work in accordance with the needs of service. And, one of the facts that is essential to recognize here is that those needs will change and those are set forth in the declarations of Roger Fraseur.

And, the needs of service change on a periodic basis, depending on the needs of service. So that you can't just put a rigid barrier at one location and say, "That's where it's going to end." So, no, in order to
achieve the public benefits of this transaction, you need to put the same employees under the same collective agreement.

COMMISSIONER MULVEY: There seems to be a dispute between how far along you are with regard to retraining the dispatchers. The union suggests that you haven't, they're not ready for this and you haven't done all the things that you said you were going to do with regard to retraining and making the dispatchers, who are going to be moved, capable in the new area.

You did provide evidence from the Roger Fraseur declaration that this was ongoing. Would you say that the union has overstated its position and that you have in fact done everything necessary to retrain them? Or is there still further work that's needed to be done before you can go ahead and actually make this move?

MR. HAWKINS: With all due regard to the union's counsel, this has been done.
We have advised the Board in the SIP, in the EJ&E transaction that these people are in a common platform. They use exactly the same equipment.

There is no contrary record evidence. And, when you take a look at the record, what the union cites are two things. Number one, the original application back in 1998 when we did not have common dispatching systems and told this Board that we did not have it.

But, the only other citation that the union gives is citations to its own brief. There is no evidence of record, no confident evidence of record, to suggest that these dispatch systems are not identical.

If you look at the affidavits of Roger Fraseur, it's harder to get any clearer than that. This issue was raised in front of the arbitrator and it was puzzling, and, therefore, recognizing that this day might come, went back and put together iron clad
affidavits that identified not only on a
conclusory sense that it is common equipment,
they're using the same equipment, we actually
went on and identified what those system were.
There is not a shred of evidence in the record
to the contrary, zero.

COMMISSIONER MULVEY: In the
second verified declaration of Mr. Fraseur,
there are seven paragraphs of what's being
done, would you say that all of those have
been met then?

MR. HAWKINS: Yes, they have. And,
we previously advised this Board and the FRA,
so it's not news to this Board, but it's also,
in terms of arbitration review, it is
undisputed in terms of the factual record
before the arbitrator. There is no contrary
evidence.

Now, back in 1998, it was a
different story. Back then the dispatch
systems were different. And we told this
Board that we would co-locate the forces for
a period of time and then integrate them thereafter. But then after that, the ATDA asked for a six-year moratorium on the move and of the work. And since the carrier couldn't achieve the public benefits of the transaction at the time, it agreed.

But that moratorium expired several years ago, and as we have pointed out in numerous places within the record, and I would say generally, it's in the 800 series of pages. And, I know that's an awfully voluminous record to read in two weeks, but from 80 -- let's see. It's in the 800 series.

The carrier has put these dispatchers in a common platform. They used the same equipment. The only thing that prevents a true consolidation is approximately 200 miles and one arbitration award.

COMMISSIONER MULVEY: Just one final point. You keep talking about public benefits. Aren't these really private benefits. These cost reductions and these
savings, which may be passed on to shippers, but aren't they still considered to be private benefits rather than public benefits?

MR. HAWKINS: No.

COMMISSIONER MULVEY: You're not cutting down on pollution or something like that.

MR. HAWKINS: We understand. There are additional public benefits. I didn't actually finish answering the Chair's question a few minutes ago, but there are additional public benefits in addition to the cost savings, but this Board has recognized time and time again that in these large transactions where you're able to take and perform the same amount of work with fewer people, that is a public benefit.

That is one of the benefits that we quantify as part of the application process and that this Board relies on in granting approval of a transaction. That in and of itself would have justified this
consolidation.

But in addition to that, in the Chicago area, allowing the carrier to truly consolidate the work and not just co-locate people under different agreements and a silo between them, there are a number of additional benefits. In the Chicago area, multiple dispatchers now have to handle the same train just because of the historical boundaries between the properties.

In addition to that, the carrier wants to set up a combined extra Board. You can't combine the extra Boards if there's a jurisdictional rule that says, "I can't do work on the Grand Trunk or I can't do work on the Illinois Central."

The technology is in place to allow these, the barriers or, not the barriers, the distinctions between these various desks to move. And, traffic fluctuates to a great degree. It actually fluctuates by shift so that you can have a
desk with responsibility for more than one area depending on what time of the day the employee works.

All that goes out the window when you have a silo and a jurisdictional wall. In the event of storms or derailments, the carrier would be able use the combined workforce to protect all of the territory. Not so when you have a jurisdictional barrier that says, "I'm a Grand Trunk person, that's not my work."

So, there are quite a few additional public benefits, but certainly the efficiencies of the transaction hinge on the ability of the carrier to combine folks in other crafts. I misspoke. This applies to every craft whether it's training engine service, whether it's the clerks, whether it's the dispatchers, this is an issue of industry-wide concern.

And, respectfully, this Board is the guardian of the New York Dock labor
protective conditions, which have been based on the Washington job and several other labor protective conditions over time. The Board has reviewed arbitration awards where that is necessary to protect the integrity of the conditions.

This award chops at the integrity of those conditions. There's no question about it. And, what the arbitrator did here — let me just discuss a little bit about the transaction.

Obviously, the control transaction is one where CN acquired control over the Illinois Central and identified and quantified a number of public benefits that flowed from that. The consolidation of dispatching work is not an afterthought. It was something that was addressed openly in the control transaction.

The ATDA came in and asked for preservation of its collective bargaining agreements. This Board declined to award
that. The Board did say that people don't have to follow their work to Canada, but that was the only augmentation this Board made in the New York Dock conditions.

So, this transaction, the subsidiary transaction, you know, you have the control transaction, the subsidiary transaction thereafter flows naturally from the original control transaction. Again, as I say, this was not an afterthought.

The necessity test. In order to accomplish the public benefits that I've just talked about, you have to have these people under a single agreement. You cannot accomplish those benefits. You cannot combine extra Boards. You cannot move work between one desk to another. It's important and critical to have these folks under a single agreement.

There are two additional issues, which I think I'll address on rebuttal, which are the benefits that are in excess of New
York Dock and why that's a problem here, and what we would ask you to do, if in fact you grant the petition for review, so I'll save that for rebuttal. Thank you.

CHAIRMAN ELLIOTT: Thank you, Mr. Hawkins.

Now, we'll hear from counsel for ATDA. I apologize for using the wrong acronym. Please step up, introduce yourself for the record, and begin, Mr. Wolly.

MR. WOLLY: Good morning, Mr. Chairman and fellow members of the Board. One of the issues that has not been addressed here is the very narrow standard of review that applies to awards rendered by arbitrators under the conditions imposed by this agency. The Board generally defers to an arbitrator's decision and will not grant review unless there are recurring or otherwise significant issues of general importance regarding the interpretation of the agency's labor conditions. That standard is not met
here, but let's talk for a moment about that standard because it is the union's position that this dispute is sui generis.

It is an unusual dispute, but it is limited to the circumstances of this particular transaction. What the railroad must satisfy is first to demonstrate that this award raises recurring or otherwise significant issues.

If it is able to establish that, those issues must be of general importance regarding the interpretation of the labor conditions. In other words, they must extend beyond the dispute over this particular movement of dispatching work from one place to the other.

Then the Board has instructed that awards are not vacated because of substantive mistake unless there is egregious error when the award fails to draw its essence from the conditions or where the arbitrator exceeds specific limits on his or her authority. And,
finally, the Board has defined egregious error
to mean irrational, holy baseless, completely
without reason, or actually and indisputably
without foundation in reason or fact.

These are standards that are near
identical to what the Supreme Court has said
applies in ordinary labor cases, and this
Board in its Lace-Curtain decision, adopted
that. So, let's take a look at whether or not
this award in fact fits within those very
narrow standards.

The railroad admits to you today,
as it has to and as it did in the arbitration,
that it is not creating a single
transportation system. When in its initial
filings after the arbitration, and apparently
it had to explain this after the arbitration
hearing because at that hearing, it did not
adequately explain it.

At pages 787 of the record and 788
of the record, the railroad says, "The carrier
has no immediate plans to completely integrate
the remainder of the GTW and IC rail systems,
and it is true that the carrier is not
proposing to fully integrate the entire GTW
and IC systems at this time. And, yet, what
the railroad has proposed is a complete
eradication of a collective bargaining
agreement that applies to a system that the
railroad will continue to hold out to the
public as a separate rail system, that being
the GTW system."

The vast majority of the work that
is going to be moved from Troy to Homewood is
work that deals with that separate GTW system.
And, to pick up on what the Chairman asked of
counsel for the railroad, it is relevant that
all the railroad has put in the record is some
need to cross assign in the Chicagoland area.

In fact, that could be done with a
far more limited approach to this. Now, the
arbitrator in this case determined that the
railroad did not carry its burden to
demonstrate that the entire collective
bargaining agreement be tossed, and so he did
not allow them at this time, and I stress, at
this time, to remove from the train
dispatchers of GTW the collective bargaining
agreement terms under which they presently
work.

He did not foreclose it at some
time in the future when in fact all of the
rail operations that are being dispatched out
of this same facility in Homewood are in fact
integrated.

COMMISSIONER MULVEY: The Hampton
award suggests that the standard for
determining whether our collecting bargaining
should be overridden is whether one can prove
that the transactions, efficiencies, and
benefits would be nonexistent without the
override. But the prior ICC Board decisions
indicate that the standard is whether the
override is necessary, and not necessarily
nonexistent whether it's typically necessary
to carry the transaction. Can you harmonize
these two formulations?

MR. WOLLY: Under the facts that were presented to Arbitrator Hampton, the railroad was not able to sustain the necessity side of the Board's determinations.

COMMISSIONER MULVEY: So, you failed to meet either standard.

MR. WOLLY: I beg your pardon?

COMMISSIONER MULVEY: You failed to meet either standard then in your view?

MR. WOLLY: I believe that he did, that it did in front of this arbitrator, so even if you believe that the arbitrator perhaps overstated what the standard was and you can tell from the union's submissions to the Board that we accept the standard of the Board, which is, it must be shown that it is necessary to effectuate the transaction to override the agreement.

And, our position was that the railroad had not shown that, that this award stands on its feet and should not be set
aside, should not even be considered for
review once you apply that standard to the
facts that are presented here.

The GTW work, by the way under
this agreement, will remain readily
identifiable, or at least for the most part,
readily identifiable. And, this alone easily
supports the determination of the arbitrator
that one of the conditions applicable to this
transaction is that those GTW dispatchers
retain the prior rights to perform this work.

What he has directed is that if
the railroad insists on only creating ten jobs
in Homewood to perform this work, that those
who are left behind have the opportunity
should vacancies occur at Homewood to move to
Homewood to follow that work. And, that is
actually a very valuable condition for these
employees, because frankly the wage that a
train dispatcher earns is considerably more
than what a clerical employee might earn if
the train dispatcher retains clerical work
rights or if they trained dispatcher is
granted voluntarily a clerical positions upon
losing his train dispatcher positions, which
is something the carrier is willing to do.

The carrier says, "It's impossible
to administer something like that." We
suggest that merely saying that is not fact.
It is very clear from the record that what the
carrier intends to do, and they use the word
"silo" as if the train dispatchers are
suggesting that, but we are not.

What the carrier intends to do is
to continue to have IC dispatchers dispatch
over IC lines, GTW dispatchers dispatch over
GTW lines, and by the way, they also happen to
have the Wisconsin Central Railroad system,
which is subject to newly filed proceeding in
front of this Board, but they are keeping that
separate as well.

Insofar as counsel says to you,
"Well, in a case of a snowstorm, in the case
of some terrible natural disaster," well, the
fact of the matter is that collective
bargaining agreement bends in the event of an
emergency. And, if it is necessary to address
an emergency and there's an inadequate
workforce, clearly, the carrier is able for
that fixed period of time to address the
emergency conditions without regard to the
kind of problem that they are telling you
today would totally interfere with their
ability to effectuate the transaction that
they ask the Board authority for some 13 years
ago.

COMMISSIONER MULVEY: On a point of
clarification, counsel for CN said that Mr.
Fraseur's statement is that all of the course
training, etc., has been done and that they
can effectuate the move. Whereas, the union
and its filing said that the training had not
been done. Would you accept now that what's
necessary to train these people to be, to work
on different desks has been done or --

MR. WOLLY: Well, I would say, Mr.
Commissioner, that there are two elements to that. One is what he has described for you is the systems are in place and there are common systems. As I stand here today, I would not disagree with him.

Insofar as training is concerned, there are different issues when someone is training as a dispatcher over different territories. Dispatchers have to learn. You know, you can't just take a train dispatcher and say, "I know you know how to dispatch over this territory between point A and point B. Sit over here and do between point C and point D without any training."

In fact, there is that kind of qualification training on every railroad, but insofar as what he tells you about the computer systems, the dispatching systems, as I stand here today, we don't disagree with that.

I will address for a few minutes the question of benefits. This Board has in
its Lace-Curtain decision and followup
decisions --

CHAIRMAN ELLIOTT: Mr. Wolly,
before we move on, just so you stay on the
same topic, going to the Commissioner's
question about the standard "has not
substantiated the deficiencies would be
nonexistent, etc." I don't think it can be
disputed that statement in itself is not a
correct statement of the benefits standard.
Would you agree with that?

MR. WOLLY: I'm not sure which
statement you're referring to.

CHAIRMAN ELLIOTT: The arbitrator
in his award said, "CN has not substantiated
that efficiencies would be nonexistent should
the GTW roster be maintained and the ATDA
collective bargaining agreement remain in
effect for those GTW dispatchers transferring
from Troy to Homeland."

MR. WOLLY: I think that the
 arbitrator's statement may be too broad. On
the other hand, I would say that in the context of this case, I think that what the arbitrator meant was in fact that the efficiency standard has not been satisfied here, the Board standard. We don't -- we're not asking you to adopt verbatim the standard that Mr. Hampton put in his award.

CHAIRMAN ELLIOTT: Because as I read it under this standard, what CN is, has requested, I think the arbitrator was correct, but under the stricter standard with respect to whether there's a public benefit as a result of the consolidation, whether or not you agree that they meet that standard, it's possible that they could meet it and they could not meet this other standard. It's possible that you could meet one standard and not meet the other.

MR. WOLLY: I would say it is possible for the carrier not to meet the stated standard that is in Mr. Hampton's award, and also not meet the standard that
this Board has more explicitly set forth in
its decisions.

CHAIRMAN ELLIOTT: At that point,
wouldn't it be the best way for us to handle this is to remand it back to the arbitrator and have him use the correct standard and just to make sure that the arbitrator knew what standard they were ruling on?

MR. WOLLY: Yes.

CHAIRMAN ELLIOTT: Okay, thank you.

VICE CHAIRMAN BEGEMAN: Can I ask a question? Mr. Hawkins, you know, made -- his statement made clear, I think, that CN's position is that they are consolidating, that they're not simply relocating, at least I believe that's what he was communicating.

You indicated that they actually are still going to just be relocated doing separate operations, separate dispatching. What evidence is it that you've been given from the railroad that everything is going to be separate?
MR. WOLLY: From the record that's been established in this proceeding if you specifically look at the submissions that were filed by the carrier, its pre-hearing, post-hearing, and post-hearing reply submissions, there's a consistent theme in them. And that theme is that they need, they say, to do this because of efficiencies that they may someday be able to accomplish by virtue of this, but the arbitrator determined that the efficiencies that they're really looking toward relates specifically --

VICE CHAIRMAN BEGEMAN: I wasn't asking what the arbitrator determined, but rather you were saying that --

MR. WOLLY: Yes, the evidence --

VICE CHAIRMAN BEGEMAN: -- what they're planning is not what they say they're planning, and that's what I'm curious about.

MR. WOLLY: Well, they said to the arbitrator, and this is record evidence, that their problems were primarily the lease that
they had in Troy, their technology integration, their use of similar management, and their problem that they faced in the Chicagoland area. Based on that evidence, the arbitrator did not believe that it was necessary to effectuate the transaction to totally eliminate the train dispatchers' collective bargaining agreement.

VICE CHAIRMAN BEGEMAN: Perhaps I wasn't being clear and I apologize. What I'm getting at is what your statement just was a few moments ago: that the grand plan is that as they relocate people, these dispatchers to Chicago, everyone is still going to operate separate systems and not consolidate, which seems very counter to what Mr. Hawkins just said, and so I'm trying to understand what the facts are.

MR. WOLLY: I think that the confusion may stem from the use of the word "systems." What Mr. Hawkins is telling you is that they're going to be using the same train
dispatching systems. And, what I'm telling
you is that while they may be using the same
physical-type of equipment and technology,
they're actually not going to be altering the
public system.

CN has more than one rail system
that it holds out to the public. It holds out
the GTW system. It has separate employees
under that system. It holds out an IC system.
It holds out a WC system. It has other
carriers. For example, it has the DM&IR and
the DWP. Two systems that it is asking for
your approval in a separate transaction to
bring into one.

It operates the WC system out of
the same physical facility using the same
technology, the same technological systems,
but it is not dispatching the trains on the WC
system in an integrated way. And, we're
saying --

VICE CHAIRMAN BEGEMAN: So you
content that they are simply relocating and
they're not consolidating?

MR. WOLLY: We are contending that
that is what is happening, but for the
potentiality of the Chicagoland area. And,
that the determination by the arbitrator that
it is essentially premature to override the
entire collective bargaining agreement because
they are not establishing the necessity to do
that should be sustained by this Board.

If I can for a minute address the
issue of the benefits that the arbitrator has
imposed to be associated with the elimination
of jobs. As you know, the carrier has
proposed to eliminate six train dispatching
jobs and to move ten people, if they so choose
to move, to Homewood.

And, I would urge the Board to
remember that under its Carmen Three case, the
Board has held there is no one size fits all
standard to these kinds of transactions. Yes,
the conditions are somewhat specific.

However, the Board on numerous has determined
that as long as what a New York Dock arbitrator does falls within the context and spirit of the conditions, and that is the standard from the Lace-Curtain case, the Board will not disturb the arbitrator's finding.

COMMISSIONER MULVEY: Is there any case from the ICC or the Surface Transportation Board which has held that an arbitrator may require a carrier to provide benefits that are far more generous than those in New York Dock? Is there any leeway for arbitrators to make adjustments in the New York Dock requirements, but still be in compliance or is New York Dock limiting, and therefore, the arbitrator cannot go beyond the benefits in New York Dock?

MR. WOLLY: In fact, in the Lace-Curtain case, which has similar benefits under the Oregon shortline conditions, in that area, the Board did in fact determine that even though there were certain things that that arbitrator granted that were not specifically
identified with the New York Dock, they fell within the context and the spirit of New York Dock. So, the answer to your question is yes. Thank you.

CHAIRMAN ELLIOTT: Thank you, counsel. Next we'll hear from counsel for CN. Please proceed with your rebuttal.

Mr. Hawkins, my the way, before you get started, I asked Mr. Wolly this question about the standard, and I think everyone is in agreement here that the arbitrator may have applied a standard that was overly broad. And, I presume you agree with that.

And, I suggested that maybe the best avenue would be a remand to have the arbitrator take a look at the case under the more, the appropriate standard, the narrower standard. Would CN also be in agreement with that path as a way of resolving this dispute?

MR. HAWKINS: We've looked at that issue and, and frankly, think that a remand
perhaps to the parties or then to a separate
arbitrator is appropriate. The Board has
reviewed this issue on a number of occasions,
and there are some cases involving the CSX.

There's a cite at 2001 Westlaw 63300, and then there's the Pennsylvania
Railroad decision at 3 Surface Transportation
Board 834. These were not addressed in our
papers because Mr. Wolly raised it in his, in
a footnote to his pleading.

The Board has typically remanded
the matter to the parties for discussion
consistent with the Board's determination, and
thereafter, the parties are free to select an
arbitrator pursuant to the New York Dock
conditions. The Board has expressed
reservations from time-to-time that remanding
a case to the same arbitrator may be
inappropriate.

There was an arbitrator Harris
decision where he expressed that the doctrine
of functus officio may bar the arbitrator from
undertaking a remand. Since the arbitrator is not a federal tribunal, it's not like a judge who has continuing jurisdiction over the matter. The jurisdiction is decided on a case-by-case basis and granted to the arbitrator in that regard.

The Board has also expressed concern that from time-to-time that remanding the case to the same arbitrator may result in additional delay. And, with all due respect, we believe that that issue is appropriate to consider here given the difficulties that this award has in a number of respects.

So, the Board has discretion to go in any of those directions. We respectfully submit that a remand to the parties or directly to the appointment of a new arbitrator is appropriate.

With respect to the questions regarding the enhancements to New York Dock, the Board has spoken on this issue. And, the Board has said that requests, and this is the
Norfolk Southern case, 4 I.C.C. 2nd 1080, which is in our papers, "The proper forum for employees or unions to request enhancements to New York Dock is before this Board, not in arbitration."

And, the Board has made it clear in a number of arbitration review cases that where an arbitrator interprets or applies the existing New York Dock conditions, that the arbitrator's decision will generally be affirm, but not where you create brand-new benefits. In this case, the arbitrator corrected, created six separation allowances to be issued in seniority order.

You only have 16 dispatchers in Troy. And, the arbitrator said that six of those people can take separation allowances, not follow their work, and that undermines the fundamental benefit, the fundamental bargain, of the New York Dock and the Washington Job Protection Agreement.

In this Board's own decision
approving the IC transaction, the Board reiterated at page 43 of the control decision that a fundamental tenet of the New York Dock and every other labor protection condition issued by the Board is that employees must follow their work as a condition of retaining protection.

The arbitrator jettisoned that in this case. And, again, that's a further reason why it's egregious error and why it is an issue of continuing industry-wide importance. Not only that --

CHAIRMAN ELLIOTT: Let's assume in that situation, the arbitrator was assuming that at least ten people would follow their work and that six would stay back. I know in the present situation you say that's not going to happen.

MR. HAWKINS: I can't make that assumption, and no arbitrator can make that assumption, but again, the Board --

CHAIRMAN ELLIOTT: So you're saying
fundamentally, he can't just slot six separation allowances.

MR. HAWKINS: Exactly.

CHAIRMAN ELLIOTT: Okay.

MR. HAWKINS: Exactly. Our experience in applying the New York Dock conditions is that people for personal reasons or a variety of other reasons choose not to follow their work. They go to different industries, they may go to a different railroad, there's all sorts of things why somebody may choose not to relocate, even if that means they lose their benefits.

COMMISSIONER MULVEY: Well, there aren't enough slots in Homewood, right, to handle all 16. There's only ten slots being created and there are 16 people, correct?

MR. HAWKINS: Well, there are 16 people at Troy, but the question of how many will actually follow their work --

COMMISSIONER MULVEY: Well, does the Hampton award require that CN pay this
allowance to those employees who could obtain Homewood dispatcher positions, but instead elect to exercise their seniority rights and fill the clerical positions?

MR. HAWKINS: Yes, they do. Yes, absolutely. If you read Sections 3 and 9 together, it orders the carrier to give employees a choice that they select. One of those choices is to take, what Mr. Wolly said, a lowered paid clerical position in Troy, but then Section 9 of the agreement says that employee still gets protection. So, you've eliminated the economic incentive for the employee to follow their work.

COMMISSIONER MULVEY: So you get displacement allowance to make up for the difference then.

MR. HAWKINS: Right, you get topped up your normal salary. It is difficult to imagine a clearer attack to the New York Dock benefits.

COMMISSIONER MULVEY: So, it's not
-- you would say that that requirement is not consistent with New York Dock then.

MR. HAWKINS: No. And, if you look at the particular circumstances of this case, the arbitrator has already offered six people buyouts. Now, in the context of a voluntary agreement where the carrier gets what it needs and believes it has enough forces to protect the work, that's one thing, but this isn't a voluntary agreement. This is a New York Dock arbitration.

So you have six people who have the buyouts and then you have a number of people, and the record is not clear as to how many people hold clerk seniority, so I won't tell you how much how many there are, but the bottom-line is, these are responsible jobs and you cannot simply move the, the work without having people trained and capable of performing it.

Two additional points. It is a stunning piece of this argument to hear that
the organization now agrees that we have
common equipment. Now, we understand that
there may be some period of familiarization.
That's true in training engine service. It's
ture in many other crafts where people move to
a different location.

You go through a period of
familiarizing yourself with physical
characteristics of the territory, and I'm sure
there might be some initial training required
tere, but the equipment is the same. And, the
arbitrator, to the extent that he was mistaken
on that, is dead wrong and there is no record
evidence to support it.

In answer to the Vice Chair's
questions, the issue of whether CN will
integrate the work, those are facts that --
within CN's control. Again, CN has said that
they're going to consolidate the work, all the
evidence of record, especially Tab 4 to our
opening submission to the arbitrator says that
it's going to be a consolidation of the work,
there's no contrary evidence. Thank you.

CHAIRMAN ELLIOTT: Thank you very
much for your attendance today and presenting
your thoughtful arguments and we'll take this
matter under advisement.

COMMISSIONER MULVEY: I have one
more question, if that's okay.

CHAIRMAN ELLIOTT: Oh, I'm sorry.

COMMISSIONER MULVEY: Let me ask
one final question to the CN representative.
To what extent does the CN override of the
overall collective bargaining agreement with
ATDA? Does it contend that the entire
collective bargaining agreement must be set
aside or only those provisions of the
bargaining agreement that prevents CN from
consolidating its Troy and Homewood
dispatching forces in the manner envisioned in
the merger application? So, is it a complete
set aside or just specific provisions?

MR. HAWKINS: Consistent with other
STB decisions, our position is that the
employee should be placed under the ICTDA collecting bargaining agreement and that there would be the rights, privileges, and benefits that are preserved under the New York Dock conditions for some period of time.

COMMISSIONER MULVEY: Thank you.

MR. HAWKINS: So, they should be under one collective bargaining agreement. We believe that's consistent with precedent.

COMMISSIONER MULVEY: Thank you.

CHAIRMAN ELLIOTT: Thank you very much, counsel.

(Whereupon, the above-entitled matter concluded at 10:16 a.m.)
null
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Canadian Nation RR v ATDA

Before: STB

Date: 05-12-11

Place: Washington, DC

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