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HAROLD A. ROSS

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Public Record

October 27, 2004

Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
Suite 700  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 32760 (Sub-No. 43)  
In The Matter of New York Dock Arbitration  
Between Union Pacific Railroad Company and  
Brotherhood of Locomotive Engineers & Trainmen

Dear Mr. Williams:

Enclosed for filing in the above-entitled proceeding are the original and ten (10) copies of the following documents submitted by the Respondent Brotherhood of Locomotive Engineers & Trainmen:

1. Motion to Exceed Page Limit; and
2. Reply of Brotherhood of Locomotive Engineers & Trainmen to Appeal

Service has been made upon Petitioner-Carrier's counsel as indicated in the certificates of service attached to each document. In addition, a 3.5 floppy disk in Word Perfect 9 is enclosed.

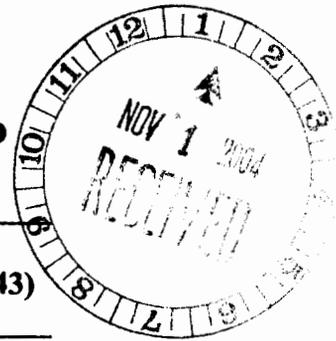
Please acknowledge receipt on the copy of this letter and return same to me in the self-addressed, stamped envelope enclosed for that purpose.

Very truly yours,

Harold A. Ross

212407

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



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**FINANCE DOCKET NO. 32760 (SUB NO. 43)**  
\_\_\_\_\_

**IN THE MATTER OF NEW YORK DOCK ARBITRATION  
BETWEEN UNION PACIFIC RAILROAD COMPANY  
AND  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN  
(ARBITRATION REVIEW)**

\_\_\_\_\_  
**REPLY OF BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS & TRAINMEN TO APPEAL**  
\_\_\_\_\_

ENTERED  
Office of Proceedings,

NOV 01 2004

Part of  
Public Record

**Mr. C. R. Rightnowar  
General Chairman - BLET  
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**Attorney for Respondent  
Brotherhood of Locomotive  
Engineers & Trainmen**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 32760 (SUB NO. 43)**

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**IN THE MATTER OF NEW YORK DOCK ARBITRATION  
BETWEEN UNION PACIFIC RAILROAD COMPANY  
AND  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN  
  
(ARBITRATION REVIEW)**

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**REPLY OF BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS & TRAINMEN TO APPEAL**

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**INTRODUCTION**

Contrary to the position taken by the petitioner, Union Pacific Railroad Company ("UP"), the matter before the Board does not assert any recurring or otherwise significant issue of general importance regarding the interpretation of the labor conditions imposed in Finance Docket No. 32760. The issue raised by UP involves only three of 16 Hub Implementing Agreements in effect on UP as a result of the UP/Southern Pacific merger. And those Agreements contain certain contractual provisions which are not in the remaining Hub Implementing Agreements or such agreements in general. The issue has not arisen since the merger or the creation of the Little Rock/Pine Bluff, Kansas City and St. Louis Hubs by UP and, as we later show, is not likely to arise in those Hubs or elsewhere hereafter. Moreover, it is clear on the face of UP's appeal that the issue in this case only involves the interpretation and application of an implementing agreement which is

not a matter of major importance.

In addition, contrary to UP's argument, the New York Dock Arbitrator appointed by the National Mediation Board, Ann S. Kenis, had authority to determine if she had jurisdiction to interpret and apply the terms and conditions set forth in the Hub Implementing Agreement. Under the law, as defined by the courts and this agency and its predecessor, New York Dock arbitrators are to interpret and apply those implementing agreements, which bear the imprimatur of this agency. In fact, UP has admitted and advocated this principle in litigation arising out of the UP/SP Merger.

Furthermore, contrary to UP's assertion, the arbitrator's decision draws its essence from the protective conditions and the Hub Implementing Agreement and the arbitrator did not commit egregious error as that term has been defined. Actually, UP is claiming that it may evade the three Hub Implementing Agreements it negotiated and voluntarily entered into with the provisions it wanted in support of the hub-and-spoke concept it requested in its merger application and for which this agency granted authority. Thus, UP seeks a time line expiration from this Board in the guise of arbitration review on the basis that there is no other alternative by which it can obtain interdivisional runs through the Little Rock/Pine Bluff Hub. To raise the question, however, is to answer it. Unquestionably, and without much thought, it is clear that UP can get an agreement voluntarily or by service of a Section 6 notice and exhaustion of the Railway Labor Act procedures, as both are indicated in Article I, Section 2 of the New York Dock conditions. In addition, a carrier could do so through another New York Dock transaction.

Moreover, as we prove in our final argument, the facts will show that the UP's contentions supporting the use of Article IX of the 1986 National Agreement are absolutely wrong and the primary reason for its attempting to do so is not operational, but financial: an attempt to obtain a

change not permitted by the New York Dock conditions at the expense of the workers involved, i.e., making them do the same work for lesser rates of pay. Stated somewhat differently, the reason advanced by UP is illusory and is a mere attempt by the Carrier to transfer wealth from the employees to UP. In Railway Labor Executives Ass'n v. United States, 987 F.2d 806, at 815 (D.C. Cir. 1993), the District of Columbia Circuit held that to satisfy the “necessity” predicate for overriding a collective bargaining agreement, the ICC must find that the underlying transaction yields a transportation benefit to the public (enhanced efficiency, greater safety or some other public gain), “not merely [a] transfer [of] wealth from employees to their employer.” (Emphasis added). See also, American Train Dispatchers v. ICC, 26 F.3d 1157, at 1164, 1165 (D.C. Cir. 1994); CSX Corporation - Control - Chessie System, Inc., and Seaboard Coast Line Industries (Arbitration Review), Finance Docket No. 28905 (Sub-No. 23) (service date Sept. 15, 1989), 1989 ICC Lexis 274 at \*13 (“the conditions were . . . to ensure that the economies and efficiencies sought by the industry through consolidations and coordinations were not achieved at the sole expense of rail employees.”). In the instant case, UP obtained extensive flexibilities and efficiencies in lieu of preserving certain provisions in pre-existing collective agreements, which flexibilities, efficiencies and exemptions became part of the agency imposed Little Rock/Pine Bluff Hub Implementing Agreement.<sup>1</sup> Now the Carrier is attempting to modify the New York Dock Implementing Agreement by unilaterally changing, in effect, the rates of pay, rules and working conditions of the employees in that Hub. Just as Implementing Agreements and changes in the pre-existing CBAs at the time of the consolidation

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Like UP and Arbitrator Kenis, respondent Brotherhood of Locomotive Engineers & Trainmen (“BLET”) recognizes that the Award pertains to all three Hubs, but for convenience refers to the situation involving the Little Rock/Pine Bluff Hub.

must be “necessary” and not for the transfer of wealth from the employees to the employer, we submit the same principle is legally and equitably required with respect to the situation confronted here.

In sum, we submit that the arbitrator’s decision does not present a recurring or significant issue warranting interpretation of the New York Dock conditions. Rather, the Arbitrator needed only to interpret and decide whether certain provisions in the Implementing Agreement constituted an agreement that Article IX of a pre-existing bargaining agreement would not override conflicting contractual language and expressions set forth in the implementing document. The Arbitrator properly resolved this issue through her interpretation of the implementing agreement and a side letter thereto, as well as its negotiating history, rather than interpreting the New York Dock conditions.

### **COUNTERSTATEMENT OF FACTS**

Many of the relevant and operative facts pertinent to this matter are contained in the Award of Arbitrator Kenis. UP Ex. A at 2-10. However, the factual statement submitted by UP is incomplete and misleading.

Among other things, UP fails to disclose the Implementing Agreement’s negotiating history presented to the arbitrator by BLET and the real life situation existing on UP at the time that it began its attempts to circumvent the terms of the Little Rock/Pine Bluff Implementing Agreement by serving notices under Article IX of the 1986 National Agreement; the purpose, in fact, for taking that action.

For convenience, like UP, we will start with a description of interdivisional service. In 1971, BLET and UP entered into an Article VIII that permitted establishing interdivisional runs, even

though that service would not otherwise be possible due to pre-existing agreement provisions such as the designation of home terminals, fixation of the wages paid the crew, establishing the lengths of runs, preventing change in terminals, and so forth. As UP states, the procedures were modified in Article IX of the 1986 National Agreement. Basically, the process was expedited and, if no agreement was reached on suitable conditions (not the institution of the service which in general automatically proceeded), those disputed conditions could be sent to interest arbitration. The 1986 provision also permits the commencement of the interdivisional service on a trial basis, *except, where as here, the run or runs would run through existing terminals.* These changes can virtually be made unilaterally by the Carrier unless the interest arbitrator finds the runs are unreasonable by reason of length, burdensome periods on duty, and other work conditions. In other words, the Carrier's burden is nonexistent as to commencing service and light as to the conditions. These provisions were contained in the pre-existing collective bargaining agreement.

In August 1996, this Board approved the UP/SP Merger. Union Pacific Corp. - Control and Merger - Southern Pacific Transp. Co., 1 S.T.B. 233 (1996). UP's operational plan requested authority to establish a "Hub and Spoke" system for the merger operations. The merger seniority districts and rosters were consolidated into large operational areas. Hubs were established at key locations of the merged railroad with spokes or different routes running out of the hubs. This case involves three hubs: North Little Rock/Pine Bluff, Arkansas; Kansas City, Missouri, and St. Louis, Missouri.

Under the Board's approval of this concept, the New York Dock conditions were imposed for the protection of the employees. Due to the magnitude of the changes, UP agreed to automatic certification of all employees represented by BLET. Article I, Section 4 of the employee conditions

required the parties to negotiate implementing agreements and, if negotiations failed, to arbitrate the terms and conditions of same.

The implementing agreements for each hub were negotiated separately in time and implemented separately in time. The North Little Rock/Pine Bluff Hub Implementing Agreement was signed October 9, 1997; the Kansas City Hub Implementing Agreement, July 2, 1998; and the St. Louis Hub Agreement, April 15, 1998. These agreements were different from any other of the Hub Implementing Agreements. They contained three distinctly different provisions. Those provisions are at the crux of this dispute and the subsequent arbitration.

Before we get to those provisions, we ought to point out that these three Implementing Agreements provided for new home terminals; established long runs that generally would have been considered interdivisional runs; established new crew change points (e.g., on the Missouri Pacific at Popular Bluff and the Cotton Belt at Ilmo, and agreed to Dexter to facilitate traffic); extended runs; and removed Jefferson City from its customarily associated territories and placed it in the Kansas City Hub for its work to be attrited. Moreover, the North Little Rock/Pine Bluff Implementing Agreement provided that trains could be run from Memphis, to Pine Bluff; however, the trains could not run from Memphis to Little Rock through Pine Bluff without a crew change.

In addition, it was agreed that the Missouri Pacific-Upper Lines bargaining agreement (“CBA”) and several other agreements would be the CBA in the Hub.

As a result of these extreme changes that provided the Carrier with a more efficient and lower cost operation, the employees requested and obtained (1) a limitation for three interdivisional runs already in being; (2) a litany of extended runs; and (3) the three provisions relied upon by BLET in support of its position before the New York Dock Arbitrator. It was BLET’s negotiating position

that the “necessity” test had been pushed to its limits and that these provisions were necessary to keep UP honest in interpreting and applying the Hub Implementing Agreement and to provide a modicum of labor stability.

Thus, each Hub Implementing Agreement adopted the collective bargaining agreement or schedule rules of the former Missouri Pacific Railroad Company-Upper Lines; however, each of the aforementioned Hub Implementing Agreements specifically provided that the Implementing Agreement provisions would supersede any prior agreement that was in conflict therewith. Article IV of the North Little Rock/Pine Bluff Hub Implementing Agreement, as well as Article IV of the two other Implementing Agreement, reads as follows (UP Ex. E at 19):<sup>2</sup>

#### **ARTICLE IV - APPLICABLE AGREEMENTS**

- A. All engineers and assignments in the territories comprehended by this Implementing Agreement currently in effect between the Union Pacific Railroad Company and the Brotherhood of Locomotive Engineers dated October 1, 1977 (reprinted October 1, 1991), including all applicable national agreements, the “local/nations” agreement of May 31, 1996, and all other side letters and addenda which have been entered into between the date of last reprint and the date of this Implementing Agreement. **Where conflicts arise, the specific provisions of this Agreement shall prevail.** None of the provisions of these agreements are retroactive. (Emphasis original).

Each of the Hub Implementing Agreements contains a provision entitled “Saving Clause.” (UP Ex. E at 24). In Section C, all *non-conflicting* collective bargaining agreements were preserved, including the *existing* ID service between the terminals *within* the *new* seniority districts:

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References to “UP Ex.” are to the exhibits accompanying UP’s Appeal or Petition for Review.

**ARTICLE VIII - SAVINGS CLAUSE**

A. The provisions of the applicable Schedule Agreement will apply unless specifically modified herein.

\* \* \*

C. Nothing in this Agreement will preclude the use of any engineers to perform work permitted by other applicable agreements *within the new seniority districts* described herein, i.e., engineers performing Hours of Service Law relief within the road/yard zone, *ID engineers performing service and deadheads between terminals*, road switchers handling trains within their zones, etc.

D.

Several *existing* ID Agreements were preserved, either in total, or in part, and modified for Hub operations. See UP Ex. E at 20, Ex. F at 13, 20 and Ex. G at 13. **However**, pursuant to the language of Side Letters to the Hub Implementing Agreements, No. 20 in the North Little Rock/Pine Bluff Hub Implementing Agreement, none of the provisions of *any preexisting* Agreement could modify or change - - or in any way nullify or undermine - - any of the provisions of the Hub Implementing Agreements involved herein.

**NORTH LITTLE ROCK/PINE BLUFF  
HUB IMPLEMENTING AGREEMENT:**

Side Letter No. 20

October 9, 1997

MR D E PENNING  
GENERAL CHAIRMEN BLE  
12531 MISSOURI BOTTOM RD  
HAZELWOOD MO 63042

MR D E THOMPSON  
GENERAL CHAIRMAN BLE  
414 MISSOURI BLVD  
SCOTT CITY MO 63780

MR M L ROYAL JR  
GENERAL CHAIRMAN BLE  
313 WEST TEXAS  
SHERMAN TX 75092-3755

Gentlemen:

**This refers to the merger Implementing Agreement for the North Little Rock/Pine Bluff Hub.**

During our negotiations your Organization raised some concern regarding the intent of Article VIII - Savings Clause, Item C thereof. **Specifically, it was the concern of some of your constituents that the language of Item C might subsequently be cited to support a position that “other applicable agreements” supersede or otherwise nullify the very provision of the Merger Implementing Agreement which were negotiated by the parties.**

**I assure you this concern was not valid and no such interpretation could be applied.** I pointed out that Item C must be read in conjunction with Item A, **which makes it clear that the specific provisions of the Merger Implementing Agreement, where they conflict with the basic schedule agreement, take precedence, and not the other way around.**

The purpose of Item C was to establish with absolute clarity that there are numerous other provisions in the designated collective bargaining agreement, including national agreements, which apply to the territory involved, and to the extent such provisions were not expressly modified or nullified, they still exist and apply. It was not the intent of the Merger Implementing Agreement to either restrict or expand the application of such agreements.

In conclusion, **this letter of commitment will confirm that the provisions of Article VIII - Savings Clauses may not be construed to supersede or nullify the terms of the Merger Implementing Agreement which were negotiated in good faith between the parties. I hope the above elaboration clarifies the true intent of such provisions.**

Yours Truly,

/s/ M A Hartman

M. A. Hartman  
General Director - Labor Relations

(UP Ex. E at 64-65; emphasis original and added).

The chief negotiator for BLET at that time, then General Chairman D. E. Penning, testified in the arbitration involved herein as to the intent and purpose of the quoted Side Letters:

Since the Carrier obtained vast, sweeping changes in the operations of train in the newly formulated “Hubs” (and “Spokes” to the Hubs), combining what were formerly separate seniority districts, I insisted, and obtained, through Side Letter No. 20 in the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, and Side Letter No. 10 in the St. Louis Hub Merger Implementing Agreement, an express, written promise from the Carrier’s negotiator, M. A. Hartman, General Director-Labor Relations, that the Carrier would not use, through the “Savings Clause,” any preexisting Collective Bargaining Agreement to undermine, change, modify, or nullify any of the very provisions of the Hub Merger Implementing Agreements under my jurisdiction that we were negotiating; these Side Letters were solely designed to provide stability to my members and their families as to their operations of trains, their methods of compensation for same, and the location of their home terminals, following the traumatic upheaval caused by the Union Pacific Railroad Company/Southern Pacific Transportation Company merger pursuant to Finance Docket No. 32760. (See BLET Ex. 1).

In other words, the preexisting agreements could not undermine or modify the later negotiated provisions of the Hub Implementing Agreements; otherwise, the Hub Implementing negotiations would be a nullity and absurd and their agreements a nullity under the normal rules of construction.<sup>3</sup>

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Also, it needs to be noted that at those Hubs on all other parts of the merged railroad other than the former MP-Upper Lines involved herein, UP did not incorporate the above-quoted Side Letters. Rather, it sought and obtained *express* contractual language *to preserve* its preexisting right to serve Article IX Notices under the ID provisions of the 1986 BLET National Agreement in *those* Hubs *after* the effective date of the implementation. They specifically state:

New pool operations not covered in this Implementing Agreement between Hubs or one Hub and non-merged area will be handled per Article IX of the 1986 National Implementation Award.

Moreover, the contrary construction now sought by UP of this Board contravenes the quid pro quo for the broad, expansive rights otherwise given the Carrier by the Implementing Agreement.

For the six years following the effective date of the three Hub Implementing Agreements, those agreements were followed as BLET submits. However, on May 16, 2003 and on May 29, 2003, UP served notices, allegedly pursuant to Article IX of the 1986 BLET National Agreement, to establish interdivisional (“ID”) service in the North Little Rock/Pine Bluff Hub Implementing Agreement, which notice, BLET submits, is contrary to and negates the specific provisions of the Hub Implementing Agreement. The specific provisions thereof pertinent to this dispute are those governing (a) the methods of operation of this same service, (b) the pay for this service, and (c) the status of Pine Bluff, Arkansas and North Little Rock, Arkansas, as “home” terminal locations for that Hub until changed by voluntary agreement, by agreement reached through the procedures of the Railway Labor Act, or by future transactions under the New York Dock conditions, which require such implementation. Stated somewhat differently, the notices, purportedly under Article IX of the 1986 BLET National Agreement, change the very provisions of the North Little Rock/Pine Bluff Hub Implementing Agreement that are to supersede the *conflicting* former rights of UP under Article IX and thusly, as found by the New York Dock Arbitrator, violate the provisions of Article IV.A and the side letter quoted above.

Notwithstanding these contractual restraints, and the guidance provided by Article I, Section 2 of the New York Dock conditions and the RLA in the process for dealing with the alleged problem, UP attempts to justify its invocation of Article IX on the basis of traffic pattern changes. As we subsequently show at pages 28-30, the facts upon which that claim is based are inaccurate and in any event do not support the leap in reasoning submitted by UP that this change would justify the Board

to interpret and apply the Hub Implementing Agreement differently than the Arbitrator.

As UP admits, BLET did meet with it after receipt of the I.D. notices and attempted to reach a voluntary agreement but UP was adamant in its position. BLET was also firm in its contention that the matter was one to be resolved under the New York Dock conditions. When BLET found it futile to discuss the matter with UP, it invoked New York Dock arbitration and requested the National Mediation Board to appoint a neutral. UP countered by insisting the NMB send the dispute to an arbitrator pursuant to Article IX of the 1986 National Agreement. BLET vigorously opposed that request. One of the reasons BLET opposed going to an arbitrator under Article IX is that Article IX does not provide for dispute resolution of the nature required by this situation. Rather, Article IX provides the arbitrator only with authority to determine the *conditions*, not the correctness, of the interdivisional service. By agreeing to that kind of interest arbitration, the issue raised by BLET could not be resolved. The NMB appears to have recognized this contention by furnishing a single arbitrator selected by the parties to hear both disputes.<sup>4</sup>

On February 12, 2004, a hearing was held in front of Arbitrator Kenis as to the New York Dock issues, and another hearing was held in the afternoon regarding Article IX of the 1986 BLET National Agreement. Following the hearing, Arbitrator Kenis entered an award in each matter.

Initially, Arbitrator Kenis concluded that jurisdiction over the parties' dispute fell under Article I, Section 11 of New York Dock. Specifically, relying upon the Carrier's own statements,

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UP suggests at page 7 of its appeal that the NMB did something improper by refusing itself to address the jurisdictional issue. That Board has consistently held that the resolution of jurisdictional questions as to New York Dock conditions are for the New York Dock arbitrator. Denver & Rio Grande Western R.R., 7 NMB 409 (1980). This holding has been affirmed by the federal courts. Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557, 564 (8<sup>th</sup> Cir. 1986).

she found the parties recognized that “it is the hub merger implementing agreements which must be interpreted and applied in order to determine whether they act as a bar to the establishment of ID service pursuant to Article IX of the parties’ 1986 National Agreement.” UP Ex. A, Award in New York Dock Arbitration at 15. She stated, “[O]ur task is to construe the provisions of the hub merger implementing agreements and decide the question of whether the language therein prevents the application of Article IX under the circumstances presented. \* \* \* [I]t is the implementing agreements which are primarily the focus of the analysis and not Article IX.” Id., 15-16. She then held:

As prior New York Dock awards involving these same parties have recognized, the interpretation and application of merger implementing agreements falls within the ambit of Article I, Section 11 of the New York Dock conditions.<sup>5/</sup> Accordingly, we find that this Committee has jurisdiction over the instant dispute.

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<sup>5/</sup> See, BLE and UP, New York Dock Arbitration Committee under Article 1, Section 11 of the New York Dock Conditions, I.C.C. Finance Docket No. 32760 (LaRocco, 2000) (dispute concerning the interpretation and application of two merger implementing agreements falls within the jurisdiction of Article 1, Section 11 of the New York Dock Conditions); BLE and UP, New York Dock Arbitrations Committee under Article 1, Section 11 of the New York Dock conditions, I.C.C. Finance Docket No. 32760 (LaRocco, 2001) (side letter to hub merger implementing agreement did not modify a schedule rule beyond the geographical territory of the St. Louis Hub).

Id., 16. The agency’s attention is also directed to the Arbitrator’s references to BLE and UP, New York Dock Arbitration Committee under Article 1, Section 11 of the New York Dock Conditions, Award No. 1 (LaRocco, 2003), and further to UP and BLE, NRAB First Division, Award No. 25418 (accepting UP’s argument that New York Dock issues are not subject to Section 3 RLA jurisdiction). Id., at 14.

Arbitrator Kenis then turned to the merits of the dispute by interpreting and applying the terms of the Hub Implementing Agreements. Although finding the Hub Implementing Agreements had not taken away all of the railroad's rights to set up interdivisional service, she concluded that in those implementing agreements UP had given up its right to establish the herein desired *interdivisional service*. In so ruling, she relied upon Article IV(A) of the Hub Implementing Agreements, which states that conflicts between those agreements and preexisting CBAs would be resolved in favor of the Implementing Agreements. Arbitrator Kenis then ruled:

It would appear that numerous provisions of the implementing Agreements governing the operations of trains, methods of compensation and home terminal locations would be nullified or modified if the new service runs were put into effect. Accordingly, the provisions of the Hub Merger Implementing Agreements must prevail in accordance with Article IV.A and the side letter set forth in full above.

Id. at 25.

Arbitrator Kenis found that UP could not establish the purposed interdivisional services in each of the three Hubs because they conflicted with the terms of the Hub Implementing Agreements and with the agreed upon operations, the methods of compensating the engineers and home terminal locations. Specifically as to the proposed North Little Rock to Memphis ID service, the Arbitrator found that Article I(A)(5) of the North Little Rock/Pine Bluff Hub Implementing Agreement prohibited UP from having engineers operate between Pine Bluff and North Little Rock on their way to Memphis. UP's proposed ID run would have required them to do so with reduced earnings for the longer run. As a result of this interpretation and application of the Hub Implementing Agreement, she found the proposed ID service could not be established.

It is well settled by this Board that New York Dock Arbitrators have sole jurisdiction to

interpret and apply the terms and provisions of agency imposed implementing agreements. In this particular case, the Arbitrator's interpretation and application is not egregiously wrong and is not reversible under applicable law related to enforcing arbitration awards. As shown in the subsequent portion of this reply, the Award is final and binding and should be upheld.

## ARGUMENT

### **A. Standard of Review**

Customarily, the Board describes the standard of review of arbitration decisions as follows:

Under 49 CFR 1115.8, the standard for review of arbitration decisions is provided in Chicago & North Western Tptn. Co.- Abandonment, 3 I.C.C. 2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Under Lace Curtain, we accord deference to arbitrators' decisions and will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Review of arbitral decisions has been limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions." Id. at 736. We generally do not overturn an arbitral award unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it is outside the scope of authority granted by the conditions. Applying these standards here, we find no basis for reviewing and overturning the arbitrator's decision in this case.

BLET Ex. 2, Burlington Northern and Santa Fe Ry. Co. - - Petition for Review of Arbitration Award, STB Finance Docket No. 32549 (Sub-No. 24) (service date of Sept. 25, 2002) at slip op. 3.

There are two phrases used in the standard that demand further definition. They are "recurring or otherwise significant issues of general importance regarding the interpretation of [the Board's] labor protective conditions" as the basis for the limited review, and vacation of the award for an alleged substantive mistake because of "egregious error." Of course, "egregious" means "extraordinarily bad" or "flagrant." And citing Loveless v. Eastern Air Line, Inc., 681 F.2d 1272,

1275-76 (11<sup>th</sup> Cir. 1982), the Board has said: “‘Egregious error’ means ‘irrational,’ ‘wholly baseless and completely without reason,’ or ‘actually and indisputably without foundation in reason and fact.’”

We also know that issues of causation, resolution of factual questions, criticism of the conclusion of the arbitrator, and the arbitrator’s failure to provide detailed discussion of the issues before him or her are not matters the Board reviews as recurring or significant. See Norfolk Southern Corporation - Control - Norfolk and Western Ry. Co. and Southern Ry. Co., Finance Docket No. 29430 (Sub-No. 20), 4 I.C.C. 2d 1080, 1086 (1988). Further, we know that the agency’s “deference to the arbitrator’s decision will vary with the nature of the issue involved, ranging from the most deferential treatment in [\*7] the case of evidentiary issues such as causation . . . [citation omitted] to significantly less deference when reviewing interpretation of Commission regulations or orders and matters of transportation policy.” See CSX Corporation - Control - Chessie System, Inc. and Seaboard Coast Line Industries (Arbitration Review), 1989 ICC Lexis 274 at \*6-7.

Under these standards of review and past application, UP has a heavy burden in obtaining review of the Arbitrator’s Award and, if review is granted, the Award’s vacation as sought.

**B. THIS CASE SHOULD NOT BE REVIEWED, BECAUSE THE SCOPE OF REVIEW IS LIMITED TO RECURRING OR OTHERWISE SIGNIFICANT ISSUES OF GENERAL IMPORTANCE REGARDING THE INTERPRETATION OF THE BOARD’S LABOR CONDITIONS.**

In Lace Curtain, the agency held that it would generally defer to an arbitration panel’s decision and would limit its review to “recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions.” 3 I.C.C. 2d supra at 735-36.

UP contends that due to dicta in Delaware & Hudson Ry. Co. - Lease and Trackage Rights

Exemption - Springfield Terminal Ry. Co., 7 I.C.C. 2d 1050 (1991) supplemented, 8 I.C.C. 2d 839 (1992) (“Springfield Terminal”), at some point of time disputes as to the interpretation and application of merger implementing agreements are not subject to New York Dock arbitration. 8 I.C.C. 2d at 846. From this premise, it leaps to the conclusion that the current issue is a significant issue of general importance. This reasoning, however, totally overlooks the Commission’s overall ruling set forth in both opinions that “[a]ny dispute concerning the proper interpretation of the effect of these critical terms [in the transaction imposed implementing agreement] must be resolved within the framework of the labor conditions we imposed . . . .” Id. In other words, the interpretation of the provisions of implementing agreements must be arbitrated pursuant to the provisions of Article I, Section 11 of the New York Dock conditions. Clearly, under the cited rulings, the involved Hub Implementing Agreement interpretation disputes were within the jurisdiction of New York Dock arbitration.

Any doubt that New York Dock arbitrators are to decide the interpretations of the parties’ implementing agreements has been affirmed by the Board in two recent cases. In USX Corporation-Control-Transtar, Inc., (Arbitration Review), STB Finance Docket No. 33942 (Sub-No. 1) (STB service date of September 24, 2002) (copy attached as BLET Exhibit 3), the Board held that the New York Dock arbitrator’s interpretation of who was to be considered a displaced employee under Article VII of the implementing agreement did “not involve the general applicability of the New York Dock conditions, nor, contrary to the railroad parties’ contentions, does it involve an interpretation of those conditions.” In the eyes of the Board “the arbitrators simply interpreted the parties’ implementing agreement carrying out the conditions.” Id. at 6. Likewise, in another case decided over ten years after Springfield Terminal, the Board found no basis under Lace Curtain to

review a garden variety matter routinely handled by New York Dock arbitration panels. Burlington Northern, Inc., etc. - Control and Merger - Santa Fe Pacific Corporation, et al. (Arbitration Review), STB Finance Docket No. 32549 (Sub-No. 23) (service date of September 25, 2002) (BLET Ex. 4).

In this regard, the Board stated:

We find no basis under Lace Curtain to review this Award and decline to do so. First, we reject BNSF's claim that the Board must review the Award because it implicates "recurring or otherwise significant issues." In this case, the Panel looked to see if a specific prior CBA, the National Agreement, applied to employees affected by certain specific operational changes. Finding that it did, the Panel then determined that the CBA could be given effect without depriving the public of the transportation benefits of the acquisition or preventing BNSF from implementing the proposed operational changes. The Panel's action here in interpreting a CBA is the kind of task in which arbitrators routinely engage and does not present an issue of general importance regarding the interpretation of our labor conditions.

Id. at 5.

As we previously have shown, the dispute here as to interpretation of the North Little Rock/Pine Bluff Hub Implementing Agreement is not a recurring dispute or one likely to arise again. Moreover, as the above cases consistently show that interpretations of implementing agreement provisions are grist for the mill of New York Dock arbitration. UP has offered no basis for considering the instant case different and unique, one that needs the Board's expertise.

**C. THE NEW YORK DOCK ARBITRATOR HAD AUTHORITY TO DETERMINE WHETHER SHE HAD JURISDICTION UNDER ARTICLE I, SECTION 11 TO INTERPRET AND APPLY THE TERMS OF THE HUB IMPLEMENTING AGREEMENTS.**

As the cited cases in the above section reveal, the Arbitrator did have authority under New York Dock, contrary to UP's assertion, to assume jurisdiction over any dispute involving the

interpretation of any terms of the Hub Implementing Agreement that may be involved. According to these authorities, Article I, Section 11 has not been limited to “dispute[s] or controvers[ies] with respect to the interpretation, application or enforcement of any provision of” New York Dock. At page 10 of the appeal, however, UP claims that New York Dock arbitration must have something to do with labor protective benefits or operational changes needed for the approved merger transaction; otherwise, the arbitrator has no jurisdiction. This assertion is wrong for at least four reasons.

First, ever since Lace Curtain, as stated most recently in Burlington Northern, Inc., Finance Docket No. 32549 (Sub-No. 23), (BLET Ex. 4 at 2, “if the parties . . . disagree on the interpretation of an implementing agreement, the issues are resolved by arbitration, subject to an appeal under our differential Lace Curtain standard of review.” (Footnote omitted).

Second, the interpretation sought by BLET is related to the operational changes needed for the merger transaction, which UP now wishes to circumvent, and, therefore, also relates to the employees’ protections provided through the language contended in the Hub Implementing Agreement and the applicable Side Letter.

Third, UP in judicial forums has submitted the argument that employees filing hybrid breach of collective bargaining agreement and breach of duty of fair representation cases arising from the Carrier’s application of the Hub Implementing Agreements must file and progress claims under Article I, Section 11 of the New York Dock conditions. See, e.g., UP’s Brief in Stroud v. Brotherhood of Locomotive Engineers and Union Pacific R.R., U.S. Court of Appeals for the Fifth Circuit, Case No. 02-40579, at 18-19 (BLET Ex. 5) (“well settled that disputes over the modification of seniority rights of employees in connection with STB approved mergers must be resolved under

the arbitration procedures contained in the New York Dock conditions. \* \* \* The mandatory arbitration procedures are set forth in Article I, Section 11 . . . .”); UP Brief in Moore v. Brotherhood of Locomotive Engineers and Union Pacific R.R., U.S. Court of Appeals for the Tenth Circuit, Case No. 00-3219, at 18 (BLET Ex. 6) (“Article I, Section 11 of the New York Dock conditions provides for *arbitration of disputes arising over the interpretation and application of the particular terms of a negotiated or arbitrated implementing agreement.*”); UP Brief in Kasel v. Brotherhood of Locomotive Engineers and Union Pacific R.R., U.S. Court of Appeals for the Tenth Circuit, Case No. 01-1088, at 33 (BLET Ex. 7). The UP was successful in all of these cases by having the Court dismiss for lack of jurisdiction on the basis that these claims required the interpretation of the provisions of the Hub Implementing Agreements, as to which Article I, Section 11 was provided exclusive primary jurisdiction. See, e.g., Stroud v. Brotherhood of Locomotive Engineers, Decision of Fifth Circuit (BLET Ex. 8); at 2, 3; also Kasel v. Brotherhood of Locomotive Engineers, Decision of Tenth Circuit (BLET Ex. 9), at 2.

Finally, UP has not provided any basis supporting its concept that some time after two years but before six years the Board’s jurisdiction over the Hub Implementing Agreements automatically expires, even if the Carrier has not sought to act under Article I, Section 2 of the New York Dock conditions. In pertinent part that condition states:

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

Even though Carrier suggests the matters in dispute revert to Railway Labor Act status, UP has never

served a Section 6 Notice to bargain on the changes sought in the Hub Implementing Agreements. Why? By utilizing Article IX the Carrier can establish the interdivisional service without more; only the terms and conditions referred to in Sections 2 and 3 are subject to interest arbitration. UP Ex. D at 17, 18.

Moreover, the question is answered by the Commission's decision that followed Springfield Terminal by several years. CSX Corporation - - Control - - Chessie System, Inc., et al (Arbitration Review), Finance Docket No.28905 (Sub-No. 27) (service date of November 22, 1995) (BLET Ex. 10). In this case, the Carrier served notice in 1994 under New York Dock imposed in transactions which had been approved by the Commission as early as 30 years prior thereto. CSXT sought to merge operations in the proposed Eastern District by use of a single pool of employees. The employees objected on the basis that CSXT had to notice and implement New York Dock related coordinations when the former carriers first came under common control or soon thereafter. Even though the authority had been used and existed for thirty years, the Commission rejected the union's position and held that it had "never imposed a deadline on making merger-related operational changes," because "causality is not diminished with the basis of time." Id., 9. The decision of the New York Dock arbitrator was upheld upon the basis that there was a reasonably direct connection between the agency's decisions and the 1994 coordination. Id., 10. Here, there is such connection between the Hub Implementing Agreement, and the stealth bypass by UP to circumvent its merger-related obligations. The rationale in CSX Corporation is equally applicable to this case. CSXT bound itself to New York Dock procedures. UP also bound itself to those conditions as embodied in the Hub Implementing Agreement. The implementing agreements incorporated those procedures subject to change by voluntary agreement, an agreement under the RLA notice, negotiation and

mediation procedures, or by a future transaction under New York Dock.

**D. THE ARBITRATOR DID NOT COMMIT EGREGIOUS ERROR. HER DECISION DRAWS ITS ESSENCE FROM THE PROTECTIVE CONDITIONS AND THE HUB IMPLEMENTING AGREEMENTS, WHICH INTERPRETATIONS ESTABLISH THAT THE PRE-EXISTING CBAS ARE IN CONFLICT WITH THE IMPLEMENTING AGREEMENTS. THE LATTER SUPPLANT ARTICLE IX AS NECESSARY, AS FOUND BY THE ARBITRATOR.**

If the Board decides to review the New York Dock Arbitrator's decision, notwithstanding its recent decisions on similar issues involving the interpretation and application of implementing agreements - - and by raising the issue we do not mean to suggest the Board should - - we submit the opinion in CSX Corporation, *supra*, is informative. In that case, the Arbitrator's findings on linkage were entitled to deference and would only be reversed upon a showing of egregious error. In addition, as to that case, the Commission said that the issue of whether the railroad had bound itself to follow RLA procedures (the reverse of here), in undertaking the changes at issue, involved factual issues, which findings warranted the agency's deference. Here, the railroad bound itself to the New York Dock and the Hub Implementing Agreement procedures. From that observation, it is clear, we submit, that (1) the Arbitrator had before her an issue of causation, and (2) that she found on the facts before her that UP had bound itself on changes in home terminals, creation of new interdivisional service extending the ID service agreed upon in the Hub Implementing Agreement negotiations, and reducing the pay of the engineers on the extended runs. BLET requests the affirmance of the Arbitrator's award, as done in that case. Linkage in this case without a doubt, and as found by the Arbitrator, arose from the parties' decision to achieve the full transportation benefits of the merger by overriding to the extent necessary the existing collective bargaining agreement and replacing it with inter-railroad changes covered by the imposed New York Dock conditions.

Whether UP and BLET were right or wrong in that decision, is irrelevant to this Board's ruling, as it was in the cases cited by BLET herein.

In Burlington Northern, Inc. et al. - Control and Merger - Santa Fe Pacific Corporation, et al. (Arbitration Review), STB Finance Docket No. 32549 (Sub-No. 23), this agency had before it a similar case. In that case, BNSF and the United Transportation Union agreed upon an implementing agreement concerning a consolidation several years after the BN and Santa Fe had been approved. The parties could not agree on two matters, one of which was whether the protections under the New York Dock conditions or the National Agreement I.D. service applied. BNSF argued that subsequent extended run changes sought by it were unavailable to the separate carriers before the merger and, as such, were inter-railroad changes covered by the New York Dock conditions imposed in the merger case. UTU contended that the National Agreement protections applied. The New York Dock arbitration panel found that, as an unresolved matter, the runs at issue were interdivisional service changes, the National Agreement protections applied, and that it was not necessary to override the existing collective bargaining agreement which had been applied following the merger to achieve the transportation benefits of the transaction. BLET Ex. 4 at 2.

At the outset, the Board described the limited standard of review in a case of this nature and its "deference to the arbitrator's competence in this area and special role in resolving labor disputes." Id., 4. In this respect, the Board stated that it is "particularly deferential to findings of fact made by arbitrators, setting them aside only when shown they constitute egregious error" and accordingly established that its analysis would focus "on whether BNSF has met its burden of proof under these criteria." Id.

The reasoning of the Board in that case is fully applicable to that at bar and leads to the same

conclusion that was made by the agency in September 2002. Finding no basis to review the award under Lace Curtain, the Board rejected BNSF's contention that it implicated "recurring or otherwise significant issues." Id., 5. The Board explained that the Arbitrator looked to see if the prior CBA applied to the employees and then if it could be given effect without depriving the public of the transportation benefits of the acquisition. Id. Therefore, the Board held that the Arbitrator's action "in interpreting a CBA is the kind of task in which arbitrators routinely engage and does not present an issue of general importance regarding the interpretation of our labor conditions." Id. (Footnote omitted).

Next, this agency found that BNSF had not carried its "heavy evidentiary burden to show why" the Board must overturn the findings of the arbitral panel. Id. In this regard, the Board pointed out that BNSF had not shown that the Arbitrator's findings "reflect[ed] egregious error or that the Award is irrational." All the Arbitrator found was that "the changes at issue were, in fact, interdivisional changes of an existing railroad, ATSF." Id. In regard to the Board's holding that the Arbitrator had not acted irrationally, it said that the petitioner had not carried its burden of proof on that record that "the application of the CBA would prevent the intended transportation benefits of the transaction." Id. at 6.

The Board next rejected BNSF's assertion that the Award did not draw its essence from New York Dock. Relying, in part, on Article I, Section 3 of the New York Dock conditions, the Board disposed of this issue in these terms: "In this case, consistent with New York Dock, the Panel interpreted the prior CBA, found that it applied to the issue runs, and concluded that affected employees could properly choose the CBA protections over the New York Dock protections." Id. (Footnote omitted).

Finally, the Board rejected BNSF's claim that the Arbitrator "exceeded the scope of its authority." Id., 7. Reflecting upon the oft-stated judicial premise that the work of arbitrators is to interpret agreements and as long as they do so, even if they are totally wrong,<sup>5</sup> the award must be upheld, the Board stated:

As discussed above, the Panel did not abrogate or override the imposed New York Dock conditions. Instead, it interpreted the National Agreement and found that it was not necessary to abrogate that agreement in order to implement the transaction. [Footnote omitted]. Such a determination is a matter well within the expertise of arbitrators. [Footnote omitted].

The same reasoning applies to the instant case. The Arbitrator interpreted both the New York Dock imposed Hub Implementing Agreement and the National Agreement. She found that the New

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Contrary to the views expressed by UP, part by the ruling in Union Pacific R.R. v. Surface Transportation Board, 358 F.2d 31 (D.C. Cir. 2004), review of an Arbitration Award is not endless. As the Supreme Court stated in Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2002), (per curiam), judicial review of a labor-arbitration decision . . . is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement . . . . "[T]he fact that "a court is convinced [the arbitrator] committed serious error does not suffice to overturn [the arbitrator's] decision."

Perhaps the concept of what is an egregious error is summed up best by Judge Posner of the Seventh Circuit in Hill v. Norfolk Western Ry., 814 F.2d 1192, 1194-95 (7<sup>th</sup> Cir. 1987):

As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract, it is not whether they clearly erred in interpreting the contract, it is not whether they grossly erred in interpreting the contract . . . . If they did, their interpretation is conclusive . . . . [A] party will not be heard to complain merely because the arbitrators' interpretation is a misinterpretation.

Simply put, they just must interpret the agreement.

York Dock Implementing Agreement overrode the National Agreement in several respects so that only certain runs of an interdivisional nature and changes in terminals could be made at this time. While these actions did not abrogate the National Agreement, the parties saved or preserved those changes to its application so that changes to the involved runs could not subsequently be made unilaterally or on an ad hoc basis. The Implementing Agreement restrictions would have to be changed consistent with Article I, Section 2 of New York Dock by voluntary agreement or through the Section 6 procedures of the Railway Labor Act, or by New York Dock, or other Board-imposed conditions related to a subsequent transaction. The findings on which that determination was made are not egregious nor irrational, and the Award draws its essence from New York Dock and the New York Dock negotiated Hub Implementing Agreements. The Arbitrator did not abrogate the New York Dock Conditions; rather, she enforced them. The Award she drew is reasonable, well within her arbitral expertise, and did not exceed the scope of her authority. In sum, UP has failed to carry its burden to make any of the required showings under the Lace Curtain standard of review.<sup>6</sup>

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UP's reliance on alleged past practice at pages 22-26 also fails to denigrate the Arbitrator's conclusions. Factually, as shown from the differences in agreement language, it is clear the UP and BLET intended a different result in these Hubs. If UP, as the draftsman of the Implementing Agreements, had intended the application to be similar, it knew how to obtain that result. Furthermore, past practice is difficult, if not impossible, to establish. In United Transp. Union v. St. Paul Depot Co., 434 F.2d 220, 222-23 (8<sup>th</sup> Cir. 1970), cert. denied, 401 U.S. 975 (1971), the Court said in terms destructive of UP's strained argument that a past practice existed which required Arbitrator Kenis to find that Article IX applied:

An "established practice under the [Railway Labor] Act should demonstrate not only a pattern of conduct but also some kind of mutual understanding, either express or implied. Thus, prior behavior by itself, although similar to the acts in dispute, falls short of an "established practice." Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might

Any doubt that might remain, we submit, is removed by the Board’s similar findings and holding in USX Corporation - Control Exemption - Transtar, Inc. (Arbitration Review), STB Finance Docket No. 33942 (Sub-No. 1) (September 19, 2002) (BLET Ex. 3, at 6-7. There too an Arbitrator “simply interpreted the parties’ implementing agreement carrying out the conditions.” And, as suggested here, the Board found and held:

Examining the language of the implementing agreement and other indicia of intent, the Arbitrator determined that the parties themselves intended to precertify affected employees so as to eliminate the need to show causation in this case, and the carrier’s arguments accurately reflect the bargain it made with TCU.<sup>6/</sup> We do not find that the Arbitrator’s decision in this regard was egregious error, or that petitioner has demonstrated any other basis under our Lace Curtain standards that would warrant our review. [Footnote omitted].

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<sup>6/</sup> Thus, the Arbitrator’s decision should not be broadly construed, nor read in any way as departing from the general principle that to receive benefits under the New York Dock conditions, an employee must demonstrate that he or she was adversely affected by a Board authorized consolidation.

In sum, the Arbitrator’s decision does not warrant review and there is no basis upon which

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Footnote 6 continued:

reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute.

Here, in addition to the differences previously shown, i.e., different union committees and agreements were involved, UP never attempted to or placed into effect different extended runs or additional I.D. service in the North Little Rock/Pine Bluff Hub or the other two Hubs. Thus, there has been absolutely no “prior conduct of the[se] parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the [Hub Implementing Agreement].” Id., 222.

it can or should be set aside.

**E. MOREOVER, PETITIONER'S CLAIM THAT THE INVOLVED INTER-DIVISIONAL SERVICE IS NECESSARY IS INACCURATE AND SIMPLY DOES NOT JUSTIFY ITS ATTEMPT TO TRANSFER WEALTH FROM THE EMPLOYEES TO UP.**

In a last ditch attempt to provide some justification for review, UP asserts that as a result of increased traffic at Memphis there is congestion that requires that the service run through Pine Bluff to North Little Rock. Currently, some trains run to Pine Bluff where there is an exchange of the crew that proceeds with the train. No justification has been provided by UP for the interdivisional service through the Kansas City Hub and the St. Louis Hub.

There are at least three reasons why UP's contentions must be rejected. From the outset of the merger, UP's hub-and-spoke arrangement has caused congestion, which has continued since the UP/SP merger and still continues. See "Woes at Union Pacific Create a Bottleneck for the Economy," Wall Street Journal, July 22, 2004, at A1. (BLET Ex. 11). As well known and this article establishes, much of the congestion arises from UP's refusal to hire and train a sufficient force of operating employees. The institution of interdivisional service is, if at all, a band aid that will not heal the problem.

The claim that there has been a sudden surge of traffic in the Memphis - Little Rock Corridor does not withstand scrutiny as the reason that UP must seek operational relief under Article IX of the BLET 1986 National Agreement. On October 9, 1997, the date the North Little Rock/Pine Bluff Hub Implementing Agreement was signed, the parties agreed to adjust the work equity of the former St. Louis Southwestern ("SSW") engineers and the former UP engineers for the combined pool from Memphis to North Little Rock. BLET Ex. 12. Based upon preexisting equity mileage, it was agreed

that there would be thirty (30) prior-righted turns in the Memphis-North Little Rock freight pool (X344-RE30). The agreement addressed the preexisting equity to the 30 turns in that pool as of 1997. Further, it provided that any new turn above 30 would be protected based upon seniority rights in the Zone and, thereafter, from the Hub common engineers' seniority roster.

As of October 9, 1997, the UP and BLET *agreed that the preexisting mileage run by both the former SSW crews and UP crews, under the UP (Missouri Pacific-Upper Lines) mileage agreement, required that the pool be manned by 30 turns.* *Id.* at 25-a. This determination was computed on the basis of UP's data as stated in Side Letter No. 8 of the Hub Implementing. BLET Exhibit 13.

At the New York Dock Arbitration Hearing on February 12, 2004, UP was provided with a copy of BLE Exhibit "AB" and made no objection to making the exhibit a part of the record. A copy thereof is attached hereto as BLET Exhibit 14.

BLE Arbitration Exhibit "AB" established the number of turns in the Memphis to North Little Rock freight pool in February 10, 2004 to be thirty-one (31), with the thirty-first (31<sup>st</sup>) turn (AR 21) being added on January 21, 2004, and the thirtieth (30<sup>th</sup>) (AR 24) being added on January 20, 2004. As such, as of January 19, 2004, there were 29 turns in the Memphis to North Little Rock freight pool (X344-RE30), one less than in the freight pool as of February 15, 1998, the date of implementation of the North Little Rock/Pine Bluff Hub Merger Agreement.

If there had been an 81% increase in traffic in the Memphis to North Little Rock corridor, there should have been a corresponding increase in the number of pool turns protecting the alleged increase in traffic per the New York Dock Hub Implementing Agreement. In fact, as in January 2004, or September 30, 2004, at the filing of UP's appeal herein, UP had twenty-nine (29) turns in

the Memphis to North Little Rock freight pool, one (1) fewer than the 30 on the date of implementation of the North Little Rock/Pine Bluff Hub Agreement. See BLET Ex. 15, Declaration of Gary W. Bell, Local Chairman of BLET Division 182.

In short, the above facts show the primary reason for the Carrier's use of Article IX to be financial, not operational or for transportation benefits as that term is normally used. Here, there is no operational efficiency. It already has the right to provide directional traffic in this Corridor. Id., ¶11. If anything, operations may be reduced a few minutes, no more. Those minutes even can be limited by a running change of crews. The real change is the fact that UP can extend the run 51 miles and eliminate employee payments. By negating its commitments, UP will realize a reduction in labor costs exceeding at a *minimum* \$1.25 million annually. See BLET Ex. 14 at ¶¶8-11. This cavalier treatment of its employees results in a transfer of wealth from those employees to the Carrier. It does not constitute a benefit to the public.

### **CONCLUSION**

Based upon the foregoing reasoning and authorities, the respondent Brotherhood of Locomotive Engineers & Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters, respectfully requests that the Board deny the petition for review.

Respectfully submitted,



**CHARLES R. RIGHTNOWAR**

**General Chairman**

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**Attorneys for Respondent**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by first class mail, postage prepaid, upon Clifford A. Godiner, Esq., and Rodney A. Harrison, Esq., Thompson Coburn LLP, One US Bank Plaza, St. Louis, Missouri 63101, attorneys for petitioner on this 27<sup>th</sup> day of October 2004.



**HAROLD A. ROSS**

**Attorney for Respondent**

**APPENDIX**  
**BLET EXHIBITS**

Exhibit No.		Appendix Page No.
BLET Exhibit 1	Penning Affidavit (Organization Exhibit D at Arbitration).....	1
BLET Exhibit 2	<u>Burlington Northern and Santa Fe Ry. Co. - - Petition for Review of Arbitration Award</u> , STB Finance Docket No. 32549 (Sub-No. 24) (service date of September 25, 2002).....	4
BLET Exhibit 3	<u>USX Corporation - Control - Transtar, Inc. (Arbitration Review)</u> , STB Finance Docket No. 33942 (Sub-No. 1) (service date of September 24, 2002).....	10
BLET Exhibit 4	<u>Burlington Northern, Inc., etc - Control and Merger - Santa Fe Pacific Corporation (Arbitration Review)</u> , STB Finance Docket No. 32549 (Sub-No. 23) (service date of September 25, 2002).....	17
BLET Exhibit 5	UP Brief in <u>Stroud v. Brotherhood of Locomotive Engineers and Union Pacific R.R.</u> , U.S. Court of Appeals for the Fifth Circuit, Case No. 02-40579.....	24
BLET Exhibit 6	UP Brief in <u>Moore v. Brotherhood of Locomotive Engineers and Union Pacific R.R.</u> , U.S. Court of Appeals for the Tenth Circuit, Case No. 00-3219.....	36
BLET Exhibit 7	UP Brief in <u>Kasel v. Brotherhood of Locomotive Engineers and Union Pacific R.R.</u> , U.S. Court of Appeals for the Tenth Circuit, Case No. 01-1088.....	46
BLET Exhibit 8	Decision of Fifth Circuit in <u>Stroud v. Brotherhood of Locomotive Engineers</u> .....	54
BLET Exhibit 9	Decision of Tenth Circuit in <u>Kasel v. Brotherhood of Locomotive Engineers</u> .....	57
BLET Exhibit 10	<u>CSX Corporation - - Control - - Chessie System, Inc., et al. (Arbitration Review)</u> , Finance Docket No. 28905 (Sub-No. 27) (service date of November 22, 1995).....	59
BLET Exhibit 11	“Woes at Union Pacific Create a Bottleneck for Economy,” <u>Wall Street Journal</u> , July 22, 2004, Page A-1.....	77

BLET Exhibit 12	December 9, 1997 side letter agreement between BLET and UP.....	80
BLET Exhibit 13	Side Letter No. 8 to North Little Rock/Pine Bluff Hub Implementing Agreement.....	83
BLET Exhibit 14	BLET Exhibit “AB” to Arbitrator Kenis.....	85
BLET Exhibit 15	Declaration of Gary B. Bell Chairman with computer printout attached.....	88

**AFFIDAVIT OF DENNIS E. PENNING**

Dennis E. Penning, under oath, states the following facts:

1. I was the General Chairman, Brotherhood of Locomotive Engineers ("BLE"), Union Pacific Railroad-Eastern Region (former Missouri Pacific Railroad and former Chicago & Eastern Illinois Railroad), from May, 1995, until October, 1998.

2. In my capacity as General Chairman, I was personally involved in all of the negotiations of each of the several Hub Implementing Agreements, including, but not limited to, the St. Louis Hub Merger Implementing Agreement, Kansas City Hub Merger Implementing Agreement, and North Little Rock/Pine Bluff Merger Implementing Agreement that established the labor conditions of the Union Pacific Railroad merger with the Southern Pacific Transportation Company, pursuant to Surface Transportation Board Finance Docket 32760;

3. The Union Pacific Railroad ("UP") management insisted that the Merger Implementation Agreements, pursuant to Finance Docket 32760, be negotiated on a "Hub" basis whereby the major terminals would be merged separately, with all of the inbound/outbound trackage to each terminal acting as "spokes" to the "Hub."

4. Each of these "Hubs" were negotiated separately in time, and thereafter ratified by Membership vote of only those Members working on the territory of the newly proposed "Hub"; each of the "Hubs" was implemented separately in time.

5. For example, the members living within the territory of the North Little Rock/Pine Bluff Hub were not permitted to vote on the St. Louis Hub Merger Implementing Agreement, or vice versa.

Exhibit 1

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6. Since the Carrier obtained vast, sweeping changes in the operations of trains in the newly formulated "Hubs" (and "Spokes" to the Hubs), combining what were formerly separate seniority districts, I insisted, and obtained, through Side Letter No. 20 in the North Little Rock/Pine Bluff Hub Merger Implementing Agreement, Side Letter No. 9 in the Kansas City Hub Merger Implementing Agreement, and Side Letter No. 10 in the St. Louis Hub Merger Implementing Agreement, an express, written promise from the Carrier's negotiator, M. A. Hartman, General Director – Labor Relations, that the Carrier would not use, through the "Savings Clause," any preexisting Collective Bargaining Agreement to undermine, change, modify, or nullify any of the very provisions of the Hub Merger Implementing Agreements under my jurisdiction that we were negotiating; these Side Letters were solely designed to provide stability to my members and their families as to their operations of trains, their methods of compensation for same, and the location of their home terminals, following the traumatic upheaval caused by the Union Pacific Railroad Company/Southern Pacific Transportation Company merger pursuant to Finance Docket No. 32760.

7. Unlike the Hub Merger Implementing Agreements negotiated by other General Chairmen on other geographical territories of the Union Pacific Railroad Company, I did not agree to a Collective Bargaining Agreement provision that preserved the Carrier's former rights under Article IX, 1986 BLE National Agreement;

8. The notices served by the Carrier on May 16, 2003, May 29, 2003, and August 29, 2003, purportedly under authority of Article IX, 1986 BLE National Agreement, would violate Article IV-Applicable Agreements of each of the Hub Agreements under my former jurisdiction - - North Little Rock/Pine Bluff, Kansas City, and St. Louis - - in that the changes

proposed would conflict with the specific provisions related to the pools currently established by the Hub Merger Implementing Agreements, as well as the permanent home terminals of Pine Bluff, Arkansas, North Little Rock, Arkansas, St. Louis, Missouri, Kansas City, Missouri, and those specific provisions that Jefferson City would remain a home terminal for current employees until those employees were attrited.

STATE OF MISSOURI     )  
  ) SS.  
COUNTY OF ST. LOUIS    )

I, Dennis E. Penning, after being duly sworn upon my oath, state that I have read the foregoing, and the information contained therein is true and correct to the best of my knowledge, information, and belief.

*Dennis E. Penning*  
Dennis E. Penning

Feb SUBSCRIBED AND SWORN TO before me, a Notary public this 10 day of \_\_\_\_\_, 2004.

*Kathleen M. Strawser*  
Notary Public

My Commission Expires: Feb 10, 2007

KATHLEEN M. STRAWSER  
Notary Public — Notary Seal  
STATE OF MISSOURI  
St. Louis County  
My Commission Expires: Feb. 10, 2007

32788  
EB

SERVICE DATE - SEPTEMBER 25, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32549 (Sub-No. 24)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY—  
PETITION FOR REVIEW OF ARBITRATION AWARD

Decided: September 24, 2002

We are denying a petition filed by The Burlington Northern and Santa Fe Railway Company (BNSF) seeking review of an arbitration award that was issued on April 25, 2002, by a panel chaired by neutral member Christine D. Ver Ploeg that granted benefits under the New York Dock labor protective conditions<sup>1</sup> to Ms. Diane Suchy (Ms. Suchy or claimant).

BACKGROUND

In 1995, our predecessor, the Interstate Commerce Commission (ICC), approved the control and merger of the Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company,<sup>2</sup> subject to the standard New York Dock conditions. As a result of the ICC's approval, the transaction was consummated and the two companies combined operations.

In a letter dated November 1, 1995, BNSF notified Ms. Suchy that, as a result of the transaction, her position was to be abolished effective January 1, 1996. Ms. Suchy had been employed as a Manager of Administration in BN's Mechanical Department at Fort Worth, TX. The letter advised Ms. Suchy that she could either receive a separation payment or exercise any seniority rights and receive no separation payment. The letter indicated that Ms. Suchy needed to choose one of the alternatives and advise the carrier of her decision by December 31, 1995.

In a letter dated November 21, 1995, Ms. Suchy advised BNSF that she wanted to exercise her seniority under a union agreement and return to a clerical position. She further indicated that, prior to selecting any of the options that BNSF had offered, she wanted to be advised if she would be eligible to receive a displacement allowance under the New York Dock conditions. Ms. Suchy further stated that she elected to receive a dismissal allowance if not entitled to a displacement allowance under the New York Dock conditions.

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<sup>1</sup> See New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

<sup>2</sup> Burlington Northern et al.—Merger—Santa Fe Pacific et al., 10 I.C.C.2d 661 (1995).

In a letter dated December 14, 1995, BNSF advised Ms. Suchy that she was not eligible for New York Dock benefits because she had a management position.<sup>3</sup> BNSF stated further that, if she continued to believe that she was eligible for New York Dock benefits, she should provide additional information to support her claim. In 1996, Ms. Suchy exercised her union seniority and obtained a position as a Customer Service Representative in BNSF's Revenue Management Department in Minnesota and has remained in that position since then.

In a letter dated June 29, 1998, counsel for claimant advised BNSF that he was submitting a claim on her behalf for a displacement allowance under the New York Dock conditions. In the letter, counsel asserted that Ms. Suchy was a non-agreement, exempt employee who was adversely affected by the BNSF merger and was thus entitled to benefits under Article IV of New York Dock.<sup>4</sup> The letter indicated that, when Ms. Suchy's job was eliminated, she had to exercise her union seniority to obtain a clerical position at a significant salary decrease and loss of other fringe benefits.

BNSF and claimant's counsel continued to correspond but were unable to resolve the claim. They then submitted the dispute to arbitration before Neutral Ver Ploeg.<sup>5</sup> The arbitration hearing was held on April 16, 2002. There, BNSF asserted that Ms. Suchy was a management employee and therefore was not entitled to New York Dock benefits. BNSF also challenged the timeliness of Ms. Suchy's claim, contending that the claim was barred by what it claims was the applicable statute of limitations and by the doctrine of laches because it was filed more than 2 years after her position was eliminated. Claimant asserted that the statute of limitations and the doctrine of laches did not apply and that, in any event, the claim was timely filed.

Neutral Ver Ploeg's award, which was issued on April 19, 2002, determined that Ms. Suchy was entitled to New York Dock benefits. Based on Ms. Suchy's testimony and affidavits from the former head of her department and her direct supervisor that were submitted by BNSF, Neutral Ver Ploeg found Ms. Suchy's position to have been that of a "highly responsible" administrative assistant rather than that of a manager.

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<sup>3</sup> In BNSF's December 14, 1995 letter, Wendell A. Bell (Director, Labor Relations) stated that he was responding to Ms. Suchy's "claim for New York Dock benefits."

<sup>4</sup> Article IV reads: "Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same level of protection as are afforded to members of the labor organizations under these terms and conditions."

<sup>5</sup> The arbitration panel also considered a claim for New York Dock benefits brought by another employee, Margaret Ellingston. The award determined that Ms. Ellingston was not entitled to New York Dock benefits because she had a management position. The claim of Ms. Ellingston is not before us in this appeal.

The arbitrator also rejected BNSF's assertion that Ms. Suchy's claim was untimely. She determined that Ms. Suchy's letter of November 21, 1995, was a timely notice of her claim. The arbitrator noted that: "[while] it remains disturbing that Ms. Suchy did not further press this claim until 1998 [, if BNSF] had shown more than speculative prejudice as a result of this two and one-half year delay, decision on this question may well have gone the other way."<sup>6</sup>

BNSF filed its petition to review the arbitration award on May 15, 2002. Claimant filed a reply on June 4, 2002. On June 24, 2002, BNSF filed a reply to claimant's reply, and claimant responded on July 8, 2002.<sup>7</sup>

### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.8, the standard for review of arbitration decisions is provided in Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Under Lace Curtain, we accord deference to arbitrators' decisions and will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Review of arbitral decisions has been limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions." Id. at 736. We generally do not overturn an arbitral award unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it is outside the scope of authority granted by the conditions. Applying these standards here, we find no basis for reviewing and overturning the arbitrator's decision in this case.

BNSF does not challenge the arbitrator's conclusion that Ms. Suchy was a clerical employee eligible for New York Dock protection. Rather, the carrier limits its arguments to two issues dealing with the timeliness of the claim. First, BNSF argues that a 2-year statute of limitations applies and bars this claim. Second, the railroad argues that Ms. Suchy's 2½ year delay in prosecuting her claim requires that we find the claim to be barred by the doctrine of laches.

Statute of Limitations. BNSF asks us to review the arbitrator's determination that Ms. Suchy's claim was timely filed. The carrier acknowledges that neither the BNSF merger decision nor the New York Dock conditions set a time limit for filing claims for benefits. BNSF contends,

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<sup>6</sup> Arbitration Award at 12.

<sup>7</sup> BNSF also filed a Motion for Leave to File a Reply, contending that Ms. Suchy's reply contains misstatements. The claimant objected to BNSF's Motion. We will accept these supplemental filings in the interest of a complete record.

however, that the general 2-year statute of limitations for filing complaints in 49 U.S.C. 11705(c)<sup>8</sup> should apply to claims for New York Dock benefits.

BNSF argues that application of the 2-year limit bars Ms. Suchy's claim for New York Dock benefits. The carrier contends that Ms. Suchy's claim arose in December 1995 when her position was eliminated and she was notified that she was not entitled to New York Dock benefits. However, the railroad states, Ms. Suchy did not file a sufficient complaint for benefits or invoke arbitration until the submission of the letter from her counsel dated June 29, 1998. BNSF contends that Ms. Suchy's letter of November 17, 1995, was a preliminary inquiry into whether she was eligible for New York Dock benefits and should not be considered a "complaint" sufficient to satisfy the 2-year statute of limitations. Even if the November 17, 1995 letter were considered a complaint, BNSF argues, the claimant waived her right to arbitrate the dispute pursuant to New York Dock because she delayed seeking arbitration for more than 2½ years, thereby failing to satisfy the statute of limitations.

In support, BNSF cites Modin v. New York Central Company, 650 F.2d 829 (1980) (Modin), cert. denied, 454 U.S. 967 (1981), which held that the 2-year statute of limitations, now in section 11705(c), applied to complaints filed initially in court as well as complaints before the agency. Thus, the court found time-barred a court action for damages brought by an employee's widow against a railroad alleging that cancellation of an insurance policy after the 1966 merger of the Pennsylvania and New York Central railroads violated an ICC order that extended employee benefits to non-union employees.

In reply, claimant asserts that the arbitrator correctly found that her claim was timely filed and that her letter of November 17, 1995, was timely notice of her claim. In addition, claimant argues that a 2-year statute of limitations does not apply to claims under the New York Dock conditions. Claimant suggests that, in any event, a carrier's failure to provide New York Dock benefits can be viewed as a continuing violation regarding which a claim would be proper at any time during the 6-year protective period.

The arbitrator's finding that Ms. Suchy's letter of November 21, 1995, gave BNSF timely notice of her claim for New York Dock benefits is limited to the specific facts of this case and is reasonable. BNSF's letter of November 1, 1995, advising Ms. Suchy that her position was being

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<sup>8</sup> Section 11705(c) reads: "A person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues." Section 11704(b) reads: "A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable to a person for amounts charged that exceed the applicable rate for the transportation."

eliminated, asked her to notify the company by December 31, 1995, whether she decided to either accept a separation payment or exercise any union seniority. Ms. Suchy's November 21, 1995 response claimed that she was entitled to some type of New York Dock benefits and indeed BNSF itself referred to Ms. Suchy's letter as a "claim for New York Dock benefits." BNSF has failed to show that, under these circumstances, the arbitrator erred in finding that Ms. Suchy's 1995 letter was a claim for New York Dock benefits.

And, having found no basis for overturning the arbitrator's determination that Ms. Suchy's 1995 letter was a claim, we need not address (1) BNSF's assertion that the 2-year limitation in section 11705(c) should be applied to the filing of claims or the request for arbitration under New York Dock or (2) the applicability of Modin.

Laches. BNSF further contends that the claimant's delay in processing her claim amounts to laches, citing arbitration decisions that recognize laches to bar delayed claims.<sup>9</sup> BNSF asserts further that it was prejudiced by the delay in processing the claim and hampered in locating and presenting documents and witnesses who could testify on its behalf. It notes that it was unable to present a certain witness who could have testified about the nature of Ms. Suchy's duties because the witness had retired and was not available to testify at the arbitration hearing. Ms. Suchy's delay in prosecuting her claim raises an issue of laches.

Ms. Suchy disputes that laches barred her claim, and cites arbitration decisions that rejected laches as applicable to arbitrations under the New York Dock conditions.<sup>10</sup> She also disputes BNSF's assertions that it has been prejudiced by her delay in filing the claim. She argues that BNSF should have had the records available to submit in the arbitration proceeding. She notes that BNSF submitted affidavits from employees, including one from a retired employee who was Ms. Suchy's supervisor. The claimant asserts that testimony from those employees would have added little to their written affidavits.

We have recognized that arbitrators can dismiss claims for laches. In Grand Trunk Western Railroad Company—Merger—Detroit and Toledo Shore Line Railroad Company—Arbitration Review, Finance Docket No. 28676 (Sub-No. 2) (STB served Feb. 26, 1996) (GTW), we affirmed an arbitrator's decision that dismissed claims for New York Dock benefits because the claims were delayed for almost 7 years. In the decision, we noted that an

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<sup>9</sup> Southern Railway Company v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Muessig, 1990); Transportation-Communications International Union v. Norfolk and Western Railway (LaRocco, 1990).

<sup>10</sup> Brotherhood of Railway Carmen v. Burlington Northern Railroad Company (Marx, 1984); Transportation-Communications International Union v. Union Pacific Railroad Company (Stallworth, 1988).

arbitrator acting under delegated authority could bar stale claims when the delays could make it difficult or impossible to determine whether claims are valid. We indicated further that: “[i]n the absence of any particular statutory deadlines for filing, or of any agency rule concerning the subject, we think that it is appropriate for the arbitral board to make determinations concerning timeliness, as necessary to protect the integrity of the arbitral process.” Id. at p.4.

Here, as in GTW, the arbitrator has looked to the need to protect the integrity of the arbitral process in deciding whether Ms. Suchy’s claim should be barred by laches. In finding that the passage of 2½ years did not constitute an unreasonable delay in filing the claim, the arbitrator based her conclusion on BNSF’s having shown only “speculative prejudice” as a result of the delay. In making her finding, the arbitrator employed the standard we had previously upheld in GTW. Her application of that standard to the facts of this case was not unreasonable. As the presiding officer at the hearing as well as the adjudicator, the arbitrator was in a position to make that determination. We apply our deferential Lace Curtain standard of review and, therefore, we will not disturb the arbitrator’s determination on the issue of laches.

Accordingly, we will deny BNSF’s appeal.

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

It is ordered:

1. BNSF’s motion for leave to file a reply is granted.
2. BNSF’s appeal is denied.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary

32715  
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SERVICE DATE - SEPTEMBER 24, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33942 (Sub-No. 1)

USX CORPORATION-CONTROL EXEMPTION-TRANSTAR, INC.

(Arbitration Review)

Decided: September 19, 2002

Tracks, Traffic, and Management Services, Inc. (TTMS or petitioner) has appealed an arbitration award entered by a panel chaired by neutral member John C. Fletcher, addressing a dispute between TTMS and the Transportation•Communications International Union (TCU or respondent). We will not review the award.

BACKGROUND

In USX Corporation-Control Exemption-Transtar, Inc., STB Finance Docket No. 33942 (STB served Nov. 30, 2000), we exempted from the prior approval requirements of 49 U.S.C. 11323-25 the acquisition by USX Corporation (USX) of control of Transtar, Inc. (Transtar) and five rail carriers controlled by Transtar. The exemption authority was subject to the standard labor protective conditions in New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock).

As part of the transaction, the administrative and support functions for carriers controlled by Transtar were transferred from the Bessemer and Lake Erie Railroad Company (BLE), which had performed all of these functions for Transtar's carriers, to TTMS, a noncarrier subsidiary of Transtar. On December 22, 2000, TTMS, BLE, and TCU signed an implementing agreement transferring clerical employees from BLE to TTMS and realigning clerical positions on BLE. The agreement allowed BLE employees who were performing the transferred work the choice of either following their work to TTMS or remaining with BLE. Pay rates for TTMS clerical positions were set at the same or higher rates than pay rates for the comparable BLE positions. In addition, the implementing agreement also required BLE, on written request, to furnish test period average (TPA) data, computed in accordance with Article I, section 5 of the New York Dock conditions, to employees who would be affected by the transaction.<sup>1</sup>

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<sup>1</sup> Under Article I, section 5 of the New York Dock conditions, a TPA is determined by  
(continued...)

When bidding on positions closed, on January 11, 2001, every affected employee had obtained a position: 83 with TTMS and 29 with BLE. All but one of the affected employees used their prior rights in the bidding process, and all but four obtained their first choice of positions.

The transaction was consummated at the close of business on March 23, 2001. On the next business day, the BLE employees who had elected to follow their work to TTMS became TTMS employees. The transferred employees reported to work in the same building and, consistent with the implementing agreement, performed similar work at identical (or sometimes higher) rates of pay.

The dispute at issue here arose when several affected clerical employees who had transferred from BLE to TTMS obtained their TPA data and then filed claims for New York Dock displacement allowances with TTMS and BLE. The claimants sought displacement allowances for selected months in which their actual earnings fell short of their average monthly earnings calculated by the TPA formula.

TTMS rejected these claims, asserting that, because the claimants were performing similar work at the same (or higher) rates of pay, they had not been “placed in a worse position” as a result of the Transtar transaction and were not eligible for displacement allowances under the New York Dock conditions. TCU, representing the employees, responded that the implementing agreement committed TTMS to treating all of the employees who had transferred to TTMS as “displaced employees” within the meaning of New York Dock, thereby entitling them to displacement allowances when their monthly compensation fell below their TPAs.

Unable to resolve the dispute, TTMC and TCU agreed to invoke arbitration pursuant to Article I, section 11 of the New York Dock conditions and selected John C. Fletcher as neutral member. The parties filed and exchanged written submissions in advance of the arbitration hearing, which was held on January 29, 2002.

Arbitration. At the arbitration hearing, TCU asserted that, when the parties negotiated the implementing agreement, they agreed to recognize that any employee whose position was abolished as a result of the transaction was to be considered a “displaced employee” entitled to New York Dock benefits. TCU claimed that this understanding was implicit in the requirement in

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<sup>1</sup>(...continued)

dividing by 12 the total compensation received by the employee and the total time for which he was paid for the 12-month period immediately preceding the date of the displacement. The TPA produces a monthly average compensation and average monthly time for which the employee was paid.

Article VII<sup>2</sup> of the implementing agreement that “affected” employees be given TPA data on request. To support this assertion, TCU submitted copies of correspondence between the parties and excerpts from notes of TCU officials that detailed the discussions held by the parties while negotiating the implementing agreement. On the grounds that it was already acknowledged in the implementing agreement that all employees were adversely affected and considered as displaced employees, TCU asserted that TTMS was required to compensate each transferring employee when his monthly compensation fell below his TPA.

Conversely, TTMS claimed that Article VII was not intended to automatically certify employees for New York Dock benefits. TTMS argued that Article VII required the employees to show not only that they were entitled to receive a monthly displacement allowance pursuant to their TPA data, but more significantly that they were adversely affected by the transaction. It argued that the claimants were not adversely affected because they worked under the same or better compensation packages, were subject to the same labor agreement terms, and were performing the same clerical work that they performed as BLE employees.

Further, while acknowledging that the claimants’ actual earnings occasionally fell below their TPAs, TTMS claimed that the lower earnings were not caused by the Transtar reorganization or the transfer of functions to TTMS. According to TTMS, the claimants’ earnings occasionally fell below their TPAs because TPA comparisons are based on monthly earnings and some calendar months (e.g., February) are shorter than the “average” month. TTMS asserted that, all other things being equal, an employee who is paid at an hourly or daily rate

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<sup>2</sup> That Article reads as follows:

**Article VII—Filing Claims for Protective Benefits:**

BLE will, on written request, furnish a test period average (TPA) to all BLE employees who, pursuant to this agreement: 1) follow their position/work to TTMS; 2) transfer to TTMS; (3) or remain with their position/work on BLE. BLE will also, on written request, furnish a TPA to those BLE employees who are unable, through no fault of their own, to follow or remain with their position/work on either company, TPAs will be calculated in accordance with Article I, Section 5 of New York Dock, and will be furnished within sixty (60) days after the date an employee submits a written request for same.

Employees affected by this transaction who are entitled to a monthly displacement or dismissal allowance under Article I, Section 5 or 6 of New York Dock, must submit claims for these benefits to the officer designated by the carrier, using the form provided by the carrier, within sixty (60) days following the end of the month for which the claim was made.

necessarily will earn less than his average monthly compensation in months with fewer than the average number of workdays. TTMS stated that this is the result of simple arithmetic and does not show that an employee actually has been adversely affected by a transaction.<sup>3</sup>

The Arbitrator agreed with TCU that employees' positions had been abolished as a result of the transaction and held that employees were presumed to be displaced employees in any month in which their compensation fell below their TPA. He determined that, when negotiating the implementing agreement, the negotiators had intended that any employee whose position was abolished by the Transtar transaction was to be considered "affected" by that transaction, noting that TCU had insisted that all employees be given TPAs, and that the carriers agreed to provide TPAs upon request.

Addressing TTMS's argument that employees must be adversely affected to be considered displaced under New York Dock, the Arbitrator determined that the implementing agreement provided that the only way a claimant could determine whether he is adversely affected by the transaction would be by comparing his actual monthly salary to his TPA. The Arbitrator found that the language in the implementing agreement indicated that the parties anticipated that at least some of the transferring employees would be displaced and thus be entitled to occasional displacement allowances.

The Arbitrator rejected TTMS's assertions that employees receiving displacement allowances in "short months" would be receiving a windfall. He noted that the TPAs are based on average monthly compensation, not on hourly rates of pay, and that occasionally receiving extra pay during short months would not result in a windfall.

Appeal. TTMS filed its appeal of the arbitration award on April 9, 2002. TCU filed a reply on May 6, 2002. On May 28, 2002, TTMS filed a reply to TCU's reply.<sup>4</sup> We will grant a

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<sup>3</sup> According to TTMS, nearly all TTMS employees worked a Monday-through-Friday schedule, with the average month having 21.75 workdays (261 workdays per year divided by 12 months per year = 21.75 workdays per month). TTMS noted that the standard work calendar varies between 20 and 23 workdays in a month; that short months, and long months, occur for all employees, whether or not they are affected by a Board-authorized transaction; and that about half of the months in a given year have fewer than the average (21.75) number of workdays. It notes that the year 2001 had 5 months with 21 or fewer workdays. As a result, all employees working a Monday-through-Friday work schedule were likely to experience 5 months in 2001 when their earnings were below their monthly averages for the year.

<sup>4</sup> TTMS also filed a petition for leave to file a reply, contending that TCU's reply relied on assertions that were not considered in the arbitration proceeding. TCU has not objected, and  
(continued...)

petition for leave to intervene that was filed on June 3, 2002, by the National Railway Labor Conference (NRLC or intervenor), and accept the brief it filed in support of TTMS. TCU filed a response to NRLC's brief on July 23, 2002.<sup>5</sup>

In its appeal, TTMS claims that the Arbitrator misconstrued Article I, section 5 of New York Dock by concluding that an employee who transfers to a position performing the same work, at the same location, and under the same (or higher) compensation and benefits package and labor agreement, qualifies as a "displaced employee" if his actual monthly earnings occasionally fall below his TPA. Petitioner reiterates that all railroad employees experience monthly earnings fluctuations resulting from short-months and other non-transaction-related factors such as weather and employment levels, and that comparing an employee's actual monthly earnings with TPA data will therefore always result in occasional shortfalls.

Moreover, petitioner argues that the Arbitrator erred by assuming that "worse position" can be determined by comparing the employee's actual earnings with his TPA. TTMS asserts that, under New York Dock, TPA data may only be used for computing a displacement allowance and cannot be used to determine whether an adverse effect was caused by the transaction in the first place. Thus, TTMS argues that its agreement to furnish TPA data to affected employees on demand did not mean that the employees would automatically qualify as displaced employees entitled to receive displacement allowances without evidence of causation.

Finally, TTMS is concerned that for the next 5 years the Arbitrator's decision could require it to pay displacement allowances to employees who were not placed in a worse position by the transaction, but were instead affected by post-transaction events. It notes that one employee who is claiming a displacement allowance was in fact placed in a worse position when his position was eliminated several months after he was transferred to TTMS.

NRLC asserts that the Arbitrator incorrectly interpreted the New York Dock conditions by finding that a dip in monthly earnings by itself automatically qualifies an employee for New York Dock benefits for 6 years. The intervenor argues that entitlement to New York Dock displacement allowances requires a showing that a decline in an employee's income was caused by a covered transaction, and that a decline in income alone would not entitle an employee to a displacement allowance. Like TTMS, NRLC maintains that providing TPAs on request does not imply "precertification." While noting that carriers and unions have agreed in some transactions

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<sup>4</sup>(...continued)  
we will accept the reply.

<sup>5</sup> TCU also filed a petition to accept its late-filed reply to NRLC's brief. On August 5, 2002, TTMS responded to TCU's Petition. We will also accept these supplemental filings in the interest of a complete record.

to precertify that certain employees would be considered adversely affected by a transaction, NRLC asserts that the parties did not agree to precertify employees in this transaction. Finally, intervenor takes no position on the current dispute as to whether the Arbitrator intended to adopt a general rule negating the requirement that a claimant demonstrate that an adverse effect was caused by the approved transaction, as TTMS assumes, or rather merely determined that the contract terms in this particular case obviated the need for a showing of causation, as TCU argues. But NRLC expresses concern that, if broadly construed, the Arbitrator's decision could unduly burden carriers by requiring payments to employees who are not actually worse off due to a transaction.

TCU responds that the Arbitrator's decision does not present a recurring or significant issue warranting interpretation of the New York Dock conditions. Rather, respondent asserts that the Arbitrator needed only to decide whether including Article VII in the implementing agreement constituted an agreement that the TPAs would be used to determine if employees were placed in a worse position. The union claims that the Arbitrator properly resolved this issue through interpreting the implementing agreement and its negotiating history, rather than interpreting the New York Dock conditions.

#### DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.8, the standard for review of arbitration decisions is provided in Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. of Elec. Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988). Under Lace Curtain, we accord deference to arbitrators' decisions and will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Review of arbitral decisions has been limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions." 3 I.C.C.2d. at 736. We generally do not overturn an arbitral award unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it is outside the scope of authority granted by the conditions.

We find no reason to disturb the Arbitrator's decision here under the Lace Curtain standards. The Arbitrator's decision does not involve the general applicability of the New York Dock conditions, nor, contrary to the railroad parties' contentions, does it involve an interpretation of those conditions. Rather, the Arbitrator simply interpreted the parties' implementing agreement carrying out the conditions.

Examining the language of the implementing agreement and other indicia of intent, the Arbitrator determined that the parties themselves intended to precertify affected employees so as to eliminate the need to show causation in this case, and that the carrier's arguments did not

accurately reflect the bargain that it made with TCU.<sup>6</sup> We do not find that the Arbitrator's decision in this regard was egregious error, or that petitioner has demonstrated any other basis under our Lace Curtain standards that would warrant our review.<sup>7</sup>

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

It is ordered:

1. TTMS's petition for leave to file a reply is granted.
2. NRLC's petition for leave to intervene is granted.
3. TCU's petition to late-file its response to NRLC's filing is granted.
4. TTMS's request for our review of this matter is denied.
5. This decision is effective October 24, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary

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<sup>6</sup> Thus, the Arbitrator's decision should not be broadly construed, nor read in any way as departing from the general principle that to receive benefits under the New York Dock conditions, an employee must demonstrate that he or she was adversely affected by a Board authorized consolidation.

<sup>7</sup> We note that the Arbitrator's decision does not address claims by individual employees for displacement allowances. As a result, we do not address concerns raised by the parties about whether the decision would affect an employee allegedly impacted by post-transaction events.

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SERVICE DATE - SEPTEMBER 25, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 32549 (Sub-No. 23)

BURLINGTON NORTHERN INC. AND  
BURLINGTON NORTHERN RAILROAD COMPANY  
-CONTROL AND MERGER-  
SANTA FE PACIFIC CORPORATION AND  
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY  
(Arbitration Review)

Decided: September 23, 2002

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a petition for review<sup>1</sup> of an arbitration award (the Award) entered by an Arbitration Panel (the Panel) chaired by neutral member Robert Peterson.<sup>2</sup> We decline to review the Award.

BACKGROUND

In a decision served August 23, 1995, the Interstate Commerce Commission (ICC or Commission), our predecessor, approved the acquisition of control of Santa Fe Pacific Corporation by Burlington Northern Inc. The ICC also approved the common control and merger of Burlington Northern Railroad Company (BN) and The Atchison, Topeka and Santa Fe Railway Company (ATSF).<sup>3</sup> The Commission imposed the standard New York Dock conditions for the protection of employees<sup>4</sup> on its approval of both the acquisition and the merger. Under

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<sup>1</sup> Appeals of arbitration decisions are permitted under 49 CFR 1115.8.

<sup>2</sup> BNSF also requests a waiver of the 30-page limit prescribed in 49 CFR 1115.2(d) and 1115.8. The request is unopposed and, as the submitted material will assist us in reaching a more informed decision, it will be granted.

<sup>3</sup> Burlington Northern, et al. — Merger — Santa Fe Pacific, et al., 10 I.C.C.2d 661 (1995) (BNSF Merger).

<sup>4</sup> See New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d (continued...))

Exhibit 4

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New York Dock, changes affecting rail employees and related to approved transactions must be implemented by agreements negotiated before the changes occur. If the parties cannot reach agreement or if they disagree on the interpretation of an implementing agreement, the issues are resolved by arbitration, subject to appeal to the agency under our deferential Lace Curtain standard of review.<sup>5</sup>

In accordance with New York Dock, BNSF and the United Transportation Union (UTU) entered into implementing agreements for all but two changes. The parties disagreed over the substantive labor protections that applied to employees on extended runs from Kansas City, MO, to Galesburg, IL, and from Amarillo, TX, to Enid, OK. The railroad and the union submitted the resolution of these two matters to arbitration.

Before the Panel, UTU argued that these runs were “interdivisional service changes” covered by the January 1972 National Agreement, Article XIII labor protection provision, as embodied in the 1985 National Agreement (National Agreement). Therefore, according to UTU, employees adversely affected by the changes have recourse to that existing collective bargaining agreement (CBA), not the New York Dock conditions.<sup>6</sup> BNSF argued that these runs were unavailable to the separate carriers before the merger and, as such, were inter-railroad changes covered by the imposed New York Dock conditions. In its July 21, 2001 Award, the Panel found that the runs at issue were interdivisional service changes,<sup>7</sup> that the National Agreement protections applied,<sup>8</sup> and that it was not necessary to override the agreement to achieve the transportation benefits of the transaction.

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<sup>4</sup>(...continued)  
Cir. 1979).

<sup>5</sup> Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co. — Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff’d sub nom. IBEW v. ICC, 862 F.2d 330 (D.C. Cir. 1988).

<sup>6</sup> The main difference in employee protection appears to be that the National Agreement provisions may cover affected employees beyond the New York Dock period of 6 years, “equal to the length of time which such employee has seniority in the craft or class at the time he is adversely affected.” See National Agreement, Art. XIII, Section (1)(d). It was for that reason that affected employees here preferred the National Agreement protections over the New York Dock protections.

<sup>7</sup> See Award at 11.

<sup>8</sup> See Award at 14.

On August 10, 2001, BNSF filed its petition for review. UTU filed a reply on August 30, 2001. On October 9, 2001, BNSF filed a motion to strike portions of UTU's reply. UTU opposed this motion in a reply filed on October 17, 2001.

#### PRELIMINARY MATTER

BNSF seeks to strike three sentences from UTU's reply on grounds that they are incorrect and clear misrepresentations and misstatements of the record.<sup>9</sup> UTU argues in reply that BNSF's motion is untimely under 49 CFR 1104.13(a) and is an impermissible reply to a reply under 49 CFR 1104.13(c). Further, UTU disputes BNSF's characterization of its statements.

The motion to strike will be denied. The three statements to which BNSF objects do not purport to be statements of fact but, rather, constitute argument and characterization of the record. BNSF may fairly dispute them, but the railroad's disagreement with their import is not a reason to strike them from the record. BNSF's objections go to the weight to be accorded the statements rather than to their admissibility. Accordingly, the motion to strike will be denied.<sup>10</sup>

#### DISCUSSION AND CONCLUSIONS

The scope of our review of arbitral rulings interpreting and applying our New York Dock labor conditions is limited. Under Lace Curtain, we generally defer to an arbitration panel's decision and limit our review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions."<sup>11</sup> We generally will not overturn an arbitral award unless it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions, or that it exceeds the authority reposed in the arbitrators by those conditions.<sup>12</sup>

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<sup>9</sup> The three sentences are footnote 3, second sentence; page 13, first paragraph, the second to the last sentence; and page 17, first paragraph, the second to the last sentence.

<sup>10</sup> We also agree with UTU that BNSF's motion to strike is untimely. Our rules, at 49 CFR 1104.13(a), provide that a party may file a reply or motion addressed to a pleading within 20 days after that pleading has been filed with the Board. BNSF, however, did not file its motion until 40 days after UTU filed its reply, and gave no reason for filing late. Further, BNSF's motion is clearly an attempt to reply to a reply, disputing assertions made by UTU in its filing. Such replies are impermissible under 49 CFR 1104.13(c).

<sup>11</sup> Lace Curtain at 735-36.

<sup>12</sup> Delaware and Hudson Railway-Lease and Trackage Rights Exemption-Springfield Terminal Railway, Finance Docket No. 30965 (Sub-No. 1) (ICC served Oct. 4, 1990), remanded (continued...)

We are particularly deferential to findings of fact made by arbitrators, setting them aside only when shown to constitute egregious error. We employ these limited standards of review in deference to the arbitrator's competence in this area and special role in resolving labor disputes.<sup>13</sup> Thus, our analysis here focuses on whether BNSF has met its burden of proof under these criteria.

BNSF argues that Board review of the Award is appropriate here because the Award cannot be said to draw its essence from New York Dock, reflects egregious error, and exceeds the authority reposed in the arbitrators. Petitioner further asserts that its petition raises an issue of general importance regarding the interpretation of agency labor protective conditions. In this instance, petitioner asserts, the Panel has abrogated and overridden the substantive New York Dock labor conditions imposed by the ICC in BNSF Merger and replaced them with inapplicable National Agreement terms.<sup>14</sup>

UTU counters that the Panel correctly found: (1) that the provisions of the National Agreement applied to the runs in dispute and to affected employees; and (2) that no need existed to override that prior collective bargaining agreement (CBA) in the circumstances here. UTU asserts that BNSF has failed to satisfy any of the relevant criteria for Lace Curtain review. This dispute, UTU contends, is a garden variety matter routinely handled by New York Dock arbitration panels and does not require review by the Board. UTU adds that, even if the issues involved were of sufficient significance to warrant review, BNSF seeks review of the Panel's findings of fact, which are accorded the greatest deference by the Board under Lace Curtain. Finally, UTU contends that New York Dock contemplates that existing CBAs be given effect unless an override is necessary to implement the transaction and to secure transportation benefits

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<sup>12</sup>(...continued)

on other grounds sub nom. Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir 1993).

<sup>13</sup> Norfolk and Western Railway Company, Southern Railway Company and Interstate Railroad Company – Exemption – Contract to Operate and Trackage Rights (Arbitration Review), Docket No. 30582 (Sub-No. 2) (ICC served July 7, 1989).

<sup>14</sup> According to petitioner, the National Agreement only covers intra-railroad district changes by individual carriers; it is not a vehicle for consolidating or otherwise achieving the inter-railroad operations and merger-driven changes that, it argues, are involved here. Petitioner further points out that the ICC, in BNSF Merger, addressed the union's arguments in favor of enhanced protection and rejected them in imposing New York Dock. BNSF views UTU's actions here as a backdoor attempt to secure those enhanced protections.

to the public<sup>15</sup> and that no such need has been shown here. For these reasons, UTU argues that the Board should decline to review this Award.

We find no basis under Lace Curtain to review this Award and decline to do so. First, we reject BNSF's claim that the Board must review the Award because it implicates "recurring or otherwise significant issues." In this case, the Panel looked to see if a specific prior CBA, the National Agreement, applied to employees affected by certain specific operational changes. Finding that it did, the Panel then determined that the CBA could be given effect without depriving the public of the transportation benefits of the acquisition or preventing BNSF from implementing the proposed operational changes. The Panel's action here in interpreting a CBA is the kind of task in which arbitrators routinely engage and does not present an issue of general importance regarding the interpretation of our labor conditions.<sup>16</sup>

Nor has BNSF shown that the Panel's findings reflect egregious error or that the Award is irrational. While the Panel agreed with the carrier's position that the National Agreement does not apply to inter-railroad operations, the Panel found that the changes at issue were, in fact, interdivisional changes of an existing railroad, ATSF.<sup>17</sup> This is a factual finding to which we accord great deference under our Lace Curtain standards. Those who, like BNSF, ask us to overturn the findings of an arbitral panel carry a heavy evidentiary burden to show why we must do so. Petitioner has not met that burden here.<sup>18</sup>

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<sup>15</sup> UTU cites Fox Valley & Western Ltd. – Exemption Acquisition and Operation – Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation and the Ahnapee & Western Railway Company (Arbitration Review), Finance Docket No. 32035 (Sub-Nos. 2-6) (ICC served Aug. 10, 1995), slip op. at 2-3 .

<sup>16</sup> See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company–Control and Merger–Southern Pacific Rail Corporation, et al. (Petition for Enforcement of Arbitration Award), STB Finance Docket No. 32760 (Sub-No. 37) (STB served Aug. 16, 2000).

<sup>17</sup> In so doing, the Panel pointed to the carrier's notice to institute the changes which contemplated "applying the Santa Fe schedule and full rights for all crews to do all permissible work at all points along the run," and to the fact that, although the Commission decision gave the carriers the authority to merge, they elected to remain, at least for a time, separate corporate entities, both held by a newly created holding company. Award at 11. These facts are consistent with the Panel's finding that the changes were interdivisional.

<sup>18</sup> BNSF's petition echoes the dissenting opinion to the Award which argued that, because the subject runs were new and involved new crew district assignments, there were no prior  
(continued...)

Further, BNSF has not shown that the Panel, having found these changes to be interdivisional in nature, acted irrationally in applying the existing UTU National Agreement to the changes. The Board or arbitrators acting under the New York Dock conditions may override provisions of existing CBAs only when an override is necessary to carry out an approved transaction and to achieve public transportation benefits.<sup>19</sup> Here, the Panel found that application of a prior CBA was not an impediment to the transaction because the CBA does not bar the operational changes BNSF proposed but, rather, simply provides greater employee protection than the New York Dock conditions. BNSF has not demonstrated on this record that the application of the CBA would prevent the intended transportation benefits of the transaction. As such, we find that BNSF has not met its burden of proof.

We also reject BNSF's assertion that the Award did not draw its essence from New York Dock. To the contrary, the Award was made pursuant to New York Dock procedures. In particular, Article I, Section 3, of the New York Dock conditions embodies the concept that agency-imposed protective arrangements do not always supersede pre-existing protective agreements. That provision further provides that an employee may make an election between the provisions of New York Dock and any other applicable protective agreement. In this case, consistent with New York Dock, the Panel interpreted the prior CBA, found that it applied to the issue runs, and concluded that affected employees could properly choose the CBA protections over the New York Dock protections.<sup>20</sup>

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<sup>18</sup>(...continued)

agreements applicable to any employees post-merger and, therefore, no already protected employees. But the petition, like the dissent, fails to adequately address how the operational changes at issue affected any employees other than those of the Santa Fe.

<sup>19</sup> Norfolk & W. Rwy. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 127-28 (1991); Swonger v. STB, 265 F.3d 1135, 1141 (10th Cir. 2001); United Transportation Union v. STB, 108 F.3d 1425, 1427 (D.C. Cir. 1997); CSX Corp. — Control — Chessie System, Inc. et al., 3 S.T.B. 701, 720 (1998).

<sup>20</sup> We also find meritless BNSF's argument that the ICC's rejection of enhanced labor protection in lieu of New York Dock protection, in its 1995 decision, bars the Panel's actions here and prevents us from affirming those actions. The ICC imposed New York Dock protections as a floor, finding that no need for enhanced protection had been shown on that record. But the ICC did not rule out the possibility that employees might be eligible for greater protection based on a prior agreement. Indeed, the ICC had clearly indicated that such questions would be resolved in future negotiations or arbitrations. See BNSF Merger at 760. In any event, as discussed, the Panel's actions here were made pursuant to New York Dock provisions, not in abrogation thereof.

Finally, we find no merit in BNSF's allegations that the Panel improperly overrode our New York Dock conditions and thereby exceeded the scope of its authority. As discussed above, the Panel did not abrogate or override the imposed New York Dock conditions. Instead, it interpreted the National Agreement and found that it was not necessary to abrogate that agreement in order to implement the transaction.<sup>21</sup> Such a determination is a matter well within the expertise of arbitrators.<sup>22</sup>

In sum, the arbitral award is facially reasonable. BNSF has failed to demonstrate otherwise or to make any of the required showings under the Lace Curtain standard of review. As such, we decline to review the Award.

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

It is ordered:

1. BNSF'S request for waiver of the page limit is granted.
2. BNSF's motion to strike is denied.
3. The petition for review is denied.
4. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary

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<sup>21</sup> Arbitrators acting pursuant to the New York Dock conditions are given wide latitude to forge implementing agreements based on their expertise and may also, when necessary, draw on bargaining agreements in effect before a merger. See Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Transportation Company, et al. (Arbitration Review), STB Finance Docket No. 32760 (Sub-No. 22) (STB served June 26, 1997), slip op. at 5 & n.7 (UP/SP (Sub-No. 22) June 26, 1997 decision) and cases cited therein.

<sup>22</sup> See, e.g., UP/SP (Sub-No. 22) June 26, 1997 decision, slip op. at 3.

No. 02-40579

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**J. RANDY STROUD,  
Plaintiff-Appellant,**

v.

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNION  
PACIFIC RAILROAD COMPANY,  
Defendants-Appellees,**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION  
THE HONORABLE PAUL BROWN, U.S. DISTRICT JUDGE

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**BRIEF OF DEFENDANT-APPELLEE  
UNION PACIFIC RAILROAD COMPANY**

---

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Exhibit 5

The Dallas/Fort Worth Hub implementing agreement, along with a summary, letters from the General Chairman and ballots, were mailed to the engineers within the territorial limits of the Dallas/Fort Worth Hub, including the Longview Hub. Stroud and six other engineers circulated a letter urging members to vote against ratification of the Dallas/Fort Worth Hub implementing agreement. Record Vol. 2, p. 5, Ex. J. General Chairman Slone countered with a document entitled "Do you know the facts about the DFW Hub proposal." Record Vol. 2, p. 5, Ex. K.

By letter dated July 8, 1999, Stroud requested President Monin to extend the deadline for returning the ballots for the Dallas/Fort Worth Hub implementing agreement because all affected members allegedly had not received ballots. Record Vol. 2, p. 6, Ex. Q. Stroud's request for an extension of the voting deadline was denied by letter dated July 15, 1999, wherein Monin advised that the agreement had been ratified. Record Vol. 2, p. 6, Ex. R. The Dallas/Fort Worth Hub implementing agreement was ratified on July 13, 1999, by a vote of 195 to 138. Record Vol. 2, p. 6.

### **SUMMARY OF ARGUMENT**

Summary judgment was proper in this case. There is no genuine issue as to any material fact required to establish that Union Pacific and the BLE

were entitled to judgment as a matter of law, and that Stroud's complaint should be dismissed in its entirety.

The District Court correctly found that the gravamen of Stroud's claims was his challenge to the seniority provisions of the Dallas/Fort Worth Hub implementing agreement and, thus, are encompassed within the mandates of the arbitration provisions of Article I, Section 11 of the *New York Dock* conditions. Indeed, the District Court's decision is consistent with the decisions of the other federal courts that have addressed similar challenges to implementing agreements negotiated in connection with the Union Pacific-Southern Pacific merger. Since the STB conditioned its approval of the Union Pacific-Southern Pacific merger on the application of the *New York Dock* conditions, the determination of whether the interests of employees are being protected in accordance with those conditions lies within the exclusive jurisdiction of the STB. Thus, the District Court did not err in holding that it lacked jurisdiction over Stroud's claims due to the applicability of the mandatory arbitration provisions of the *New York Dock* conditions or, in the alternative, because the challenge to the Dallas/Fort Worth Hub implementing agreement is one within the primary jurisdiction of the STB.

While the District Court did not directly address the claims that (1) Section 3 of the Railway Labor Act, 45 U.S.C. § 153, divests the Court of

jurisdiction over Stroud's claims, (2) Stroud's claims against the BLE are barred by the applicable statute of limitations, (3) the ratification of the Dallas/Fort Worth Hub implementing agreement barred Stroud's challenge to the terms of the agreement, they are equally dispositive of Stroud's claims.

## ARGUMENT

### I.

#### THE DISTRICT COURT PROPERLY FOUND THAT IT LACKED JURISDICTION OVER STROUD'S CLAIMS

##### A. Standard of Review

This Court "review[s] the questions of law presented by the district court's dismissal . . . under the *de novo* standard [and] need not accept the district court's rationale and may affirm on any grounds supported by the record." *Brown v. U.S.*, 227 F.3d 295, 297-98 (5<sup>th</sup> Cir. 2000)(internal citations omitted).

##### B. Stroud's Claims are Subject to the Mandatory Arbitration Provisions of Article I, Section 11 of the *New York Dock* Conditions.

The STB (formerly the ICC) has "exclusive" authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers within its jurisdiction. 49 U.S.C. § 11321. Union Pacific applied for authority to acquire control of the Southern Pacific under Section 11323 of the Interstate Commerce Commission Termination Act ("ICCTA"). 49 U.S.C.

§ 11323. Section 11324 of the ICCTA, 49 U.S.C. § 11524, provides that railroads seeking such authority are required to “provide a fair arrangement” for the protection of employees affected by the transaction. The standard terms imposed by the STB for the protection of employees affected by a merger or acquisition of control are the *New York Dock* conditions. Accordingly, the STB conditioned its approval of Union Pacific's acquisition of control of Southern Pacific on the *New York Dock* conditions as the protective terms for affected employees.

With the approval of the merger, Union Pacific was *required* by the provisions of Article I, Section 4 of *New York Dock* to negotiate an agreement for the purpose of implementing the protective conditions. *New York Dock*, 360 I.C.C. at 77-78. The agreement “shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case.” *Id.*, Article I, Section 4(a). In the event the railroad and the labor organization are unable to reach agreement through negotiations, Article I, Section 4(a) of the *New York Dock* conditions provides that either party may submit the dispute to a neutral referee for resolution. *Id.* The decision of the referee is considered final and binding, subject to the limited review only by the STB. *Chicago & North Western Transportation*

*Co. – Abandonment*, 3 I.C.C. 729 (1987), *aff'd sub nom.*, *IBEW v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

Seniority provisions “have consistently been modified in the past” in consolidations, and almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction.” *CSXT Corp. – Control – Chessie System Inc., & Seaboard C.L. Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 27) (served Dec. 7, 1995), slip op. at 15, *aff'd sub nom.*, *United Transportation Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997). Article I, Section 4 does not require any particular seniority integration methodology, and grants the parties through negotiation and, if necessary, the arbitrator the discretion to fashion the appropriate methodology for a particular case. *See American Train Dispatchers Association v. I.C.C.*, 26 F.3d 1157, 1163.

It is now well settled that disputes over the modification of seniority rights of employees in connection with STB-approved mergers must be resolved under the arbitration procedures contained in the *New York Dock* conditions. Indeed, “[W]hether a merger implementing agreement fairly blends the rights of plaintiffs with those of other affected employees and whether particular changes in seniority are necessary to effectuate a merger are matters within the exclusive jurisdiction of the arbitrator and the [STB].”

*Spaulding v. United Transportation Union, et al.*, 279 F.3d 901, 913 (10<sup>th</sup> Cir. 2002). *Accord, Atkins v. Louisville & Nashville R.R. Co.*, 819 F.2d 644, 647-49 (6<sup>th</sup> Cir. 1987) and cases cited therein; *Hagerman v. United Transportation Union, et al.*, 281 F.3d 1189, 1195 (10<sup>th</sup> Cir. 2002) and cases cited therein; *Atkinson v. Union Pacific Railroad Company*, 628 F. Supp. 1117, 1119-20 (D. Kan. 1985). The mandatory arbitration procedures are set forth in Article I, Section 11 of the *New York Dock* conditions:

In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provisions of this appendix, . . . within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

As is the case with arbitration awards issued under Article I, Section 4, the STB has exclusive jurisdiction to review an arbitrator's decision resolving disputes over *New York Dock* implementing agreements. *United Transportation Union v. Norfolk & Western R. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), *cert denied*, 484 U.S. 1006 (1988); *IBEW v. ICC*, *supra* at 338; *Swonger v. Surface Transportation Board*, 265 F.3d 1135, 1139 (10<sup>th</sup> Cir. 2001), *cert. denied*, \_\_\_U.S. \_\_\_, 152 L. Ed 2d 819 (May 13, 2002). Arbitration awards that are reviewed by the STB are treated as final agency orders, which are subject to review by the appellate courts under a deferential standard. *UTU v. Norfolk & Western*, *supra* at 1120.

A number of employees, like Stroud, who were dissatisfied with the seniority integration provisions of agreements implementing the Union Pacific-Southern Pacific merger at various hubs have filed complaints in the federal courts. In each of those complaints, the employees claimed that the implementing agreement wrongfully abridged their pre-merger seniority and alleged that their exclusive collective bargaining representative breached the duty of fair representation in negotiating those agreements. The courts dismissed every one of those complaints on the same ground that the District Court dismissed Stroud's complaint – lack of jurisdiction. *See Hagerman v. United Transportation Union, supra*; *Moore v. Brotherhood of Locomotive Engineers, et al.*, 2000 WL 882374 (D. Kan. 2000), *aff'd w/o pub. opinion*, 16 Fed. Appx. 833 (10<sup>th</sup> Cir. 2001); *Kasel, et al. v. Brotherhood of Locomotive Engineers, et al.*, \_\_\_ F. Supp. \_\_\_ (D. Colo. 2001) (Slip opinion attached as Attachment A), *aff'd w/o pub. opinion*, 26 Fed. Appx. 883 (10<sup>th</sup> Cir. 2002); *Spaulding v. United Transportation Union, supra*.

An examination of Stroud's complaint reveals that the District Court was correct in finding that his claims are appropriate for arbitration under Article I, Section 11 of the *New York Dock* conditions. In fact, Stroud's claims are strikingly similar to those in *Moore v. BLE, supra*. The plaintiff in *Moore* challenged the implementing agreement negotiated by Union Pacific

and the BLE, and duly ratified by the members, for the Expanded Salina Hub. The plaintiff alleged, as does Stroud here, that the BLE breached the duty of fair representation, and that Union Pacific joined in that breach, by negotiating an implementing agreement that improperly eliminated his existing seniority and failed to maintain his prior rights. In granting the defendant's motions to dismiss on jurisdictional grounds, the court found that:

the issues raised in Moore's complaint qualify for arbitration under Section 11 of the *New York Dock* conditions. This case involves a controversy with respect to the interpretation, application or enforcement of the implementing agreements that were negotiated in accordance with the conditions imposed by the STB when it approved the Southern Pacific/Union Pacific merger. Specifically, the issue is whether those agreements abridge certain seniority rights to which Moore claims he is entitled. It is unclear why Moore now denies the appropriateness of a *New York Dock* arbitrator when his attorney requested such an arbitrator several months after the Expanded Salina Hub agreement had been ratified.

2000 WL at 882374 \*3.<sup>5</sup>

Stroud asserts that the District Court's dismissal of his complaint for lack of subject matter jurisdiction rests on a "transmogrification" of the allegations in his complaint. Brief at 18. Stroud argues that the District Court improperly read his duty of fair representation claim out of the complaint by

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<sup>5</sup> It is to be noted that Moore was represented by Bruce Stoltze, the same attorney who represents Stroud in this action. Additionally, Stoltze represented the plaintiffs in *Spaulding v. United Transportation Union, supra*, and *Swonger v. Surface Transportation Board, supra*.

determining that his duty of fair representation claims are “eclipsed by [his] overarching challenge to the seniority provisions of the DFW Hub agreement and the alleged adverse effect the STB approved merger had on the proposed class members’ relative employment positions,” and that those “claims comprise the gravamen” of his complaint. Brief at 19; Record 446. However, the fact that the District Court did not “recast” Stroud’s complaint to confer jurisdiction on the STB is evident from the allegations in the complaint. Indeed, the District Court’s determination that Stroud’s claims arise out of a dispute over the interpretation, application and enforcement of the Longview and Dallas/Fort Worth Hubs was based on its close examination of the allegations in Stroud’s complaint. Record 446.

Specifically, the District Court noted that in the opening paragraph of the complaint Stroud claims that he was “deprived of contractual and statutory rights relating to railroad craft seniority, compensation and employment.” Record 2, 447. Additionally, the District Court noted that Stroud contended that the “[I]mplementing Agreements at the Longview Hub and DFW Hub have failed to provide for this Plaintiff and the class members to maintain their prior seniority and/or the equivalent of their seniority and equity rights vis-à-vis other members of the BLE, all in violation of their rights under the law, the pre-merger agreement and the constitution of the

BLE.” Record 7. Those and other allegations in Stroud’s complaint undeniably present a dispute over the interpretation, application and enforcement of the Longview and Dallas/Fort Worth Hubs.<sup>6</sup> Thus, the District Court’s ruling that Stroud’s allegations were jurisdictionally wanting was entirely proper.

Finally, Stroud’s argument that *Vaca v. Sipes*, 386 U.S. 171 (1967), dictates a different result is unavailing. While it is true that the Supreme Court in *Vaca* held, in part, that the availability of the National Labor Relations Board (“NLRB”) to determine whether a union’s conduct constitutes an unfair labor practice did not foreclose an aggrieved employee from pursuing a breach of the duty of fair representation claim in court, that holding was based on the finding that there were congressional and other exceptions to the NLRB’s exclusive jurisdiction. *Id.* at 179-181. Unlike the NLRB, Congress has expressly reserved the consideration of employee claims in railroad merger cases to the STB. *See Hagerman v. United Transportation Union, supra*, 281 F.3d at 1195 (“Because the [STB] has authority to exempt transacting parties for any law as necessary to bring about the approved

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<sup>6</sup> It is also to be noted that Stroud’s prayer for relief is that the Court adjudge, determine and declare the “seniority and that all members of the class are entitled to exercise such fair seniority as this Plaintiff and class members are entitled under the law” Record 11. It is for the STB to determine whether a seniority arrangement is fair. *See Spaulding v. United Transportation Union, supra*.

transaction, the [*New York Dock*] remedies in disputes to which they apply, effectively preempt other legal remedies”). Since the gravamen of Stroud’s complaint is that the Dallas/Fort Worth Hub implementing agreement treats him unfairly, the District Court was correct in holding that the *New York Dock* arbitration process is the exclusive forum for addressing that claim and dismissing Stroud’s complaint.

**C. Stroud’s Claims are Subject to the Primary Jurisdiction of the Surface Transportation Board.**

Implicit in the allegations in Stroud’s complaint are claims that Union Pacific and the BLE, in negotiating the Longview and Dallas/Fort Worth Hub implementing agreements, violated the requirements of Article I, Section 4 of the *New York Dock* conditions that “each transaction which may result in a . . . rearrangement of forces shall provide for the selection of forces involved on a basis accepted as appropriate for application in a particular case.” As explained above, Article I, Section 4(a) requires that the provisions for the selection of forces be arrived at either through negotiation or arbitration. Review of an arbitrator’s decision for compliance with the requirements of Article I, Section 4(a) lies within the exclusive jurisdiction of the STB. *IBEW v. ICC, supra*.

Resolution of the question of whether a negotiated implementing agreement complies with the requirements of the *New York Dock* conditions

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

COURT OF APPEALS NO. 00-3219

ROGER L. (BUCKY) MOORE, et al.,

Appellants/Plaintiffs,

v.

BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS AND UNION PACIFIC  
RAILROAD COMPANY,

Appellees/Defendants.

U.S. District Court for  
the District of Kansas

Case No. 99-1214-JTM

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

JUDGE J. THOMAS MARTEN, PRESIDING

**BRIEF OF APPELLEE  
UNION PACIFIC RAILROAD COMPANY**

Oral Argument Requested

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ATTORNEYS FOR APPELLEE UNION PACIFIC RAILROAD COMPANY

01-302672.01

Exhibit 6

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## SUMMARY OF ARGUMENT

Summary judgment was proper in this case. There is no genuine issue of any material fact required to establish that Union Pacific is entitled to judgment as a matter of law, and that Moore's Amended Complaint should be dismissed in its entirety.

The allegations in the Amended Complaint involve a dispute over the interpretation, application or enforcement of implementing agreements negotiated pursuant to Article I, Section 4 of the *New York Dock* conditions. Moore alleges that the Expanded Salina and Southwest Hub implementing agreements wrongly abridged his seniority rights, and his prayer for relief is, *inter alia*, that the Court declare that he is entitled to exercise his previous Rock Island seniority. Unquestionably, the application and enforcement of the provisions of the prior implementing agreements and the Expanded Salina and Southwest Hub implementing agreements are at the heart of Moore's claims. Consequently, the District Court was correct in finding that it lacked subject matter jurisdiction over Moore's claims because they are subject to the arbitration provision of Article I, Section 11 of the *New York Dock* conditions. Moreover, the District Court properly found that any complaint that Moore may have that the Expanded Salina and Southwest Hub implementing agreements do not comply with the requirements of the *New York Dock* conditions to "provide for a fair" arrangement

for the protection of employees affected by the Union Pacific/Southern Pacific merger is subject to the primary jurisdiction of the STB.

Moore's claims against Union Pacific not only present a dispute over the interpretation and application of a *New York Dock* implementing agreement but, also, a dispute over the meaning of the seniority provisions of the March 4 Agreement and the various implementing agreements that followed. Thus, even if Moore were not required to pursue his claims before a *New York Dock* arbitrator or the STB, the minor dispute resolution procedures of the Railway Labor Act divest the courts of jurisdiction over his Amended Complaint. The District Court properly found that it could not exercise jurisdiction under the hybrid doctrine because Moore's breach of the duty of fair representation claim against the BLE are barred by the ratification of the Expanded Salina and Southwest Hub implementing agreements. Moreover, Moore failed to come forward with significant admissible probative evidence supporting his allegations that Union Pacific conspired or cooperated with the BLE in its alleged breach of the duty of fair representation.

Accordingly, the decision of the District Court granting Union Pacific summary judgment and dismissing Moore's Amended Complaint must be affirmed.

## ARGUMENT

### I.

#### **THE DISTRICT COURT PROPERLY FOUND THAT IT LACKED SUBJECT MATTER JURISDICTION OVER MOORE'S CLAIMS THAT THE HUB IMPLEMENTING AGREEMENTS WRONGFULLY ABRIDGE HIS SENIORITY RIGHTS**

##### **A. Standard of Review**

The District Court granted Union Pacific's and the BLE's motions for summary judgment. This Court reviews a grant of summary judgment de novo, applying the same legal standard used by the District Court. *Jurasek v. Utah State Hospital*, 158 F.3d 506, 510 (10th Cir. 1998) ("*Jurasek*"). In this case, the District Court considered the motions for summary judgment under Fed. R. Civ. P. 56(c) and the legal standard enunciated in various decisions of this Court and the U.S. Supreme Court. Moore App. at 193-94.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When applying this standard, the District Court must examine all of the evidence in a light most favorable to the opposing party. *Jurasek*, 158 F.3d at 510. The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Baker v. Board of Regents*, 991 F.2d 628, 630 (10th Cir. 1993). The moving party need not disprove the non-moving party's claim or defense; it

need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. Indeed, the nonmoving party must come forward with “specific facts showing that there is a *genuine issue for trial*.” *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis in *Matsushita*). The opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the opposing party must come forward with significant admissible probative evidence supporting that party’s allegations. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

“If there is no genuine issue of material fact in dispute, then [this Court] next determine[s] if the substantive law was correctly applied by the district court.” *Jurasek*, 158 F. 3d at 510.

**B. The District Court did not Err in Finding that Moore’s Claims are Subject to the Mandatory Arbitration Provisions of Article I, Section 11 of the New York Dock Conditions**

The STB (formerly the ICC) has “exclusive” authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers within its jurisdiction. 49 U.S.C. § 11321. Union Pacific applied for authority to acquire control of the Southern Pacific under Section 11323 of the ICCTA. 49 U.S.C. § 11323. Section 11324 of the ICCTA, 49 U.S.C. § 11324,

provides that railroads seeking such authority are required to “provide a fair arrangement” for the protection of employees affected by the transaction. The standard terms imposed by the STB for the protection of employees affected by a merger or acquisition of control are the *New York Dock* conditions. Accordingly, the STB conditioned its approval of Union Pacific's acquisition of control of Southern Pacific on the *New York Dock* conditions as the protective terms for affected employees.

With the approval of the acquisition, Union Pacific was *required* by the provisions of Article I, Section 4 of *New York Dock* to negotiate an agreement for the purpose of implementing the protective conditions. *New York Dock*, 360 I.C.C. at 77-78. In the event the railroad and the labor organization are unable to reach agreement through negotiations, Article I, Section 4(a) of the *New York Dock* conditions provides that either party may submit the dispute to a neutral referee for resolution. The decision of the referee is considered final and binding, subject to the limited review only by the STB. *Chicago & North Western Transportation Co. – Abandonment*, 3 I.C.C. 729 (1987), *aff'd sub nom., IBEW v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

Seniority provisions “have consistently been modified in the past” in consolidations, and almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction.” *CSXT Corp. – Control – Chessie System Inc., & Seaboard C.L. Industries, Inc.*, Finance Docket No. 28905

(Sub-No. 27) (served Dec. 7, 1995), slip op. at 15, *aff'd sub nom., UTU v. STB*, 108 F.3d 1425 (D.C. Cir 1997). It is well established that Article I, Section 4 does not require any particular seniority integration methodology, and grants the parties through negotiation and, if necessary, the arbitrator the discretion to fashion the appropriate methodology for a particular case. *See ATDA v. I.C.C.*, 26 F.3d at 1163.

Article I, Section 11 of the *New York Dock* conditions provides for arbitration of disputes arising over the interpretation and application of the particular terms of a negotiated or arbitrated implementing agreement. The railroad, a union or any aggrieved employee may invoke arbitration under Article I, Section 11.

In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provisions of this appendix, . . . within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

As is the case with arbitration under Section 4, the STB has exclusive jurisdiction to review arbitration awards arising from *New York Dock* implementing agreements. *United Transportation Union v. Norfolk & Western R. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), *cert denied*, 484 U.S. 1006 (1988); *IBEW v. ICC*, 862 F.2d at 338. Section 11 arbitration awards that are reviewed by the STB are treated as final agency orders, which are subject to review by the

appellate courts under a deferential standard. *UTU v. Norfolk & Western*, 822 F.2d at 1120.

It is now well settled that disputes over the application of a *New York Dock* implementing agreement or the protective conditions themselves must be arbitrated, and a federal court lacks jurisdiction to resolve such claim. *Hoffman v. Missouri Pacific Railroad*, 806 F. 2d 801 (8th Cir. 1986) (“*Hoffman*”); *Walsh v. United States of America and Interstate Commerce Commission*, 723 F. 2d 570 (7th Cir. 1983) (“*Walsh*”). In *Walsh*, the Seventh Circuit held that the language of Article I, Section 11 of the *New York Dock* conditions requires mandatory arbitration of disputes over the denial of protective benefits under a merger agreement. The court held that the ICC, in using the word “may” in Section 11 meant to connote mandatory arbitration. *Walsh*, 723 F.2d at 574. The court reasoned that such an interpretation was also supported by the U.S. Supreme Court’s interpretation of a similar provision of the RLA. *Id.*, citing *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30, 34 (1957). Finally, the court noted that its holding was in line with “strong federal policy which favors arbitration of labor disputes whether mandated by statute or by contractual agreement.” *Id.*

*Hoffman* is particularly instructive. In *Hoffman*, the Eighth Circuit expressly adopted the Seventh Circuit’s reasoning in *Walsh* in holding that arbitration of plaintiff’s claim was mandatory under Section 11 of the *New York Dock*

conditions. *Hoffman*, 806 F.2d at 801. It is to be noted that the Eighth Circuit rejected the employee's claim that she was excused from the duty to exhaust administrative remedies by virtue of the union's refusal to handle the arbitration of her claim. The court acknowledged that under *New York Dock* the employee was free to progress her claim through arbitration without her union's involvement. *Id.*; see also *Collins v. Burlington N. R.R. Co.*, 867 F.2d 542, 544-45 (9th Cir. 1989); *Atkins v. L&N Railroad Co.*, 819 F.2d 644, 650 (6th Cir. 1987); *Ryan v. Railway, Airline and Steamship Clerks, et al.*, 1992 WL 363763, at \*3 (N.D. Ohio 1992).

The District Court correctly found that the issues raised in Moore's Amended Complaint are subject to arbitration under Article I, Section 11 of the *New York Dock* conditions since they involve a dispute "with respect to the interpretation, application or enforcement of the implementing agreements that were negotiated in accordance with the conditions imposed by the STB when it approved the Southern Pacific/Union Pacific merger." Moore App. at 202.

The District Court expressed its doubts with respect to Moore's denial that his claims that the implementing agreements wrongfully abridge his seniority rights as a locomotive engineer are appropriate for Article I, Section 11 arbitration. Moore App. at 203. It is undisputed that Moore's attorney made a request of the NMB several months after the ratification of the Expanded Salina Hub to "schedule a *New York Dock* arbitration and that an arbitrator be selected" relating

to the contention that the Expanded Salina Hub implementing agreement wrongfully abridges Moore's rights as an engineer. UP App. at 3, 4, 17, 18, 19, 203. However, instead of pursuing and exhausting the available administrative remedies, Moore initiated this lawsuit.

Moore contends that the arbitration provision of Article I, Section 11 has no application in this case by virtue of the exception of disputes under Section 4. This contention ignores the fact that his claim is that the implementing agreement that resulted from the process outlined in Article I, Section 4 wrongfully abridges his seniority rights. In that regard, Moore concedes that it would be proper to present the issue of "whether there has been a violation of the implementing agreement or of the *New York Dock* conditions," which requires "an interpretation of the negotiated implementing agreement[s] or the *New York Dock* conditions. Moore Brief at 33.

Thus, the District Court properly declined to exercise jurisdiction over Moore's Amended Complaint.

**C. The District Court did not Err in Finding that the Surface Transportation Board is the Appropriate Entity to Decide the Issues Raised in Moore's Amended Complaint**

Also implicit in the allegations in Moore's Amended Complaint are claims that Union Pacific, in negotiating the Expanded Salina and Southwest Hub implementing agreements, violated the requirements of Article I, Section 4 of the *New York Dock* conditions that "each transaction which may result in a . . . rearrangement of forces shall provide for the selection of forces involved on a basis

No. 01-1088

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

JOHN KASEL, et al.,

Plaintiffs/Appellants,

v.

THE BROTHERHOOD OF  
LOCOMOTIVE ENGINEERS, et al.,

Defendants/Appellees.

U.S. District Court  
for the District of Colorado

Case No. 99-M-859

On Appeal from the United States District Court  
For the District of Colorado  
The Honorable Richard P. Matsch, U. S. District Judge

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BRIEF OF UNION PACIFIC RAILROAD COMPANY,  
DEFENDANT/APPELLEE

---

ORAL ARGUMENT REQUESTED

Prepared and submitted by:

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Exhibit 7

issue of material fact in dispute, “then [this Court] next determine[s] if the substantive law was correctly applied by the district court.” *Jurasek, supra* at 510.

**B. Appellants’ Breach of Contract and Promissory Estoppel Claims are Subject to the Mandatory Arbitration Provisions of Article I, Section 11 of the New York Dock Conditions**

The STB (formerly the ICC) has “exclusive” authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers within its jurisdiction. 49 U.S.C. § 11321. Union Pacific applied for authority to acquire control of the Southern Pacific under Section 11323 of the ICCTA. 49 U.S.C. § 11323. Section 11324 of the ICCTA, 49 U.S.C. § 11324, provides that railroads seeking such authority are required to “provide a fair arrangement” for the protection of employees affected by the transaction. The standard terms imposed by the STB for the protection of employees affected by a merger or acquisition of control are the *New York Dock* conditions. Accordingly, the STB conditioned its approval of Union Pacific's acquisition of control of Southern Pacific on the *New York Dock* conditions as the protective terms for affected employees. With the approval of the acquisition, Union Pacific was *required* by the provisions of Article I, Section 4 of *New York Dock* to

negotiate an agreement for the purpose of implementing the protective conditions. *New York Dock*, 360 I.C.C. at 77-78.

Article I, Section 11 of the *New York Dock* conditions provides for arbitration of disputes arising over the interpretation and application of the particular terms of a negotiated or arbitrated implementing agreement. The railroad, a union or any aggrieved employee may invoke arbitration under Article I, Section 11.

In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provisions of this appendix, . . . within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

App. 43.

The STB has exclusive jurisdiction to review arbitration awards arising from *New York Dock* implementing agreements. *United Transportation Union v. Norfolk & Western R. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), *cert denied*, 484 U.S. 1006 (1988); *IBEW v. ICC*, 862 F.2d at 338. Section 11 arbitration awards that are reviewed by the STB are treated as final agency orders, which are subject to review by the appellate courts under a deferential standard. *UTU v. Norfolk & Western*, 822 F.2d at 1120.

It is now well settled that disputes over the application of a *New York Dock* implementing agreement or the protective conditions themselves must be arbitrated, and a federal court lacks jurisdiction to resolve such claim. See, *Atkins v. Louisville & Nashville R.R. Co.*, 819 F.2d 644, 647-48 (6th Cir. 1987) (“In fact every federal court which has interpreted § 11 of the *New York Dock* conditions has concluded that arbitration is mandatory under that provision”). See also, *Collins v. Burlington Northern R.R.*, 867 F. 2d 542, 545 (9<sup>th</sup> Cir. 1989); *Hoffman v. Missouri Pacific Railroad*, 806 F. 2d 800, 801 (8th Cir. 1986) (“*Hoffman*”); *Walsh v. United States of America and Interstate Commerce Commission*, 723 F. 2d 570 (7th Cir. 1983) (“*Walsh*”). In *Walsh*, the Seventh Circuit held that the language of Article I, Section 11 of the *New York Dock* conditions requires mandatory arbitration of disputes over the denial of protective benefits under a merger agreement. The court held that the ICC, in using the word “may” in Section 11 meant to connote mandatory arbitration. *Id.* at 574. The court reasoned that such an interpretation was also supported by the U.S. Supreme Court’s interpretation of a similar provision of the RLA. *Id.*, citing *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U.S. 30, 34 (1957). Finally, the court noted that its holding was in line with “strong

federal policy which favors arbitration of labor disputes whether mandated by statute or by contractual agreement.” *Id.*

*Hoffman* is particularly instructive. In *Hoffman*, the Eighth Circuit expressly adopted the Seventh Circuit’s reasoning in *Walsh* in holding that arbitration of plaintiff’s claim was mandatory under Section 11 of the *New York Dock* conditions. *Hoffman*, 806 F.2d at 801. It is to be noted that the Eighth Circuit rejected the employee’s claim that she was excused from the duty to exhaust administrative remedies by virtue of the union’s refusal to handle the arbitration of her claim. The court acknowledged that under *New York Dock* the employee was free to progress her claim through arbitration without her union’s involvement. *Id.*; see also *Collins v. Burlington N. R.R. Co.*, 867 F.2d 542, 544-45 (9th Cir. 1989); *Atkins v. L&N Railroad Co.*, 819 F.2d 644, 650 (6th Cir. 1987); *Ryan v. Railway, Airline and Steamship Clerks, et al.*, 1992 WL 363763, at \*3 (N.D. Ohio 1992).

An examination of Appellants’ complaint reveals that their claims are appropriate for Article I, Section 11 arbitration. Appellants complain about the “interpretation of vacation seniority for the eight (8) allocated turns.” Aplt. Brief 13 at ¶ 39. Appellants further complain about the “multiple interpretations of DHA” that were affecting them. Aplt. Brief 15 at ¶ 44. Thus, there can be no question that Appellants’ claims involve a dispute over

the interpretation, application or enforcement of the provisions of the Denver Hub implementing agreement, which was negotiated pursuant to *New York Dock* conditions.

Plaintiffs concede that Article I, Section 11 requires arbitration of disputes arising from the conditions. Aplt. Brief at 33. However, they argue that Article I, Section 11 does not require arbitration of claims that the union breached its duty of fair representation through the interpretation or application of a *New York Dock* implementing agreement.

An argument similar to Appellants' was rejected by the United States District Court for the District of Kansas in *Moore v. Brotherhood of Locomotive Engineers and Union Pacific Railroad Company*, No. 99-1214-JTM (June 15, 2000). The plaintiff in *Moore* filed a "hybrid" action alleging that Union Pacific breached pre-merger agreements and BLE breached its duty of fair representation by negotiating implementing agreements for other hubs created as a result of the Union Pacific/Southern Pacific merger. Specifically, plaintiff alleged that the implementing agreement wrongfully deprived him of prior rights and seniority. The District court dismissed plaintiff's complaint finding that:

the issues raised in Moore's complaint qualify for arbitration under Section 11 of the *New York Dock* conditions. This case involves a controversy with respect to the interpretation,

application or enforcement of the implementing agreements that were negotiated in accordance with the conditions imposed by the STB when it approved the Southern Pacific/Union Pacific merger. Specifically, the issue is whether those agreements abridge certain seniority rights to which Moore claims he is entitled.

Slip. Op. at 10-11.<sup>10</sup>

The same result is required in this case. Arbitration under Article I, Section 11 is the appropriate forum for resolution of Appellants' claims that Union Pacific's and BLE's interpretation and application of the provisions of the Denver hub implementing agreement abridge their asserted seniority-based right to work on long pool turns even when their turns have been cut through the regulation process, vacation selection and work as firemen.

The case cited by Appellants in support of their argument that their claims are not subject to mandatory arbitration under Article I, Section 11 is not analogous. The plaintiffs in *Harris v. Union Pacific Railroad Company*, 141 F. 3d 740 (7th Cir. 1998), filed an action alleging that the denial of their applications for the merger-related separation program based on their maternity leave status violated the FMLA, PDA and ERISA. In *Harris*, Union Pacific did not argue that the court lacked subject matter jurisdiction over plaintiffs' claims because they were subject to mandatory arbitration

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<sup>10</sup>This Court recently affirmed the dismissal of plaintiff's complaint in Appeal No. 00-3219.

under Article I, Section 11. To the contrary, Union Pacific argued that the court lacked subject matter jurisdiction and plaintiffs failed to state claims upon which relief could be granted because Section 11341(a) of the Interstate Commerce Act (now Section 11321(a) of the Interstate Commerce Commission Termination Act) provided for an exemption “from all other law, . . . as necessary to let [the merging carrier] carry out the [approved] transaction.” 49 U.S.C. § 11321(a). Union Pacific maintained that the FMLA, PDA, and ERISA were superceded by virtue of the Interstate Commerce Commission’s (“ICC”) approval of its merger with the CNW. In rejecting Union Pacific’s argument, the court, acknowledging the ICC’s power to supercede other laws in approving a railroad merger, held that the ICC order approving the Union Pacific/CNW merger had to evidence the ICC’s exercise of its power either “directly or by necessary implication” in order to divest the court of jurisdiction. *Id.* at 744.

In this case, Union Pacific is not arguing that any state laws have been “superceded” by the STB’s approval of its merger with the Southern Pacific and, therefore, Appellants must seek to persuade the STB to authorize litigation over a claim arising under a particular state law. Union Pacific’s argument that the District Court lacked subject matter jurisdiction rested

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 02-40579  
Summary Calendar

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U.S. COURT OF APPEALS  
**FILED**

NOV 27 2002

CHARLES R. FULBRUGE III  
CLERK

J. RANDY STROUD,

Plaintiff-Appellant,

VERSUS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS; UNION PACIFIC RAILROAD  
COMPANY,

Defendants-Appellees.

---

Appeal from the United States District Court  
For the Eastern District of Texas, Sherman Division

---

(4:99-CV-289)

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:\*

Plaintiff J. Randy Stroud appeals from the district court's grant of summary judgment to Defendants Brotherhood of Locomotive Engineers (BLE) and Union Pacific Railroad Co. (UP) on his claims alleging deprivation of contractual and statutory rights in a merger implementation agreement between BLE and UP, as well as

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\*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Exhibit 8

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claims of a violation of a duty of fair representation by BLE and wrongful interference with contractual relations by UP. The district court granted summary judgment on alternative grounds. First, it concluded that it lacked subject matter jurisdiction over the claims because they fell within the mandatory arbitration provision of Article I, Section 11 of the New York Dock Ry.-Control-Brooklyn Eastern Dist. Terminal, 360 I.C.C. 60, 84-90 (1979) ("New York Dock"), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2nd Cir. 1979), conditions. Second, the district court held that where New York Dock did not preclude jurisdiction, it should decline jurisdiction under the primary jurisdiction doctrine. Penny v. Southwestern Bell Telephone Co., 906 F.2d 183, 187 (5th Cir. 1990).

We review the district court's grant of summary judgment de novo, employing the same criteria used in that court. Rogers v. International Marine Terminals, 87 F.3d 755, 758 (5th Cir. 1996). Summary judgment should be granted where the record indicates no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Id.

Here, we agree with the district court that the gravamen of Plaintiff's complaint is a dispute with the "interpretation, application and enforcement" of the BLE-UP implementation agreement. Thus, federal jurisdiction is precluded by the mandatory arbitration provision of New York Dock Article I, Section 11. Spaulding v. United Transportation Union, 279 F.3d 901, 913

(10th Cir. 2002). To the extent that federal jurisdiction is not preempted by the mandatory arbitration clause, we agree with the district court that it should be declined because the Surface Transportation Board has primary jurisdiction. Penny, 906 F.2d at 187.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

**FILED**  
United States Court of Appeals  
Tenth Circuit

FEB 6 2002

JOHN KASEL; Y. G. ARIAS,

Plaintiffs-Appellants,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization; LOCAL UNION NO. 103 BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization; LOCAL UNION NO. 451 BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization; DIVISION 29 BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization; UNION PACIFIC RAILROAD COMPANY, a Delaware corporation; and JOHN DOES 1-10, individuals,

Defendants-Appellees.

**PATRICK FISHER**  
Clerk

No. 01-1088

(D.C. No. 99-M-859)

(D. Colo.)

**ORDER AND JUDGMENT<sup>(\*)</sup>**

Before **EBEL, GIBSON<sup>(2)</sup>**, and **PORFILIO**, Circuit Judges.

Plaintiffs-Appellants John Kasel and Y.G. Arias are engineers with Union Pacific Railroad Company ("UP") and members of the Brotherhood of Locomotive Engineers ("BLE") who were displaced as a result of the UP-Southern Pacific merger. They have brought claims for breach of contract and promissory estoppel against UP and claims for breach of the duty of fair representation against BLE. Appellants claim that UP violated a commitment made to the BLE negotiators that Appellants would keep the new Long Pool turns to which they were assigned after the merger unless there was a significant decrease in business. Appellants also contend that UP violated commitments that their vacation rights would be recognized based on their pre-merger seniority, and that they would be entitled to bump to Fireman positions in the event that they were displaced from their Long Pool positions.

The district court ruled that it lacked jurisdiction over Appellants' claims against UP because the

claims were subject to mandatory arbitration pursuant to the New York Dock conditions agreed to by UP when it sought the Surface Transportation Board's approval of the merger. See New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979). The district court also ruled that Appellants' claims against BLE were time-barred, and that the record did not support a finding that BLE breached its duty of fair representation. Accordingly, the district court granted summary judgment to UP and BLE and dismissed Appellants' suit.

Appellants challenge each of the district court's rulings. After reviewing the briefs and record in this case, we agree with the district court's conclusions. For substantially the reasons set forth in the district court's opinion, we AFFIRM.

ENTERED FOR THE COURT

David M. Ebel

Circuit Judge

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### FOOTNOTES

Click footnote number to return to corresponding location in the text.

\* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

<sup>2</sup> Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

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URL: <http://lawdns.wuacc.edu/ca10/cases/2002/02/01-1088.htm>.

EC

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

## INTERSTATE COMMERCE COMMISSION

## DECISION

SERVICE DATE

DEC 7 1995

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

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

Decided: November 22, 1995

The Commission finds that employment changes proposed by the petitioning railroad may be effected pursuant to arbitration under the agency's standard New York Dock conditions for protecting employees adversely affected by agency-approved consolidations

## BY THE COMMISSION:

We uphold the findings of fact and conclusions of law in the award of Arbitrator Robert M. O'Brien concerning the implementing agreements proposed by CSX Transportation, Inc. ("CSXT") to effect that carrier's coordination of operations in a new operating district. Because the proposed implementing agreements are necessary to effect the proposed transaction and would not override any "rights, privileges and benefits" that must be preserved under our New York Dock labor protection conditions, we conclude that those agreements satisfy the requirements of our labor protection conditions. The agreements should therefore be adopted.

## BACKGROUND

CSXT in its present form was created by a series of transactions approved by this agency. In our 1980 decision in Finance Docket No. 28905 (Sub-No. 1) et al.,<sup>1</sup> we allowed CSX Corporation, a noncarrier holding company, to control as subsidiary corporations the Chessie System, Inc. ("Chessie"), Seaboard Coast Line Industries, Inc. ("SCLI"), and, indirectly through stock ownership, the Richmond, Fredericksburg & Potomac Railroad Company ("RF&P Railroad").<sup>2</sup> The railroads controlled by Chessie included the Chesapeake & Ohio Railway Company ("C&O"), the Baltimore & Ohio Railroad Company ("B&O"), and the Western Maryland Railway Company ("WM"). The railroads controlled by SCLI included the Seaboard Coast Line Railroad (Seaboard), the Louisville and Nashville Railroad Company (L&N), the Clinchfield Railroad, and several smaller carriers.

In a subsequent series of decisions, we approved the consolidation of the railroad corporate entities controlled by

<sup>1</sup> CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980) (CSXT--Control--Chessie and Seaboard).

<sup>2</sup> At that time, RF&P Railroad was controlled (65.9%) by the Richmond-Washington Company, which, in turn, was owned by Chessie (40%) and SCLI (40%).

CSX Corporation into its subsidiary CSXT.<sup>1</sup> The last steps in this process involved the RF&P Railroad. In 1991, CSXT spun off RF&P Railroad's non-rail assets and created the Richmond, Fredericksburg & Potomac Railway Company ("RF&P Railway") to acquire and to operate RF&P Railroad's rail assets. CSXT invoked our class exemption for corporate families to obtain approval for the acquisition and control.<sup>2</sup> In 1992, CSXT again invoked our corporate family class exemption to operate RF&P Railway directly and to assume all of its rights and obligations.<sup>3</sup>

The decisions creating present-day CSXT were approved subject to our standard labor protection conditions. These conditions were adopted in New York Dock Ry.--Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock) to implement our mandate to provide such protection under 49 U.S.C. 11347. Under New York Dock, labor changes that are related to Commission-approved transactions are established by implementing agreements negotiated before the changes occur. If the parties cannot reach an implementing agreement, the issues are resolved by arbitration. Arbitration awards may be appealed to the Commission under our Lace Curtain standard of review.<sup>4</sup>

<sup>1</sup> In CSXT--Control--Chesie and Seaboard, the Commission authorized the CSX Corporation ("CSX") to acquire control of the 6 subsidiary rail carriers of Chesie and the 10 subsidiary rail carriers (the so-called "Family Lines") of SCLI, through the merger of Chesie and SCLI into CSX. Two years later, in Seaboard Coast Line R.R.--Merger Exemption--Louisville & N. R.R., Finance Docket No. 30053 (ICC served Nov. 8, 1982), the Seaboard and the L&N (both of which were subsidiaries of SCLI in 1980) merged to form the Seaboard System, Inc. Subsequently, in Baltimore & O. R.R. and Chesapeake & O. Ry.--Merger Exemption, Finance Docket No. 31033 (ICC served May 22, 1987), the B&O merged into the C&O. Later that year, C&O merged into the recently created CSXT. See Chesapeake & O. R.R. and CSX Transp. Inc.--Merger Exemption, Finance Docket No. 31106 (ICC served Sept. 18, 1987).

<sup>2</sup> See the notice of exemption in CSX Corporation, et al.--Corporate Family Transaction Exemption--Richmond, Fredericksburg and Potomac Railroad Company, Finance Docket No. 31954 (ICC served Oct. 31, 1991).

<sup>3</sup> CSX Transportation, Inc.--Operation Exemption--Richmond, Fredericksburg and Potomac Railway Company, Finance Docket No. 32020 (ICC served Apr. 15, 1992).

<sup>4</sup> Under 49 CFR 1115.8, the standard for review is provided in Chicago & North Western Tptn. Co.--Abandonment, 3 I.C.C.2d 729 (1987), popularly known as the "Lace Curtain" case. Under the Lace Curtain standard, the Commission does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." Id. at 735-736. In Delaware and Hudson Railway Company--Lease and Trackage Rights Exemption--Springfield Terminal Railway Company, Finance Docket No. 30965 (Sub-No. 1) et al. (ICC served Oct. 4, 1990) at 16-17, remanded on other grounds in Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993), we elaborated on the Lace Curtain standard as follows:

Once having accepted a case for review, we may only overturn an arbitral award when it is shown that the award is irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

This agency (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction.<sup>7</sup> Those contesting proposals that we exercise our authority to override collective bargaining agreements argue that: (1) New York Dock requires the preservation of pre-transaction bargaining agreements; or (2) the changes may not be made because they are not (perhaps due to the passage of time) related to, or necessary for effectuating the purposes of, the proposed transaction. Under New York Dock, employees affected when a collective bargaining agreement is overridden must be compensated pursuant to the formula established therein, which provides comprehensive displacement and termination benefits for up to 6 years.

This proceeding has arisen because of CSXT's efforts to make operational changes that are allegedly related to, and necessary to realize the operational benefits from, certain mergers that helped to create the present-day CSXT. On January 10, 1994, CSXT served a notice on the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) (jointly, "the unions") of its intention to invoke the authority of New York Dock to make operational changes and related employee assignments in order to effectuate the public benefits of the transactions.

Briefly, CSXT is proposing to coordinate train operations in a portion of its system, its new "Eastern B&O Consolidated District" (the "Eastern District"), by transferring work, abolishing and creating positions, and merging seniority rosters. All engineers and trainmen working in the new district would be placed under CSXT's collective bargaining agreements with UTU and BLE covering the former B&O lines. The notice reveals a net loss of 5 positions (47 abolished minus 42 established). CSXT made minor alterations and proposed further details as to the implementation of these coordinations in draft implementing agreements (one for each union) transmitted to the unions on February 25, 1994. In the Appendix to this decision, we have reproduced the major operational changes that were proposed in Article I of CSXT's draft implementing agreements.<sup>1</sup>

The unions refused to participate in the negotiation of an implementing agreement, objecting that: (1) the changes may not be made under New York Dock because they violate existing collective bargaining agreements; (2) CSXT improperly related the changes to the whole group of Commission decisions<sup>2</sup> rather than specified individual decisions; and (3) the changes cannot be related to any of the transactions approved in the decisions because the decisions are too old. CSXT then invoked arbitration under New York Dock. Unable to negotiate, the parties selected Robert M. O'Brien as the arbitrator. An arbitration hearing was

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Where modification is necessary, we may act under either section 11347 or section 11341(a). CSX Corp.--Control--Chessie and Seaboard C.L.I., 4 I.C.C.2d 641 (1988), modified 6 I.C.C.2d 715 (1990); Brandywine Valley R. Co.--PUR.--CSX Transp., Inc., 5 I.C.C.2d 764 (1989); Railway Labor Executives' Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993) (RLEA); Norfolk & Western v. American Train Dispatchers, 499 U.S. 117 (1991); and American Train Dispatchers Association v. I.C.C., 26 F.3d 1157 (D.C. Cir. 1994) (ATDA).

<sup>1</sup> The notices and letters of transmittal to the unions appear in attachments 1 and 2 of volume I of the Appendix to CSXT's petition filed June 9, 1995. The specific changes announced for each union were the same.

<sup>2</sup> See note J, supra, for a statement of the decisions.

held on March 28, 1995. Arbitrator O'Brien issued his award on April 24, 1995.

The Arbitrator's findings of fact and law favored CSXT. He found that the operational changes were subject to New York Dock because they "directly related to and flowed from" the merger authorizations by which CSXT was created. (Award at 9.) The Arbitrator rejected the unions' arguments that: (1) the changes were not subject to New York Dock because they were not related to specific decisions imposing New York Dock protection (but, rather, a whole group of decisions); and (2) the changes cannot be related to any of the transactions approved in the decisions because the decisions are stale. The Arbitrator also held that, acting under our precedent, he had "the authority under both Section 11341(a) and 11347 to modify existing collective bargaining agreements" when they frustrate attainment of the public benefits of transactions approved by this agency. (Award at 14.) Concerning such benefits, the Arbitrator found that CSXT had in fact shown that the changes were necessary to attain the public transportation benefits of the transactions. (Award at 16-18.)

Although his findings of fact and law favored CSXT, the Arbitrator stopped short of adopting the implementing agreements proposed by CSXT. He cited Article I, section 2 of New York Dock, which provides in pertinent part,

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

Arbitrator O'Brien noted that, in RLEA, the court ruled that section 11347 of the Interstate Commerce Act (49 U.S.C. 11347) mandates that rights, privileges and benefits afforded employees under existing collective bargaining agreements must be preserved.<sup>22</sup> The court remanded the case to the Commission to define "rights, privileges and benefits." As the Arbitrator noted, we have not yet rendered a ruling in that proceeding. Because we have not yet ruled on the court's remand, the Arbitrator declined to rule on the issue. The Arbitrator left it to the Commission to determine whether the changes proposed by CSXT would be contrary to any such "rights, privileges and benefits." (Award at 21-22.)

On June 9, 1995, CSXT and the unions filed petitions for review of the Arbitrator's award. On June 29, 1995, CSXT and the unions filed replies. On July 28, 1995, CSXT filed a petition for leave to file a reply to the reply filed on June 29, 1995, by the unions. By decision served August 22, 1995, we granted CSXT's petition and allowed the unions to file a reply to the substantive arguments raised therein. The unions filed a reply on September 6, 1995.

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<sup>22</sup> The court noted, RLEA at 813-814, that section 11347 incorporates the protections afforded under the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U.S.C. 565, which provides, inter alia, that "rights, privileges and benefits" afforded employees under existing collective bargaining agreements be preserved.

ARGUMENTS OF THE PARTIES

The parties raise four main issues: (1) whether we should hear the appeal under our Lace Curtain standard; (2) whether the operational changes proposed by CSXT are linked to, or caused by, a prior approved transaction subject to New York Dock, i.e., whether they were properly before the Arbitrator; (3) whether the changes would improperly reopen prior implementing agreements by contravening provisions in them that allegedly require that such changes be accomplished through bargaining under the RLA; and (4) whether the changes are the type of changes that may justify our overriding collective bargaining agreements or, alternately, involve "rights, privileges and benefits" that must be preserved under section 2 of New York Dock.

1. Whether the appeal should be heard

In its reply filed June 29, 1995, CSXT argues that the Arbitrator's findings of fact should not be reviewed under our deferential Lace Curtain standard of review (see n. 6, supra), under which we do not review arbitrators' findings as to issues of causation, the calculation of benefits, or the resolution of other factual questions. In this category of unreviewable issues, according to CSXT, are the Arbitrator's findings that (1) the operational changes proposed by CSXT grow out of the prior control and merger transactions and that (2) CSXT demonstrated a need to modify collective bargaining agreements to realize the benefits of the merger.

In their June 29, 1995 reply to CSXT, the unions argue that the Arbitrator's award is fully reviewable under our Lace Curtain standard on the grounds that the Arbitrator made egregious errors of fact and law.

2. Whether the changes proposed are linked to or caused by a prior approved transaction

In their petition for review filed June 9, 1995, the unions argue that the Arbitrator lacked jurisdiction under New York Dock to consider the changes sought by CSXT pursuant to our authority to approve operational changes that are necessary to effectuate mergers. That is so, according to the unions, because the changes cannot be linked to, or were not caused by, any of the merger transactions cited by CSXT. The unions maintain that the changes sought here are due to pre-1980 control proceedings not cited by the carrier and involving the property at issue. According to the unions, the changes cannot be linked to the 1980 decision that put Chessie and SCLI under common control because they do not involve SCLI property."

In its reply, CSXT advances various arguments to show that the labor changes proposed by CSXT grow out of the prior control and merger transactions. CSXT cites various decisions where this agency or arbitrators acting under its authority assertedly allowed changes under New York Dock. Responding to the unions' argument that, because the changes do not involve SCLI property, they cannot be linked to Finance Docket No. 28905 (Sub-No. 27),

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" The unions sometimes discuss this issue of linkage or causation in terms of whether "the consolidation of seniority rosters and seniority districts" (reply filed June 29, 1995 at 6) or an attempt to realize "efficiencies" (petition filed June 9, 1995 at 19) can be considered to be "transactions" under New York Dock. Although the unions' choice of words sometimes differs, the underlying issue is the same-- whether CSXT is attempting to implement a transaction or transactions that are subject to New York Dock.

CSXT notes that the changes involve property of the RF&P, the last carrier to come under the complete control of CSXT. CSXT responds to the unions' argument that our 1980 decision in Finance Docket No. 28905 (Sub-No. 27) cannot be the source of the changes allegedly because it is too old by (1) pointing to decisions where we have assertedly held that causality is not diminished by time and (2) arguing that CSXT was not able to integrate the operations of its subsidiaries until the subsidiaries were actually merged into CSXT, a lengthy process that was not concluded until 1992.

3. RLA bargaining requirement in prior decisions

In their petition for review, the unions argue that the merger transactions have already been covered by implementing arrangements and that the coordination sought here would improperly reopen these prior agreements.<sup>12</sup> The unions maintain that the prior implementing agreements require that the changes proposed here be accomplished through bargaining under the Railway Labor Act (RLA) rather than arbitrations under New York Dock.<sup>13</sup>

In its reply, CSXT responds that the language in question is old boilerplate language going back as far as 1959 that provides merely that matters touched upon in implementing agreements can be changed pursuant to transactions that do not require our approval without going through New York Dock procedures. CSXT cites five implementing agreements where representatives of labor allegedly did not argue that the language required bargaining under the RLA to implement transactions requiring Commission approval. The carrier also argues that it cannot credibly be found to have agreed to a one-sided bargain that would have permanently waived its ability to accomplish future coordinations through the New York Dock procedures. Finally, CSXT argues that it had no authority to waive its statutory right to have these issues governed by Commission procedures under section 11347 and New York Dock rather than RLA procedures.

4. Ability to override prior agreements

Both parties tacitly assume that CSXT's changes would in fact contravene collective bargaining agreements. As in prior cases where our authority under New York Dock was at issue, neither party systematically discusses how the collective bargaining agreements would bar the changes sought by management in the absence of action by this agency. Instead, the parties restrict their argument to whether we may compel the changes under New York Dock. The Arbitrator did not resolve this issue.

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<sup>12</sup> The prior agreements alleged by the unions to bar the instant coordination due to language requiring modification pursuant to RLA procedures are: (1) the two 1983 coordination agreements between (a) the B&O and WM and BLE and (b) B&O and WM and UTU, both of which involved lesser included territory (see Exh. 9 to the unions' Appendix of Exhibits); and (2) the two 1992 coordination agreements between (a) CSXT, RF&P, and UTU (see Exh. 10 to the unions' Appendix of Exhibits) and (b) CSXT, RF&P, and BLE (see Exh. 11 to the unions' Appendix of Exhibits), both of which involved lesser included territory.

<sup>13</sup> The language in question typically provides that "This agreement ... shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended." See, e.g., the 1979 implementing agreement reached between the B&O, WM, and several unions, in CSXT's petition filed June 9, 1995, Appendix volume II, exhibit J6, page 8.

In its petition for review filed June 9, 1995, CSXT asks us to decide the issue that the Arbitrator declined to decide, i.e., whether the changes proposed by CSXT would fail to preserve the "rights, privileges and benefits" of existing collective bargaining agreements. Briefly, CSXT argues that the changes do not alter prior rights, privileges, or benefits because: (1) the pay, benefits, and other "key terms" of the prior agreements will not change; (2) all employees will continue to be covered by collective bargaining agreements (the B&O agreements); and (3) our labor protection obligations have never been interpreted as giving employees of a merged carrier like CSXT the "right" or "privilege" of working only on the lines of their former employers.

The unions argue that, under RLEA, the changes must be necessary to secure the public benefits of the merger and that the changes at issue fail this test. CSXT responds that its changes will effectuate the cited transactions by merging operations on lines where train operations are allegedly being conducted as though they continued to belong to separate railroads. The unions dispute CSXT's statement (that operations in the proposed district are being conducted as though they continued to belong to separate railroads) on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts."

CSXT argues that the changes meet the standard imposed in RLEA for changing prior practices that interfere with attainment of the public benefits of the transaction. CSXT argues that: (1) the changes will improve operational efficiency; (2) this improvement is a public benefit under RLEA; and (3) the cost savings from this improvement satisfy RLEA by not creating merely a transfer of wealth from labor to CSXT." Concerning this last point, CSXT contrasts the operational changes proposed here with changes in pay and pension benefits (not proposed here) and other changes that, according to CSXT, can directly transfer wealth from labor to carriers. CSXT accuses the unions of interpreting RLEA as disallowing any changes to collective bargaining agreements, not just changes that are designed to transfer wealth from labor to carriers.

The parties dispute the broader implications of section 2 of New York Dock. CSXT views the "rights, privileges and benefits" language of section 2 as merely creating a savings clause that preserves the collective bargaining agreement provisions that are not required to be modified in order to effectuate Commission-authorized transactions. The unions respond that RLEA precludes CSXT's argument.

The unions dispute CSXT's position that the changes are not important enough to constitute changes in "rights, privileges and benefits." In particular, the unions argue that changes in the location where employees work must be considered in any evaluation of whether "rights, privileges and benefits" are changed and that we may not consider only pay and benefits. The unions also argue that union representation is a right that must be preserved.

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

\*\* The parties sometimes argue in terms of whether the changes "flow solely from modification to labor agreements" or use similar terms. When they do this, they seem to be disputing whether we would be contravening RLEA by mandating changes that are designed less to secure the public benefits of transactions than to transfer wealth from labor to the carrier.

The parties dispute the relevance of section 11341(a). The unions question the Arbitrator's premise that modifications of collective bargaining agreements may be ordered pursuant to 49 U.S.C. 11341(a), on the grounds that section 11341(a) does not apply to transactions that are approved under our section 10505 exemption authority.<sup>16</sup> In response, CSXT argues that, first, the Arbitrator did not rely exclusively on section 11341(a) but also relied on section 11347, and, second, that the Arbitrator related the changes to Finance Docket No. 28905 (the common control proceeding), which was not approved via an exemption under section 10505.

#### DISCUSSION

As noted, the parties raise four main issues. The threshold issue is whether we may hear the appeal on its merits.

1. Whether the appeal should be heard. We will hear the appeal. Under our Lace Curtain standard of review, we do not review issues of causation, the calculation of benefits, or the resolution of other factual questions in the absence of egregious error. Here, the Commission must decide the issue of whether the changes involve "rights, privileges and benefits" that must be preserved under section 2 of New York Dock because the arbitrator deferred resolution of it to us. The Arbitrator's decision on the issue of whether the proposed changes are linked to a prior transaction is a factual issue. That decision should not be set aside except for egregious error. The third issue raised on appeal, whether the railroad has bound itself to follow RLA procedures in undertaking the changes at issue here, involves factual determinations by the arbitrator which merit our deference. However, because it goes beyond mere factual questions, it warrants our review under the Lace Curtain standards.

2. Whether the changes proposed are linked to or caused by a prior approved transaction. The parties dispute whether the labor changes proposed by CSXT are linked to, or caused by, a prior approved transaction subject to New York Dock, i.e., whether they were properly before the Arbitrator. We find that the changes were properly before the Arbitrator under New York Dock.

The Arbitrator's finding on linkage is a factual finding as to causation, and, as such, is entitled to deference under our Lace Curtain standard of review. Such findings are reversed only upon a showing of egregious error.

The Arbitrator's finding of linkage was not egregious error. The purpose of the changes is to ensure that CSXT ceases to operate as a collection of separate railroads and fully enjoys the operational economies of being a unified system.<sup>17</sup> The

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<sup>16</sup> We have asserted two statutory grounds for modification of collective bargaining agreements: section 11347, the statutory basis of New York Dock; and section 11341(a).

<sup>17</sup> The unions dispute CSXT's statement, that operations in the proposed district are being conducted as though they continued to belong to separate railroads, on the grounds that operations in the district have in fact been merged, except for the consolidation of seniority districts. See the statements of UTU General Chairmen Robert J. Will and John T. Reed, attached to the unions' reply filed June 29, 1995. We find, however, that operations in the proposed district have not been merged, based on the statement of CSXT's Director of Employee Relations Michael D. Rogers, attached to CSXT's response filed July 28, 1995.

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opportunity to make these changes was created by an entire series of decisions. These began with the 1963 and 1967 decisions that brought the B&O, C&O, and WM under common control and ended with the 1992 decision that formally merged the RF&P into the CSXT system.<sup>14</sup> All of these decisions played a role in creating the opportunity for CSXT to coordinate operations in the proposed Eastern District by use of a single pool of employees. This opportunity cannot be attributed solely to any individual decision in this series of decisions.

The relevant inquiry is whether the action at issue is linked to prior Commission action in which we imposed New York Dock conditions. As long as the actions at issue are rooted in transactions subject to New York Dock, it does not matter whether these conditions were imposed in one transaction or several. The conditions do not vary from case to case. The only question is whether they are applicable. The unions do not dispute that they are. Neither logic nor precedent supports the unions' contention that the basis for a carrier's action must be found in a single, Commission-approved transaction, rather than in a series of them.

The unions' position is based on an assumption that CSXT had a duty to implement whatever New York Dock-related coordinations involving C&O, B&O, and WM track when these carriers first came under common control or soon thereafter. If CSXT had been under such a duty, the instant coordination arguably could have been criticized as too late to be accomplished under New York Dock.

But we have never imposed a deadline on making merger-related operational changes. In fact, in CSX Corporation--Control--Chessie System, Inc., and Seaboard Coast Line Industries, 8 I.C.C.2d 715, 724 n. 14 (1992), we held that causality is not diminished with the passage of time:

Causality, however, is not *per se* diminished by a lengthy delay in exercising authority previously granted. This is not analogous to laches. There could be any number of reasons why an entity formed as a result of a Commission-approved transaction might wish to postpone a coordination which could have been undertaken earlier.

We have been given no reason to depart from this holding here. CSXT merged its operations gradually, delaying many changes until the corporate entities were merged. This approach does not appear to be unreasonable on its face, and no showing has been made that it is unreasonable. Nor has any showing been made that CSXT's gradual merger of its operations prejudiced the rights of employees under New York Dock. If anything, the gradual nature of the merger would have been more likely to benefit employees by providing for a smoother integration of personnel into the merged system.

The unions note that the order of Presidential Emergency Board 219 increasing the basic mileage of train and engine service employees influenced the benefits of the coordination. See the statements of Don M. Menefee and John T. Reed, attached to the unions' Appendix of Exhibits filed with its petition on June 9, 1995. Without the merger decisions, however, there could have been no coordination at all, notwithstanding Presidential

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<sup>14</sup> The Arbitrator's failure to include the pre-1980 transactions as grounds for his jurisdiction did not affect his jurisdiction because this agency, like courts operating under modern rules of pleading and practice, may uphold its jurisdiction for any valid legal reason, regardless of whether that reason is pleaded or argued.

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Emergency Board 219. Without Presidential Emergency Board 219, the new district would most likely have been smaller (due to a smaller range of crew travel), but some coordination would still have been possible. The connection between the merger decisions and the coordination was not severed by the action of the Emergency Board. A reasonably direct causal connection remains between our decisions and the coordination. Our standard of "reasonably direct connection" was applied in: (1) Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Railway Company (Petition for Review of Arbitral Award), Finance Docket No. 28583 (Sub-No. 24) (ICC served June 23, 1986); and (2) Maine Central Railroad Company--Lease (Arbitration Review), Finance Docket No. 29720 (Sub-No. 1A) (ICC served Dec. 8, 1988), aff'd Brotherhood of Maintenance of Way Emp. v. I.C.C., 920 F.2d 40 (D.C. Cir. 1990). Thus, the Arbitrator did not commit egregious error by finding a connection.

3. RLA bargaining requirements in prior agreements. The parties dispute whether the coordination sought by CSXT would contravene provisions in prior implementing agreements that allegedly require that subsequent coordinations be accomplished through bargaining under the RLA.

We uphold the Arbitrator's decision that these provisions impose no such requirement. The intent of the provisions requiring RLA bargaining was not to bar this type of coordination under New York Dock. The lack of intent was manifested in two ways: (1) differences in the territories involved; and (2) past dealings.

(a) Territorial differences. The Arbitrator found that the changes proposed by CSXT here do not involve the same territory or property involved in the prior agreements.<sup>19</sup> We have no

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<sup>19</sup> In making this finding, the Arbitrator distinguished an earlier arbitration award where Arbitrator Harris found to the contrary (Award at 19):

The Unions cite a 1994 award rendered by Neutral Robert O. Harris in a case between the UTU and CSXT (involving Carrier's notice to coordinate work performed on the C&O and the Louisville and Nashville Railroad Company) in support of its contention. Arbitrator Harris found that because of an earlier implementing agreement involving the same properties, CSXT was precluded from asking for de novo arbitration to coordinate property subject to an implementing agreement which, by its express terms, may only be changed pursuant to the RLA. The Carrier has appealed the Harris award to the ICC.

It appears that Arbitrator Harris concluded that an implementing agreement may not be changed in a second coordination of the same properties except in accordance with the terms of the implementing agreement. However, CSXT and or its predecessors agreed to implementing agreements involving the WM and the RF&P. Evidently, there were no implementing agreements involving the B&O and the C&O. Since over 80% of the territory the Carrier now proposes to coordinate involves former B&O and C&O property the Carrier is not now seeking coordination of "the same properties" which were subject to earlier implementing agreements, in this Arbitrator's judgment.

reason to question this finding, much less to find it egregiously wrong.<sup>20</sup>

Nor do we find egregious error in the Arbitrator's premise that the prior agreements were not intended to cover future coordinations involving different track and territories. While it can be argued that CSXT bound itself to RLA procedures as a condition for changing the coordinations involving the lesser included track at issue in the prior agreements, the carrier cannot reasonably be found to have intended these agreements as perpetually waiving New York Dock procedures for future coordinations involving territories of substantially greater extent and differing scope. Such a waiver would have barred the carrier from any future New York Dock coordination between the track involved in the prior agreements and the remainder of the CSXT system, thereby creating an "island" of unintegrated operations in its system. We cannot plausibly find that the carrier intended to use the minor and routine 1983 and 1992 agreements to bind itself to such a significant restriction, at least in the absence of specific language in those agreements or other credible evidence of such intent.

(b) Past dealings. The Arbitrator also implied that past dealings show that the RLA requirement was not intended to bar the instant coordination.<sup>21</sup> Under general contract law, the intent of parties to an agreement can be ascertained from a course of dealing or usage of the trade. Custom and usage, as reflected in the arbitration agreements cited by CSXT, contravenes the contention that RLA procedures are required for subsequent coordination efforts under New York Dock.<sup>22</sup> The

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<sup>20</sup> The Arbitrator's finding that different territory was involved was not egregiously wrong. An inspection of the track involved in the prior agreements (see the agreements and diagrams cited in note 11, above) indicates that much of the track and the scope of the coordination differs:

1. The WM trackage involved in the two 1983 agreements coordinating operations on the WM and the B&O only partially overlaps the WM trackage at issue here. Part of the WM trackage involved in the 1983 agreements seems to have been abandoned.

2. The B&O track involved in the 1992 agreements coordinating operations on the RF&P and the B&O ran from Potomac Yard to Baltimore and Philadelphia and from Potomac Yard west to Brunswick and east again to Baltimore, a small subsegment of the B&O track involved here. Unlike the agreements at issue here, the 1992 agreements did not involve C&O track.

<sup>21</sup> The Arbitrator stated (Award at 20):

It is also noteworthy that CSXT and its predecessors have negotiated several implementing agreements containing language similar to that involved in the Harris award. Many of those properties were subsequently coordinated without resort to the RLA. Rather, they were coordinated in accordance with ICC procedures.

<sup>22</sup> The agreements are discussed on pages 29-30 of CSXT's reply filed June 29, 1995 and appear in exhibits 36, 38, 39, 40, 41, 42, and 43. In each of the five implementing agreements cited by CSXT, the union did not object to the expansion of the coordination of operations under New York Dock, notwithstanding the presence of similar language referring to the RLA in the prior implementing agreements establishing the coordinations that

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awards cited by CSXT, going back over 30 years, show that neither party had any reason to view this language as restricting CSXT's ability to invoke New York Dock to implement future operational changes, an ability that CSXT would not have readily given up. This usage history is consistent with CSXT's position that the language is boilerplate language that provides merely that matters touched upon in implementing agreements can be changed pursuant to transactions that do not require our approval without going through New York Dock procedures.

Because we are upholding the Arbitrator's finding that the intent of the language requiring RLA procedures was not to bar future coordinations under New York Dock, we do not have to reach CSXT's argument that carriers have no authority to waive their statutory right to have such issues governed by Commission procedures under section 11347 and New York Dock rather than RLA procedures.

4. Ability to override prior agreements. It is well settled that we have the authority to modify collective bargaining agreements when modification is necessary to obtain the benefits of a transaction that we have approved in the public interest. See the cases cited in note 7, supra. At issue here are the limits of that authority. In particular, the issue is whether the changes sought by CSXT comport with the court's decision in RLEA.

The court in RLEA did not intend to make every change an impermissible change in rights, privileges, or benefits. As the court stated (987 F.2d at 814), "Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor-- an obviously absurd position-- § 565 [of the Rail Passenger Service Act, 45 U.S.C. 565] (and hence § 11347) does seem to contemplate that the ICC may modify a CBA." [Citation omitted.] Nor did the court hold that changes in work location or the switching of employees from work under one collective bargaining agreement to another involved impermissible changes in rights, privileges, or benefits.

To determine which changes are permissible, the court in RLEA established the following standard (987 F.2d at 814-815):

. . . it is clear that the Commission may not modify a CBA willy-nilly: § 11347 requires that the Commission provide a "fair arrangement." The Commission itself has stated that it may modify a collective bargaining agreement under § 11347 only as "necessary" to effectuate a covered transaction. [Citation omitted.] . . . We look therefore to the purpose for which the ICC has been given this authority [to approve consolidations]. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer . . . .

In other words, the court's standard is whether the change is (a) necessary to effect a public benefit of the transaction or (b) merely a transfer of wealth from employees to their employer.

This standard has been met here. The Arbitrator did not commit error (much less egregious error) in finding that the

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:(...continued)

were expanded. The unions do not dispute CSXT's position that they did not raise the RLA language as an objection to subsequent expansion.

changes sought by CSXT would improve efficiency,<sup>13</sup> a factual finding entitled to deference under our Ice Curtain standard. CSXT has supported its claims that merging the separate seniority rosters into one will produce real efficiency benefits; see volume III of the Appendix of Exhibits to the Petition of CSXT, Tab B at 8-12. Improvements in efficiency reduce a carrier's costs of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers. The savings realized by CSXT can be expected to be passed on to the public because of the presence of competition. Where the transportation market for particular commodities is not competitive, regulation is available to ensure that cost decreases are reflected in rate decreases. Moreover, increased efficiency and lower costs would enable CSXT to increase traffic and revenue by enabling that carrier to lower its rates for the service it provides or to provide better service for the same rates. While the railroad thereby benefits from these lower costs, so does the public.

The changes sought by CSXT do not appear to be a device merely to transfer wealth from employees to the railroad. Indeed, there does not appear to be a significant diminution of the wealth of the employees. The extent of unionization will not change. The reduction in labor costs will occur through more efficient use of employees and equipment, not by any reduction in current hourly wages and benefits.<sup>14</sup> In order to use employees more efficiently, CSXT will require some employees to work different territories and report to different staging areas. Some employees may have to move. Moving expenses are a benefit under our New York Dock compensation formula.

The one adverse effect on employees from the proposed consolidation of seniority districts apparent from the record is that some employees may have to travel to protect their seniority rights. A specific instance cited was that terminal reporting points for engineers working out of Cumberland, MD, would be 100 miles away. No reduction in wages or change in working conditions would exist, except the minor changes noted. Employees subject to these changes would be compensated under New York Dock. For that reason, the criteria of RLEA have been met.

In considering whether the actions taken by CSXT comport with RLEA, we need to consider the court's decision in ATDA, which adopted the RLEA standard, adding (26 F.3d at 1164, emphasis supplied):

In other words, the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain.

The Arbitrator found that the consolidation of the seniority districts would lead to lower costs, hence resulting in transportation benefits. But the unions have asserted that these benefits arise merely from the modification of the CBA, thereby contravening the court's holding in ATDA.

We disagree. On page 16 of his decision, Arbitrator O'Brien states:

<sup>13</sup> See note 16, above.

<sup>14</sup> Certain WM employees may experience minor changes in compensation due to minor differences between the B&O and WM collective bargaining agreements. But the differences apply only to small numbers of employees and in atypical situations. Any changes in compensation would be compensable under New York Dock.

CSXT has convinced this arbitrator that it is necessary to change the seniority districts of the train and engine service affected by its proposal if the territory of the erstwhile C&O, B&O, WM and RF&P to be coordinated is to be run as a distinct and unified rail freight operation. Were the Carrier required to continue operating this territory as four separate railroads each with its own work force and seniority districts the operating efficiencies contemplated by the coordination would be illusory. (Emphasis added.)

Here, the "transaction" is not, as labor contends, the modification of the collective bargaining agreements but rather the mergers of four previously separate railroads into a single entity. The merging of the seniority districts does not have its genesis in the modification of the collective bargaining agreements. As long as the C&O, B&O, WM and RF&P remained separate railroads, the employees of each must of necessity have worked independently of each other. Approval of the merger was the action that permitted these four groups of employees to be melded into one. Once the merger had taken place, the consolidation of the employees--and the modification of the collective bargaining agreements--became necessary if the efficiencies of the single work force, made possible by the merger, were to be realized.

We must also determine whether the CBA provisions to be changed--(1) "scope" provisions governing "ownership" of work;<sup>21</sup> and (2) seniority provisions--are "rights, privileges, and benefits" that must be preserved. The D.C. Circuit Court remanded RLEA to permit the Commission to define the meaning and scope of the phrase "rights, privileges, and benefits" in section 405 of the Amtrak Act as incorporated into 49 U.S.C. 11347. 987 F.2d at 814.

The history of the phrase "rights, privileges, and benefits" indicates that it has traditionally meant what it implies--the incidents of employment, ancillary emoluments or fringe benefits--as opposed to the more central aspects of the work itself--pay, rules and working conditions. The genesis of section 405 of the Amtrak Act was the Urban Mass Transit Act of 1962 (UMTA), which authorized federal financial assistance to state and local governments for the improvement of urban mass transit systems. Section 13(c) of that Act (now codified as 49 U.S.C. 5333(b)) required the Secretary of Labor to certify as "fair and equitable" arrangements to protect affected employees. The first requirement of section 13(c) for a "fair and equitable" arrangement was "the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise."

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

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<sup>21</sup> See ATDA, 26 F.3d at 1160-61 for discussion of scope provisions.

attaching to his employment, including without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions so long as such benefits continue to be accorded to other employees of the bargaining unit, inactive service or furloughed as the case may be.

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

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

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

The unions argue that section 2 of New York Dock gives employees a right to retain their existing union representation. The coordination will require WM engineers, currently represented by UTU, to work under the agreement that BLE negotiated with the B&O rather than their current agreement. The effect of our transactions on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act. Fox Valley & Western Ltd.--Exemption Acquisition and Operation--Certain Lines of Green Bay and Western Railroad Company, Fox River Valley Railroad Corporation, and the Annapee & 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.

As noted, the parties dispute whether section 2 of New York Dock is merely a savings clause that preserves the collective bargaining agreement provisions that are not required to be modified in order to effectuate Commission-authorized transactions. We need not resolve that issue here. The decisions upholding our authority to change collective bargaining agreements are not premised on section 2 being merely a savings clause.

The unions have not even alleged that the consolidation of agreements in any way impairs the ability of CSXT employees to bargain collectively with the railroad. Nor are the rights, benefits, and privileges granted by past negotiations impaired. CSXT is proposing action that is made possible by transactions that we have authorized. Employees affected by those transactions are entitled to the benefit of New York Dock conditions, which have been imposed here.

#### CONCLUSIONS

We conclude that the implementing agreements proposed by CSXT satisfy the requirements of our labor protection conditions and should be adopted. The coordination proposed by CSXT is linked to transactions subject to New York Dock and was thus properly before the Arbitrator. By pursuing arbitration under New York Dock, CSXT did not contravene language in prior implementing agreements requiring that future changes must be made under the RLA because those agreements were not intended to apply to the changes sought here. Finally, we find that the changes may be made even if they are inconsistent with existing collective bargaining agreements and that our authority to require these changes is consistent with the requirement of section 2 of New York Dock that "rights, privileges and benefits" of existing collective bargaining agreements be preserved.

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

It is ordered:

1. The findings of fact and conclusions of law in the Arbitrator's award are upheld, as supplemented in this decision, and the implementing agreements proposed by CSXT are adopted.
2. This proceeding is discontinued.

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

Vernon A. Williams  
Secretary

(SEAL)

APPENDIX

CSXT's Statement of Changes Under Section 4 of New York Dock

Article I

A. Effective upon ten (10) days advance notice, all train operations and the associated work forces of the former WM, RF&P, and a portion of the former C&O, will be transferred, consolidated and merged into the train operations and associated work force on the former Baltimore and Ohio in the territory hereinafter described:

Philadelphia, Pa. - Cumberland, Md. (former B&O)  
Cherry Run, Md. - Baltimore, Md. (former WM)  
Hagerstown, Md. - Lurgan, Pa. (former WM)  
Baltimore, Md. - Potomac Yard, Va. (former B&O)  
Brunswick, Md. - Potomac Yard, Va. (former B&O)  
Potomac Yard, Va. - Richmond, Va. (former RF&P)  
Charlottesville, Va. - Richmond, Va. (former C&O)  
Brunswick, Md. - Winchester, Va. (former B&O)  
Cumberland, Md. - Brooklyn Jct. W. Va. (former B&O)  
Grafton, W. Va. - Muddlety, W. Va. (former B&O)  
Banwood, W. Va. - Huntington W. Va. (former B&O)  
Tygart Jct. W. Va. - Bergoo, W. Va. (former B&O and WM)

which areas comprise the territory shown on the sketch designated as Attachment "A."

NOTE: All branches and industrial tracks intersecting the above listed lines and all pre-existing territorial rights of the involved districts are included in the coordinated territory.

B. The following initial operational changes will be placed into effect upon implementation of the Consolidation:

1. Charlottesville, Va. will be closed as a supply point and terminal for other than outlying point assignments, transferring all other work to Richmond, Va. Charlottesville will thereafter be an outlying point for the Richmond supply point. The Piedmont-Washington Subdivision will be added to the working limits of the Richmond-Potomac Yard Pool.

2. Hanover, Pa. will be closed as a supply point and terminal for other than outlying point assignments, transferring all other work to Baltimore, Maryland. The territory between Baltimore and Hanover will be added to the working limits of the Baltimore-Brunswick Pool. Hanover will thereafter be an outlying point for the Baltimore supply point.

3. Hagerstown, Md. will be closed as a supply point and terminal for other than outlying point assignments, transferring the protection of service to and from Harrisburg to a through freight pool out of Cumberland (operating through Hagerstown). The territory between Cherry run and Hanover will be added to the working limits of the Baltimore-Brunswick pool. Hagerstown will thereafter be an outlying point for the Brunswick supply pool.

4. The protection of certain service west of Cumberland will be transferred to Brunswick by adding the territory west of Cumberland on the Mountain Subdivision and former WM lines

Source: Pages 1-3 of CSXT's proposed implementing agreement with UTU transmitted to the unions on Feb. 25, 1994, reproduced in Attachment 1 of volume I of the Appendix of Exhibits to CSXT's petition filed June 9, 1995. The same provisions appear in CSXT's proposed implementing agreement with BLE in Attachment 2.

intersecting the Mountain Subdivision to the working limits of the Brunswick-Cumberland Pool with Brunswick remaining the home terminal and Cumberland the away from home terminal.

5. The working limits of the Henry Pool will be combined with the working limits of the Cumberland-Grafton Pool. Cumberland will remain as the home terminal. Grafton will remain as the away from home terminal.

6. Elkins, W. Va. will be closed as a supply point and terminal for other than outlying point assignments, transferring the protection of service between Tygart Junction and Bergoo to the supply point of Grafton by adding that territory to the working limits of the Grafton-Cowan Pool. Laurel Bank will be added as an away from home terminal for that pool. Elkins and Laurel Bank will thereafter be an outlying point for the Cumberland supply point.

NOTE: Notwithstanding any other provisions of this Agreement, to foster an efficient and economic environment for the retention and growth of business on this marginal line, when service is needed on the Tygart-Bergoo line, qualified employees in the Grafton-Cowan Pool will be called ahead of unqualified employees. When there are no qualified employees available in the pool, the Carrier may call qualified extra employees ahead of unqualified pool employees.

C. Employees may be required to perform service throughout the coordinated territory in accordance with the B&O schedule agreement in the same manner as though such coordinated territory was included within their original seniority district.

July 22, 2004

### China's 'It Couple' Builds Sleek Towers And a High Profile

#### Yuppie Pair Becomes Darling Of the Changing Media; Who Wore What at Party

By KATHY CHEN

**BELJING**—Inside a tent amid new minimalist apartment towers, Chinese film stars and business elite mingled with Western diplomats. But the real draw of the evening were the hosts, building tycoons Pan Shiyi and Zhang Xin.

Ms. Zhang swept into the room wearing a Mao suit in untraditional electric blue. She air-kissed a Chinese television host and bantered with another guest in black velvet as TV cameras captured the exchange. In a corner, Mr. Pan chatted with the U.S. ambassador's wife.

In a country newly fascinated with glitz and glamor, Ms. Zhang and Mr. Pan have become something novel in China: a hot celebrity couple. They made their mark by building some of China's most successful office and housing complexes, defined by a simple, modern aesthetic. And they found fame thanks to an increasingly competitive media that pays attention to personalities, and a growing class of monied young professionals looking for role models.

Mr. Pan and Ms. Zhang "are the 'It Couple,'" gushes Hung Huang, a publisher of trendy Chinese-language magazines who has run stories identifying Ms. Zhang as "China's smartest woman." Mr. Hung adds: "They're self-made, they're creative and they're very good at feeling the pulse of the modern-day, middle-class Chinese."

Unlike many other Chinese entrepreneurs, who prefer to keep a low profile, the couple have opened up their lives to the press. Their faces have appeared on the covers of many of China's new glossy magazines. Hundreds of articles have chronicled their rags-to-riches story and even their sometimes stormy relationship.

Ma Weiyao, a 28-year-old media entrepreneur, and her husband have bought two of the couple's properties for investment and a third for their own use. They devour any news about the couple.

"China has so many people with



Zhang Xin

### Railroad Blues

## Woes at Union Pacific Create A Bottleneck for the Economy

#### Unexpectedly Strong Demand Leads to Rolling Delays; No Easy Fix for Christmas

### Mr. Miller's Spoiled Lumber

By DANIEL MACHALABA

**TEMPE, Ariz.**—Glenn Miller thought he could rely on Union Pacific Corp. That was before the U.S.'s largest railroad started falling behind on deliveries to his wholesale lumberyard, which is connected to Union Pacific by its own rail spur.

A series of orders took about a month each to arrive at Miller Wholesale Lumber Co. when they should have taken about 10 days. In the spring, one lumber shipment from Oregon spent three months riding the rails, including an unscheduled detour into Pennsylvania on another railroad. Union Pacific tried using a trucking company, but multiple loads of wood were warped by the desert sun and one went to a competitor by mistake. The snafus cost more than \$200,000, Mr. Miller estimates, because he had to buy lumber on the spot market to meet his obligations. "It's a nightmare for guys like me," he says.

The Union Pacific system, stretching from the Midwest to the West Coast, has been gripped by a series of operational breakdowns. Failing to anticipate a surge in demand for shipping, the railroad has found itself without adequate staffing to handle the extra freight. As a result, parts of Union Pacific's network have come close to seizing up, with labor shortages creating rolling bottlenecks and delays.

Freight yards and tracks have been so clogged that entire trains have been stuck for days. The railroad can't move empty cars quickly enough to pick up shipments, which are taking days or even weeks longer than they should to reach their destinations, if the railroad is able to carry them at all. Union Pacific, based in Omaha, Neb., is now turning away customers.

The company's troubles, the worst since its massive service breakdowns of the late 1990s, come at a pivotal time for the recovering U.S. economy. In total,

### Losing Steam

The average speed of trains run by Union Pacific, the U.S.'s largest railroad



railroads carry more than 40% of U.S. freight volume, and Union Pacific controls nearly a third of that business. It carries about \$300 billion a year of raw materials and finished goods.

The regular tide of foreign-made DVD players, sneakers and other big sellers will begin reaching U.S. shores this month for the critical holiday season. With trucking companies and other railroads also squeezed for space, Union Pacific has become a major business constraint that could create shortages for retailers and higher prices for customers. In addition, rail analysts are expecting a strong grain harvest this year, which will further strain Union Pacific's system.

Robert Sappio, a senior vice president at APL Ltd., an ocean shipping line owned by Singapore's Neptune Orient Lines Ltd., expects rail service to bog down once the peak shipping season gets under way. "I anticipate that despite the very best efforts of our partner, the UP, there will be congestion and delays," he says. APL serves fashion houses and other importers that need goods delivered from Asia. Its customers are already demanding discounts because of the rail service's unreliability.

Some of Union Pacific's most valuable freight shipments are being poached by long-haul truckers and Burlington Northern Santa Fe Corp., the railroad's chief rail competitor. But even Burlington Northern Santa Fe, whose tracks cover

Please Turn to Page A8, Column 4

Exhibit 11

## High-Flying Hedge Funds Face

# Railroad's Woes Threaten Economy

Continued From First Page

much of the same territory as Union Pacific, is not taking too much business lest its tracks also become clogged.

A Union Pacific spokesman says the railroad "clearly" has problems, which he describes as a "system under stress, but we don't see it as a crisis." The company says it didn't foresee a surge in freight demand because customers provided estimates that were too conservative. "We were very surprised with the strength of the recovery," says Union Pacific Chief Executive Richard Davidson. In the first half of 2004, Union Pacific handled more carloads than any equivalent period in its history.

The railroad is scrambling to ease its worst bottlenecks by building new tracks and bridges, particularly along the Sunset Route that links Los Angeles and El Paso, Texas, a key route for goods imported from Asia. Union Pacific also plans to acquire 700 extra locomotives and hire 5,000 new crew members this

year. "We're just trying to do the right things and get the resources in place," Mr. Davidson says.

Ever since it was created through an Act of Congress signed by President Lincoln on July 1, 1862, Union Pacific has been a crucial part of the U.S. economy. In 1869, after starting on opposite sides of the country, the Union Pacific met the Central Pacific in Utah where officials drove a golden spike into a railroad tie. The first transcontinental rail network spurred settlement of the nation's Western territories.

After the industry was deregulated in 1980, Union Pacific grew through mergers with the Missouri Pacific, Western Pacific, Missouri-Kansas-Texas, Chicago and North Western and Southern Pacific rail-

In the past couple of years, there has been an exodus of senior Union Pacific employees. A retooled retirement plan lowered the retirement age for railroad workers to 60 from 62 and many employees of the old Southern Pacific took the opportunity to leave. Other engineers displaced by remote-control locomotives chose to retire instead of taking long-distance assignments with irregular schedules.

As a result of the staffing shortages, Union Pacific can't easily move equipment around its network. The average speed of its trains has fallen by three miles per hour to about 21 mph. "They played it too tight, and it backfired," says Ed Burkhardt, president of Rail World Inc., a closely held railroad-holding company in Chicago.

James Young, president of Union Pacific Railroad Co., the unit that operates the railroad, acknowledges that Union Pacific has been running "too tight, particularly on crews." The Union Pacific spokesman says the company was "quite accurate" in estimating in total how many employees would take retirement. But forecasts in specific areas, such as individual terminals, "were wrong in a few places," he says.

As a result of its problems, Union Pacific today is expected to report second-quarter profits that are sharply lower than the year-earlier period. The company's stock price is down 17% since the start of the year.

Union Pacific's customers are bearing the brunt of the mess. Lyondell Chemical Co., a maker of petrochemicals and plastics, cut some production lines this spring because raw materials were stuck on the railroad. Moving goods by rail around Houston, where Lyondell is based, now takes seven days instead of the usual two. These problems have cost it nearly \$1 million, says a spokesman. Union Pacific isn't always obligated to make up for customers' lost income, but in the past has paid out claims to soothe damaged relationships.

Universal Forest Products Inc. has been forced to buy lumber on the spot

the first major bottleneck within four or five hours. This time, because of the various delays, Mr. Jarel didn't get there until eight hours after he went on duty. There, he halted the train at a spot where two tracks narrow to one and waited an hour for three westbound trains to pass.

Union Pacific crews are racing to install new bridges and a new eight-mile parallel track that will allow trains to move through the area in both directions at the same time. Mr. Jarel thinks that will make little difference. The new track "will just move the bottleneck out further," Mr. Jarel predicts.

Eight miles later, as the lights of Palm Springs sparkle in the distance, Mr. Jarel stopped again. This time, he was the problem. A fresh crew was called to relieve Mr. Jarel and his conductor because they were approaching hitting federally mandated 12-hour work limits. He was picked up by a van that drove him to Yuma, Ariz., the official end of his route where he normally hands off to another crew.

Mr. Jarel says he often can't complete the entire 258-mile run to Yuma. Because additional crews are drafted to deal with this kind of problem, other trains sit idle without anyone to drive them. That forces the railroad to use employees to move waiting trains onto sidings—and back again when they're ready to go—compounding the labor shortages.

The trains are sometimes parked in high-crime areas.

After starting his trip, Mr. Jarel saw thieves breaking open container doors on a nearby train. He reported the incident to a Union Pacific dispatcher who alerted police. Union Pacific says the suspects were gone when the police arrived; it's unclear if anything



Glenn Miller



Michael Jarel

was taken.

roads to become the nation's largest railroad.

But railroads are highly inflexible and problems can quickly multiply. Trains take a long time to start, stop and back up, and are restricted by the track network, much of which runs on a single track.

Union Pacific's current stumbles echo problems it faced in 1997 and 1998. Following the railroad's merger with Southern Pacific Rail Corp., it cut costs by consolidating yards, but pared too much. The resulting snafus marooned Midwestern crops and paralyzed ports on the West Coast.

Overseeing the company at the time was Mr. Davidson, a life-long railroad man. The 62-year-old executive rose through the ranks to the top spot in Union Pacific in 1997 having started life as a brakeman with the former Missouri Pacific. To better integrate his life and work, Mr. Davidson had an old baggage car outfitted with exercise equipment so his routine wouldn't be interrupted when he traveled on inspection trains.

After the Southern Pacific debacle, he promised to transform Union Pacific by building more tracks and transferring operational control from headquarters to the field. Union Pacific added a second track on a key line through Kansas and a third one in south-central Nebraska, a route the company calls the busiest in North America.

But Union Pacific's investment slowed when the economy soured. It discussed adding a track to large sections of the Sunset Route, but completed less than initially envisioned. It also put the brakes on hiring. Two of Union Pacific's biggest unions, the Brotherhood of Locomotive Engineers and Trainmen, and the United Transportation Union, say the company's problems stem from not hiring enough conductors and engineers.

market in recent months because Union Pacific didn't deliver orders from the Pacific Northwest on time. The Grand Rapids, Mich., company uses lumber to make crates, trusses and other building components. "It costs a lot of money when you start adding up all the effects," says Mike Mordell, executive vice president of purchasing, who thinks the delays have cost Universal more than \$500,000.

Among the hardest hit are firms that depend on getting raw materials just before they're used in production. As Oregon Steel Mills Inc. of Portland, Ore., waited for trainloads of natural-gas-pipeline sections to be delivered to a customer, it had to pay \$5,000 a day to the company that would eventually unload the rail cars.

The depth of Union Pacific's problems, especially along the troubled Sunset Route, can be seen through the May journey of Train ILBNS-18 from Los Angeles to Memphis, Tenn. The train—100 railcars long and packed with imported electronics, new Toyotas and other cargo—sat for three days past its scheduled departure because Union Pacific had no locomotives available. The railroad divided the train in two, to avoid blocking a grade crossing, and shunted it onto a branch line next to a high-school football field.

When Union Pacific found the locomotives, there was a two-hour delay relating to unfinished paperwork and congestion in Union Pacific's East Los Angeles yard. "It's a horrible system," says Michael Jarel, the train's 48-year-old engineer. "They throw obstacles in your path." When he was ready to leave, at 6 p.m., Mr. Jarel was blocked by locomotives moving cars around on the same track.

The Sunset Route handles up to 50 freight trains a day. Usually, trains hit

Union Pacific is planning an infusion of locomotives and new crew members. It's hiring trainmen and conductors, whose duties include fixing minor breakdowns. As their ranks are replenished, Union Pacific will teach veteran conductors, who are in charge of the individual trains, how to drive them. Because that training takes at least six months, finding enough engineers will still be a "challenge over the balance of the year," concedes Mr. Young, the Union Pacific president. In the meantime, the company has been turning away some of its highest-profile clients, including United Parcel Service Inc.

Union Pacific is considering reviving plans to add a second track to large portions of the Sunset Route. Double-tracking the entire distance would cost as much as \$1.5 billion, a big outlay for an industry that's been struggling to raise rates for years. Mr. Davidson dismisses the notion that Union Pacific hasn't invested enough in its railroad, citing the addition of a third track in Nebraska. Mr. Young says the company is discussing raising rates with its big customers in order to accelerate modernization programs.

Few of the remedies will be completed in time for the Christmas rush. Mr. Miller says he's noticed improvements lately in Union Pacific's service but still worries that shipments are arriving late. Standing in his lumberyard in Tempe, he pointed to a stack of 2-by-4s that were delivered by truck instead of rail. Because the road haulage company hired by Union Pacific didn't have enough vehicles, it stored the lumber on the ground for three weeks, spoiling it.

"I'm not selling a bright, fresh stick of wood," Mr. Miller said. "I'm selling a piece of wood that looks like a car that hasn't been washed in a month."

Side Letter No. 23

December 9, 1997

MR D E PENNING  
GENERAL CHAIRMAN BLE  
12531 MISSOURI BOTTOM RD  
HAZELWOOD MO 63042

MR D E THOMPSON  
GENERAL CHAIRMAN BLE  
414 MISSOURI BLVD  
SCOTT CITY MO 63780

MR M L ROYAL JR  
GENERAL CHAIRMAN BLE  
413 WEST TEXAS  
SHERMAN TX 75092-3755

Gentlemen:

This refers to the Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub which was signed on October 9, 1997.

During roster formulation meetings a question arose concerning the number of slotted pool turns listed on Attachments "B", "C", and "D" to the Agreement. This will confirm that the number of turns subject to the prior rights slotting arrangement are as set forth therein, i.e., 78 turns (Attachment "B"), 30 turns (Attachment "C"), and 114 turns (Attachment "D"), and those numbers are not subject to change.

Additionally, a clarification was desired regarding Article LA.4.c. Specifically, it was understood that in the unlikely event there is no extra board maintained at Memphis, or if it is exhausted, the existence of these circumstances may not be cited as a basis for denying eligible engineers the right to exercise layoff privileges under this section. Also, under such circumstances, it is understood that extra service would be protected by the next nearest extra board on which qualified engineers were available.

If the foregoing adequately and accurately sets forth our agreement in this matter, please so indicate by signing in the space provided for that purpose below.

Yours truly,



M. A. Hartman  
General Director - Labor Relations

## ATTACHMENT "C"

### Pool Allocation

North Pool (30 turns, UP Arkansas 51.388%, SSW 48.612%)  
NLR-PB -Memphis

1. Arkansas
2. SSW
3. Arkansas
4. SSW
5. Arkansas
6. SSW
7. Arkansas
8. SSW
9. Arkansas
10. SSW
11. Arkansas
12. SSW
13. Arkansas
14. SSW
15. Arkansas
16. SSW
17. Arkansas
18. SSW
19. Arkansas
20. SSW
21. Arkansas
22. SSW
23. Arkansas
24. SSW
25. Arkansas
26. SSW
27. Arkansas
28. SSW
29. Arkansas
30. SSW

**(Turns in excess of the highest number shown herein will be filled by engineers from the zone roster, and thereafter, from the common roster).**

Side Letter No. 8

October 9, 1997

MR D E PENNING  
GENERAL CHAIRMAN BLE  
12531 MISSOURI BOTTOM RD  
HAZELWOOD MO 63042

MR D E THOMPSON  
GENERAL CHAIRMAN BLE  
414 MISSOURI BLVD  
SCOTT CITY MO 63780

MR M L ROYAL JR  
GENERAL CHAIRMAN BLE  
413 WEST TEXAS  
SHERMAN TX 75092-3755

Gentlemen:

This has reference to the Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub entered into this date.

Prior to implementation of this Agreement, the Carrier and the Organization will schedule and convene a meeting in Omaha, Nebraska to develop equity data for roster formulation and data for slotting of all through freight pools associated with the North Little Rock/Pine Bluff Hub. The results of this meeting will be described in an attachment which will be appended to this Agreement prior to it being disseminated for a ratification vote.

This meeting will be conducted by Carrier Labor Relations Officers and the appropriate Local Chairmen for the territories concerned. The Carrier will provide the sources of equity data and the Local Chairmen will provide the Carrier with the necessary equity percentages for roster slotting and formulation. In the event the Local Chairmen are unable to agree upon equity percentages, the Carrier will make such determinations and will not be subject to any claims or grievances as a result thereof.

If the foregoing adequately and accurately sets forth our agreement in this matter, please so indicate by signing in the space provided for that purpose below.

Yours truly,



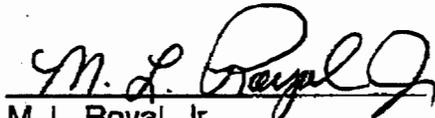
M. A. Hartman  
General Director-Labor Relations

Side Letter No. 8  
October 9, 1997  
Mr. D. E. Penning  
Mr. D. E. Thompson  
Mr. M. L. Royal, Jr.  
Page 2

**AGREED:**

  
D. E. Penning  
General Chairman, BLE

  
D. E. Thompson  
General Chairman, BLE

  
M. L. Royal, Jr.  
General Chairman, BLE

cc: D. M. Hahs  
Vice President, BLE

J. L. McCoy  
Vice President, BLE

16:29 04/041 US635 I826650 .ON N4717 BY TCS FROM H#00154 (PR ) OTEU700

GNMENT ENM ROTATING NLRK/MEMPHIS Z1 ENGINEE11 02/10/04 16:29C  
344 RE30 06530 195101 195201 196101 196201 191101 191201

31

AR21

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BULLTND-77110  
P AR WILSON EF HS P ENG 99/09/30-340  
FROM: X 344 XE60 B  
OD T WA DANCY EF HS P ENG 03/08/02-050 01/21/04  
X 344 BE20

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AR24

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BULLTND-77210  
OD T DP MADDEN EF HS P ENG 03/03/31-130 01/20/04  
X 344 BE90

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MP15

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03 0010C UR WH HOLMES \$ EF HS PIO ENG 76/01/28-001 11/18/03  
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AR13

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3 P LU AL WILLIAMS \$ EF HS PIO ENG 79/10/20-001 03/05/01  
IT UNASSIGNED  
OK T BE STARKS FT F T FIR 03/11/03-030 12/03/03  
X 344 TF20

AR28

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G P OD A TOLBERT JR \$ EF HS PIO ENG 79/12/15-003 06/12/03  
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ARO1

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G B 0145C UR WA ROGERS III \$ EF HS PIO ENG 80/01/28-001 03/29/03  
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AR29

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G P 0040C UR DW OWEN \$ EF HS PIO ENG 80/09/26-001 01/10/02  
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ARO3

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ENG P OK JW CROW EF HS PIO ENG 81/11/01-001 12/03/99  
FIT BLANKED

AR18

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ENG B 0210C UR HD GRISHAM EF HS PIO ENG 82/05/10-001 01/29/01  
PLE BLANKED

AR20

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ENG P 2145C UR TT WELLS EF HS PIO ENG 82/05/11-001 07/10/02  
FIT BLANKED

*BLE EXHIBIT*

*AB*

NG P IR	AR09 OD	TA HAZZARD BLANKED	*** EF HS PIO	ENG 97/06/01-151	07/30/03
NG B IR	AR05 2045C UR	CE KELLY BLANKED	*** EF HS P	ENG 99/02/21-130	03/23/02
NG P IR	AR25 OD	WL BOYD JR ASSIGNMENT DELETE PENDING PENDE TO: X 344 XE20 BLANKED	*** EF HS P	ENG 99/06/21-090 A	06/10/03
NG B IR	AR19 LV	CE WHITBY BLANKED	*** EF HS P	ENG 99/09/27-170	04/22/03
NG P E	AR26 LV	K THOMAS BLANKED	*** EF HS P	ENG 99/09/30-310	01/17/04
NG B T	EP31 OK	PB GREENO UNASSIGNED	*** EF HS P	ENG 01/07/06-030	01/30/04
	OK T ML	SAUCER	FT F T	FIR 04/01/12-010 X 344 TF20	01/13/04
ENG SERVICE CLASS 01/12/2004., BERRY					
IG T	SW10 OD T JP	UNASSIGNED FLATTE BLANKED	*** EF HS P	ENG 99/06/21-060 X 344 XE20	06/18/03
IG LE	SW16	BULLTND-80620 UNASSIGNED	***		
NG B PLE	SW04 OK	WA DEAN JR BLANKED	*** E P W	ENG 72/11/17-010	12/26/03
NG P FIT	SW08 OD	DW THERIAC JR BLANKED	*** EF P O	ENG 94/05/01-013	05/02/03
NG P FIT	SW28 OD	RJ FORTNER UNASSIGNED	*** EF HS PIO	ENG 97/06/01-046	10/15/03

OD	T	LR	FIGLEY	FT	F	T	FIR	04/01/12-030	01/12/04
							X 344	TF20	
							REQ 1HR 45MIN	CALL	
SW02									
NG B	OD	HA	HAY JR	\$	EF	HS	PIO	ENG 97/06/01-078	07/07/03
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	OD	T	JE HOSKINS JR	FT	F	T		FIR 03/11/03-110	12/27/03
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SW07									
NG B	OD	TD	YOUNG	\$	EF	HS	PIO	ENG 97/06/01-091	06/07/03
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SW14									
NG P	OK	LA	THROWER	\$	EF	HS	PIO	ENG 97/06/01-172	12/01/99
R			BLANKED						
SW60									
NG P	OK	R	JONES		EF	HS	P	ENG 97/06/01-295	12/31/03
R			BLANKED						
SW12									
NG B	2110C	UR	WH BAILEY		EF	HS	P	ENG 97/06/01-301	04/22/01
T			UNASSIGNED						
	2110C	UR	T TM GREEN	FT	F	T		FIR 03/08/25-120	12/03/03
							X 344	TF20	
SW22									
NG P	LP	BR	MITCHELL		EF	HS	P	ENG 97/06/01-320	07/18/02
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SW27									
NG B	2240C	UR	KC BURT		EF	HS	P	ENG 99/01/07-050	02/02/02
R			BLANKED						
SW11									
NG	0020C	UR	S BROWN		EF	HS	P	ENG 99/06/21-010	04/06/02
R			BLANKED						
SW77									
NG P	OD	WL	KING		EF	HS	P	ENG 99/09/30-320	01/14/04
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SW06									
NG B	OK	J	BUNCH		EF	HS	P	ENG 01/07/06-110	01/30/04
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OM									

BLE EXHIBIT

00087

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 32760, SUB-FILE 43

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IN THE MATTER OF ARBITRATION BETWEEN UNION PACIFIC RAILROAD  
COMPANY AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW YORK DOCK  
ARBITRATION, CASE NO. 03/074

(Arbitration Review)

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**DECLARATION OF GARY W. BELL**

**I, GARY W. BELL**, hereby declare pursuant to 28 U.S.C. §1746 as follows:

1. I am and have been the Local Chairman of Division 182, Brotherhood of Locomotive Engineers and Trainmen (“BLET”) since December, 2000, and was Assistant Local Chairman of Division 182, BLET, from August, 1996, until December, 2000.

2. Division 182, BLET, is a unit in the General Committee of Adjustment – Central Region (“GCA”). The BLET is the duly designated and authorized collective bargaining representative for the craft of Locomotive Engineers employed by the Union Pacific Railroad Company (“UP”). Division 182, BLET, has jurisdiction between several points on the UP, including, but not limited to, the thru-freight pool between North Little Rock, Arkansas, Pine Bluff, Arkansas, and Memphis, Tennessee. I have been employed on the territory within the jurisdiction of Division 182, BLET, since June 2, 1979.

3. As Local Chairman of Division 182, BLET, I have authority to make adjustments in the number of “turns” in the thru-freight pool between North Little Rock, Arkansas, Memphis, Tennessee, and Pine Bluff, Arkansas, based upon the fluctuation of mileage accrued by the Engineers operating trains within the pool. The fluctuation in the mileage of these Engineers is

directly based upon the increase or decrease in the number of trains operated between North Little Rock, Arkansas, Memphis, Tennessee, and Pine Bluff, Arkansas.

4. My experience in making adjustments to the number of “turns” in the thru-freight pool between North Little Rock, Arkansas, Memphis, Tennessee, and Pine Bluff, Arkansas, based upon an increase or decrease in the mileage, has fluctuated between 27 and 31 “turns”, generally averaging about 30 “turns”; each “turn” has been represented by an individual Engineer. There has been no substantial increase in the amount of mileage in this pool, hence no substantial increase in the number of required Engineers.

5. As Assistant Local Chairman of Division 182, BLET, during the merger negotiations, pursuant to Finance Docket No. 32760, I was assigned, by former Division 182 Local Chairman Harold Young, the duties of negotiating the equity in various pools involving the membership of Division 182, including, but not limited to the thru-freight pool between North Little Rock, Arkansas, Memphis, Tennessee, and Pine Bluff, Arkansas.

6. During the equity negotiations, I met with various Carrier representatives and Local Chairman R.E. Stone, who had jurisdiction of Division 858, BLET, representing Engineers at Pine Bluff, Arkansas, and points between Pine Bluff, Arkansas and Memphis, Tennessee, on the former St. Louis Southwestern Railway Company (“SSW”), a subsidiary of the former Southern Pacific Transportation Company (“SPT”). We examined sources of equity data provided by the Carrier representatives, and I, in conjunction with Local Chairman Stone and various other BLET representatives, supplied the necessary equity percentages for roster slotting and formulation. At that time, there were 30 “turns” in the North Little Rock, Arkansas, Memphis, Tennessee, and Pine Bluff, Arkansas, thru-freight pool, as reflected in Attachment “C” of the Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub. As such,

there has been no substantial increase in this pool from 1997 to the present, nor any increase in congestion.

7. I have reviewed the Carrier's proposals and positions during the handling of the instant dispute, and have understood that the Carrier's sole intent is to realize additional profit by reducing its payments to its employees that operate trains on this territory under the current provisions of the Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub.

8. Article I, Section A (15) of the Merger Implementing Agreement for the North Little Rock/Pine Bluff Hub ("Hub Agreement"), provides for the *minimum* payment of a two hour pro-rata "transport" allowance, separate and apart from all other earnings, for time spent in actual transportation between Pine Bluff, Arkansas, and North Little Rock, Arkansas, or from a location "on line of road" where the train "comes to rest," and the crew is relieved, depending on point of origination and termination of assignments, that is increased if the Engineer is on overtime, under Question & Answer No. 14 to Article I. The current, average non-overtime rate is \$44.59, and the current average overtime rate is \$69.38. Virtually all Engineers receive one of these two rates at a minimum of one time during a round trip in this pool. Under the total number of "starts" in this pool currently experienced by our Engineers during September, 2004, projected into an annual average experience, the Carrier will realize a *minimum* benefit to the Carrier of at least \$213,621.00 by the elimination of the Hub Agreement mandated "transport" allowance through establishment of interdivisional service. As the actual mode of transportation of employees to or from their on-duty point is provided at Carrier expense, separate and apart from all other earnings, to employees for the time actually spent transporting, the elimination of this Hub Agreement mandated "shuttle" transportation will also create a savings that is beyond the Organization's available data, and cannot, therefore, be calculated; however, such

elimination shall create a cost to the employees to provide their own transportation over the 51 mile distance between North Little Rock and Pine Bluff, Arkansas.

9. Article I, Section A (5) and Section A (5)(b) of the Hub Agreement provides that “a line of demarcation” is established between North Little Rock and Pine Bluff that prohibits Engineers from operating their thru-freight trains, either at the beginning or the end of the trip, from North Little Rock to Pine Bluff or vice versa. In order to handle the freight traffic limited to the corridor between North Little Rock and Pine Bluff, “hauling jobs” were created. Three of these hauling jobs are regular assigned positions for Engineers, with “extra hauling jobs” called to supplement the three regular assigned positions, with temporarily assigned Extra Board Engineers. The total number of hauling jobs in September, 2004, both regular assigned positions and temporarily assigned Extra Board positions, was 201 assignments. The average payment per assignment was \$414.30 from Pine Bluff, Arkansas, and \$351.20 from North Little Rock, Arkansas. Projecting the combined, average payment on an annual basis, at the same number of assignments, the Carrier, by abolishing this Hub Agreement mandated service, and replacing it with interdivisional service, would receive an annual benefit to the Carrier of approximately \$918,271.00.

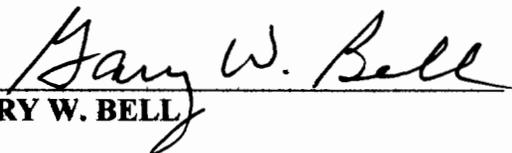
10. Currently, there are six Engineers that qualify for Reverse Held-Away-From-Home Time (“HAHT”) payments, pursuant to the Hub Agreement, that are working Yard, TSE, and extra board assignments at, or in the vicinity, of Memphis, Tennessee. Should these assignments be eliminated, forcing these employees to “place” or “bump” into this thru-freight pool, the Carrier’s expenses for HAHT payments would vastly increase. Elimination of these Hub Agreement payment provisions through interdivisional service, would add an approximate annual potential benefit to the Carrier, at a minimum, of \$105,768.00.

11. In serving its Article IX notice on the Organization, the Carrier allegedly is attempting to secure the right to provide for directional traffic in this Corridor; however, under the North Little Pine/Bluff Hub Merger Implementing Agreement, they currently have the right to operate directional traffic. As such, the filing of the Article IX notice is solely an attempt to secure a financial windfall, and not to obtain operational right(s) that they currently hold.

12. The focus of my research has been on the thru-freight pool between North Little Rock, Arkansas, Memphis, Tennessee, and Pine Bluff, Arkansas. However, additional interdivisional service projected by the Carrier during discussions of this dispute as to other pools and other corridors would substantially decrease the expenses to the Carrier and reduce the earnings of its engineers by the same amount through the elimination of the Hub Agreement provisions.

I declare under penalty of perjury that the foregoing is true and correct.

**Dated:           October 22, 2004**

  
**GARY W. BELL**

X 344 RE30 06530 195101 195201 196101 196201 191101 191201

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  EP31
ENG          BULLTND-72130          ***
              OK T WA DANCY          EF HS P          ENG 03/08/02-050    01/21/04
                                      X 344  BE20

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  DK01
ENG          UNASSIGNED          ***
  FIR          BLANKED+

  MP15
ENG 0025C UR  WH HOLMES          $ EF HS PIO          ENG 76/01/28-001    11/18/03
  FIR          BLANKED

  AR13
ENG P 2010C NR  AL WILLIAMS          $ EF HS PIO          ENG 79/10/20-001    03/05/01
  FIT          UNASSIGNED
              2010C NR T BE STARKS  FT  F  T          FIR 03/11/03-030    12/03/03
                                      X 344  TF20

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  AR28
ENG P          PL  A  TOLBERT JR      $ EF HS PIO          ENG 79/12/15-003    06/12/03
  FIT          BLANKED

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  AR01
ENG B 1955C NR  WA ROGERS III        $ EF HS PIO          ENG 80/01/28-001    03/29/03
  FIR          UNASSIGNED

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  AR29
ENG P          OK  DW OWEN            $ EF HS PIO          ENG 80/09/26-001    01/10/02
  FIT          BLANKED

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  AR03
ENG P          OD  JW CROW            EF HS PIO          ENG 81/11/01-001    12/03/99
  FIT          BLANKED

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  AR18
ENG B 1735C NR  HD GRISHAM          EF HS PIO          ENG 82/05/10-001    01/29/01
  FIR          UNASSIGNED

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  AR20
ENG P          OK  TT WELLS          EF HS PIO          ENG 82/05/11-001    07/10/02
  FIR          UNASSIGNED

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  AR24
ENG P          OK  ME SIMPSON         $ EF HS PIO          ENG 88/09/01-016    01/07/04
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AR09					***		
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FIR			BLANKED				
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AR05					***		
ENG B	OK	CE	KELLY		EF HS P	ENG 99/02/21-130	03/23/02
FIR			BLANKED				
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AR21					***		
ENG P	IP	EL	BLANN JR	FT	EF HSTP	ENG 99/06/20-140	08/12/02
	LV T	DC	SHARKEY		EF HS P	ENG 99/09/27-160	01/08/03
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FIT			BLANKED				
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AR25					***		
ENG P	OD	WL	BOYD JR		EF HS P	ENG 99/06/21-090	06/10/03
FIR			BLANKED				
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AR19					***		
ENG B	OK	CE	WHITBY		EF HS P	ENG 99/09/27-170	04/22/03
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AR26					***		
ENG P 1920C NR		K	THOMAS		EF HS P	ENG 99/09/30-310	01/17/04
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SW06					****^		
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	OK T DP		MADDEN		EF HS P	ENG 03/03/31-130	01/20/04
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SW04					***		
ENG B	PL	WA	DEAN JR	\$	E P W	ENG 72/11/17-010	12/26/03
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SW08					***		
ENG P	OD	DW	THERIAC JR		EF P O	ENG 94/05/01-013	05/02/03
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SW28					***		
ENG P	PL	RJ	FORTNER	\$	EF HS PIO	ENG 97/06/01-046	10/15/03
	OK T	JL	MCENTIRE JR		EF HS P	ENG 99/09/27-255	01/10/04
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FIR			UNASSIGNED				
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SW02					***		
ENG B	OD	HA	HAY JR	\$	EF HS PIO	ENG 97/06/01-078	07/07/03
FIT			UNASSIGNED				
	OD T	JE	HOSKINS JR	FT	F T	FIR 03/11/03-110	12/27/03
						X 344 TF20	
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	SW07				***		
ENG B	OD	TO	YOUNG	\$	EF HS PIO	ENG 97/06/01-091	06/07/03
FIR			UNASSIGNED				
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	SW14				***		
ENG P	PL	LA	THROWER	\$	EF HS PIO	ENG 97/06/01-172	12/01/99
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	SW10				***		
ENG B	LH	BA	NORWOOD	\$	EF HS PIO	ENG 97/06/01-275	10/23/03
	PL T	FH	MITCHELL		EF HS P	ENG 99/01/07-120	11/17/03
						X 344 XE20	
FIT			BLANKED				
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	SW60				***		
ENG P	OK	R	JONES		EF HS P	ENG 97/06/01-295	12/31/03
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	SW12				***		
ENG B	LV	WH	BAILEY		EF HS P	ENG 97/06/01-301	04/22/01
FIT			UNASSIGNED				
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ENG P	PL	BR	MITCHELL		EF HS P	ENG 97/06/01-320	07/18/02
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	SW27				***		
ENG B	2215C	NR	KC BURT		EF HS P	ENG 99/01/07-050	02/02/02
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	SW11				***		
ENG	OK	S	BROWN		EF HS P	ENG 99/06/21-010	04/06/02
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	SW77				***		
ENG P	OK	WL	KING		EF HS P	ENG 99/09/30-320	01/14/04
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	SW16				***		
ENG P	OD	TL	SMALL		EF HS P	ENG 99/09/30-330	01/17/04
FIR			BLANKED				

# ATTACHMENT

“3”

ASSIGNMENT ENM ROTATING NLRK/MEMPHIS Z1 ENGINEE11

09/30/04 10:02C

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AR11

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ENG

BULLTND-50202

OK T BG PHILLIPS FT EF HSTP ENG 04/09/21-010 09/28/04

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AR13

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ENG P 1155C UR AL WILLIAMS \$ EF HS PIO ENG 79/10/20-001 03/05/01

FIT UNASSIGNED

OK T KD HOWARD FT F T FIR 04/09/06-110 09/12/04

X 344 TF20

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AR28

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ENG P OD A TOLBERT JR \$ EF HS PIO ENG 79/12/15-003 06/12/03

FIT UNASSIGNED

OS T DE STOFFER FT F T FIR 04/06/07-060 07/28/04

X 344 TF90

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AR01

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ENG B 1345C UR WA ROGERS III \$ EF HS PIO ENG 80/01/28-001 03/29/03

FIT UNASSIGNED

OS T DL ELLISON FT F T FIR 04/06/07-011 06/08/04

X 344 TF20

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AR29

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ENG P 1740C NR DW OWEN \$ EF HS PIO ENG 80/09/26-001 01/10/02

REQUEST MANUAL CALL

FIT UNASSIGNED

1740C NR T WR CARLSON FT F T FIR 04/05/24-020 09/07/04

X 344 TF20

OK TO OS 09/16 09/17 0800

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AR18

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ENG B OK HD GRISHAM EF HS PIO ENG 82/05/10-001 01/29/01

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OK T MD THIRION FT F T FIR 04/09/06-070 09/04/04

X 344 TF90

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AR09

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ENG P LV TA HAZZARD \$ EF HS PIO ENG 97/06/01-151 07/30/03

OK T LR SMITH EF HS P ENG 98/11/30-110 05/28/03

X 344 XE20

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AR05

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ENG B OK CE KELLY EF HS P ENG 99/02/21-130 03/23/02

FIT UNASSIGNED

OS T RL CARMAN JR FT F T FIR 04/06/07-020 09/06/04

X 344 TF90

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00097

AR20  
 ENG B 1710C UR K THOMAS \*\*\*  
 EF HS P ENG 99/09/30-310 06/28/04  
 CALL CREW SERVC ASAP 1 866 897 7784  
 FIT UNASSIGNED  
 OK T NA THOMAS FT F T FIR 04/09/06-090 09/04/04  
 X 344 TF20  
 ENG CLASS SE0489 9/6/04

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AR25  
 ENG B OK L EDWARDS \*\*\*  
 EF HS P ENG 01/07/06-100 02/21/04  
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AR19  
 ENG P OD J BUNCH \*\*\*  
 EF HS P ENG 01/07/06-110 05/25/04  
 FIT UNASSIGNED  
 OS T MD WILLIAMSON FT F T FIR 04/06/07-030 08/16/04  
 X 344 TF20  
 OK TO GO WITH OR WILLIAMS RE62

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AR15  
 ENG B 1300C NR JC CASH \*\*\*  
 FT EF HSTP ENG 03/08/07-070 09/24/04  
 FIR UNASSIGNED

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AR26  
 ENG 1430C UR M HARE \*\*\*  
 EF HS P ENG 04/05/03-030 07/21/04  
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AR03  
 ENG B OK RA RHODES \*\*\*  
 EF HS P ENG 04/05/03-070 08/07/04  
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AR21  
 ENG B OK MA RHODES \*\*\*  
 EF HS P ENG 04/05/03-090 08/07/04  
 FIT BLANKED

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SW77  
 ENG BULLTND-49301 \*\*\*^  
 OD T BK BARRICK EF HS P ENG 04/08/22-030 09/23/04  
 X 344 BE60  
 FIR BLANKED

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SW04  
 ENG B OD WA DEAN JR \*\*\*  
 \$ E P W ENG 72/11/17-010 12/26/03  
 FIR BLANKED

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SW08  
 ENG P OS DW THERIAC JR \*\*\*  
 EF P O ENG 94/05/01-013 05/02/03  
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 FIR BLANKED

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	SW28			***		
ENG P	OK	RJ FORTNER	\$	EF HS PIO	ENG 97/06/01-046	10/15/03
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	SW02			***		
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FIT		UNASSIGNED				
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				X 344	TF20	
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	SW14			***		
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*						
	SW60			***		
ENG P	1540C UR	R JONES		EF HS P	ENG 97/06/01-295	03/15/04
FIT		BLANKED				
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	SW12			***		
ENG B	OD	WH BAILEY		EF HS P	ENG 97/06/01-301	04/22/01
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	OK T	CW MARTIN	FT	F T	FIR 04/09/06-080	09/04/04
				X 344	TF20	
				ENG CLASS	SE0489 9/6/04	
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	SW22			***		
ENG P	OD	BR MITCHELL		EF HS P	ENG 97/06/01-320	07/18/02
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*						
	SW27			***		
ENG B	1055C NR	KC BURT		EF HS P	ENG 99/01/07-050	02/02/02
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*						
	SW16			***		
ENG B	1430C UR	JR WALKER		EF HS P	ENG 99/10/26-350	02/20/04
FIT		BLANKED				
*						
	SW07			***		
ENG B	1235C NR	DD ORING		EF HS P	ENG 03/03/31-150	02/26/04
PLE		BLANKED				
*&						
	SW06			***		
ENG P	OK	JA BURKS		EF HS P	ENG 03/08/07-050	03/31/04
FIR		BLANKED				
*						
	SW10			***		
ENG P	OK	JD WILSON		EF HS P	ENG 03/08/07-060	04/20/04
FIR		BLANKED				