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

In the matter of arbitration between

United Transportation Union and
Brotherhood of Locomotive Engineers

-and-

CSX Transportation, Inc.

Background

CSX Transportation, Inc. (hereinafter referred to as CSXT or the Carrier) is a Class I railroad that has evolved from the merger and acquisition of some eleven (11) railroads and their subsidiaries pursuant to the authorization of the Interstate Commerce Commission (hereinafter referred to as the ICC). Since 1962, the Baltimore & Ohio Railroad (hereinafter referred to as the B&O) and the Chesapeake & Ohio Railroad (hereinafter referred to as the C&O) have been commonly controlled and managed. These railroads and some subsidiaries comprised the Chessie System, Inc. The Chessie System, Inc. also controlled the Western Maryland Railway Company (hereinafter referred to as the WM).

In 1980, the Chessie System, Inc. and the Seaboard Family Lines, Inc. were merged to form CSX Transportation, Inc. The ICC approved this merger in Finance Docket No. 28905. In this same Finance Docket, the ICC also authorized the CSX Corporation to control the Richmond, Fredericksburg & Potomac Railroad (hereinafter referred to as the RF&P) through stock ownership.

In 1983, through a Notice of Exemption, the ICC authorized the B&O to operate the railroad properties of WM as part of the B&O system. (Finance Docket No. 30160). In 1987, the ICC issued another Notice of Exemption in Finance Docket No. 31033 merging the B&O into the C&O. As a result of this merger, the B&O ceased to exist as a separate corporate entity. In 1987, the ICC also authorized the merger of the C&O into CSX in Finance Docket No. 31106. In 1988, the ICC authorized the merger of the WM into CSXT (Finance Docket No. 31296). In 1992, the ICC authorized CSXT to operate the properties of the RF&P in the name and for the account of CSXT (Finance Docket No. 32020).

It should be noted that with the exception of the seminal 1980 merger between the Chessie System, Inc. and the Seaboard Coast Line Industries, Inc., all these other mergers were exempt from prior ICC approval. In all of these Finance Dockets, the ICC imposed the labor protective conditions set forth in New York Dock Railway-Control-Brooklyn Eastern District Terminal, 360 ICC 60, (1979) (hereinafter referred to as the New York Dock Conditions).

This arbitration under Article I, Section 4, of the New York Dock Conditions emanates from a January 10, 1994 notice that the Carrier served on four (4) United Transportation Union (UTU) General Committees of Adjustment and three (3) Brotherhood of Locomotive Engineers (BLE) General Committees of Adjustment. The Carrier claims that this notice was served in accordance with Article I, Section 4, of the New York Dock Conditions. The

Carrier contends that this New York Dock notice was served pursuant to ICC Finance Dockets 28905, 30160, 31033, 31106, 31296, 31954 and 32020.

The January 10, 1994, notice advised the affected UTU and BLE General Committees of Adjustment that CSXT intended to fully transfer, consolidate and merge the train operations and associated work force on the former WM, RF&P and a portion of the former C&O in the area between Philadelphia, PA., Richmond, VA., Charlottesville, VA., Lurgan, PA., Connellsville, PA., Huntington, W. VA. and Bergoo, W. VA. This proposed consolidation would include all terminals, mainlines, intersecting branches and subdivisions located in this territory between southern Pennsylvania and southern Virginia. This territory would be known as the Eastern B&O Consolidated District. It would encompass seven (7) existing seniority districts for train service employees and five (5) existing seniority districts for engine service employees.

The January 10, 1994, notice also advised the UTU and BLE General Committees of Adjustment that the aforementioned operations on the C&O, WM and RF&P would be merged into operations on the former Baltimore and Ohio Railroad and the affected train and engine service employees would be governed by the existing collective bargaining agreements on the former B&O applicable to train and engine service employees. Additionally, CSXT proposed that the working lists of the separate districts protecting service in this territory would be merged, including

establishment of common extra boards to protect service out of the respective supply points that would be maintained.

The notice outlined six (6) initial operational changes that the Carrier intended to make in order to facilitate the proposed transfer, consolidation and merger. However, CSXT subsequently withdrew its proposal requiring the Keystone Subdivision to protect certain service west of Cumberland. The Carrier suggested that a meeting be held on January 20, 1994, to commence negotiations for an implementing agreement pursuant to Article I, Section 4, of the New York Dock Conditions.

CSXT estimates that forty-five (45) train and engine positions would be abolished and forty-three (43) new positions would be created as a result of this consolidation. Some positions will be established at new locations. The Carrier asserts that no train or engine service employees will be furloughed as a result of the coordination. However, the Carrier's proposal will result in the closing of a number of supply points on the former C&O, B&O and WM. Reporting points would also change for some train and engine service employees. One seniority district would be created for the proposed Eastern B&O Consolidated District.

On February 10, 1994, the parties met to discuss the Carrier's January 10, 1994, notice. The UTU and the BLE took the position that the notice was improper for a myriad of reasons. They claimed that the proposal was improper because it would cause changes in the rates of pay, rules and working conditions

in existing collective bargaining agreements without compliance with the Railway Labor Act. They further asserted that the proposal did not involve a "transaction" under the New York Dock Conditions. Moreover, the UTU and BLE complained that the notice failed to specifically relate any of the proposed changes to the individual Finance Dockets cited by the Carrier. They also claimed that the proposal was not permitted by the Interstate Commerce Act and had no relation to the merger dating back to 1980 between the Chessie System, Inc. and the Seaboard Coast Line Industries, Inc. because no properties of the former Seaboard Coast Line were involved in the proposed changes. The Unions asked the Carrier to withdraw its January 10, 1994, notice but it refused to do so.

On February 25, 1994, CSXT submitted a proposed implementing agreement to the BLE and UTU involving the properties of the former B&O, C&O, RF&P, and WM it wished to merge. The Unions reiterated their objections to the notice and declined to meet to discuss the Carrier's proposed implementing agreement. On March 25, 1995, CSXT insisted that its notice was proper and legal and suggested that the parties proceed to arbitration pursuant to Article I, Section 4, of the New York Dock Conditions.

The BLE and UTU General Committees of Adjustment agreed to participate in the arbitration requested by CSXT while reserving their rights to challenge the January 10, 1994, notice as improper and procedurally infirm; and that there was no legal basis or authority for the changes proposed in the notice. The

Unions maintained that these arguments, among others, would be presented to the New York Dock arbitrator.

On September 23, 1994, the National Mediation Board designated the undersigned as Arbitrator of this dispute. The parties submitted extensive Submissions and a plethora of evidence in support of their respective positions. A hearing was held on March 28, 1995, in Washington, D.C. Based on the extensive evidence and arguments advanced by the Unions and CSXT, this Arbitrator hereby addresses the issues submitted to him.

Findings and Opinion

The ultimate question before this Arbitrator is whether the Carrier's proposed implementing agreements with the United Transportation Union and the Brotherhood of Locomotive Engineers comport with Article I, Section 4, of the New York Dock labor protective conditions. However, before reaching that paramount question, the Unions have presented several threshold issues that must be addressed. As noted heretofore, when the Unions agreed to CSXT's invocation of arbitration, they specifically reserved their right to submit these issues to the Arbitrator appointed pursuant to Article I, Section 4, of the New York Dock Conditions.

It is a universally accepted principle that Arbitrators appointed pursuant to Article I, Section 4, of the New York Dock Conditions serve as an extension of the ICC. Since these Arbitrators derive their authority from the ICC, they are duty

bound to follow decisions and rulings promulgated by the ICC. The ICC has suggested that New York Dock Arbitrators should initially decide all issues submitted to them, including issues that might not otherwise be arbitrable, subject, of course, to ICC review. Consistent with that mission, the undersigned Arbitrator hereinafter addresses the issues advanced by the UTU and BLE.

I. Has CSXT presented a "transaction" as defined in Article I, Section 1(a) of the New York Dock Conditions?

A "transaction" is defined as any action taken pursuant to a Commission authorization upon which New York Dock Conditions have been imposed. The Unions stress that CSXT is the moving party in this arbitration. Therefore, according to the Unions, CSXT must prove that there is a causal nexus between an ICC approved transaction and the operational changes it wished to make on the C&O, B&O, WM and RF&P railroads.

Rather than demonstrate this requisite causal relationship, the Unions contend that the Carrier merely listed seven Finance Dockets in its purported January 10, 1994, notice and explained eight (now seven) changes it wished to implement without identifying whether any of the particular Finance Dockets bear any relationship to any of the proposed changes. For these reasons, among others, the Union submits that CSXT has not submitted a proper and valid New York Dock notice for this Arbitrator's consideration.

In CSX Corp. - Control - Chessie System, Inc. and Seaboard Coast Line Indus., Inc., 8 I.C.C. 2d 715 (1992), the ICC set

forth guidelines to determine when a proposed coordination constitutes a "transaction" under New York Dock. In that proceeding, CSXT proposed to abolish four dispatcher positions at Corbin, Kentucky and transfer this work to management positions in Jacksonville, Florida. CSXT served this notice under the authority of Finance Docket No. 28905 which the ICC had approved in 1980, eight (8) years prior to the proposed transfer of these dispatcher positions. The American Train Dispatchers Association (ATDA) refused to agree to an implementing agreement and one was imposed by a New York Dock Arbitrator. The ATDA appealed the Arbitrator's Award to the ICC arguing that the change proposed in 1988 occurred too long after imposition of New York Dock conditions in 1980 to qualify as a "transaction."

The ICC rejected the ATDA's argument and found that the eight (8) year lapse between its imposition of New York Dock labor protective conditions in Finance Docket No. 28905 and the proposed transfer of dispatching functions in 1988 did not, by itself, render the proposal improper. The ICC explained that the relevant inquiry is not the passage of time but whether the coordination "reasonably flowed" from the control transaction that had been approved in 1980. The ICC declared that approval of a principal transaction extends to and encompasses subsequent transactions that are directly related to and fulfill the purposes of the principal transaction. The ICC did caution, however, that there must be a direct causal connection between the earlier merger transaction and the subsequent operational

changes sought to be implemented by a carrier.

It is instructive to note that in 1980, the ICC authorized the CSX Corporation to control the RF&P in Finance Docket No. 28905. In 1987, the ICC approved the merger of the B&O into the C&O in Finance Docket No. 31033. and the merger of the C&O into CSX (Finance Docket No. 31106). In 1988, the ICC sanctioned the merger of the WM into CSXT which had been formed in 1987 (Finance Docket No. 31296). And in 1992, the ICC authorized CSXT to operate the properties of the RF&P (Finance Docket No. 32020). All these Finance Dockets were cited by the Carrier in its January 10, 1994, notice to the UTU and BLE.

In this Arbitrator's opinion, the operational changes proposed by the Carrier in its January 10, 1994 notice directly related to and flowed from the aforementioned transactions that were authorized by the ICC. Were it not for the ICC permission in those Finance Dockets, CSXT would have no authority to merge the B&O, C&O, WM and RF&P territories into a single, discrete rail freight operation. To this Arbitrator, there is a direct causal relation between the mergers and coordinations sanctioned by the ICC in the Finance Dockets cited in the Carrier's January 10, 1994, notice and the operational changes it sought to implement on the former B&O, C&O, WM and RF&P properties. Accordingly, that proposal constituted a "transaction" as defined in Article I, Section 1(a), of the New York Dock Conditions.

II. Does the Arbitrator lack authority to grant CSXT's request for modification or relief from existing collective bargaining agreements because Article 1, Section 2, of the New York Dock conditions mandates the preservative of rates of pay, rules, working conditions and rights, privileges and benefits under existing agreements?

Article I, Section 2, of New York Dock provides 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 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.

In Railway Labor Executives' Association v. United States of America and the Interstate Commerce Commission, 982 F.2d 806 (1993), the United States Court of Appeals for the District of Columbia Circuit 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. The Court remanded the case to the ICC to define "rights, privileges and benefits." The ICC has not yet rendered a ruling in that remanded proceeding.

The Unions argue that until the ICC defines what is meant by the "rights, privileges and benefits" language of Section 405 of the Rail Passenger Service Act, which has been incorporated into Section 11347 of the Interstate Commerce Act, this Arbitrator lacks authority to grant CSXT the right to modify or eliminate any existing collective bargaining agreements.

Although the ICC has suggested that New York Dock arbitrators address all issues submitted to them, subject to its review, clearly it would be inappropriate for this Arbitrator to determine what was intended by the statutory language "rights, privileges and benefits" in Section 405 of the Rail Passenger Service Act. In *Executives*, the Court of Appeals for the D.C. Circuit specifically remanded this determination to the ICC. Therefore, it would be totally inappropriate for this Arbitrator to offer an opinion on the scope of this statutory language and I expressly decline to do so.

Addressing the facts extant in this particular proceeding, it appears that there would be several significant changes in the working conditions of train and engine service employees affected by the Carrier's proposal. For instance, their current seniority districts will be expanded to include all of the C&O, B&O, WM and RF&P territory to be coordinated. Also, the crew reporting points will be expanded to include all reporting points in this combined seniority district. Many present supply points will be eliminated for these employees. And those employees now working under the C&O, WM and RF&P schedule agreements will be placed under B&O schedule agreements. Additionally, some employees will have their representation changed from the UTU to the BLE.

While these are indeed not insignificant changes for many train and engine service employees in the territory to be coordinated, nevertheless similar changes are not uncommon in many New York Dock implementing agreements. Several New York Dock

Arbitrators have imposed implementing agreements placing employees under a different collective bargaining agreement. Moreover, numerous CSXT employees have been transferred to other railroads with different agreements pursuant to ICC implementing agreements. It should be noted that representation changed for many employees when the B&O Central District was created. Moreover, crew reporting points and seniority districts have been changed and expanded as a result of ICC authorized mergers and consolidations. CSXT's current proposed coordination is not markedly different from other mergers and coordinations approved by the ICC or by Arbitrators acting under the authority of the ICC.

III. Does Section 11341 (a) of the Interstate Commerce Act apply to proceedings exempted from prior review and approval by the ICC?

Section 11341(a) of the Interstate Commerce Act (49 U.S.C. 11341[a]) exempts a carrier from the antitrust laws and all other law, including State and municipal law, as necessary to let it carry out a transaction approved by the ICC under Chapter 113 of the Interstate Commerce Act (*49 U.S.C. section 11301 et seq.*) In Norfolk & Western Railway Co. et al. v. American Train Dispatchers et al., 499 U.S. 117 (1991), the United States Supreme Court ruled that the Section 11341(a) exemption "from all other law" includes a carrier's legal obligation under a collective bargaining agreement when necessary to carry out an ICC-approved transaction. The Supreme Court concluded that obligations imposed by laws, such as the Railway Labor Act, will

not prevent the efficiencies of rail consolidations from being achieved.

The Unions contend that this exemption applies only when it is necessary to carry out a transaction approved by the ICC. They maintain that the exemption does not apply when the ICC exempts a railroad from review and approval pursuant to Section 10505 of the Interstate Commerce Act (49 U.S.C. 10505). All of the transactions cited by CSXT in its January 10, 1994, notice, with the exception of the 1980 seminal transaction in Finance Docket No. 28905, involved exemptions under Section 10505 rather than approvals under Chapter 113. Therefore, the Unions assert that the Section 11341(a) exemption from "all other law" is inapplicable to these transactions.

In the light of the Supreme Court's unambiguous decision in *Train Dispatchers*, it cannot be gainsaid that the ICC may exempt transactions approved under Section 11341(a) from the RLA, and collective bargaining agreements entered into thereunder, when this is necessary to carry out a transaction approved by the ICC. The ICC has ruled that this authority extends to Arbitrators when they are working under the delegated authority of the ICC (See CSX Corporation - Control - Chessie System, Inc. and Seaboard Coast Line Industries, 8 I.C.C.2d 715 [1992]). Moreover, several Arbitrators under Article I, Section 4, of New York Dock have concluded that they have the authority to override existing collective bargaining agreements if they are an impediment to carrying out an approved transaction.

At issue here is whether the Section 11341(a) exemption from the RLA and collective bargaining agreements subject to the RLA also applies to transactions exempt from ICC review and approval under Section 10505 of the Interstate Commerce Act. A literal reading of Section 11341(a) would seem to support the Unions' argument that the exemption from other laws does not apply to transactions exempt from ICC approval. However, the ICC has concluded that it has the authority under both Section 11341(a) and Section 11347 of the Interstate Commerce Act to modify collective bargaining agreements under the RLA when they are an impediment to a merger. (See CSX Corporation -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 ICC 2d 715 (1990)). This is the so-called ICC "Carmen II" decision. The Court of Appeal for the D.C. Circuit deferred to the ICC's judgment in *Executives*.

As noted at the outset of this proceeding, Arbitrators acting under the authority of the ICC must adhere to ICC rulings and decisions. In the aforementioned Carmen II decision, the ICC expressly stated that Arbitrators appointed under the New York Dock conditions have the authority to modify collective bargaining agreements when necessary to permit mergers. Thus, this Arbitrator has the authority under both Section 11341(a) and 11347 to modify existing collective bargaining agreements if this is necessary to carry out the coordination proposed by CSXT in its January 10, 1994, notice.

IV. Are the provisions of Section 11341(a) inapplicable to combinations of multiple approved or exempted transactions?

When the CSXT served its January 10, 1994, notice on the UTU and BLE, it cited seven (7) Finance Dockets that the ICC had either approved or exempted from prior approval and regulation. The Unions contend that there is no statutory or other legal basis or precedent for combinations of multiple approved or exempt transactions. This Arbitrator must respectfully disagree with the Unions' contention, however.

It is true that Section 11341(a) of the Interstate Commerce Act refers to "the transaction" in the singular. Nevertheless, the Carrier's reference to multiple Finance Dockets does not appear to be barred by the Interstate Commerce Act, ICC decisions, or the New York Dock Conditions. It is noteworthy that all of the cited Finance Dockets apply to CSXT's control of the four (4) properties it now wishes to consolidate. Moreover, the ICC imposed the same labor protective conditions in each of those transactions. Also, for many years, CSXT and its predecessor railroads have served notices under New York Dock and other ICC labor protective conditions listing multiple Finance Dockets. Evidently, neither the affected rail labor organizations nor the ICC took any exception to this practice.

For all the foregoing reasons, this Arbitrator finds that it was not improper for CSXT to reference a combination of seven (7) Finance Dockets in its January 10, 1994, notices to the UTU and BLE.

V. Is the Section 11341(a) exemption necessary to carry out the Carrier's proposed coordination?

In *Dispatchers*, the Supreme Court declared that the Section 11341(a) exemption is applicable only when it is necessary to carry out an approved transaction. The Court ruled that the exemption can be no broader than the barrier which would otherwise stand in the way of implementation. The ICC advocated a similar limitation in *Carmen II*. The ICC assumed that any change in collective bargaining agreements will be limited to those necessary to permit the approved consolidation and will not undermine labor's rights to rely primarily on the RLA for those subjects traditionally covered by that statute.

The Unions argue that the changes now proposed by CSXT are not necessary to carry out the Finance Dockets cited in the Carrier's January 10, 1994 notices in view of the actual transactions involved in those Finance Dockets; the lack of any relationship between the proposed changes; and the years that have passed since those ICC decisions.

CSXT has convinced this Arbitrator that it is necessary to change the seniority districts of the train and engine service employees 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 district the operating efficiencies contemplated by the coordination would be illusory. According to the Carrier, the proposed consolidation of

the present four seniority districts into a single seniority district will eliminate some train delays and will promote more efficient manpower utilization. To achieve this enhanced efficiency it is necessary to eliminate the current seniority districts on the affected territory and create a single seniority district.

CSXT also contends that to achieve the enhanced operating efficiency intended by its proposed consolidation some crew supply points will have to be closed, such as Hanover, PA, Charlottesville, VA and Haggerstown, MD for freight train operations. These changes, in conjunction with the establishment of Richmond as a common supply point for train service crews, will improve manpower utilization, according to the Carrier, since excess RF&P train and engine service employees at Richmond will be able to supplement the B&O, WM and C&O crews who now operate there. Again, it appears that it will be necessary to close some former crew supply points in order to achieve the efficiencies contemplated by the proposed consolidation.

It must be stressed that employees working in the consolidated territory will continue to receive the same wage rates and benefits that they currently receive. Except for the elimination of their current seniority districts and the closing of some supply points for crews, the present collective bargaining agreements on the B&O, C&O, WM and RF&P will be continued unchanged. This transaction therefore will not result in a mere "transfer of wealth" from these employees to CSXT which

the D.C. Court of Appeals found impermissible in *Executives*. Rather, the savings will be achieved from better utilization of equipment, facilities and manpower. Also, CSXT will not be obligated to hire additional train and engine service employees due to its more efficient use of employees on the combined territory. Moreover, CSXT estimates that train delays will be greatly reduced. Thus, in this Arbitrator's opinion, the transaction itself will yield enhanced efficiency independent of any modifications in the present collective bargaining agreements on the B&O, C&O, WM and RF&P.

VI. Is it permissible for the Carrier to coordinate all or part of properties that are already subject to earlier implementing agreements?

In 1983, the UTU and the BLE executed implementing agreements after the B&O received permission to operate the properties of the Western Maryland in Finance Docket No. 30160. In 1992, the UTU and the BLE executed implementing agreements after the CSXT acquired the rail assets and operations of the RF&P in Finance Docket No. 31954. Those implementing agreements provided that "they shall remain in full force and effect until revised or modified in accordance with the Railway Labor Act."

According to the Unions, those implementing agreements are still in effect since they were never revised or modified pursuant to the RLA. The Unions maintain that the Carrier has no right to re-coordinate the properties that were involved in those implementing agreements.

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 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.

This would seem to distinguish the Harris Award. In any event, this Arbitrator finds nothing in the Interstate Commerce Act, ICC decisions or the New York Dock Conditions which preclude coordination of property previously coordinated and subject to an implementing agreement which may only be revised or modified

pursuant to the RLA. Any tension between this Award and the Harris Award must be resolved by the ICC.

In this Arbitrator's view, when the drafters agreed that an implementing agreement could only be changed in accordance with the RLA they intended this prohibition to apply to matters subject to bargaining under the RLA. They could not have intended it to affect the jurisdiction of the ICC. Nor did they have the right to preclude the ICC from reviewing mergers and coordinations subject to its jurisdiction. A new transaction would be governed by the Interstate Commerce Act, not the Railway Labor Act.

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. The ICC has made it clear that labor disputes arising from transactions which it has approved are resolved through labor protective conditions it has imposed, such as New York Dock, not through the Railway Labor Act.

For all the foregoing reasons, this Arbitrator finds that it was permissible for CSXT to propose a subsequent coordination of property that had been coordinated previously which was subject to an implementing agreement which could only be modified or revised pursuant to the Railway Labor Act.

VII. Is there a public transportation benefit flowing from the Carrier's proposal?

In *Executives* the Court of Appeals for the D.C. Circuit held that to override a collective bargaining agreement, the ICC must find that the underlying transaction yields a transportation benefit to the public, not merely a transfer of wealth from employees to their employer. Although the Court of Appeals remanded that proceeding to the ICC to clarify whether there were, in fact, transportation benefits to be had from the lease transaction involved there, it suggested that "transportation benefits" could include the promotion of safe, adequate and efficient transportation; the encouragement of sound economic conditions among carriers; and enhanced service levels.

The Carrier anticipates that its proposed changes will promote more economical and efficient transportation in the territory now served by the B&O, C&O, WM and RF&P which it wished to coordinate. According to the D. C. Court of Appeals, there would thus be some transportation benefit flowing to the public from the underlying transaction proposed by CSXT in its January 10, 1994, notices to the UTU and BLE.

Conclusion

As observed heretofore, the ICC must decide whether changes in the B&O, C&O, WM and RF&P collective bargaining agreements that are necessary to implement the transaction proposed by the Carrier involve "rights, privileges and benefits" of train and

engine employees affected by the transaction which must be preserved. If the ICC determines that their "rights, privileges and benefits" have been preserved, an issue on which this Arbitrator makes no finding, then the implementing agreements proposed by CSXT on February 25, 1994, meet the requirements of Article I, Section 4, of the New York Dock Conditions. Any employees adversely affected by this transaction will be entitled to New York Dock labor protective benefits.

The Carrier's January 10, 1994, notice to the UTU and BLE comported with the requirements of the New York Dock Conditions. The notices were in writing; were posted and served on the UTU and BLE ninety (90) days in advance; contained a full and adequate statement of the proposed changes; and included an estimate of the number of employees in each craft who would be affected by the proposed changes. The notices were therefore proper New York Dock notices.

Respectfully submitted,

Robert M. O'Brien, Arbitrator

April 24, 1995

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SURFACE TRANSPORTATION BOARD

SERVICE DATE
APR 29 1996

DECISION

Finance Docket No. 28905 (Sub-No. 26)

CSX CORPORATION--CONTROL--CHESSIE SYSTEM, INC.
AND SEABOARD COAST LINE INDUSTRIES, INC.
(ARBITRATION REVIEW)

Decided: April 15, 1996

CSX Transportation, Inc. (CSXT), filed an appeal with the former Interstate Commerce Commission (ICC) to review an arbitration award interpreting and applying a labor protective agreement. The Surface Transportation Board has now been given jurisdiction over this matter.[1] We reverse the findings of facts and conclusions of law in the award of Arbitrator Robert O. Harris concerning the implementing agreement proposed by CSXT to effect that carrier's coordination of operations in a new operating district. We will vacate the arbitral decision and award, and remand the proceeding to the parties to continue the implementing process in accordance with Article I, Section 4 of the New York Dock conditions through further negotiations or arbitration to reach a new implementing agreement.

PROCEDURAL MATTERS

On January 25, 1995, the Railway Labor Executives' Association (RLEA) and its affiliated labor organizations[2] filed a notice under 49 U.S.C. 10328 to intervene. RLEA contends that all the affiliated labor organizations maintain collective bargaining agreements (CBAs) with CSXT, and will be significantly affected by the resolution of the issues raised in this proceeding.

CSXT opposes RLEA's intervention on the grounds that RLEA is not a party to the proceeding. CSXT argues that section 10328 applies to intervention by designated representatives of employees and is, therefore, not available to RLEA, which is

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] The affiliated labor organizations are: American Train Dispatchers Department, Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Locomotive Engineers; Hotel Employees & Restaurant Employees International Union; International Brotherhood of Boilermakers & Blacksmiths; International Brotherhood of Electrical Workers; International Brotherhood of Firemen & Oilers; and Sheet Metal Workers International Association.

comprised of chief executives of several unions. According to petitioner, the CSXT employees who may be affected by this proceeding are represented by the United Transportation Union (UTU), which already is a party. In response, RLEA argues that it is being "utilized as a convenient, shorthand reference for each of the nine railway labor organizations listed in the Notice, as well as the unincorporated associations to which their chief executives belong." Consequently, RLEA believes section 10328 is applicable to its intervention.

We agree with RLEA that the issues to be decided here are pertinent to collective bargaining agreements between its affiliates and CSXT as well as between labor and the railroad industry in general. RLEA and its affiliates have a legitimate interest in the outcome of this proceeding. Thus, we will grant RLEA's request to intervene, and will accept into the record its statement filed on January 25, 1995. We will refer to the UTU and the RLEA collectively herein as the Unions or as labor.

By pleading filed February 15, 1995, CSXT petitions for leave to file a reply to UTU's reply and a 2-day extension to file a reply to RLEA's statement. In the interest of developing a full and complete record, we will grant CSXT's request in its entirety. CSXT's reply to UTU and to RLEA, filed February 15, 1995, is accepted into the record.

BACKGROUND

CSXT in its present form was created by a series of transactions approved by the ICC. In the 1980 decision in CSX Corp.--Control--Chessie & S.C.L. Industries, Inc., 363 I.C.C. 521 (1980) (CSXT Control), the Commission allowed CSX Corporation, a noncarrier holding company, to control as subsidiary corporations the Chessie System, Inc. (Chessie) and Seaboard Coast Line Industries, Inc. (SCLI). 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 Company (Clinchfield), and several smaller carriers. In a subsequent series of decisions, the ICC approved the consolidation of the railroad corporate entities controlled by CSX Corporation into its subsidiary CSXT.[1]

Each of these transactions creating present-day CSXT was approved subject to the ICC's 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 the Congressional mandate to provide such protection under 49 U.S.C. 11347.

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[1] In CSXT Control, the Commission authorized the CSX Corporation (CSX) to acquire control of the 6 subsidiary rail carriers of Chessie and the 10 subsidiary rail carriers (the so-called Family Lines) of SCLI, through the merger of Chessie 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).

Under New York Dock, labor changes necessary for consummation of agency-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 Board under the Lace Curtain standard of review.[4]

Pursuant to the ICC's 1980 decision in CSXT Control, on March 4, 1981, CSXT and the UTU entered into an implementing agreement (the 1981 Agreement) for the coordination of certain territories of the C&O, L&N, and Clinchfield Railroad Company (Clinchfield). In that agreement, the affiliate carriers and relevant labor organizations agreed that train operations between Hazard-Fleming and Martin, KY, on the C&O and L&N lines, and between Shelby, KY, and Erwin, TN, on the C&O and Clinchfield lines would be combined into "the Coordinated Territory." The Agreement concluded with the following statement in Article XVIII: "This Agreement shall remain in full force and effect until revised or modified in accordance with the Railway Labor Act, as amended."

On February 11, 1993, CSXT served a notice pursuant to Article I, Section 4 of New York Dock upon the UTU Committees of C&O, L&N, and Clinchfield to expand the Coordinated Territory.[5] The 1993 proposed coordination involved operations from Ravenna, KY, through Perrit, Hazard, Deane, and Martin, KY, to Beaver Jct., and then to either Russell or Shelby, KY. UTU opposed the notice on the grounds that Article XVIII required that the 1981 Agreement could only be revised or modified by the Railway Labor Act (RLA). Arbitration followed.

On October 17, 1994, an Arbitration Committee[6] found that the carrier's New York Dock notice of February 11, 1993, was improper because the 1981 Agreement specified RLA procedures as the only method of modification of the 1981 Agreement. In support of its ruling, the Committee stated:

> If the ICC found, as it has, that parties can make enforceable arrangements, jointly agreed to, which are different from those required by New York Dock, it

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[4] 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). Under the Lace Curtain standard, the agency 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 735-36. 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), the ICC said:

> 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.]

[5] A second notice, dated March 17, 1993, referred to the February 11, 1993 notice, and explained in detail the proposed coordination between: (1) Ravenna and Martin; (2) Hazard and Shelby; and, (3) Russell and Dent.

[6] Robert O. Harris, chairman and neutral member, H. S. Emerick, for the carrier, and Robert W. Earley, for the union.

would appear that an arbitration committee acting under authority granted by the ICC would be similarly bound to follow such arrangements. If that is the case, the carrier, by its 1981 agreement, has precluded itself from asking for de novo arbitration of a coordination which encompasses a coordination which it previously agreed may only be modified in an agreed upon-manner.

On December 9, 1994, CSXT petitioned for review of the Arbitration Committee's decision and award. CSXT requested the ICC to vacate the decision, find that the 1981 Agreement is not an impediment to implementing the transaction proposed by the 1993 notice, and direct the Arbitration Committee to fashion a new implementing agreement as required by Article I, Section 4 of New York Dock. UTU replied. RLEA filed a statement in support of UTU's position, and CSXT filed a rebuttal. For the reasons discussed below we will review the arbitrator's decision, vacate the decision, and remand the proceeding to the parties to continue the implementing process in accordance with Section 4 of New York Dock.

ARGUMENTS OF THE PARTIES

The parties raise three main issues: (1) whether CSXT was bound by the provisions of Article XVIII of the 1981 Implementing Agreement; (2) whether the changes would improperly reopen the prior 1981 Agreement by re-coordinating the territory already coordinated there; and (3) whether the changes are the type that may justify our overriding Article XVIII as an impediment to the proposed transaction.

Lace Curtain Review. CSXT contends that its appeal meets the Lace Curtain standard of review. The carrier avers that its appeal raises recurring and otherwise significant issues of general importance regarding the proper interpretation of New York Dock and, thus, satisfies the Lace Curtain criteria. In addition, CSXT argues that the Arbitrator's conclusion that the parties, through a prior implementing agreement, could replace the agency's New York Dock procedures with RLA procedures for implementing future transactions, is egregious error, and thus, merits our review and reversal. The Unions do not challenge our authority to review the Arbitrator's decision, but they argue that there is no reason to overturn the award.

Article XVIII Language. UTU contends that CSXT knowingly and voluntarily agreed to the Article XVIII language that provides that the RLA procedures are the only way to modify the 1981 Agreement, and that CSXT is, therefore, bound by the bargaining clause.

CSXT counters that Article XVIII's reference to the RLA was merely "boilerplate phraseology" found in many collective bargaining agreements, and that it applied only to modifications of those provisions relating to employees' rates of pay and work rules after implementation of the 1981 transaction. CSXT maintains that the agency's New York Dock procedures would be followed for any future transactions that also involved the Coordinated Territory.

UTU, however, takes issue with the railroad's categorization of Article XVIII as merely boilerplate language pertaining to employee rates or work rules. It argues that it was not necessary to include the disputed language to assure the use of the RLA for negotiating those provisions, because such matters are subject to RLA procedures anyway.

CSXT complains that the labor organizations' interpretation of Article XVIII focuses only on the reference to RLA procedures

and ignores the Agreement's recognition of New York Dock procedures in Article XVIII(a) of the Agreement. Because the agreement specifically referenced New York Dock, CSXT contends that it was free to carry out new coordinations under those procedures, pursuant to the authority granted in CSXT Control.

CSXT asserts that it and its predecessors have previously coordinated territories under New York Dock in subsequent ICC-authorized transactions, despite the inclusion of similar RLA language in the implementing agreement, and without any objection from UTU. For example, the WM and B&O entered into an implementing agreement with UTU on November 28, 1979. Section XI of the agreement contained the same reference to the RLA as does Article XVIII. B&O and WM served notice in 1983 under Article I, Section 4 of New York Dock to expand the Coordinated Territory by adding track from Curtis Bay Railroad. After UTU refused to agree to a new implementing agreement, one was imposed by an arbitration committee under New York Dock.

In 1959, the former Atlantic Coast Line Railroad Company and L&N entered into an implementing agreement with a predecessor union of the UTU coordinating their operations in Montgomery, Alabama. Section 5 of that agreement contained the same Article XVIII reference to the RLA at issue here. Nevertheless, this territory was expanded to include track of the former Atlanta & West Point Railroad and the Western Railway of Alabama, pursuant to a 1983 New York Dock implementing agreement. The former B&O, C&O and L&N expanded their coordinated train operations in Cincinnati, Ohio under a 1984 New York Dock implementing agreement, see Appendix I, even though this same territory had been the subject of an earlier coordination accomplished under an implementing agreement with the UTU containing the RLA reference. In 1992 CSXT expanded coordinated territories of the former C&O and Seaboard System in Richmond, Virginia to include track of the former Richmond, Fredericksburg and Potomac Railroad. The previous November 29, 1989 implementing agreement again contained the RLA reference.

The union responds that its failure to invoke its right to follow RLA procedures in the past is not a waiver of that right here. The union contends that in the instance involving B&O and WM, it did not invoke its RLA bargaining right because there was an intervening ICC decision under which the second coordination agreement proceeded. In addition, the consolidation involved only 0.15 miles of rail and five employees, who were not subject to significant changes.

CSXT also argues that the arbitrator's decision failed to explain what "quid pro quo" it would receive for relinquishing its statutory right to accomplish coordinations through New York Dock procedures. CSXT implies that the 1981 Agreement was not a typical "contract" embodying some bargain between CSXT and UTU in which the railroad could waive its statutory right. Rather, CSXT characterizes the 1981 Agreement as a regulatory requirement of the ICC.

UTU states that the language is clear, simple, and unambiguous, and that the Arbitrator had no need to "psychologize" the carrier's motivation. UTU speculates that CSXT readily and knowingly agreed to Article XVIII because it had no meaningful expectation in 1981 that it would re-coordinate the same territory 12 years later.

CSXT maintains that the Committee's construction of Article XVIII is contrary to the statute, to New York Dock, and to the CSXT Control decision. Citing Norfolk & Western Railway Company, Southern Railway Company and Interstate Railroad Company--Exemption--Contract to Operate and Trackage Rights (Arbitration

Review], Finance Docket No. 30582 (Sub-No. 2) (ICC served May 7, 1992 and July 7, 1992) (Norfolk & Western), the railroad argues that the exclusive method required by ICC precedent for accomplishing a transaction such as it proposed here is that provided in New York Dock. According to CSXT, the parties may not, by agreement, vary the requirements set by the statute and ICC order, especially when the alternative procedure is contained in an agreement that has never been reviewed by the agency.

UTU maintains, however, that nothing in the statute or in New York Dock prohibits the carrier and the labor organization from voluntarily agreeing in a New York Dock implementing agreement to a different method of resolving matters concerning future coordinations of the involved lines.

Relation to 1981 Agreement. CSXT argues that its 1993 proposed transaction was not intended to be a modification of the 1981 Agreement, but was a new coordination, requiring a completely new notice and a new implementing agreement under Article I, Section 4 of New York Dock. CSXT maintains: (1) that the transaction covered by the 1981 Agreement had already been consummated; (2) that, by its terms and by operation of New York Dock, it was limited to coordinating the train operations described therein, and did not address future transactions; (3) that the 1981 Agreement would not be modified or revised by the proposed transaction, but would be superseded and replaced by a new New York Dock Implementing Agreement governing the expanded, Coordinated Territory; and, (4) that employees' interests would still be protected, because they would continue to receive the protections and benefits under New York Dock, as guaranteed in CSXT Control.

In response, UTU cites language from CSXT's 1993 notices that appears to contradict the railroad's argument that the 1993 proposal was not intended to modify the 1981 Agreement. The February 11, 1993 notice stated that it was "necessary to reopen discussions of the consolidated area." The stated intention of the March 11, 1993 notice was "to reopen the agreements coordinating the operations between Hazard and Shelby, Kentucky . . . to revise the present agreements to operate as indicated below: ****." According to the union, the matters "indicated below" were three proposals to expand the 1981 Hazard-Deane-Martin coordination.[7]

DISCUSSION AND CONCLUSIONS

Lace Curtain Review. In Lace Curtain, the ICC asserted its authority to review arbitral awards arising from the labor protective conditions that the agency imposes upon its approval of mergers and other transactions embraced within 49 U.S.C. 11343(a). The ICC stated there that it would review such awards if they involve "significant issues of general importance regarding the proper interpretation of our labor protective conditions."[8] It also said that where there is egregious error or where the award fails to draw its essence from the labor conditions, it would reverse an arbitral award.[9]

The issue of whether the railroad has bound itself to follow RLA procedures in undertaking the changes at issue is a significant issue of general importance which merits our review.

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[7] See Exhibits A and B, UTU's verified statement.

[8] Lace Curtain, 3 I.C.C.2d at 736.

[9] Id. at 735.

Neither union disputes our authority to review the Arbitrator's decision. Accordingly, we will hear the appeal.

Article XVIII Language. Arbitrator Harris concluded that the carrier notice under Section 4 of New York Dock was improper because the Implementing Agreement provides that following the procedures of the RLA offers the "only method for modifying or expanding the coordination of forces originally agreed to covering the territory between Hazard and Martin, KY." But Harris did not support his finding that the reference to the RLA had that meaning. Before the arbitrator, CSXT argued, as it does here, that the reference to RLA procedures in Article XVIII means that changes in pay and working conditions must be negotiated pursuant to the RLA. But the railroad claims that the language does not mean that any further modification of the implementing agreement to carry out an ICC-authorized transaction is subject to RLA rather than ICA procedures.

Rather than restating the procedure under the law, labor believes that including the subject language would express the intent to adopt a new procedure, the RLA, rather than the customary procedure under the ICA for implementing changes arising out of an ICC-approved transaction. The Unions argue that such an interpretation makes the most sense because section 6 notice under the RLA must be served by the carrier if it proposes any changes in rates of pay or work rules, whether such a provision is inserted in the implementing agreement or not. Thus, reasons UTU, a more reasonable interpretation of the language is that it was included to make clear in this agreement that a wider scope was envisioned for the RLA than is usually the case. Labor concludes that the language is clear, simple, and unambiguous.

We do not agree with the Unions that the reference to the RLA is free from ambiguity. It is neither uncommon nor unreasonable for the parties to an agreement to recite the applicable law in the contract. Thus the interpretation argued by CSXT may not be rejected out of hand. Moreover, assuming without deciding that carriers and unions may by agreement replace the ICA process with that of the RLA, the fact that Congress enacted sections 11347 and 11341(a) to govern in these instances suggests that any ambiguity in an agreement be resolved in favor of the ICA process. See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, (1991). Any agreement by the parties to depart from section 11347 and New York Dock procedures to resolve matters that would normally be covered by those procedures should therefore be clearly and unambiguously expressed. That is not the case here.

In looking at the evidence submitted by the parties, we note that the railroad has pointed to certain circumstances to support its position. CSXT notes that similar language had been included in four other implementing agreements. The railroad points to this as a practice continuing over 30 years which has never been interpreted by the railroads, the unions or anyone else to until now mean that the RLA displaces New York Dock as the procedure for modifying implementing agreements to make changes arising out of transactions approved by the ICC. The unions have challenged the relevance of one of those precedents, but have not produced any precedents where a provision such as the one in Article XVIII has been employed or interpreted to provide for modifications for an implementing agreement pursuant to RLA provisions.

In another arbitration case, CSX Corporation--Control--Chessie, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27), (ICC served Dec. 7, 1995). (CSX--Control--Chessie/Seaboard), Arbitrator Robert M. O'Brien addressed a similar provision in an

implementing agreement. The UTU and the Brotherhood of Locomotive Engineers (BLE) argued there, as UTU and the RLEA have argued here, that any change to the implementing agreement had to be undertaken pursuant to RLA procedures. In support of their arguments to Arbitrator O'Brien, the unions cited the decision of Arbitrator Harris in this proceeding. O'Brien distinguished Harris' award by construing the latter's holding as limited to a "second coordination of the same properties." O'Brien then found that in the proceeding before him the properties to be coordinated were different. Arbitrator O'Brien then went on to say, O'Brien Award at 20, that:

> In this Arbitrator's view, when the drafters agreed that an implementing agreement could only be changed in accordance with the RLA they intended this prohibition to apply to matters subject to bargaining under the RLA. They could not have intended it to affect the jurisdiction of the ICC. Nor did they have the right to preclude the ICC from reviewing mergers and coordinations subject to its jurisdiction. A new transaction would be governed by the Interstate Commerce Act, not the Railway Labor Act.

In support of his conclusion, Arbitrator O'Brien cited the fact that CSXT had negotiated several implementing agreements containing the RLA language and noted that many of these properties were subsequently coordinated without resort to the RLA. "Rather", he noted, "they were coordinated in accordance with ICC procedures. O'Brien Award at 21. The ICC upheld Arbitrator O'Brien's award.

Because we conclude that Article XVIII merely recites existing law, which provides that RLA procedures apply to modifications of rates of pay and rules (i.e., matters which are outside the scope of modification to CBA's which can be made by an implementing agreement), we need not address CSXT's assertion that this transaction warrants a new implementing agreement rather than modification of the 1981 Agreement. Nor need we resolve the issue of whether the parties to an implementing agreement, by mutual consent, may supplant New York Dock procedures with RLA procedures to govern matters that otherwise would be covered by the New York Dock procedures. Finally, we need not consider whether we may or should override the provisions of such an agreement pursuant to the provisions of section 49 U.S.C. 11321(a) or 49 U.S.C. 11347.[10]

We find that the arbitrator committed egregious error in finding that CSXT was bound to effect the coordination at issue by resorting to the RLA as a result of the provisions of Article XVIII. Accordingly, we vacate the arbitrator's award and remand the proceeding to the parties to continue the implementing process in accordance with Article I, Section 4 of the New York Dock conditions through further negotiations or arbitration to reach a new implementing agreement.

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[10] The court in Brotherhood of Locomotive Engineers v. I.C.C., 885 F.2d 446 (8th Cir, 1989), held that parties to an implementing agreement under New York Dock could agree to follow RLA procedures for any modifications to an implementing agreement and that the ICC lacked authority to override such an agreement. The court, however, based its conclusions on Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562 (D.C. Cir. 1989) (holding that the ICC lacked authority to modify CBA's), which was subsequently overturned by the Supreme Court. Norfolk & W. Ry Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991).

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

It is ordered:

1. The decision and award of Arbitrator Robert O. Harris is vacated. The proceeding is remanded to the parties for further proceedings in accordance with our findings.

2. A copy of this decision will be served on Arbitrator Robert O. Harris.

3. This decision is effective on the service date.

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

Vernon A. Williams
Secretary

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EB

SERVICE DATE - JULY 15, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

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

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

Decided: July 1, 1997

We deny the petition of the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) (jointly, the Unions) for a supplemental order concerning the ICC's decision served December 7, 1995.

BACKGROUND

CSXT Transportation, Inc. (CSXT) was created through various transactions that were approved by the ICC subject to the standard *New York Dock* labor protection conditions.[2] Under *New York Dock*, labor changes related to approved transactions are effected through implementing agreements negotiated before the changes occur. If the parties cannot agree, the issues are resolved by arbitration, with possible appeal to the Board under its deferential *Lace Curtain* standard of review.[3] The Board (or arbitrators acting under *New York Dock*) may, with

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11326 and 11327. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

[2] The ICC adopted these conditions in *New York Dock Ry.--Control--Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), to implement its mandate to provide such protection under former 49 U.S.C. 11347, which has been recodified as 49 U.S.C. 11326.

[3] 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 Board does not review "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error," which is to say, error that may have far reaching consequences for a substantial number of employees subject to the conditions or that may interfere with our ability to oversee implementation of the conditions. *Id.* at 735-36. 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), the ICC 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

(continued...)

limited exceptions not relevant here, override provisions of collective bargaining agreements (CBAs) that prevent realization of the public benefits of approved transactions.[4] Affected employees receive comprehensive displacement and dismissal benefits for up to 6 years.

This proceeding arose because of CSXT's efforts to make operational changes related to a series of ICC-approved transactions that helped to create the carrier as it is today. Briefly, CSXT proposed to coordinate train operations and make related labor changes over a portion of its system by creating a new operating district, the "Eastern B&O Consolidated District" (Eastern District), and merging seniority rosters in that new district. All engineers and trainmen working in the new Eastern District were to be placed under CSXT's CBAs with UTU and BLE covering the former Baltimore & Ohio Railroad Company lines. There was to be a net loss of five positions. On January 10, 1994, CSXT served a notice on UTU and BLE of its intention to implement the labor changes under *New York Dock*.

The Unions refused to participate in the negotiation of an implementing agreement. The Unions argued, *inter alia*, that the labor changes may not be compelled under *New York Dock* because they would violate existing CBAs.[5] Unable to negotiate, CSXT invoked arbitration under *New York Dock*. The parties selected Robert M. O'Brien as the arbitrator. Arbitrator O'Brien issued his award on April 24, 1995.

The arbitrator ruled that he had jurisdiction to arbitrate an implementing award under *New York Dock*. The arbitrator held that CSXT could implement the labor changes, unless the ICC were to find that they would unlawfully override "rights, privileges, or benefits" of CBAs that must be preserved under Article I, section 2 of *New York Dock*. The arbitrator reserved that issue for the ICC itself to decide in light of the District of Columbia Circuit Court of Appeals' remand of this issue in *RLEA*, *supra* n.4. Both sides appealed the arbitrator's award.

In its December 7, 1995 decision, the ICC affirmed the arbitrator's authority to implement labor changes related to the consolidation. The ICC rejected the Unions' argument that the changes could not be implemented under *New York Dock* because they involved CBA "rights, privileges, or benefits" that must be preserved under that decision. The ICC reaffirmed its authority to modify CBA terms when such changes are necessary to permit the carrier to realize the public benefits of an approved transaction. The ICC upheld the arbitrator's finding that public benefits would arise out of the positive effect of the workforce consolidation on

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(...continued)

> imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions. [Citations omitted.]

The ICC reviewed issues of law and policy, including issues involving interpretation of the statute or its labor conditions, under the more expansive standard of review appropriate for a regulatory agency charged with administration of a regulatory statute and its conditions thereunder. *See Wallace v. CAB*, 755 F.2d 861, 864-65 (11th Cir. 1985); *Pan American World Airways Inc. v. CAB*, 683 F.2d 554, 562 (D.C. Cir. 1982).

[4] Where modification is necessary, we may act under either former sections 11347 or 11341(a), where these former provisions apply, or under the successors to these provisions. *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*).

[5] The Unions also argued that (1) CSXT improperly based the changes on a succession of Commission decisions rather than on a specified individual decision and (2) the changes cannot be based on any of the transactions approved in the succession of decisions because those decisions are too old. These issues are not involved in this decision.

operational efficiency. Subsequently, the ICC's decision was affirmed in *United Transportation Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997).

By petition filed October 17, 1996, the Unions request that we enter a "supplemental order" under current 49 U.S.C. 11327 requiring CSXT to submit quarterly reports as to: (1) the public transportation benefits "assertedly realized" by the transaction; and (2) the manner in which those benefits have been used.[6] On November 6, 1996, CSXT replied in opposition to the Unions' petition for a supplemental order.

On December 31, 1996, the Unions filed a motion to file a reply to CSXT's reply and tendered a separately filed reply. CSXT filed a reply in opposition to the Unions' motion on January 8, 1997.[7]

DISCUSSION AND CONCLUSIONS

The Unions' petition for a supplemental order is more properly construed as a petition to reopen this administratively final matter. We may reopen and revise such decisions based on material error, changed circumstances or new evidence. The Unions urge us to begin a separate proceeding to reexamine the issue of whether the public benefits of the transaction are actually being realized; they argue that the benefits found by the arbitrator were "presumed" and based on unsupported assumptions. In essence, they are arguing that the ICC committed material error by adopting the arbitrator's finding that there would be public benefits from the proposed consolidation of seniority districts.

We disagree. As noted by the ICC in its December 7, 1995 decision at 12-13, and affirmed by the court (slip op. at 11-12), the efficiency benefits of the consolidation were supported and quantified in the record before the arbitrator. Thus, the efficiency benefits were neither presumed nor based on unsupported assumptions. The Unions have failed to justify reopening of this administratively final and judicially affirmed matter.

The Unions also argue that we must reconsider the issue of whether the efficiency benefits of the transaction (assuming *arguendo* that they exist) will likely be passed through to the public. But the ICC's final decision thoroughly explained why the efficiency gains would benefit the general public as well as the railroad (slip op. at 13):

> 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.

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[6] On April 12, 1996, the Unions filed an earlier petition for a "supplemental order" asking us to remedy alleged defects in CSXT's implementation of the labor changes in the new Eastern District. On October 23, 1996, the Unions filed a notice of withdrawal of that petition.

[7] We will not consider the Unions' reply to CSXT's reply. Under 49 CFR 1104.13(c), replies to replies are prohibited. This prohibition may be waived upon a showing of good cause, but the Unions have not shown good cause here because they have not explained why the additional argument could not have been submitted in their original petition. Moreover, the Unions' reply merely offers further argument in support of its petition that we impose a reporting requirement on CSXT.

The Unions have not attempted, however, to explain why they believe the ICC's decision was erroneous as regards efficiency gains. Once again the question of efficiency gains was expressly addressed by the court reviewing the ICC's decision and the ICC's conclusions were affirmed. Thus, their petition must be denied.

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

It is ordered:

1. The Unions' petition for a supplemental order is denied.

2. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

UNITED TRANSPORTATION UNION
and Brotherhood of Locomotive
Engineers, Petitioners,

v.

SURFACE TRANSPORTATION BOARD
and United States of America,
Respondents,

Railway Labor Executives' Association,
et al., Intervenors.

No. 95-1621.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 4, 1997.

Decided March 21, 1997.

Railroad unions petitioned for review of order of the Surface Transportation Board allowing abrogation of seniority terms of existing collective bargaining agreements as part of consolidation of former railroads into consolidated rail district. The Court of Appeals, Harry T. Edwards, Chief Judge, held that: (1) established seniority provisions are within category of interests that are subject *to abrogation to effectuate* an railroad transaction approved by the Interstate Commerce Commission (ICC), and (2) evidence supported finding that changes proposed by railroad were necessary to effectuate consolidation of railway operations approved by the ICC.

Petition denied.

1. Commerce ⇐85.7

When a proposed consolidation involves rail carriers, statute requires Interstate Commerce Commission (ICC) to impose la-

bor-protective conditions on the transaction to insure a fair arrangement that will safeguard interest of adversely affected employees. 49 U.S.C.(1994 Ed.) § 11347.

2. Commerce ⇐85.7

Seniority provisions of collective bargaining agreement (CBA) are not within the compass of "rights, privileges, and benefits" protected absolutely by statute from power of Interstate Commerce Commission (ICC) to abrogate certain terms of collective bargaining agreement (CBA) as necessary to effectuate an ICC-approved railroad consolidation. 49 U.S.C.(1994 Ed.) § 11347.

See publication Words and Phrases for other judicial constructions and definitions.

3. Commerce ⇐209

Evidence supported arbitrator's factual finding that railroad's abrogation of terms of existing collective bargaining agreements (CBAs), in order to merge separate seniority rosters of former railroads into single seniority list for engineers and trainmen for entire consolidated rail district, was necessary to effectuate consolidation approved by the Interstate Commerce Commission (ICC).

On Petition for Review of an Order of the Surface Transportation Board.

William G. Mahoney, Washington, DC, argued the cause for petitioners, with whom John O'B. Clarke, Jr. and Richard S. Edelman were on the briefs.

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Ronald M. Johnson argued the cause and filed the brief for intervenor CSX Transportation, Inc.

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Before: EDWARDS, Chief Judge, HENDERSON and ROGERS, Circuit Judges.

Opinion for the Court filed by Chief Judge EDWARDS.

HARRY T. EDWARDS, Chief Judge:

This case arises out of an effort by CSX Transportation, Inc. ("CSXT") to implement an approved merger of operations of portions of four former railroads into a new, consolidated rail district. In so doing, CSXT sought to abrogate terms of existing collective bargaining agreements ("CBAs") in order to merge separate seniority rosters from the former railways into single seniority lists for engineers and trainmen for the entire district and to place the employees of the consolidated district under one CBA. CSXT served notice on the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers ("BLE") (jointly, "unions") of its intent to consolidate the various seniority districts. After negotiations between CSXT and the unions failed to produce an agreement implementing the proposed changes, the dispute was referred to arbitration. The arbitrator ruled in favor of CSXT, holding that the proposed changes are necessary to effectuate a transaction approved by the Interstate Commerce Commission ("ICC"); however, in light of this court's decision in *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 814 (D.C.Cir. 1993) (*Executives*), the arbitrator reserved for the Commission the question whether CSXT's proposed changes undermine "rights, privileges, and benefits" protected by 49 U.S.C. § 11347 and the so-called "*New York Dock* rules." *See New York Dock Ry.-Control-Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir.1979) (*New York Dock*).

Section 11347 incorporates the protections of the Rail Passenger Service Act, 45 U.S.C. § 565, which provides that, in transactions (such as railway consolidations) approved by the Commission,

> protective arrangements shall include ... such provisions as may be necessary for

> . . . the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements. . . .

However, the Supreme Court and this court have made it clear that the ICC may abrogate certain terms of a CBA as necessary to effectuate an ICC-approved transaction. *See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 127–28, 111 S.Ct. 1156, 1162–63, 113 L.Ed.2d 95 (1991) (*Dispatchers*); *American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157, 1163–64 (D.C.Cir. 1994) (*ATDA*); *Executives*, 987 F.2d at 814. The questions at issue here are (1) whether established seniority provisions are within the category of interests that are subject to abrogation, and, if so, (2) whether the changes proposed by CSXT are *necessary* to effectuate the consolidation of railway operations that had been approved by the ICC. The Commission answered affirmatively to each of these questions, and we can find no error in the agency's judgment.

The principal dispute in this case is over the meaning of "rights, privileges, and benefits," for the parties agree that any employment arrangement meeting this definition is fully protected, save for modifications achieved through collective bargaining. The Commission held that "the term 'rights, privileges, and benefits' means the 'so-called incidents of employment, or fringe benefits' . . . and does not include scope or seniority provisions." *CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27) (Nov. 22, 1995) (*Commission decision*), *reprinted in* Joint Appendix ("J.A.") 238. In light of the applicable statutory provisions and the judicial decisions construing them, we can find no basis to overturn the Commission's holding on this point.

Furthermore, the Commission did not err in upholding the arbitrator's finding that CSXT's proposed changes are *necessary* to effectuate an ICC-approved consolidation. The ICC found that "merging the separate seniority rosters into one will produce real efficiency benefits," *see id.* at 13, *reprinted in* J.A. 236, thus making clear the nexus between the proposed changes and the effectuation of an approved transaction found to be in the public interest.

On the record at hand, the petition for review must be denied.

I. Background

CSXT, a major rail carrier, is the product of various railroad mergers, all approved by the ICC.[1] CSXT had its genesis in the ICC's 1980 decision authorizing CSX Corporation to control two railroad holding companies. *See CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521 (1980) (*CSX Control*). Over time, the operations of the railroad subsidiaries of Chessie System, Inc. ("Chessie") and Seaboard Coast Line Industries, Inc. ("SCLI") were merged together and, ultimately, became CSXT. CSXT has combined various operations, facilities, and workforces throughout portions of the former railroads that today constitute CSXT.

This case arises out of an attempt by CSXT to consolidate train operations, workforces, and facilities on portions of four former railroads—the Baltimore and Ohio Railroad("B&O"), Western Maryland Railway ("WM"), Chesapeake and Ohio Railway ("C&O"), and Richmond, Fredericksburg and Potomac Railway ("RF&P"). In 1993, CSXT decided to combine train operations, workforces, and facilities on the eastern portion of the former B&O with contiguous portions of the former RF&P, WM, and C&O to create the Eastern B&O Consolidated District. CSXT proposed to place all of the train crew employees working in the new, consolidated district on merged seniority rosters, with one

1. The ICC is the predecessor to the Surface Transportation Board ("STB"). Effective January 1, 1996, the Interstate Commerce Act ("ICA") was amended by the ICC Termination Act, thereby transferring all of the ICC's remaining functions to the STB. *See* Pub.L. No. 104–88, 109 Stat. 803 (1995). A savings clause in the Termination Act, § 204, provides that matters arising before January 1, 1996 will continue to be governed by the ICA as it existed pre-amendment. We, therefore, will refer to the pre-amendment ICA. We note that §§ 11341(a) and 11347 of the ICA were continued by the ICC Termination Act, but were renumbered, respectively, as §§ 11321(a) and 11326.

list for engineers and a separate list for trainmen.

At the time when the disputed proposals were advanced, CSXT had CBAs with the UTU and BLE covering each of the former railroads constituting the new district. The seniority rules in the CBA for each railroad generally required that work in that geographic region be performed by employees with seniority rights under that agreement. Under CSXT's proposed implementation plan for its consolidation of operations in the Eastern B&O District, CSXT could use any engineer or trainman to staff a train throughout the consolidated district, regardless of whether the territory was within the boundaries of the employee's railroad prior to consolidation.

On January 10, 1994, pursuant to Commission-mandated procedures under section 4 of the *New York Dock* rules, *see New York Dock*, 360 I.C.C. at 77, CSXT served notice on the unions of its intent to consolidate various seniority districts of its affiliate carriers. The unions refused to negotiate an implementing agreement concerning these changes. Because the unions and CSXT could not reach an agreement, the matter was referred to arbitration as required by section 4 of the *New York Dock* rules, *see New York Dock*, 360 I.C.C. at 78.

A neutral arbitrator found (1) that the coordination proposed by CSXT was linked to an ICC-approved transaction; (2) that *New York Dock* arbitration was not barred by the terms of prior implementing agreements that made reference to Railway Labor Act ("RLA") bargaining; (3) that CSXT had shown that modification of existing CBAs was necessary; and (4) that the proposed changes to the existing CBAs could be made, provided, as required by section 2 of *New York Dock* rules implementing 49 U.S.C. § 11347, they did not undermine protected "rights, privileges, and benefits." *See UTU v. CSX Transp., Inc.*, (Apr. 21, 1995) (O'Brien, Arb.), *reprinted in* Supplemental Appendix ("S.A.") 413. The arbitrator, in light of this court's decision in *Executives*, 987 F.2d at 814 (leaving for the Commission to determine in the first instance the scope of protected "rights, privileges, and benefits"), reserved for the Commission the question whether CSXT's proposed changes to the CBAs undermine protected "rights, privileges, and benefits." *See UTU v. CSX Transp., Inc.*, (Apr. 21, 1995) (O'Brien, Arb.), *reprinted in* S.A. 413.

The unions petitioned the Commission to review and reverse the arbitrator's decision, *see* Petition of UTU and BLE, *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Indus., Inc.*, Finance Docket No. 28905 (Sub-No. 27) (June 9, 1995), *reprinted in* J.A. 33, while CSXT requested the Commission to uphold the arbitrator's findings and, further, to find that CSXT's proposed changes to the CBAs did not undermine protected "rights, privileges, and benefits," *see* Petition of CSXT, *CSXT—Bhd. of Locomotive Eng'rs and United Transp. Union*, Finance Docket No. 28905 (Sub-No. 27) (June 9, 1995), *reprinted in* J.A. 7.

The Commission ruled in favor of CSXT. *See Commission decision, reprinted in* J.A. 224–41. First, the ICC sustained the arbitrator's finding that CSXT's proposed coordination of train operations in the new, consolidated B&O Eastern District was linked to ICC-approved merger and control transactions. *See id.* at 8, *reprinted in* J.A. 231. Second, the Commission upheld the arbitrator's finding that prior implementing agreements of CSXT do not require that CSXT accomplish the coordination at issue here through Railway Labor Act ("RLA") bargaining procedures, as CSXT's proposed changes involve a different (i.e., greater) territory than that to which the prior agreements applied. *See id.* at 10–12, *reprinted in* J.A. 233–35. The Commission also found that applying *New York Dock* rules in the instant case comports with the parties' prior implementing agreements. On several occasions, CSXT has consolidated operations within the territory of the former railroads and, without objection from the unions, applied *New York Dock* rules. *See id.* Third, the Commission found that CSXT's proposed changes to seniority rights as established by CBAs were necessary to effectuate the ICC-approved transaction. The ICC also found that CSXT's proposed changes are not a device to transfer wealth from the employees

to the railroad, and that the merging of the separate seniority districts will produce real efficiency benefits. *See id.* at 13, *reprinted in* J.A. 236. Finally, the ICC determined that CSXT's proposed changes do not involve "rights, privileges, and benefits" that are protected by 49 U.S.C. § 11347 and section 2 of the *New York Dock* rules. The Commission noted that "rights, privileges, and benefits" include only "the incidents of employment, ancillary emoluments or fringe benefits." *See id.* at 14, *reprinted in* J.A. 237. The Commission concluded that the CBA provisions at issue in this case do not fall within the protected "rights, privileges, or benefits," as they involve scope and seniority changes of the type that consistently have been modified in the past in connection with consolidations. *See id.* at 15, *reprinted in* J.A. 238.

On January 4, 1996, the STB denied the unions' petition for an administrative stay. The unions then filed a petition for review in this court.

II. Analysis

The Supreme Court has made clear that, to effectuate an ICC-approved transaction, 49 U.S.C. § 11341(a) (1994) allows for the abrogation of terms in a CBA. *See Dispatchers*, 499 U.S. at 127–28, 111 S.Ct. at 1162–63.[2] In this court's *Executives* decision, however, we pointed out that "§ 11347 [involving 'employee protective arrangements in transactions involving rail carriers'] on its face provides more, not less, generous labor protection than does § 11341(a)." 987 F.2d at 814. Thus, the court found that, with respect to transactions covered by section 11347, "the Commission may not modify a CBA willy-nilly." *Id.* Nonetheless, the *Executives* decision is clear in recognizing that the Commission may modify CBAs as necessary to effectuate covered transactions:

> The statute clearly mandates that "rights, privileges, and benefits" afforded employees under existing CBAs be preserved. Unless, however, every word of every CBA were thought to establish a right, privilege, or benefit for labor—an obviously absurd proposition—§ 565 (and hence § 11347) does seem to contemplate that the ICC may modify a CBA.

Id. at 814 (footnotes omitted). Subsequently, in *ATDA*, the court construed *Executives* as holding that "certain contractual provisions," *i.e.*, those treading upon any rights, privileges, or benefits in a CBA, "are immutable." 26 F.3d at 1163.

In this case, we face two main issues—(1) whether CSXT's proposed seniority changes involve terms of a CBA that are shielded absolutely from the ICC's abrogation authority and, if not, (2) whether the proposed changes are "necessary" to effectuate an ICC-approved transaction.[3]

A. *"Rights, Privileges, and Benefits"*

The unions argue that the Commission erred in finding that CSXT's proposed merger of the seniority rosters in the consolidated district would not undermine protected rights. We disagree.

[1] When a proposed consolidation involves rail carriers, 49 U.S.C. § 11347 requires the Commission to impose labor-protective conditions on the transaction to ensure a "fair arrangement" that will safeguard the interests of adversely affected employees. *See Executives*, 987 F.2d at 813. In interpreting the safeguards required by § 11347, the Commission held in *New York Dock* that "[t]he rates of pay, rules, working conditions and all collective

2. Section 11341(a) provides, in relevant part, that a carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." 49 U.S.C. § 11341(a) (1994).

3. In their briefs, the unions also contend that, under previous implementing agreements, CSXT was required to make any modifications to CBAs for the former railroads comprising the new consolidated district through RLA procedures. On the record at hand, we find nothing in this claim that gives us pause or that would deter us from deferring to the Commission's judgment.

We also note that, in a related case involving the same contract language at issue here (but a different consolidated district), a panel of this court is currently considering, and will address, whether the language requires application of RLA procedures. *See UTU v. STB*, No. 96–1201.

bargaining and *other rights, privileges, and benefits* ... under applicable laws and/or existing collective bargaining agreements ... shall be preserved unless changed by future collective bargaining agreements." 360 I.C.C. at 84 (emphasis added). In other words, CBA terms that establish "rights, privileges, and benefits" may not be abrogated outside of collective bargaining.[4] Up until now, this broad conceptual framework has been clear, but the scope of the rights at issue has defied comprehension. Obviously confused, the court in *Executives* remanded that case to the Commission to allow the agency to explain the meaning of the phrase "rights, privileges, and benefits." *See* 987 F.2d at 814.

[2] In this case, the Commission offers a definition: "rights, privileges, and benefits" refers to "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." *See Commission decision* at 14, *reprinted in* J.A. 237. And "the incidents of employment, ancillary emoluments or fringe benefits" refers to employees' vested and accrued benefits, such as life insurance, hospitalization and medical care, sick leave, and similar benefits. *See id.* at 15, *reprinted in* J.A. 238. According to the Commission, seniority provisions are not within the compass of "rights, privileges, and benefits" protected absolutely from the Commission's abrogation authority. *See id.* On this point, the Commission notes that seniority provisions "have consistently been modified in the past in connection within [sic] consolidations. This may 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." *Id.*

The Commission's interpretation is reasonable. *See American Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 847–48 (D.C.Cir. 1995) (holding that the ICC's interpretation of *New York Dock* rules is entitled to substantial deference by a reviewing court). Under the Commission's interpretation, "rights, privileges and benefits" are protected absolutely, while other employee interests that are not inviolate are protected by a test of "necessity," pursuant to which there must be a showing of a nexus between the changes sought and the effectuation of an ICC-approved transaction. Under this scheme, the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by Congress.

In this case, the only contested changes to the CBAs are seniority provisions covering the previously separate regions of rail service. When pressed at oral argument, the unions' counsel was forced to acknowledge that employees will lose no so-called "fringe benefits" by virtue of CSXT's proposed changes to the CBAs. Thus, the Commission committed no error in holding that CSXT's proposed changes do not undermine protected "rights, privileges, and benefits."

B. Necessity

[3] We next turn to the question whether CSXT's proposed changes to the seniority rosters were *necessary* to effectuate an ICC-approved transaction. The unions contend that the Commission erred in finding a nexus. We disagree.

1. Nexus Between Changes Sought and ICC–Approved Transaction

It is undisputed that the Commission has, through a series of decisions, approved CSXT's proposed consolidation of the Chessie and Seaboard subsidiaries as being in the public interest. *See CSX Control*, 363 I.C.C. at 521. Petitioners, however, contend that the Commission erred by finding that there is a nexus between CSXT's proposed changes to the seniority rosters and the ICC-approved transaction. They argue simply that the passage of time between the ICC approval in *CSX Control* and the proposal for changes to the seniority rosters has rendered

4. No one has suggested that *seniority provisions* fall within the compass of "rates of pay, rules, working conditions" under *New York Dock*, so the scope of this term is not an issue in this case. It is only the meaning of "other rights, privileges, and benefits" that is at issue.

the two events unrelated. This argument is meritless.

The record clearly supports the Commission's affirmance of the arbitrator's factual finding that the proposed changes are linked to an approved transaction. As the Commission noted, CSXT has consolidated its operations gradually, often waiting until corporate entities were merged. The Chessie and Seaboard Coast subsidiaries were not fully merged until 1992. On this record, we are satisfied that the passage of time does not diminish a causal connection. *See CSX Corp.—Control—Chessie Sys., Inc. and Seaboard Coast Line Indus.*, 8 I.C.C.2d 715, 724 n. 14 (1992), *aff'd sub nom. ATDA*, 26 F.3d at 1157.

2. Transportation Benefit

In *Executives*, we held that, in addition to finding a nexus between the proposed changes and an ICC-approved transaction, "to satisfy the 'necessity' predicate for overriding a CBA, the ICC must find that the underlying transaction yields a transportation benefit to the public, 'not merely [a] transfer [of] wealth from employees to their employer.' 987 F.2d at 815. 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." *ATDA*, 26 F.3d at 1164 (quoting *Executives*).

CSXT argued, and the ICC accepted, that a consolidation of seniority rosters was necessary to effectuate the merger of the rail lines. This is both obvious on its face and was demonstrated by CSXT. First, there is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation. Second, CSXT demonstrated that changing crews at previous territorial boundaries of the former railroads, as would be required with separate seniority rosters, would increase costs and slow down transit times. Improvements in efficiency generated by a consolidated seniority roster will reduce CSXT's cost of service, resulting in reduced rates to shippers and ultimately to consumers. The unions offered no evidence to the arbitrator or Commission to challenge CSXT's contentions of improved efficiency. Indeed, at oral argument, the unions' counsel conceded that these efficiencies are not open to dispute. In short, the record supports the Commission's finding that CSXT's proposed changes to the CBAs are necessary to effectuate the ICC-approved transaction.

III. Conclusion

For the foregoing reasons, the petition for review is denied.