Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39877
Docket No. MW-38780
08-3-NRAB-00003-050201
(05-3-201)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier assigned outside forces (Armand Castle) to perform Maintenance of Way work [install two (2) switches and crossover] at the Departure Yard to the Escape Track on April 25, 26, 27, 28, 29 and 30, 2004, instead of Foreman J. Payne, Machine Operators E. Valley, H. Sanchez and Trackmen O. Powell, D. Jopek, G. Ramos, S. Floyd and R. Fuentes (Carrier's File 3040500005).

2) The Agreement was violated when the Carrier assigned outside forces (Armand Castle) to perform Maintenance of Way work (install switch ties, relocate switches and add crossover) at the South Receiving Lead tracks 5, 6, 7 and 8 on May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14 and 16, 2004, instead of Foreman J. Payne, Machine Operators E. Valley, D. Liford, J. Mooney, Trackmen O. Powell, D. Jopek, G. Ramos, S. Floyd, R. Fuentes and A. Serratos (Carrier's File 3040500006).

3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the aforesaid work and

discuss the matter in good faith effort as required by the Scope Rule.

4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants J. Payne, E. Valley, H. Sanchez, O. Powell, D. Jopek, G. Ramos, S. Floyd and R. Fuentes shall now each be compensated for ten (10) hours' pay at their appropriate rates of pay for each date of April 25, 26, 27, 28, 29 and 30, 2004.

5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants J. Payne, E. Valley, D. Liford, J. Mooney, O. Powell, D. Jopek, G. Ramos, S. Floyd, R. Fuentes and A. Serratos shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for seventeen (17) hours at their respective time and one-half rates of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned outside forces, instead of the Claimants, to perform certain work during April and May 2004.

The Organization initially contends that because of the Carrier's actions, the Claimants were forever deprived of the opportunity to perform the subject work and enjoy the monetary benefit accruing therefrom, in accordance with the terms of the Agreement. The Organization asserts that the instant claim should be sustained because track maintenance and construction work clearly is encompassed within the scope of the parties' Agreement. The Organization argues that this fact has not been and cannot be validly disputed by the Carrier. The Organization emphasizes that the construction and maintenance of tracks constitute some of the most fundamental of all Maintenance of Way work, so there can be no question but that work of this character is encompassed within the scope of the Agreement and is contractually reserved to BMWE-represented employees who have established and hold seniority within the Track Department.

The Organization maintains that it is fundamental that work of a class belongs to those for whose benefit the contract was made, and delegation of such work to others not covered thereby is a violation of the Agreement. The Organization insists that the work involved here clearly is scope-covered work that is reserved to the Carrier's Track Department forces.

The Organization also argues that the Carrier failed to meet its obligation to provide proper written notice of its plans to contract out such work and to meet with the Organization to discuss the matter in good faith pursuant to the requirements of the Scope Rule. The Organization asserts that the Carrier's October 3, 2003 notice lacked specific information such as (1) when the intended contracting was to begin (2) the number of contractor employees involved (3) the type of equipment needed and (4) the anticipated length of the project. The Organization insists that such deficiencies place the "notice" into the realm of an improper/lacking notice.

The Organization goes on to contend that even if it is found that the Carrier provided proper advance notice and a meeting was held about the particular work involved here, this does not justify the Carrier's contracting of the work. The Organization asserts that it is well established that the mere giving of notice and the holding of a conference does not allow a carrier carte blanche to proceed with contracting. The Organization insists that the Carrier bears the burden of

justifying its decision to contract out such work, and it points to a number of prior Awards in support of the Organization's position.

The Organization then maintains that the Carrier's reliance on the January 1999 Implementing Agreement is misplaced. The Organization emphasizes that this Implementing Agreement does not contain any provision whatsoever for the contracting out of BMWE work, except for specific work outlined in Article I, Section 1(h) which does not apply here. The Organization points out that the Carrier has not shown that the work in question, which was contracted out in 2003, was contracted out because it was "initially required for implementing the Operating Plan," as provided in the Implementing Agreement. Moreover, Article I, Section 1(i)(5) of the Implementing Agreement provides for the distribution of certain Carrier BMWE work to Norfolk Southern (NS) and/or CSXT BMWE-represented employees, but not to outside forces.

Addressing the Carrier's allegation that it did not possess the necessary equipment to perform the work involved here, the Organization argues that this is not tenable in light of the fact that Maintenance of Way forces perform work of the character involved here using the same or similar types of equipment that the Carrier owns. In addition, even if the Carrier did not own the necessary equipment, the Organization asserts that the Carrier was obligated to make a good-faith effort to acquire it through rental or leasing arrangements and then assign its forces to operate such equipment. The Organization emphasizes that there is no evidence that the Carrier made any attempt whatsoever to rent or lease the required equipment.

As for the Carrier's argument that it did not have adequate forces to perform the work, the Organization contends that this is not true. Just as the Carrier maintains the equipment in its inventory necessary to perform the work at issue, the Carrier also maintains forces that are sufficiently qualified and capable of operating such equipment safely and efficiently. Moreover, the Organization further argues that the Board consistently has held that the mere lack of qualified employees does not provide the Carrier with grounds to assign scope-covered work to outside forces. These prior Awards establish the principle that a carrier is responsible for

recruiting and training adequate forces to perform work encompassed within the scope of the Agreement.

The Organization insists that the work at issue here clearly and unambiguously is encompassed within the scope of the Agreement and is reserved to the Carrier's forces. The Organization further points to the stated concerns that in connection with the Conrail (CR) acquisition by CSXT and NS, certain problems due to lack of equipment or manpower on the remaining CR property might occur. The Organization suggests that this is why the Implementing Agreement allows for NS and CSXT BMWE employees to perform certain work over and above routine CR maintenance work. The Organization asserts that while the work at issue might fall into this category, it was assigned to outside forces, and not to NS and/or CSXT BMWE-represented employees, prompting the instant claim.

With regard to the Carrier's "piecemeal" defense, the Organization emphasizes that it is clear that this is nothing more than an attempt to latch onto an arbitration buzzword that has no application to this case. The Organization disputes the assertion that this is a single project of large magnitude. The Organization insists that the truth is that this work simply is one of a series of smaller projects that are being contracted out separately by the Carrier and performed by separate contractors. Moreover, the Carrier failed to show how the work in question was interdependent/interrelated to another work project so as to make it impossible to be accomplished by Carrier forces. The Organization maintains that the Board consistently has rejected this so-called "piecemeal" defense and has required carriers to divide the work.

The Organization then disputes the Carrier's argument that the Claimants are not entitled to a monetary award. The Organization asserts that a plethora of prior Awards have upheld the principle that working claimants are entitled to receive monetary awards to ensure enforcement of the collective bargaining agreement and to compensate them for lost work opportunities.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that this dispute involves the interpretation and application of the January 14, 1999 Implementing Agreement that was negotiated and arbitrated under the New York Dock Conditions, pursuant to Finance Docket 33388, Decision 89 of the STB approving the Conrail transaction. The Carrier asserts that the New York Dock Conditions contain exclusive arbitration procedures for the handling of disputes separate and apart from Section 3 of the Railway Labor Act, as amended. The Carrier argues that several Awards have held that the NRAB lacks authority to interpret a dispute involving the interpretation and application of a New York Dock Implementing Agreement, even if the claim arguably involves portions of the Agreement.

The Carrier submits that although the Organization may attempt to portray this case as simply a contracting out case under the scope of the Collective Bargaining Agreement, the record makes clear that this case is inextricably tied to the provisions of the January 1999 Implementing Agreement. The Carrier emphasizes that in line with prior Board precedent, the Board should dismiss the instant claim for lack of jurisdiction.

Without waiving this argument, the Carrier goes on to assert that contrary to the misrepresentation in Part (3) of the claim, the Carrier complied with the procedures to be followed when it plans to contract out scope-covered work. The Carrier insists that, well in advance of contracting out the disputed work, it notified the involved General Chairmen of its intention to contract out work in connection with the major expansion of the Detroit Intermodal Terminals in Livernois Yard. The Carrier also met and fully discussed this project with the Organization, but the parties were unable to reach an understanding regarding this contracting project. The Carrier nevertheless proceeded with the contracting as provided for in the Scope Rule, while the Organization exercised its right to file the instant claim.

The Carrier contends that the record establishes that it fully complied with the advance notice provisions of the Scope Rule. The Carrier points out that the Organization initially recognized this fact in its early correspondence in connection with this claim. The Carrier asserts that it was not until the General Chairman's August 4, 2004 letter that the Organization, for the first time and without any proof, contended that the work at issue was not contemplated in the Carrier's October 3,

2003 notice. The Carrier asserts that its notice clearly stated that, in addition to the other work involved, about five miles of new track and 20 new turnouts would be installed at Livernois Yard. Moreover, there is no requirement that every single aspect of a project be set forth in minute detail. Accordingly, the Carrier contends that the Organization's allegation in Part (3) of the instant claim is totally devoid of merit and is without any factual basis whatsoever. The Carrier suggests that the Organization's attempt to interject this issue into the present dispute is, at best, carelessness or, at worst, a disingenuous attempt to obfuscate the record in order to disguise the weakness of its position.

The Carrier then contends that there can be no reasonable argument that the work at issue in connection with the expansion project at Livernois Yard was "over and above routine maintenance." The Carrier asserts that this is the type of work that the January 1999 Implementing Agreement stated was beyond the capability of Conrail – Shared Assets to perform. The Carrier argues that while the Implementing Agreement gave NS and CSXT the right to provide this type of work on Conrail's behalf, it did not prevent Conrail from contracting out this type of work so long as it was done as provided for in the Agreement, as happened in this case. The Carrier insists that the New York Dock Arbitration Award and the resulting Implementing Agreement recognize that Conrail no longer would be able to perform such large-scale projects and that such projects would have to be completed by another party or parties, be it NS, CSXT, or outside contractors.

The Carrier further contends that even if the Implementing Agreement did not apply, the disputed work nevertheless was properly contracted out under the terms of the Agreement and in accordance with the criteria that have been applied on this property. The Carrier emphasizes that it has the right to contract out work when it does not have sufficient manpower or equipment to complete the project with its own forces. The Carrier contends that the Organization never disputed the fact that the Carrier did not have sufficient forces to complete this large-scale project. Moreover, although the Organization made unsupported statements that the Carrier could lease the necessary equipment, the Carrier points out that the Organization never supported such statements with evidence, nor did it ever dispute the fact that the Carrier did not have the necessary equipment.

The Carrier goes on to assert that the Organization is well aware that projects of this magnitude have been contracted out in the past, even before the June 1999 transaction, while Conrail was a large Class I railroad. The Carrier emphasizes that between 1996 and 1998, it contracted out work in connection with improvements to eight of its intermodal facilities without any claims being progressed by the Organization.

Pointing to a prior Award, the Carrier argues that the Detroit Intermodal Terminal project at Livernois Yard certainly fulfilled the criteria for a large-scale project in that it was a multi-million-dollar project that would take more than one year to complete. The Carrier asserts that its post-transaction maintenance force at Detroit certainly would not have been remotely able to handle this project.

As for the Organization's unfounded position that the Claimants should have been used to perform the work in dispute, the Carrier emphasizes that the Organization has laid claim to small portions of work included in this major facility improvement. The Carrier asserts that the Organization's position totally ignores the unrefuted fact that this work was but a miniscule part of the multi-million-dollar project that took more than one year to complete. The Carrier insists that under the circumstances, it was not required to piecemeal small portions of the project to provide work for its own forces in Detroit, especially when those forces were fully employed and working overtime. The Carrier asserts that a number of prior Awards have held that the Carrier is not required to piecemeal portions of a project that has been properly contracted out.

The Carrier further contends that the Organization incorrectly characterized the facts in asserting that the Carrier's lack of manpower and equipment is self-imposed. The Carrier argues that the Organization cited manpower numbers from before the June 1, 1999 transaction, when the Carrier's operations were significantly reduced and most of the BMWE-represented employees were allocated to either NS or CSXT. The Carrier emphasizes that it was allocated sufficient forces to handle its normal maintenance needs in line with its new character as a terminal switching company. The Carrier insists that the fact that its reduced maintenance staff could not be reasonably expected to complete a large construction

project does not support the Organization's contention that the Carrier is understaffed.

The Carrier points out that even before the June 1999 transaction, a project of this large scope most likely would have been contracted out, as similar projects have been in the past. The Carrier also emphasizes that the Organization failed to note that four of the 28 employees on the Detroit roster were either on leave of absence as a union official or working in a management position, one had transferred to another craft, and five were off sick.

The Carrier goes on to assert that most of the Carrier's roadway equipment, including the type of equipment used on this project, had been taken over by NS and CSXT as part of the June 1999 transaction. The Carrier argues that after June 1, 1999, it no longer possessed such equipment, including on the claim dates. The Carrier further contends that this type of specialized roadway equipment is not readily available for lease without an operator, and the Organization has not offered any evidence to refute this.

The Carrier then contends that the instant claim is excessive. The Carrier insists that the Claimants were fully employed during the claim period, and they suffered no monetary loss as a result of the contracting of this large-scale project. The Carrier therefore argues that the Claimants are not entitled to the penalty payment claimed in this case.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board thoroughly reviewed the extensive record and finds that substantial jurisdictional questions have been raised by the Carrier. As the Board stated in Third Division Award 38988:

> ". . . the language in Article I, Section 1(h) of the January 14, 1999 Arbitrated implementing Agreement; and the clearly established precedent that the Board has no jurisdiction to consider disputes arising under implementing agreements established pursuant to

New York Dock, the question of whether the work in dispute fell within the purview of Article I, Section 1(h) of the January 14, 1999 Arbitrated Implementing Agreement can only be decided by a duly authorized Board constituted pursuant to New York Dock."

See also Third Division Award 36276 wherein the Board held:

"These issues all involve interpreting provisions of the November 2, 1998 Implementing Agreement. Because the Implementing Agreement was negotiated under the auspices of Article I, Section 4, of the New York Dock Conditions, the parties must utilize the dispute resolution mechanism in Article I, Section 11, of the New York Dock Conditions to resolve this dispute. See Third Division Awards 29317 and 29660. Because the Board lacks jurisdiction to adjudicate the issues raised by the instant claim, we dismiss the claim."

It is clear when one reviews the extensive record in this case that both parties were relying on Implementing Agreement provisions. Therefore, the Board has no jurisdiction to resolve this dispute.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of July 2009.

LABOR MEMBER'S DISSENT
TO
AWARDS 39877, 39878, 39879 AND 39880
DOCKETS MW-38780, MW-38781, MW-38782 AND MW-38815
(Referee Peter R. Meyers)

The Organization respectfully dissent from the Majority's findings that it lacked jurisdiction to resolve Scope Rule claims advanced by the Employes concerning the Carrier's subcontracting of maintenance of way work to third parties. According to the Majority, resolution of that dispute can only be had in an arbitration panel established under Article I, Section 11 of the New York Dock[1/] conditions imposed by the Surface Transportation Board (STB) as a condition of its approval of the Carrier's acquisition and division by CSXT and Norfolk Southern in STB Finance Docket No. 33888. As we will show below, a Section 11 panel does not have jurisdiction to resolve the disputes brought to this Board by the Employes and the Majority's failure to render a decision on the merits regarding these claims amounts to a failure of the Board to comply with its obligations under the Railway Labor Act. The Board is obligated by statute to comply with the commands and requirements of the RLA which means that it must apply and interpret the Collective Bargaining Agreement (CBA). Here, the Majority failed to comply with the requirements of the statute by not rendering decisions on disputes involving interpretation of the CBAs, by failing to decide matters within its jurisdiction and instead deferring to a body that lacks jurisdiction over the disputes, and failing to render a decision that draws its essence from the CBA. Instead, the Majority ignored the CBA and its statutory jurisdiction and based its decision on irrelevant considerations outside the CBA and the Railway Labor Act.

I. THIS BOARD'S JURISDICTION.

The Board was created by the 1934 Amendments to the Railway Labor Act. The Third Division of the Board has "jurisdiction over disputes involving . . . maintenance of way men . . ." Section 3 First(h). The "disputes" over which this Division has jurisdiction involve "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ." Section 3 First(i). When an employe raises a claim that the Carrier's actions violate a term of a collective bargaining agreement, the Board's jurisdiction to resolve that claim is exclusive. Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 324 (1972). There is no other administrative agency established under law with jurisdiction to resolve disputes concerning "the interpretation or application of agreements concerning rates of pay, rules or working conditions." In these cases, the Organization alleged violations of the Scope Rule of the parties' CBA as modified by an implementing agreement imposed by an arbitrator under the New York Dock conditions. The Majority mistakenly adopted the Carrier's argument that because the implementing agreement modified the Scope Rule an arbitration panel created to resolve disputes

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[1/] The conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern Dist. Term., 360 I.C.C. 60, aff'd. sub nom. New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

over statutory employee protective conditions contained in New York Dock has exclusive jurisdiction to resolve disputes over the interpretation or application of the Scope Rule and other rules contained in the CBA between the Organization and Carrier. We will show that argument is both bad history and bad law.

II. EMPLOYEE PROTECTIVE CONDITIONS.

The New York Dock conditions imposed under the Conrail acquisition are the most recent refinement of employee protective conditions first established in the rail industry by agreement in 1936. In 1933, Congress passed legislation in the depths of the Depression that imposed a freeze on railroad employment. In 1936, the law was to expire and President Roosevelt persuaded management and labor to fashion a voluntary arrangement that would protect the economic interests of employees, yet permit the carriers to engage in business reorganizations necessary for their survival. The 1936 agreement, called the "Washington Job Protection Agreement" (WJPA) permitted carriers to engage in "coordinations" whereby operations were unified, consolidated, merged or otherwise combined. In return, employees economically harmed by such coordinations were to receive income guarantees for a fixed period of time so as to cushion the blow of job loss or income reduction.

The WJPA also contained provisions in Sections 4 and 5 for notice and negotiation between the parties over the effects on seniority caused by the coordination. Section 5 expressly required that "[e]ach plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case." In the event the parties could not agreement on such an "implementing agreement" regarding employee selection, the WJPA provided for mandatory arbitration of the agreement.

The Transportation Act of 1940 made the imposition of employee protective conditions mandatory on railroad mergers and acquisitions. The statutory protective conditions required, at a minimum, that employees affected by a merger be protected economically for four (4) years after the Interstate Commerce Commission (ICC) approved the transaction. In virtually all such merger and acquisitions, the WJPA also applied as a matter of contract and the two (2) protective arrangements co-existed. In some cases, such as the so-call Oklahoma Conditions in 1944, the manner of the selection of forces and assignment of employees was set forth expressly in the ICC's order approving the transaction. In other cases, the selection and assignment was handled under the WJPA in a proceeding separate from the ICC imposed protective conditions.

In 1952, the ICC expressly incorporated a modified version of the economic protections contained in the WJPA as a condition of its approval of a transaction. In the New Orleans Union

Passenger Terminal case, the operating plan contemplated an adverse impact on some employees more than four (4) years after the ICC's approval of the transaction. To remedy that problem, the ICC also imposed the WJPA as a condition with the proviso for the first four (4) years, affected employees would obtain benefits under the statutory protections contained in the so-called Oklahoma Conditions. However, to the extent that such an employee would be entitled to further benefits under the WJPA, he could claim them as well. Additionally, employees affected more than four (4) years after the ICC's approval of the transaction were entitled to WJPA benefits. Finally, in 1967, the ICC expressly imposed Sections 4 and 5 of the WJPA relating to the procedures used to select and assign employees to a merged operation as a condition of its approval of the Southern Railway – Central of Georgia merger.

Following the Southern—Central of Georgia case, the development of employee protective conditions in the railroad industry moved temporarily from the ICC to the Secretary of Labor as conditions were developed for the creation of Amtrak from the passenger operations of the various rail carriers. The Secretary was charged with developing protective conditions consistent with the protective language contained in the Rail Passenger Services Act of 1970. Those conditions, known as the "Appendix C-1" conditions extended the protective period to a maximum of six (6) years from the four (4) provided under ICC conditions, provided for adjustment of economic benefits to take account wage increases, provided for negotiation or arbitration of an agreement regarding the selection of forces and assignment of employees resulting from Amtrak's takeover and contained a provision that preserved the "rights, privileges and benefits" accruing to employees under existing collective agreements. In the "4R Act" of 1976, Congress mandated the ICC to refashion employee protective provisions that incorporated both the Southern-Central of Georgia conditions and the Appendix C-1 conditions. The result of that effort is the New York Dock conditions created in 1979, which were imposed upon the CSX-NS-Conrail transaction. So, even if the Majority could look to the Interstate Commerce Commission Termination Act (ICCTA) in making its decision; as a matter of law, an implementing agreement does not become a separate agreement regarding terms and conditions of employment; instead it modifies an existing CBA as necessary to allow a transaction to go forward without the CBA as an impediment. Simply put, the CBA is modified by the implementing agreement but it then continues to apply as any CBA does to all matters involving rates of pay, rules and working conditions.

III. THE INTERSECTION OF EMPLOYEE PROTECTIVE CONDITIONS AND THE COLLECTIVE BARGAINING AGREEMENT.

Article I, Section 2 of the New York Dock conditions reads as follows:

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and

> *benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.*

That provision was adopted from the Appendix C-1 protections into ICC imposed statutory protections for the first time in New York Dock.

Beginning in the early 1980's, a series of disputes arose over the authority of an arbitrator to make changes in existing collective agreements while fashioning an implementing agreement pursuant to Article I, Section 4 of New York Dock, which in turn derived from the adoption of Sections 4 and 5 of the WJPA into the Southern-Central of Georgia conditions. Needless to say, the rail unions asserted the arbitrator had no such authority while the rail carriers said the arbitrator had such authority pursuant to both Section 4 and the so-called "cram down" provisions contained in the former Section 11341(a) of the Interstate Commerce Act [now Section 11321(a)] which exempted carriers participating in an approved transaction from the anti-trust laws and "all other laws" necessary to carry out the approved transaction. This dispute was played out before the ICC, the STB and the courts in the so-called Carmen cases beginning in the mid-1980's and continuing until 1998. The final pronouncement on this issue was made by the STB in CSX Corp.—Control—Chessie System, Inc., 3 S.T.B. 701 (1998) ("Carmen III"). The STB's decision in that case established the parameters of the arbitrator's authority in the Conrail implementing agreement arbitration and also described exactly what the implementing agreement did to existing collective agreements.

In Carmen III, the STB attempted to synthesize an earlier decision of the ICC in CSX Corp.—Control—Chessie System, Inc., 6 I.C.C.2d 715 (1990) ("Carmen II") and the Supreme Court's decision in Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991) ("Dispatchers"). According to the STB, Carmen II held that "in connection with an approved transaction, CBAs and collective bargaining rights could be modified without resort to RLA procedures, under the auspices of Section 11347 [now Section 11326] and the protective conditions imposed thereunder." Carmen III, 3 S.T.B. at 708. In Dispatchers, the STB noted that the "cram down" provisions of the former Section 11341(a) reached both the Railway Labor Act because it was a "law" and collective bargaining agreements negotiated under it "(because immunity from a law implies immunity from the obligations imposed by that law.)" Id. at 714. However, the STB also noted that the Court limited the effect of the "cram down" provisions to those "necessary" to carry out an "approved" transaction. Id.

After reviewing both decisions, the STB largely stayed with the ICC's analysis in Carmen II. The scope of the authority of arbitrators to modify CBAs while fashioning an implementing agreement under Section 4 would be defined by the authority exercised by arbitrators during the

period 1940 – 80 under both conditions imposed by the ICC and the implementing agreement arbitration processes under the WJPA, another CBA. 3 S.T.B. at 718. Additionally, the scope of that authority was further limited to its use in an "approved transaction" where the changes were "necessary" to carry out that transaction and the changes could not affect "rights, privileges or benefits" protected by Article I, Section 2 of New York Dock. Id. at 719. "Rights, privileges or benefits" protected by Section 2 are '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.' Id. at 723, quoting, UTU v. ICC, 108 F.3d at 1430. Accordingly, the STB set the following standard for a Section 4 arbitrator operating under the New York Dock conditions. The arbitrator had the authority to make changes to a CBA, the changes had to be in the context of an approved transaction, the changes had to be necessary to carrying out the transaction, "rights, privileges and benefits" could not be changed and the arbitrator's overall authority to make changes was constrained by the practice of arbitrators in similar proceedings between 1940 and 1980.

IV. THE SECTION 4 ARBITRATOR'S MODIFICATIONS TO THE CONRAIL CBA IN FD 33888.

Following the STB's approval of CSX's and NS's acquisition of Conrail, BMWE and the three (3) carriers entered into negotiations, pursuant to Article I, Section 4 of the New York Dock conditions to devise an implementing agreement dividing the Conrail BMWE-represented workforce among the three (3) carriers. The parties could not reach an agreement and arbitrator William Fredenberger was selected by the National Mediation Board to fashion the implementing agreement. On January 14, 1999, arbitrator Fredenberger issued his decision. Arbitrator Fredenberger addressed the issue of changes to subcontracting rules in CBAs as coming within his jurisdiction thus:

> *The parties are in further dispute with respect to the use of outside contractors by NS and CSXT for rehabilitation and construction projects necessary to link the Carriers' system with allocated CRC lines and to upgrade track and increase capacity.* The Carriers emphasizes [sic] that these projects would be temporary and that under the BMWE's proposal it would be required to hire and then lay off substantial numbers of employees. Nor emphasizes the Carriers, does BMWE's proposal allow for NS, CSXT or third parties to perform maintenance of way functions for CRC as operator of the SAAs where those functions cannot be performed efficiently by the drastically reduced employee complement of CRC.*

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

Following his memorandum opinion, Arbitrator Fredenberger attached an "Implementing Agreement" applicable to the Carriers and BMWE. Article I, Section 1(i) of that Agreement made the following changes to the Conrail, CSX and NS CBAs as they related to the use of third parties to perform maintenance of way work on Conrail operated territory:

> *The parties recognize that, after the transaction, CRC will no longer have the system support it formerly had available. Therefore, to permit operation of the Share Assets Areas in a reasonable and efficient manner:*
>
> *(1) Major annual program maintenance such as rail, tie, and surfacing projects will be provided by CSXT and/or NSR in accordance with their respective collective bargaining agreements and/or practices.*
>
> *(2) CRC will purchase continuous welded rail ("CWR") from CSXT and/or NSR.*
>
> *(3) CRC will obtain from CSXT and/or NSR, in accordance with their respective collective bargaining agreements and/or practices, services such as component reclamation and prefabricated track work.*
>
> *(4) CRC will obtain from CSXT and/or NSR, in accordance with their respective collective bargaining agreements and/or practices, roadway equipment overhaul/repair that cannot be accomplished on line of road by CRC forces.*
>
> *(5) Changes, additions, improvements, and rationalizations that are over and above routine maintenance will be provided by CSXT and/or NSR in accordance with their respective collective bargaining agreements and/or practices.*

BMWED submits that those modifications to the three (3) collective agreements then became part of those parties' agreements governing rates of pay, rules and working conditions under the Railway Labor Act. Note, that the Arbitrator fashioned his arbitrated "agreement" in the form followed by a voluntary agreement, i.e., the parties "recognize" that Conrail's status would be different after the transaction. The point that must be stressed is that in Carmen III, the STB clearly discussed the authority of a Section 4 arbitrator to "modify" an existing CBA. Implementing agreements made under Section 4, whether voluntarily or involuntarily through arbitration, effect changes to Railway Labor Act agreements. Section 4 agreements are not independent agreements somehow separated from other agreements between the parties made under the Railway Labor Act. Instead, the implementing agreements make "necessary" modifications to existing CBAs to permit the carrying out of "transactions" approved by the STB. Nowhere in Carmen III, Carmen II, or Train Dispatchers do the STB, ICC or Supreme Court even suggest that a completed implementing agreement is a special creature of the Interstate Commerce Act with a continuing dispute resolution process attached to it. Indeed, a comparison of the jurisdiction of arbitrators under Section 3 of the Railway Labor Act and Article I, Section 11 of the Interstate Commerce Act shows that there is no process under the latter act to interpret or apply the terms of an implementing agreement independently of the Railway Labor Act. So, to the extent that the Majority considered the implementing agreement, it completely failed to understand and essentially ignored its plain terms, as the implementing agreement expressly modified the CBA; it did not set up a parallel agreement.

V. AN ARBITRATOR ACTING UNDER ARTICLE I, SECTION 11 OF NEW YORK DOCK LACKS JURISDICTION TO INTERPRET AN EARLIER IMPLEMENTING AGREEMENT'S MODIFICATIONS TO RATES OF PAY, RULES AND WORKING CONDITIONS CONTAINED IN A CBA NEGOTIATED UNDER THE RLA.

As we noted in Part I above, the Third Division of the NRAB has jurisdiction to adjust disputes "growing out of grievances or out of the interpretation or application of agreements governing rates of pay, rules, or working conditions." Sec. 3 First (i). That jurisdiction may be shared with an adjustment board created under Section 3 Second. No other forum has been granted jurisdiction to resolve the types of disputes presented to Section 3 panels. Here, the Majority assumes that another panel created outside the Railway Labor Act has exclusive jurisdiction to resolve disputes concerning the interpretation or applications of agreements governing rates of pay, rules and working conditions, so long as that agreement has been modified by an implementing agreement fashioned under protective conditions imposed by the ICC or STB. According to the Majority, that panel is one created under Article I, Section 11 of the New York

Dock conditions. A review of the history and application of arbitration under statutorily imposed employee protective conditions reveals otherwise.

In 1944, the ICC imposed conditions for the economic protection of employees affected by the acquisition of the Oklahoma Railway by the Santa Fe Railway and the Rock Island Railroad. These conditions came to be called the Oklahoma Conditions. The conditions themselves were contained in numbered paragraphs in the ICC's order approving the transaction. Paragraph 8 of the Oklahoma Conditions established the following arbitration provision:

> *In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing Conditions Nos. 4, 5, 6, and 7, which cannot be settled by the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representative.*

Conditions Nos. 4, 5, 6 and 7 concern the computation and payment of "displacement" or "dismissal" allowances to employees who suffered an adverse affect as to compensation as a result of the approved transaction.

In Southern Ry.—Control—Central of Georgia Ry., 331 I.C.C. 151 (1967), the ICC expressly incorporated the "implementing agreement" provisions of the collectively bargained WJPA into its order approving the transaction. The ICC noted that the economic protections afforded by its protective conditions were to be put into place after forces had been rearranged in accordance with Sections 4 and 5 of the WJPA. Id. at 169-70. Article I, Section 6 of the conditions provided arbitration in the following manner:

> *In the event any dispute or controversy arises with respect to the protection afforded by these conditions or with respect to their interpretation, application, or enforcement, which cannot be settled by the carriers and the employe or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination.*

The Appendix C-1 conditions imposed by the Secretary of Labor to apply to employees of railroads adversely affected by the creation of Amtrak also contained an arbitration provision in Article I, Section 11 that mandated arbitration of "any dispute or controversy, with respect to the interpretation, application or enforcement of any provision of this Appendix . . ." with the

exception of disputes involving the formation of implementing agreements under Article I, Section 4 or disputes over an employee's loss on the sale of his home under Article I, Section 12.

The New York Dock protective conditions which are an amalgam of Appendix C-1 and the Southern-Central of Georgia, conditions contains the following language mandating arbitration in 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 provision of this appendix, except sections 4 and 12[2/] of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.*

The use of these arbitration provisions is a delegation by the ICC, formerly, or the STB, presently, of the agency's primary jurisdiction regarding employee protective conditions imposed as part of its approval of a railroad merger, consolidation, etc. Black v. S.T.B., 476 F.3d 409, 413 (6th Cir. 2007). The primary purpose of such arbitration is to determine whether or not an employee, or a group of employees, are considered eligible for displacement or dismissal allowances under the imposed conditions. Additionally, arbitration can be used by the STB to resolve questions regarding the interpretation of terms contained within the protective conditions themselves. E.g., American Train Dispatchers Ass'n v. I.C.C., 54 F.3d 842, 846 (D.C. Cir. 1995)(ICC properly delegated to arbitrator the task of determining the "total compensation" earned by an individual claimant.) What these arbitrations do not do and cannot do, is resolve disputes over CBAs modified under Article I, Section 4 of the New York Dock conditions.

A useful comparison can be made with the arbitration provisions of the privately negotiated WJPA from 1936. That protective agreement, which the ICC noted is separate and distinct from protective conditions required by statute, Southern-Central of Georgia, 331 I.C.C. at 169, also contains an arbitration provision like Article I, Section 11; however it differs significantly in the scope of matters subject to that panel's jurisdiction. Section 13 of the WJPA provides in pertinent part:

> *In the event that any dispute or controversy arises (except as defined in Section 11)[3/] in connection with a particular coordination, including an interpretation, application or enforcement of any provisions of this agreement* ***(or of the***

[2/] Section 4 concerns implementing agreements like the type fashioned by Referee Fredenberger. Section 12 concerns an employee's loss on the sale of his home.

[3/] The WJPA's equivalent to Article I, Section 12 of New York Dock.

> ***agreement entered into between the carriers and the representatives of the employees relating to said coordination as contemplated by this agreement)*** *(emphasis added) which is not composed by the parties thereto within thirty days after the same arises, may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement.*

In other words, the WJPA, a CBA concerning protective conditions, contains its own arbitration procedures established under Section 3 Second of the RLA. The jurisdiction of that arbitration panel to resolve disputes over implementing agreements made under the WJPA is that such agreements are made under the Railway Labor Act and outside of the statutory protective conditions. Here, by contrast, the implementing agreement was a product of the statutorily imposed protective conditions.

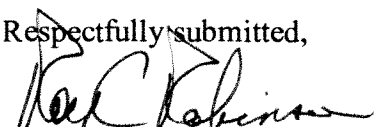
As we demonstrated in Part IV above, the implementing agreement made modifications to the Scope Rule in the BMWED-Conrail CBA. However, those changes are self-executing, they became incorporated into the CBA, they do not exist in some parallel statutory world that is separate, but somehow equal to, the CBA. Indeed, the correctness of this view is shown by noting the limited nature of Section 11 arbitration.

First, unlike the WJPA a Section 11 arbitration expressly does not have jurisdiction to interpret an implementing agreement. Jurisdiction is limited to interpretation of the New York Dock conditions. Indeed, Section 11 arbitrators expressly are divested of jurisdiction to resolve Section 4 disputes regarding formation of implementing agreements and lack jurisdiction to resolve disputes over losses from the sale of an employee's home. Therefore, the greatest jurisdiction the panel could exercise would be to interpret the modifications of the BMWE-Conrail CBA on the basis that the implementing agreement was an "application" of New York Dock. However, note the arbitration language in the WJPA which expressly confers jurisdiction upon the arbitration panel to interpret implementing agreements versus the silence on that point in Section 11. However, even if the Section 11 panel had jurisdiction to interpret the self-executing provisions of the implementing agreement, it certainly would not have jurisdiction to interpret and apply the parts of the Scope Rule not modified by the implementing agreement and all other provisions of the BMWED-Conrail CBA. That jurisdiction resides exclusively in arbitration panels established under Section 3 of the Railway Labor Act. The Section 11 panel cannot determine if the proper claimants have been invoked, if time limits under the CBA have been followed or even what has been the practice under the CBA both before and after its modification by the Section 4 arbitrator. All of those inquiries must be made and answered by the Section 3 arbitrator. Therefore, it makes common sense, in addition to good law, to presume that the implementing agreement made self-executing modifications to the CBA. Once those modifications were made, the Section 4 arbitrator

under New York Dock lost jurisdiction of the dispute and no other New York Dock arbitrator retained some residual jurisdiction over the implementing agreement process. Indeed, as we noted above, a Section 11 arbitrator has no primary jurisdiction over Section 4 disputes and there is absolutely nothing in the conditions that even implies a retained jurisdiction over the changes made to CBAs under Section 4. There is only one BMWED-Conrail CBA and one Scope Rule; there are not two, one under the Railway Labor Act and another one under the New York Dock conditions.

Therefore, the Board's failure to make a decision on the merits of the dispute brought under the BMWED-Conrail CBA, as modified, is a failure of the Board to comply with its jurisdictional command under the Railway Labor Act. The Board was required to resolve this dispute on the merits, its failure to do through an interpretation and application of the CBA created under the Railway Labor Act is a basis to set aside the awards as unlawfully issued. The awards failed to comply with the statute and did not conform to the Board's jurisdiction, the Board failed to perform its statutory duty under Section 3 and the Board failed to limit itself to the terms of the CBA in rendering its award.

Respectfully submitted,



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