SURFACE TRANSPOR ATION BOARD
FINANCE DOCKET NO. 33388
ARBITRATION PURSU. NT TO ARTICLE 1, SECTION 4
NEW YORK DOCK PRC TECTIVE CONDITIONS
ARBITRATION OPINIO. AND AWARD
FEBRUARY 27, 1999

In the Matter Involving the

CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN RAILWAY COMPANY,
And CONSOLIDATED RAIL CORPORATION

and

BROTHERHOOD RAILWAY CARMEN DIVISION
- TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION and TRANSPORT
WORKERS UNION

Introduction and Background Facts

On July 23, 1998 the Surface Transportation Board (hereinafter the "STB") issued an order authorizing CSX Transportation, Inc. (hereinafter "CSXT"), Norfolk Southern Railway Company (hereinafter "NSR") and the Consolidated Rail Corporation (hereinafter "Conrail" or "CRC"), referred to collectively as the "Carriers", to enter into a Transaction which would result in the allocation of certain Conrail rail lines and facilities to CSXT and NSR; and which would allow Conrail to continue to operate certain

properties, known as the Shared Assets Areas (hereinafter the "SAAs").

In accordance with that authorization the Carriers served notice on representatives of the labor organizations of the various crafts and classes employed by the Carriers to consummate the Transaction pursuant to Article I, Section 4 of the so-called New York Dock (New York Dock Railway - Control - Brooklyn Eastern District Terminal, 360 I.C.C. 60) employee protective conditions. Included among the Organizations receiving the Article I, Section 4 notices were the Brotherhood of Railway Carmen Division of the Transportation Communications International Union (hereinafter the "BRC") and the Transport Workers Union of America (hereinafter the "TWU"). These notices were served on August 31, 1998. The two Organizations represented Conrail's Carmen as a result of an historical "split" of representation of the Carmen craft or class, which "split" existed as the result of the TWU's representation of Carmen on the former Penn Central Railroad and the BRC's representation of Carmen on the other component railroads which became part of Conrail in 1976.

The Carriers and the TWU and the BRC engaged in negotiations regarding the development of implementing

agreements which would govern certain subject matters, including, inter alia, Conrail Carmen's seniority and the rates of pay, rules and working conditions which would apply to some or all of them subsequent to the effective date the Transaction was consummated.

The parties (hereinafter the "Carriers", the "BRC" and the "TWU") concluded their negotiations on October 16, 1998 with the signing of an implementing agreement (hereinafter the "Negotiated Agreement"). The TWU advised the Carriers at the signing of this Agreement that the Agreement would have to be ratified by its membership.

When the Negotiated Agreement failed ratification, an arbitration proceeding pursuant to the New York Dock conditions was initiated. The below-signed Arbitrator was selected to hear the parties' respective positions, to consider relevant evidence and to decide the issues in dispute. The parties filed extensive pre-hearing submissions which were received on or about January 15, 1999, and an arbitration hearing was conducted on January 22, 1999 at the Lido Holiday Inn in Sarasota, Florida.

Counsel for the parties entered their appearances as follows:

Richard S. Edelman, Esquire
O'Donnell, Schwartz & Anderson
David Rosen, Esquire
General Counsel, TWU
For the TWU

Mitchell Kraus, Esquire
General Counsel, TCU-BRC
Mr. Richard Johnson
General President, BRC
For the BRC

Ronald M. Johnson, Esquire
Amy B. Smith, Esquire
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Assistant General Counsel, CSX
For the CSX

Jeffrey Berlin, Esquire
Mark Martin, Esquire
Sidley & Austin
Mark D. Perreault, Esquire
General Soliciter, NSR
For the NSR

Mr. Angelo J. Rudi
Assistant Director, Labor Relations, CRC
For the CRC

The parties filed rebuttal briefs and summaries of their arguments on or about February 2, 1999.

Most, if not all, of the relevant background facts regarding the nature of operations to be performed by each of the Carriers, as those operations would impact the Carmen's craft or class, as well as the history of the parties' negotiations are subsumed in the positions of the

parties which are articulated below. Thus they wi.l not be repeated in this section of the Opinion and Award.

Carriers' Statement of Position

The Carriers point out that the STB's Order authorized CSXT, NSR, and Conrail, together with their corporate parents, to undertake certain STB-regulated transactions that will effect a major restructuring of their existing rail systems. The Carriers further point out that when the Transaction is consummated, CSXT and NSR each will obtain exclusive use and operation of principal parts of Conrail's system, and that Conrail will continue to operate limited properties, the SAAs, in certain key areas for the joint benefit of CSXT and NSR. The Carriers submit that the STB found that the Transaction would provide substantial benefits to shippers and the public.

The Carriers state that they seek imposition of the October 16, 1998 Negotiated Agreement, which the BRC agreed to and continues to support, and which the TWU also agreed to, but which failed a ratification vote by that Organization's members. The Carriers assert that the Negotiated Agreement will enable the Carriers to carry out the Transaction and realize the public transportation

benefits intended by the STB, while being fair to employees. The Carriers' rely upon their four part pre-hearing submission, which they contend demonstrates the changes to collective bargaining agreements which are necessary for the Transaction.

The Carriers submit that an Article I, Section 4 arbitration is conducted before a neutral referee who acts as a delegate of the STB and is bound by that agency's rulings and precedent. The Carriers point out that the conditions direct the referee to "fashion a solution that is 'appropriate for application in the particular case.'"; and cite American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157 (D.C. Cir. 1994) in support of this contention. The Carriers maintain that a New York Dock referee has no jurisdiction, absent consent of the parties, to modify, enhance or depart from the terms of the New York Dock conditions.

The Carriers contend that it is well-settled that a New York Dock referee is empowered to modify existing labor agreements as necessary to implement the STB-authorized transactions, and cite Railway Labor Executives Ass'n v. United States, 987 F.2d 806 (D.C. Cir. 1993) in support of this contention. The Carriers argue that the STB recently

reaffirmed this principle in CSX - Control - Chessie Sys. And Seaboard Coastline, Finance Docket No. 28905 (Sub. No. 22) (Sept. 22, 1998), commonly referred to as Carmen III, in which the STB explained that the authority to modify agreements extends to effectuation of operating changes and coordinations that are directly related to, or flow from, the principal transaction, and that modification of a labor agreement is justified if it is necessary to the achievement of the public transportation benefits upon which the STB's approval was based. The Carriers assert that in the instant Transaction, Referee William Fredenberger, applying these standards, adopted an implementing agreement for maintenance of way work that modified the applicable Conrail agreement in ways that are similar to the terms of the Negotiated Agreement.

The Carriers argue that the Negotiated Agreement contains the necessary features of a New York Dock implementing agreement and reflects the best judgment of the parties' skilled negotiators; and that the Negotiated Agreement was the product of lengthy debate and considerations, regarding what changes to collective bargaining agreements were necessary for the Transaction. The Carriers submit that the Negotiated Agreement also

follows a pattern agreed to by the five other shopcraft unions. The Carriers contend that the implementing agreements entered into by these unions are identical to the Negotiated Agreement in their fundamental terms, providing for the permanent allocation of Conrail employees among CSXT, NSR and Conrail/SAA; the realignment of the Conrail property into CSXT and NSR seniority points; and application of a CSXT or NSR shopcraft agreement to the allocated lines.

The Carriers maintain that the Negotiated Agreement itself is the best evidence of the changes that are necessary and appropriate to realization of the benefits of the Transaction. The Carriers point out that New York Dock referees uniformly defer to the judgment of the parties' negotiators, and impose negotiated agreements in instances where the agreement is not ratified by the union's leadership or membership.

In any event, the Carriers submit that the Referee should adopt the Negotiated Agreement because, as the Carriers demonstrated in their submission, the changes to collective bargaining agreements affected by the Negotiated Agreement are necessary to realization of the benefits made possible by the Transaction.

The Carriers argue that the threshold issue is the permanent allocation of Conrail's workforce among CSXT, NSR and Conrail, as operator of the SAAs. The Carriers point out that the New York Dock conditions do not prescribe a formula for workforce allocation; and further point out that the Referee is charged with adopting or fashioning a mechanism that is "appropriate" to the transaction, again citing Carmen III and ATDA v. ICC. The Carriers submit that the allocation proposal that they have presented is straightforward and meets the Carriers' operational needs, while minimizing the impact on employees; as each employee is permanently allocated exclusively to one of the Carriers on the basis of the employee's reporting work location as of "Day One". The Carriers maintain that this approach (1) minimizes operational disruption and employee relocations, (2) represents the allocation methodology the Carriers, BRC and TWU agreed to in negotiations and (3) is the same as that adopted by all the other shopcraft Organizations and incorporated in their agreements.

The Carriers contend that the Negotiated Agreement addresses changes to collective bargaining agreements necessary for the consolidation of CSXT's operations with the Conrail lines and workforces allocated to it.

CSXT asserts that there are four principal aspects to the Negotiated Agreement as it relates to CSXT. First, Conrail freight cars and locomotives allocated to CSXT will be integrated into CSXT's existing fleets, and managed and operated on a system basis without regard to prior railroad ownership. CSXT submits that such integration will improve service, as well as reduce costs, by permitting the more efficient utilization of cars and locomotives throughout CSXT's expanded system. CSXT contends that in order to fully integrate the fleets, it must be able to utilize its workforce and allocated Conrail Carmen as a unified workforce. To achieve these benefits, CSXT points out that it will apply the existing CSXT Carmen collective bargaining agreement applicable to the former Baltimore and Ohio Railroad ("B&O Agreement") to employees working on allocated Conrail lines, except at Toledo, where the former Chesapeake and Ohio Railway ("C&O Agreement") will be applicable.

Second, CSXT submits that it will gain efficiencies by integrating Conrail's existing Carmen workforce with CSXT's Carmen workforce, through the application of CSXT agreements to the former Conrail territories. CSXT submits that application of CSXT agreements will enable it to

realize the substantial efficiencies arising from having uniform rules and practices throughout the combined system. For example, CSXT points out that it will realize substantial efficiencies by converting the work territories of former Conrail Carmen from district seniority to point seniority. CSXT points out that Conrail's seniority districts, many of which are being fragmented in the Transaction, would restrict CSXT from assigning employees to work on a line of road outside of the district, even when a Carman within the seniority district is closest to a car needing repair. CSXT contends that the result would be that trains would be delayed while a Carman with seniority in that district traveled to the area where the repairs were needed. CSXT asserts that under a point seniority system, CSXT would be able to dispatch the closest Carman, thereby minimizing train delays. CSXT argues that avoidance of train delays is necessary if CSXT is to become more competitive with other rail carriers and trucks, one of the public transportation benefits of the Transaction identified by the STB. CSXT submits that, by providing a greater pool of employees from which to draw, a point seniority system provides CSXT with the flexibility to match work with available Carmen, reducing the costs

associated with hiring additional employees. CSXT maintains that this same flexibility also produces cost savings by enabling CSXT to reduce the amount of equipment and facilities it must maintain.

Third, CSXT asserts that it will realize efficiencies of the Transaction by consolidating heavy freight car repair work for the Conrail cars allocated to CSXT at CSXT's existing shop facilities. CSXT points out that Conrail performs such work at its car repair facility at Hollidaysburg, Pennsylvania, which shop is located on lines allocated to NSR; and that CSXT's existing shops have sufficient capacity to meet CSXT's foreseeable needs. CSXT further points out that the consolidated work will be performed pursuant to the CSXT agreements currently applicable at those shops. CSXT submits that the STB and referees have recognized that consolidation of such work, under a single collective bargaining agreement, provides substantial efficiencies that constitute public transportation benefits.

Fourth, CSXT points out that it will consolidate heavy locomotive repair work at CSXT's existing locomotive repair facilities; and that Conrail performs such work at its shops in Juniata, Pennsylvania and Selkirk, New York.

CSXT further points out that it is not obtaining the Juniata shop because it is on allocated Conrail lines, which will be operated by NSR. CSXT submits that, while the Selkirk shop is allocated to CSXT, it does not have the capability to perform heavy locomotive repair work of the magnitude performed at the Juniata shop. CSXT submits that its Huntington and Waycross shops have sufficient capacity to handle heavy repairs for CSXT's expanded locomotive fleet. As with the consolidation of heavy freight car repair, CSXT submits that the benefits of such consolidation are well-recognized.

CSXT concludes that each of the changes in existing agreements made by the Negotiated Agreement are necessary to realize the efficiencies of the Transaction. CSXT points out that these changes include efficiencies derived from an integrated freight car fleet, consolidation of heavy and programmed shop work and better utilization of employees and equipment involved in the repair and maintenance of cars. CSXT contends that the improved utilization of Carmen and equipment and car repair facilities that these changes permit are necessary to support the increased competition and service levels

described in CSXT's Operating Plan and anticipated as a result of the Transaction.

Finally, CSXT argues that the Negotiated Agreement contains benefits and features that represent a balancing of interests of the involved parties which exceed what is required under New York Dock, and which a New York Dock referee would not otherwise have the authority to impose, but which the Carriers are willing to accept if the Negotiated Agreement is adopted in its entirety. CSXT contends that the Negotiated Agreement also preserves "rights, privileges and benefits" as required by the New York Dock conditions.

NSR points out that it also plans to maintain its existing and allocated cars and locomotives as part of an integrated fleet. NSR asserts that to gain the efficiencies resulting from this arrangement, NSR must operate the integrated fleet under NSR's existing management structure and consistent with its existing equipment maintenance and repair operations.

NSR submits that it will achieve operating efficiencies by consolidating and realigning the former Conrail property into seniority points under NSR's existing agreements, consistent with the point seniority system in

effect throughout NSR's system. NSR points out that it will operate the bulk of its allocated lines under the terms of a Norfolk & Western Shopcraft Agreement. NSR also points out that it will operate certain common point locations under the terms of the Nickel Plate Shopcraft Agreement, and one common point location under the terms of the former Southern Railway Shopcraft Agreement. NSR asserts that these agreements will support an integrated car and locomotive fleet through the application of scope and work rules that are consistent with NSR's proposed operations, and with the terms of New York Dock implementing agreements reached with the other five shopcraft labor organizations.

NSR submits that it also will achieve efficiencies in its Mechanical Department operations by consolidating work and eliminating duplicative facilities. NSR points out that its existing and allocated lines adjoin at numerous locations, where both NSR and Conrail currently maintain forces and facilities for performing light and running repairs of rail cars. NSR submits that it will establish common points at these locations, enhancing the competitiveness of the expanded NSR system by maximizing

the use of employees and repair equipment and eliminating duplicate costs associated with redundant facilities.

NSR points out that it intends, among other things, to change its heavy car repair operations to make the best use of its existing and allocated facilities. To maximize efficiency in the performance of heavy car repair after Day One, NSR points out that it will (1) consolidate most program car repair work for the integrated NSR car fleet at Conrail's Hollidaysburg heavy freight car repair shop, (2) consolidate freight car reclamation work at its car shop in Roanoke, and (3) perform most rebodying, new car construction and component fabrication work for the expanded system at Roanoke. NSR submits that its proposed consolidation is consistent with, and dictated by, the capabilities of these shops.

NSR states it also plans to increase efficiencies through functional specialization of its heavy locomotive repair work. NSR states that it intends to use the Juniata Locomotive Works at Altoona to perform locomotive overhaul and component rebuild work for locomotives manufactured by General Motors, and to use the Roanoke Shops to perform such work for locomotives manufactured by General Electric.

Given the structure of the Transaction, NSR maintains that it would be inefficient and counterproductive for NSR to attempt to operate its allocated properties by adopting Conrail's existing labor agreement with TWU; and that the Conrail collective bargaining agreement segments Conrail's properties along lines that bear no relationship to NSR's restructured operations and workforces, and its imposition on NSR's expanded operations would frustrate NSR's ability to achieve needed efficiencies.

NSR points out that, for example, Conrail has 18 seniority districts for its Carmen, defined by mileposts, many of which will be fragmented by the Transaction. NSR argues that the fragmented seniority districts on the Conrail lines allocated to NSR are incompatible with the organization of Carmen work on NSR generally and NSR's point seniority system specifically. NSR submits that if the Conrail Agreement and fragmented seniority district system were applied to NSR's allocated properties, NSR would not be able to make efficient use of its available workforce and equipment to respond when and where operating equipment repairs are needed and would be forced to keep redundant operations and equipment.

The Carriers point out that Conrail will operate the SAAs for the benefit of CSXT and NSR; and that Conrail will no longer own revenue-service freight cars and will no longer perform the heavy repair work it currently performs. The Carriers further points out that Carmen on Conrail will only perform routine, day-to-day Carmen work, such as light running repairs and mechanical inspections of freight cars; and that Conrail will operate the SAAs under the terms of its existing agreement with TWU and BRC, with modifications necessary to reflect the narrower scope of Conrail's operations and properties. The Carriers points out that each SAA will become a separate seniority district under the Conrail Agreement, by realigning or combining certain Conrail seniority districts so that each corresponds to the boundaries of a SAA; and that a single roster will exist in each SAA, with seniority dovetailed where the new district results from the combination of portions of more than one Conrail seniority district. To the extent Conrail has a need to perform any work beyond the routine day-to-day work it is equipped to perform, the Carriers points out that Conrail will contract with CSXT or NSR to perform that work.

The Carriers assert that TWU submitted its first

written proposal for an implementing agreement with its submission; and that the day before the hearing TWU revised its proposal, and revised it again at the January 22, 1999 hearing. The Carriers point out that during the hearing TWU made other revisions, which it provided to the Carriers after the hearing as addenda to the revised TWU proposal. The Carriers state that TWU represented at the hearing that its revisions addressed the Carriers' concerns, and that the only issue remaining was whether the Conrail Agreement should continue to apply at non-common point areas on lines allocated to CSXT or NSR.

The Carriers argue that TWU's proposal was hastily conceived and revised, contains ambiguities and conflicts and is inconsistent with TWU's representations at the hearing; and that the proposal, among other shortcomings, (1) fails to ensure the permanent division of Conrail employees among NSR, CSXT, and Conrail/SAA, (2) fails to ensure that CSXT and NSR can each integrate their existing and allocated equipment fleets, (3) fails to eliminate all the restrictions on coordinating work arising from the Conrail scope rule and (4) fails to provide necessary flexibility in the performance of line-of-road repairs. In light of these facts, the Carriers argue that TWU's

proposal poses significant obstacles to realization of the benefits of the Transaction. The Carriers maintain that, even if the dispute did boil down to the question of which labor agreement should apply on lines allocated to CSXT and NSR outside of the common points, TWU's proposal still would impede, rather than effectuate, the implementation of the Transaction.

The Carriers argue that, for these reasons, the Negotiated Agreement should be adopted in this proceeding.

Position of the TWU

TWU argues that its proposal is designed to permit the allocation of Conrail Carmen among the Carriers in accordance with the methodology described in the October 16, 1998 Negotiated Agreement; as Carmen will be divided by assigning them in place as of the effective date of the agreement so that on Day One they will be assigned to the same location/territory in the same job assignments as on day minus one. TWU states that it agrees to the seven day notice and effective date elements of the Negotiated Agreement for all Conrail Carmen.

Secondly, TWU states that it agrees to the Negotiated Agreement for all common points designated in that

agreement and for the Conrail/SAA territories; and also agrees to the application of the designated CSXT and NSR collective bargaining agreements at the common points and to application of the TWU/BRC-Conrail agreement for Conrail/SAA with the modifications described in the Negotiated Agreement.

Thirdly, TWU states that its proposal recognizes that the Carriers will consolidate heavy freight car and locomotive repair and overhaul work at the large centralized facilities as indicated in the August 31, 1998 New York Dock notice, and states that it agrees that work will be done at those facilities under the agreements applicable at those facilities without regard for the pre-transaction ownership of the freight cars/locomotives.

Fourthly, TWU states that it recognizes that the Carriers plan to integrate their locomotives and freight cars into single fleets and to perform locomotive and freight car maintenance and repairs at the CSXT and NSR facilities that are most convenient and appropriate; and further states that it agrees that work on those locomotives/cars will be performed under the agreements in effect at those facilities regardless of the pre-transaction ownership of such cars/locomotives.

Fifthly, TWU states that it proposes that the TWU/BRC-Conrail agreement will continue to be the agreement applicable at non-common points, non-SAA facilities and territories; and that NSR and CSXT will enter agreements with TWU to apply the TWU/BRC-Conrail Agreement at non-common points, non SAA facilities/territories.

Finally, TWU submits that it has proposed specific waivers of certain TWU/BRC-Conrail Agreement provisions, notwithstanding its proposal for the continuation of the agreement at non-common points and non-SAA areas. TWU states that these provisions include rules such as scope, seniority and work classification, which rules would prohibit integration of freight car and locomotive fleets and work on those cars/locomotives without regard to prior ownership. Additionally, TWU points out that it has proposed to waive block truck/road truck rules including prior rights rules as to block trucks that would require assignment of Carmen to block truck/road truck work based on agreement seniority district or local shop block truck territories. TWU points out that it has indicated that it would agree to the training of NSR new hires at NSR's McDonough Training Center.

Turning to the issue of the "legal framework" applicable to a New York Dock proceeding regarding employee protective conditions, TWU contends that the state of the law, established in decisions by the United States Court of Appeals for the District of Columbia Circuit, provides that "rights, privileges and benefits are immutable" and "preserved absolutely". TWU argues that such rights, privileges and benefits are properly viewed as including fringe benefits and ancillary emoluments, such as vested and accrued benefits including life insurance, hospitalization, medical care, sick leave and similar benefits. (UTU v. STB, 108 F. 3rd at 1430). TWU asserts that the content of rates of pay, rules and working conditions has not been determined, and the degree to which they may be affected has also not yet been determined.

TWU argues that collective bargaining agreement terms, other than "rights, privileges and benefits", are presumptively or qualifiedly preserved, and citing RLEA v. U.S., 987 F. 2d 806 (1993) (hereinafter "Executives"), TWU submits that collective bargaining agreements may be overridden only when "necessary to effectuate a transaction". However, TWU contends that agreements may not be modified, as stated by the Court in Executives, "willy-

nilly". Continuing in its analysis of the decision in Executives, TWU argues that "necessity" must relate to the purpose of the transaction, but not if "the purpose of the transaction was to abrogate the terms of a collective bargaining agreement". TWU contends that there must be a public purpose to be secured by the transaction "that would not be available if the [agreement] were left in place". TWU maintains that employee protective conditions cannot be used to "transfer wealth from employees to their employer". TWU continues and argues that there is no showing of necessity where "enhanced service levels would result solely from the reduced labor cost stemming from the modifications to the [agreements] when a producer's marginal cost declines it increases its output, i.e. service". Citing ATDA v. ICC, 26 F. 3rd 1157 (1994), TWU submits that the transportation "benefit cannot arise from the [agreement] modification itself; considered independently of the [agreement], the transaction must yield enhanced efficiency, greater safety, or some other gain". (Emphasis by TWU).

Therefore, TWU contends that the public transportation benefit must derive from the transaction itself, a change in operations that intrinsically benefits the carrier in

terms of more direct routes, reduced terminal delay, more single line service, consolidated facilities; and when application of a collective bargaining agreement provision would prevent the transaction, it might be necessary to override the agreement to allow implementation of the operational change that would benefit the public. TWU maintains that there may be no override where alleged benefits do not flow from an actual transaction and/or rearrangement of forces; or when the override is merely to increase flexibility, to reduce administrative costs, to lower labor costs or to eliminate inconvenient work rules based upon the notion that there is an indirect benefit to the public by "trickle down" of lower rates as the result of lower labor costs.

TWU next discusses the import of the decision of the STB in the case known as "Carmen III". TWU points out that this decision is significant in the instant case insofar as there is a dispute regarding matters where there is no actual consolidation of facilities or coordination of work. TWU points out that the STB noted that in Carmen II the Interstate Commerce Commission (hereinafter the "ICC") stated that Article I, Section 2 of the New York Dock conditions could not realistically be interpreted as

requiring that collective bargaining agreements be preserved without any qualification whatsoever, but that "contract rights shall be respected and not overridden unless necessary to permit an approved transaction to proceed"; and that while collective bargaining agreements may have to "yield to allow implementation of an approved transaction", under Section 11347 of the Interstate Commerce Act and the employee protective conditions, collective bargaining agreements and the Railway Labor Act were only required "to yield to permit modification of the type traditionally made by arbitrators under the WJPA [Washington Job Protection Agreement] and the ICC's conditions from 1940-1980." TWU points out that the STB stated that "[t]he implementing agreements imposed in arbitration under labor conditions that antedated New York Dock generally focused on selection of forces and assignment of work"; and that "[I]f the 1940-1980 arbitrators felt themselves bound by these terms [selection of forces and assignment of employees], they must have defined them broadly enough to include contract changes involving the movement of work (and probably employees) as well as adjustments in seniority".

TWU further points out that the STB cited three other "crucial limitations" on collective bargaining agreement overrides by arbitrators. First, the override must be for an approved transaction, that is, the principal Transaction (i.e. a merger or acquisition of control), or subsequent transactions "directly related to, [growing] out of or flow[ing] from the principal transaction (such as consolidations of facilities, transfer of work assignments etc.)." Continuing in its analysis of Carmen III, TWU submits that the STB held that there must be some operational change, not merely an override unrelated to operations. TWU points out that it has agreed to changes in scope and seniority provisions and to collective bargaining agreement coverage where the Carriers are actually integrating operations; but that TWU will not agree to such overrides where there is no integration.

Secondly, TWU submits that the STB found that an agreement "override can be had only if such override is necessary to carry out the transaction"; that "necessity determinations" are to be made in the first instance by arbitrators, who should "tak[e] care to reconcile the operational needs of the transaction with the need to preserve pre-Transaction arrangements"; and who "should

not assume that all pre-Transaction labor arrangements, no matter how remotely they are connected with operational efficiency or other public benefits of the transaction must be modified to carry out the purposes of the transaction". Thirdly, TWU iterates that the STB has held that "rights, privileges and benefits must be preserved".

In summary, TWU submits that under Carmen III contract rights may have to yield to allow implementation of an approved transaction, but they must be respected and retained unless an override is necessary to permit the approved transaction to proceed, and they may be required to yield only to permit overrides of the type engaged in by Washington Job Protection Agreement (hereinafter "WJPA") arbitrators.

TWU contends, contrary to the assertions of the Carriers, that a change to make the railroad more efficient is not itself a Transaction or a transaction to implement a principal Transaction. TWU argues that a consolidation of two facilities or a coordination of work of previously separate territories may be a transaction to implement a merger and allow unified operations, but a change in the way work is performed or a change in rules and working conditions in itself is not a transaction. TWU maintains

that a collective bargaining agreement modification is necessary when it is required to obtain a transportation benefit growing from the transaction that is unrelated to the agreement modification itself.

Turning to an analysis of Article I, Section 2 of the New York Dock conditions, TWU maintains that this provision, by its express terms, preserves both rates of pay, rules and working conditions as well as rights, privileges and benefits. TWU submits that under D.C. Circuit Court case law, rights, privileges and benefits are preserved absolutely, whereas rates of pay, rules and working conditions are presumptively preserved; and, while collective bargaining agreement provisions are generally preserved, they may be overridden only for a transaction requiring a rearrangement of forces in connection with formulation of an arrangement for selection of forces and assignment of employees, when the override is necessary to obtain a public transportation benefit of the transaction.

TWU next addresses the decisions by the STB in the instant case. TWU points out that in Decision No. 89 the STB held that it was not explicitly or implicitly approving the Carriers' operating plans or any collective bargaining agreement overrides that the Carriers claimed were

necessary to their operating plans; and that arbitrators were to make their own determinations regarding such matters.

TWU further points that in Decision No. 101 the STB defined necessity for override of contractual rights in an analogous situation, a claimed Section 11321 override of a Rail Reorganization Court order granting certain contractual rights to the Providence and Worcester R.R. TWU points that the STB stated "we clarify that we only intended to override the 1982 order of the Special Court to the extent necessary to permit the CSX/NS/Conrail transaction to go forward. In other words, our preemption was only to the extent that the Special Court order could be read to block this transfer [Conrail to CSX]." TWU maintains that similarly, in the instant case, there may be no override unless the contract provisions would block the Transaction or a follow-on transaction.

TWU contends that its proposal should be adopted because it accomplishes what is required of an implementing arrangement, and it accommodates the Carriers' proposed operational changes by providing for collective bargaining agreement overrides to permit those changes, but preserves the agreement rights of employees to the greatest extent

possible. TWU submits that its proposal accomplishes the selection of forces and assignment of all employees required as a result of the principal Transaction by allocating Conrail employees among the Carriers in accordance with the employees' pre-split assignments; and that it does so in the manner agreed to by all parties previously in the Negotiated Agreement. TWU submits that its proposal adopts the Negotiated Agreement "as is" for the consolidations and coordinations of work and related agreement changes for "common points" and SAAs.

However, TWU points out that its proposal continues application of the terms of the TWU/BRC-Conrail Agreement for non-common points non-SAA areas where there will be no NSR-former Conrail, and no CSXT-former Conrail coordinations of work or integration of work forces. Moreover, TWU points out that, to the extent that the Carriers have cited elements of the TWU-BRC-Conrail Agreement that they believe would impede transactions or transaction-related plans (such as integration of fleets, assignment of shop work by specific areas of responsibility, block-trucks, use of the McDonough Training Center), TWU has waived agreement rights even in circumstances it was not required to do so.

Accordingly, TWU maintains that its proposal provides a fair and appropriate method for selection of forces and assignment of employees required for the principal Transaction and follow-on transactions, and permits the agreement changes necessary to effect the selection of forces and assignment of employees.

By contrast, TWU submits that the Carriers' proposal far exceeds what is needed for the selection of forces and assignment of employees required for the Transaction or transactions. TWU points out that the Carriers would modify collective bargaining agreement coverage for non-common points, non-SAA employees even though substitution of the NSR and CSXT collective bargaining agreements for the Conrail collective bargaining agreement is (1) unrelated to the method by which such employees are allocated among the Carriers and (2) unrelated to any coordination of work or combination of employees. Therefore, TWU maintains that the Carriers' proposal is neither fair nor appropriate, and fails to satisfy the Carmen III tests for overrides of collective bargaining agreements.

Based upon the foregoing facts and arguments, TWU requests that its proposal be accepted and that the Carriers' proposal be rejected.

Findings and Opinion

The BRC also filed a submission in this case and assumed a non-adversarial, "neutral" position insofar as the dispute between the Carriers and the TWU is concerned regarding the retention of the TWU/BRC-Conrail collective bargaining agreement.

The BRC's position is found in a single paragraph on page 2 of its submission, which paragraph reads as follows:

> BRC seeks no changes in that agreement [the October 16, 1998 Negotiated Agreement]. However, to the extent that the arbitrator imposes terms that provide greater benefits or more favorable terms than the October 16 Agreement, BRC, pursuant to Side Letter No. 13 of that Agreement, reserves the option to receive those same benefits or terms for the employees it represents.

While the BRC reserved the right to attend the arbitration hearing and did so, and reserved the right to "comment" upon the Carriers' and TWU's proposed implementing agreements, the BRC remained neutral and did not favor one proposal or the other.

The Transaction in this case, to this Arbitrator's knowledge, is reasonably unique. Two profitable railroads were given the right to acquire the majority of another profitable railroad, for the stated purpose of increasing competition in a geographic region of the country. Conrail, the railroad being acquired, retained certain limited geographic locations known as the SAAs, and at those points the Conrail collective bargaining agreements are to remain in force and effect.

The evidence in the record establishes that the Carriers engaged in extensive, detailed negotiations regarding implementing agreements that would apply to employees in all of the crafts or classes who would be acquired by CSXT and NSR and/or who would remain employees of Conrail.

As noted in the above sections of this Opinion, the Carriers and the BRC and TWU entered into a comprehensive agreement on October 16, 1998 regarding the selection and allocation of Conrail employees among the three carriers. This Negotiated Agreement is contained in a fifteen page Implementing Agreement, with Attachment A, the NSR Seniority Points with Active Rosters, and Attachment B, the CSXT Seniority Points with Active Rosters. The parties

also appended twenty-four Side Letters of Agreement all dated October 16, 1998 to the Negotiated Agreement.

These Side Letters of Agreement preserved for Conrail employees represented by the BRC/TWU such "rights, privileges and benefits", as Conrail's Supplemental Unemployment Benefit Plan (Side Letter No. 1), the inclusion of Conrail employees represented by the TWU and BRC in NSR's and CSXT's "current 401(k) Plans" (Side Letter No. 11) and the preservation of the rights of former Conrail employees "currently employed on any passenger agency or former Monongahela Railroad" to exercise "seniority in the same manner they could have, had the acquisition of Conrail by NSR and CSXT not occurred" (Side Letter No. 10). In fact, there is no issue before this Arbitrator as to whether any rights, privileges and benefits of Conrail employees have not been preserved "absolutely" through the medium of the October 16, 1998 Negotiated Agreement.

During the course of the parties' oral arguments questions were raised regarding the relative value of the CSXT and NSR collective bargaining agreements vis-à-vis the BRC/TWU-Conrail collective bargaining agreement. To:

Richard Johnson

9 pages

The TWU has urged this Arbitrator to consider the declaration of Mr. John Czuczman, TWU's Vice President and Director of its Railroad Division, and a chart which is captioned "Impact on Conrail Maintenance of Equipment Employees (TWU/BRC-Carmen) with Imposition of N&W Agreement on NS Operated Former Conrail Property and Imposition of CSXT (B&O) Agreement on CSXT Operated Former Conrail Property" (TWU Exhibit Nos. 20 and 21) in support of its assertion that applying the NSR and CSXT collective bargaining agreements to Conrail employees at non-common points, non-SAA areas would result in an adverse impact upon said employees.

While Mr. Czuczman has proffered a well-developed and thoughtful analysis, this Arbitrator is not prepared, in the context of the record evidence, to make value judgments, even if such exercise was proper, regarding the relative value of similar or reasonably similar provisions in the "competing" collective bargaining agreements. Such comparisons would be difficult at best; and reaching subjective decisions as to which provision is more valuable to one employee as opposed to another could not, in this Arbitrator's opinion, be assessed in quantitative or qualitative terms.

A foundation principle which has been uniformly applied by arbitrators/referees in cases involving the integration of union-represented employees when corporate entities are involved in consolidations, mergers and/or acquisitions is to ensure, in light of all of the factual circumstances, that the selection and allocation of workforces and the integration of employees' seniority is "fair and equitable". The preponderant evidence of record in this case satisfies this Arbitrator that the Carriers' proposal, imposition of the Negotiated Agreement, is a fair and equitable manner for such selection and allocation of workforces. This Arbitrator's view is buttressed by the fact that all of the shopcraft labor organizations as well as the other labor organizations on the properties have agreed to virtually identical implementing agreements.

The only issue is whether the Carriers have presented sufficient evidence to persuade the Arbitrator that the application of the NSR and CSXT collective bargaining agreements at the non-common points and non-SAA areas constitute an operational necessity, consistent with the underlying purposes of the Transaction authorized and ordered by the STB in Finance Docket No. 33388.

The TWU has presented a very strong case in support of its contention that there is no legal or arbitral justification for "overriding" the terms of a collective bargaining agreement in the absence of the "necessity" to do so because of operational and efficiency needs directly related to the principal Transaction. TWU has also demonstrated during the course of these proceedings its willingness to revise its proposal and to limit the scope of its request that the TWU/BRC-Conrail collective bargaining agreement be preserved at only limited areas of the lines being acquired by NSR and CSXT in order to satisfy the concerns of NSR and CSXT that the operations of those Carriers on Day One and thereafter will not be limited in terms of operational efficiencies. And, in its rebuttal submission, TWU has argued that the Carriers have failed to make the requisite showing, as required by Carmen III, that the BRC/TWU-Conrail collective bargaining agreement should be overridden at the non-common points, non-SAA areas because there is no transaction regarding these non-common points, non-SAA areas, but "only a limited rearrangement of forces by division of Conrail Carmen among the Carriers".

On the other hand, the CSXT and the NSR have argued that retaining the TWU/BRC-Conrail collective bargaining agreement at the non-common points, non-SAA areas would adversely impact their ability to utilize their allocated Conrail Carmen as unified workforces, and, therefore, they would be unable to realize the substantial efficiencies arising from having uniform rules and practices throughout their combined systems. The primary concern of CSXT and NSR is the potential inability to assign Carmen to perform running repairs at the closest geographic point to the place where the repairs are needed, which inability would potentially result in the delay of trains. The Carriers have also relied upon a decision by Arbitrator William Fredenberger issued on January 14, 1999 in a New York Dock Article 1, Section 4 arbitration involving the Carriers and the Brotherhood of Maintenance of Way Employes and arising out of the same STB Finance Docket as here under consideration. In that proceeding Arbitrator Fredenberger was faced with the issue of his authority to "override or extinguish, in whole or in part, the terms of pre-transaction" collective bargaining agreements. While Arbitrator Fredenberger concluded, among other issues he considered, that the Carriers' proposal regarding seniority

for maintenance of way employes met the tests set forth by the STB in Carmen III and that a jurisdictional position taken by the International Association of Machinists and Aerospace Workers (hereinafter the "IAM&AW") regarding the representation of thirty-eight IAM&AW-represented Conrail employees was not sustainable, this Arbitrator is not prepared to consider the Fredenberger Award controlling in view of the TWU's assertion in its rebuttal submission that the Fredenberger Award is "to be appealed", and is allegedly "inconsistent with D.C. Circuit and STB precedent".

In responding to the CSXT's and NSR's concerns regarding their ability to efficiently assign Carmen at non-common points, non-SAA areas, the TWU has revised its initial proposal and asserted that these revisions would meet the Carriers' alleged operational needs. However, this Arbitrator is not sufficiently persuaded that the evidence of the necessity or lack thereof to override the BRC/TWU-Conrail collective bargaining agreement at the non-common points, non-SAA areas is anything more than evenly balanced. Much of the arguments and "evidence" submitted by the Carriers and the TWU fall into the realm of conjecture and speculation, particularly insofar as the

impact of the revised proposals offered by the TWU are concerned.

What "tips the balance" in favor of the Carriers' proposal, in this Arbitrator's opinion, is the Negotiated Agreement and the virtually identical implementing agreements entered into voluntarily by all of the other shopcraft labor organizations. The Carriers' proposal is favored by this Arbitrator, not necessarily because those other implementing agreements establish a "pattern", but because they constitute reliable evidence that many experienced, well-schooled union negotiators, thoroughly familiar with the needs to protect the interests of the employees they represent and the sanctity of the collective bargaining agreements they previously administered, were persuaded that the NSR's and CSXT's operations would be more efficient and meet the purposes of the STB's order in Finance Docket No. 33388. There is no reason to believe that these negotiators would have accepted the CSXT's and NSR's collective bargaining agreements if they did not believe that the new arrangements benefited the employees they represented in the context of the principal Transaction. In exchange for their agreement, TWU/BRC representatives and the representatives of the other

shopcraft organizations received substantial and generous quid pro quos reflected in the implementing agreements and the numerous side letters of agreement entered into evidence as Carrier Exhibit No. A-1 (the Negotiated Agreement) and Carrier Exhibit Nos. E-1, E-2, E-7, E-9 and E-13, the implementing agreements entered into between the Carriers and the National Conference of Firemen and Oilers, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, the International Brotherhood of Electrical Workers, the Sheet Metal Workers International Association and the International Association of Machinists and Aerospace Workers.

After full consideration of the record evidence and the parties' pre-hearing submissions, their oral arguments and post-hearing rebuttal submissions, this Arbitrator concludes that pursuant to the provisions of the New York Dock conditions that he has jurisdiction to impose and will impose the Negotiated Agreement as the full and complete agreement governing the manner by which Conrail employees represented by the TWU-BRC will be integrated into and covered for purposes of collective bargaining when they assume employment with the CSXT and NSR.

This Opinion and Award was signed this 27th day of February, 1999 in Sarasota, Florida.

Richard R. Kasher

Richard R. Kasher, Neutral Referee

February 27, 1999

Case

Docket No.	Title
FD 33388 89	CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASE/AGREEMENTS -- CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION (ARBITRATION REVIEW)

Decision Summary

GRANTED THE JOINT MOTION OF TRANSPORT WORKERS UNION OF AMERICA AND NSR TO HOLD THIS PROCEEDING IN ABEYANCE UNTIL SEPTEMBER 1, 1999.

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Graphics/Maps/Figures:

Full Text of Decision

30208

SERVICE DATE - APRIL 29, 1999

SEC

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 89)

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

-- CONTROL AND OPERATING LEASES/AGREEMENTS--

CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(ARBITRATION REVIEW)

Decided: April 28, 1999

On March 18, 1999, the Transport Workers Union of America (TWU) sought review of the February 27, 1999 arbitration award rendered by referee Richard R. Kasher (the Kasher Award). The Kasher Award adopted an implementing arrangement under Article I, section 4 of the New York Dock conditions imposed by the Board in Decision No. 89 of STB Finance Docket No. 33388, with respect to operations by both Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc.

(CSXT) following their takeover of Conrail operations as permitted by that decision. On April 9 1999, having reached a satisfactory arrangement with CSXT, TWU filed a "Partial Withdrawal Of Petition For Review Of Arbitration Award," withdrawing the union's petition insofar as it related to CSXT.

By motion filed on April 26, 1999, TWU and NSR jointly request that the Board defer handling of TWU's petition for review until September 1, 1999, and take no action with respect to the petition prior to that date. As grounds, TWU and NSR assert that they have reached a settlement that would lead to dismissal of the remaining issues involved in the petition if the settlement is ratified by the TWU membership.

Because this is a valid reason for granting the motion, and it is unopposed, the motion will be granted.

It is ordered:

1. This proceeding will be held in abeyance until September 1, 1999.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams

Secretary

30208
SEC

SERVICE DATE - APRIL 29, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 89)

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(ARBITRATION REVIEW)

Decided: April 28, 1999

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Because this is a valid reason for granting the motion, and it is unopposed, the motion will be granted.

It is ordered:

1. This proceeding will be held in abeyance until September 1, 1999.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

30150
SEC

SERVICE DATE - APRIL 1, 1999

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 89)

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
—CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL, INC AND CONSOLIDATED RAIL CORPORATION

(Arbitration Review)

Decided: March 31, 1999

On March 18, 1999, the Transport Workers Union (TWU) filed a petition under 49 CFR 1115.8 seeking review of an arbitration decision rendered under the New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) labor protection conditions. Under 49 CFR 1104.13(a), responses are due April 7, 1999.

By motion filed on March 29, 1999, Norfolk Southern Railway Company, CSX Transportation, Inc. and Consolidated Rail Corporation (collectively, railroads) jointly request an extension to April 14, 1999, to file their response. The railroads state that additional time is necessary because of the press of other cases. According to the railroads, counsel for TWU has been informed and consents. The request is reasonable and will be granted.

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

It is ordered:

1. The railroads' extension request is granted.

2. The railroads' response is due April 14, 1999.

3. This decision is effective on the date of service.

By the Board, Vernon A. Williams Secretary

Vernon A. Williams
Secretary

30245
SEC

SERVICE DATE - MAY 11, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 89)

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

(ARBITRATION REVIEW)

Decided: May 10, 1999

On March 18, 1999, the Transport Workers Union of America (TWU) petitioned the Board for review of the February 27, 1999 arbitration award rendered by referee Richard R. Kasher (the Kasher Award). The Kasher Award adopted an implementing arrangement under Article I, section 4 of the New York Dock conditions imposed by the Board in Decision No. 89 of STB Finance Docket No. 33388. In a pleading filed on April 9, 1999, TWU notified the Board that it had reached a settlement agreement with CSX Transportation, Inc., and by decision served on April 29, 1999, the Board held the proceeding in abeyance until September 1, 1999, to allow completion of settlement negotiations between TWU and Norfolk Southern Railway Company (NSR). In a pleading filed on May 6, 1999, TWU notified the Board that it withdraws its petition for review because TWU and NSR have now reached a final settlement. Due to these settlements, TWU's petition for review will be dismissed.

It is ordered:

1. TWU's petition is dismissed and the proceeding is discontinued.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary