BEFORE A JOINT
SPECIAL BOARD OF ADJUSTMENT
AND
NEW YORK DOCK ARBITRATION PANEL
APPOINTED PURSUANT TO SECTION 3 FIRST
AND SECOND OF THE RAILWAY LABOR ACT
AND
SECTION 11 OF THE NEW YORK DOCK
EMPL0YEE PROTECTIVE CONDITIONS

In the Matter of the Arbitration between:

CSX TRANSPORTATION, INC.

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, SOUTHEAST SYSTEM FEDERATION

OPINION AND AWARD

Welding Dispute

Date of Hearing: October 3, 1997
Place of Hearing: Washington, D.C.
Date of Award: November 12, 1997

PETER R. MEYERS, Chairman and Neutral Referee
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APPEARANCES

For the Organization:

William G. Mahoney--Attorney
Francisco J. Ruben--Attorney
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For the Carrier:

Ronald M. Johnson--Attorney
James B. Allred--Director, Employee Rels.
James Tomola--Senior Counsel
Elizabeth Kandravy--Attorney
Donald R. Bates--Assistant Chief Eng.

Introduction

On October 18, 1994, the Brotherhood of Maintenance of Way Employees (hereinafter "BMWE" and "the Organization") filed a claim contending that CSX Transportation, Inc. (hereinafter "CSXT" and the "Carrier") violated the scope rules contained in the collective bargaining agreements between the Organization and the former Louisville and Nashville Railroad (hereinafter "L&N") and the former Seaboard Coast Line Railroad (hereinafter "SCL"), both of which previously had been incorporated into CSXT through a series of ICC control authorizations, as well as a 1988 Implementing Agreement between CSXT and BMWE, when it used continuously welded rail ("CWR") produced at a non-union shop in Russell, Kentucky, on the former Chesapeake and Ohio Railway (hereinafter "C&O"), for installation on the former SCL.

The dispute resolution procedures of both Section 11 of the *New York Dock Employee Protective Conditions* and Section 3 of the Railway Labor Act were invoked. This matter then came to be heard, simultaneously, before a three-member panel sitting jointly as a Special Board of Adjustment and a *New York Dock* Arbitration Panel, with Peter R. Meyers as Chairman and Neutral Referee, on October 3, 1997, in Washington, D.C. The parties additionally filed written submissions in support of their respective positions.

Questions at Issue Posed by the Organization

Whether CSXT violated the scope rules of the L&N agreement and/or the Seaboard agreement in contracting Seaboard CWR welding work to a non-union subsidiary when it

transferred all welding work "currently being performed at [the] Savannah" Seaboard shop to the former L&N shop at Nashville and subjected it to the L&N agreement?

Whether CSXT, in transferring the Seaboard CWR work from the Seaboard Savannah shop and the Seaboard agreement to the L&N Nashville shop and L&N agreement, expressly reserved any right to exempt any part of such work from the L&N agreement under which it was being placed?

Whether CSXT has established "custom and practice" under the Seaboard agreement and, if so, whether Seaboard custom and practice can be applied to the L&N agreement when the Seaboard work is placed under that agreement without an express exemption?

Questions at Issue Posed by the Carrier

Does an arbitration panel designated under Article I, Section 11, of *New York Dock* have exclusive jurisdiction over this dispute or can some aspects be heard by an arbitration panel created under the Railway Labor Act?

Is it a violation of the August 1988 *New York Dock* implementing agreement, CSXT Labor Agreement 6-104-88, for the Carrier to continue to obtain continuous welded rail from its Russell Rail Welding Plant for installation on the former Seaboard Coast Line Railroad ("SCL"), just as it had prior to the consolidation of the Savannah and Nashville rail welding facilities contemplated by this implementing agreement?

Relevant Contract Provisions

NEW YORK DOCK CONDITIONS

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee who position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

. . .

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreement, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a

monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

. . .

11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article 1, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

. . .

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the

employee.

Factual Background

In 1980, the Interstate Commerce Commission ("ICC") approved a proposal under which CSXT assumed control of all railroads in the Chessie and Seaboard Coast Line Industries systems, which included the SCL and the L&N. The ICC subsequently approved a merger of the SCL and the L&N into CSXT. The ICC imposed the employee protections incorporated in the *New York Dock Labor Conditions* upon these transactions.

In 1988, with a stated intention of realizing additional efficiencies, CSXT closed a welded rail plant located at Savannah, Georgia, on the former SCL. From that point, CSXT relied on two remaining welded rail plants for continuously welded rail ("CWR"); these plants are located in Russell, Kentucky, on the former C&O, and in Nashville, Tennessee, on the former L&N. The work that previously had been performed at the Savannah shop was consolidated into the Nashville shop, pursuant to a 1988 *New York Dock* Implementing Agreement. This Implementing Agreement specifies that "Rail Welding work which is currently being performed at Savannah, Georgia" will thereafter be performed at Nashville under the former L&N-BMWE agreement.

Sub-paragraph b of Rule 38, the scope rule, in the L&N-BMWE agreement provides that

> Maintenance of Way welders will be used to do all welding that is done on materials or parts of tracks, bridges, or buildings. It is intended that this rule will apply only to welding that can be performed on line of road or in Maintenance of Way shops, and is not applicable to welding requiring the service of other departments.

Maintenance of Way welders will also do all cutting, heating, and burning on materials or parts of track, bridges and buildings, except that employees of the Bridge and Building Subdepartment will be allowed to perform burning or cutting that is directly in connection with work properly coming within their jurisdiction.

The SCL-BMWE collective bargaining agreement also contains a scope rule, Rule 23, which states, in part:

Section 1

(a) All work generally recognized as Maintenance of Way welding work except, as specifically provided in Rule 5, will be considered as being in Group A, Welding Subdepartment and will by performed by employees holding seniority therein. The work to be performed by Welding Subdepartment employees includes, but is not limited to, that involved in the electric arc and/or acetylene method of welding and cutting of rails, frogs, switches, guard rails, crossovers, etc., and in the making of field and plant welds.

The record indicates, however, that at least from the execution of the 1988 Implementing Agreement, the CSXT occasionally installed CWR from the Russell shop on the former SCL. The employees at the Russell shop are not represented by the Organization; the record indicates that it is a non-union shop.

On October 18, 1994, the BMWE filed a claim challenging CSXT's application of the 1988 Implementing Agreement, contending that under the combined effect of the 1988 *New York Dock* Implementing Agreement, Rule 38 of the L&N-BMWE collective bargaining agreement, and Rule 23 of the BMWE collective bargaining agreement applicable to the former SCL, only CWR from the Nashville plant can be installed on the former SCL. The Carrier contended that it had, over the years, installed CWR on former Seaboard property from several of its non-Seaboard shops, and that the 1988 Implementing

Agreement did not change its right to do so. The parties were unable to resolve their dispute, so this matter has come before this Panel, sitting jointly as a Section 11 *New York Dock* arbitration panel and a Special Board of Adjustment under Section 3 of the Railway Labor Act.

The Organization's Position

The Organization contends that when CSXT moved the welding work relating to CWR from the SCL shop at Nashville and placed it under the collective bargaining agreement between the Organization and L&N, that work became subject to the scope rule, Rule 38, in that agreement. This scope rule is especially restrictive, providing that maintenance of way employees shall be used to do all welding on material, parts of tracks, bridges, or buildings. Moreover, this rule does not contain any explicit or implicit exceptions. The Organization maintains that the scope rule in the BMWE-L&N agreement prohibits the performance of any work subject to it from being performed by anyone except a maintenance of way employee at the Nashville shop.

The Organization additionally contends that, given the history and precedent under Rule 38, it must be presumed that CSXT knew or should have known the consequences of its decision to subject the Seaboard welding work to the provisions of this rule. The Organization emphasizes that the agreement that facilitated the transfer of this welding work did not modify Rule 38, nor did it note an exception to Rule 38 relative to the CWR installed on former Seaboard property. CSXT itself made the welding work subject to L&N Rule 38, which expressly prohibits the work from being performed by anyone but

L&N maintenance of way employees.

The Organization further asserts that although the Carrier has contended that there was a past practice of contracting such work under the Seaboard contract, neither Seaboard nor CSXT ever informed the Organization of the installation of any CWR that was not fabricated in the Seaboard shops. Moreover, any such installation would constitute a violation of Rule 23 under the Seaboard contract, which expressly reserves all Seaboard CWR work to Seaboard maintenance of way workers. The Organization emphasizes that there is no language in any of the agreements between CSXT or its predecessors and the Organization, including the implementing agreement at issue, that suggests that Seaboard had maintained a practice of contracting such work or that any such practice was to be continued when the Seaboard welding work was placed under the L&N rule. The Organization emphasizes that if any such practice did exist under the Seaboard rule and the Carrier wanted it to continue under the L&N rule, then the Carrier would have to place explicit language in the implementing agreement to achieve that result. The Carrier, however, chose not to do so.

The Organization then contends that even if an alleged past practice of contracting such work is a possible defense, as applied to this case, it does not meet the criteria required by courts and arbitrators. The written L&N agreement and L&N Rule 38 clearly and unequivocally prohibit the contracting of CWR work; there is no need to use any alleged custom and practice as an aid in interpreting this clear and unambiguous contract language. Moreover, there are no exceptions or exemptions to Rule 38, which prohibits the

contracting out of such work. The Organization maintains that all work placed under Rule 38 becomes subject to its prohibitions.

The Organization further contends that Rule 23 under the Seaboard agreement also clearly prohibits such contracting. Given the absence of any ambiguity in this language, there is no basis for resorting to extraneous evidence to determine whether a "custom and practice" existed under that rule, unless CSXT can demonstrate mutual consent as to its claimed history of contracting or, at least, Organization knowledge of such a practice. The Organization asserts that the Carrier has not made any such showing to date.

The Organization additionally contends that Rule 23 and its application are irrelevant to this matter because the Carrier placed the Seaboard CWR work under Rule 38; in doing so, it gave no indication that it was seeking a change in the strict application of Rule 38 against contracting. Without a clear provision in the implementing agreement that certain Seaboard CWR work would be exempt from the operation of Rule 38, all such work became subject to that rule; under Rule 38, all former Seaboard CWR work must be performed in the Nashville shop by maintenance of way employees.

The Organization then points out that the Carrier may attempt to argue that it did not intend to transfer all Seaboard CWR work to Nashville, but only that work performed at the Savannah shop at the time that the implementing agreement was executed, which would exclude the work that then was performed at the Russell, Kentucky, shop. If this was the Carrier's intent, then the Carrier was obligated to inform the Organization's representatives of this during the negotiations over the implementing agreement. L&N

Rule 38, however, prohibits contracting, and all CWR fabrication work for installation on former Seaboard property became subject to that prohibition. The Carrier's reliance on "past practice" is misplaced in this case because the L&N General Chairman never was informed that contracting existed on Seaboard, that CSXT intended to continue such a practice, or that CSXT considered any such work to be excluded from the agreement. The Organization points out that even the Seaboard General Chairman was unaware of any CWR work that had been contracted under Seaboard Rule 23. The Seaboard General Chairman further testified that he did not acquiesce in any such contracting, nor was he ever asked to do so.

The Organization goes on to contend that according to CSXT's own figures for the five-year period prior to the execution of the implementing agreement, about 93% of the CWR that was installed on the Seaboard property during that time period was from the Savannah shop, combined with work the L&N was performing for Seaboard. Based on these figures, the Organization maintains that after the CWR work was moved from the Savannah shop to L&N, and thus subjected to L&N rules, over 93% of the CWR installed on the former Seaboard property should have been welded by L&N maintenance of way employees at Nashville. Because CSXT placed Savannah CWR work under Rule 38 and did not inform the L&N General chairman of its claim that a percentage of this Seaboard work previously had been contracted and would continue to be contracted, the Organization asserts that it would be a violation of L&N Rule 38 if CSXT fabricated even 6% of Seaboard CWR at Russell. CSXT's actions in contracting at least 50% of Seaboard

CWR fabrication to Russell cannot be considered a "fair arrangement" as required by either relevant statute or the *New York Dock Conditions*.

The Organization ultimately argues that all of the transferred Seaboard work is subject to L&N Rule 38, which requires that all CWR subject to its provisions be fabricated at the L&N Nashville shop by maintenance of way welders. In addition, the Carrier failed to establish a "past practice" under the Railway Labor Act. Even if the Carrier's claim of a past practice under the Seaboard contract is accepted, any such practice should have no effect on the application of the governing L&N rule. The Organization therefore asserts that its claim should be sustained.

The Carrier's Position

The Carrier initially contends that the Organization's claim is within the exclusive jurisdiction of this Panel, sitting under Section 11 of the *New York Dock Conditions*, because the claim is governed by the 1988 Implementing Agreement and can be resolved solely by reference to that Agreement. Because the Organization relies on certain provisions of its collective bargaining agreements, including Rule 38 of the L&N-BMWE agreement, it apparently contends that some aspects of its claim must be heard under the Railway Labor Act. The Carrier asserts, however, that Paragraph 9 of the 1988 Implementing Agreement specifies that any dispute regarding the interpretation or application of that Agreement is to be handled in accordance with Article I, Section 11, of the *New York Dock Conditions*. The Organization's instant claim clearly grows out of and relates to the 1988 Implementing Agreement; the claim even references this Agreement.

The claim centers on the meaning and intent of the Preamble and Section 2 of the Implementing Agreement, which relate to the consolidation and transfer of rail welding work. Because the instant dispute arises from these provisions in the Implementing Agreement and relate to what the Carrier is trying to accomplish in this *New York Dock* transaction, the Carrier contends that this matter is within the exclusive jurisdiction of the STB and this *New York Dock* panel, as an extension of the STB.

The Carrier goes on to address the Organization's argument that some or all aspects of this dispute should be decided by a Railway Labor Act panel. The Carrier disagrees with the Organization's assertion that it is necessary to consider the SCL-BMWE and L&N-BMWE collective bargaining agreements. The Carrier contends, however, that even if it were necessary to consider those agreements, the *New York Dock* panel still would have exclusive jurisdiction, as held by the ICC, the STB's predecessor. Although a dispute arising from an implementing agreement may require reference to a collective bargaining agreement, jurisdiction under the Railway Labor Act is not proper where the implementing agreement is central to the dispute. The Carrier emphasizes that the ICC/SBT has found that the Railway Labor Act has no role in the development or interpretation of implementing agreements reached under ICC-imposed labor protective conditions. Moreover, the United States Supreme Court, in *Norfolk and Western Railway v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991), rejected a challenge based on the Railway Labor Act to the ICC's exclusive jurisdiction over railroad consolidations. The Carrier asserts that there will be no jurisdictional gaps if the Organization's claim in this matter is

completely addressed by the *New York Dock* panel, even if the panel determines that it is necessary to examine provisions of the SCL-BMWE or L&N-BMWE collective bargaining agreements to resolve that claim.

Turning to the merits of this matter, the Carrier contends that the Organization cannot meet its burden of showing a violation of the 1988 Implementing Agreement. In its claim, the Organization argues that Rule 23 of the SCL-BMWE agreement provided that BMWE members covered by that agreement have exclusive rights to perform, at Savannah, all welding of CWR used on the former SCL. The Carrier points out that the Organization has asserted that because Savannah supposedly was the exclusive source of CWR used on the SCL, the 1988 Implementing Agreement replaced Savannah with Nashville as the SCL's exclusive source of CWR. The Carrier then contends that the Organization's further reference to Rule 38 of the L&N-BMWE agreement is irrelevant because Rule 38 does not apply to the Carrier's practices on the former SCL.

The Carrier then argues that the Organization's claim can be resolved solely by reference to the language, intent, and historical application of the 1988 Implementing Agreement. The Carrier contends that there is nothing in the relevant language of the Implementing Agreement that supports the Organization's interpretation that all CWR used on the former SCL will be welded at Nashville. If the parties had intended such a result, they would have clearly so stated. Instead, the Carrier points out that during the negotiations over the 1988 Implementing Agreement, it clearly stated to the Organization its intention to continue to use Russell to supply CWR for the SCL when that is the most

efficient source for a particular project. The Carrier argues that the ability to use either the Russell or the Nashville plant to supply CWR for particular projects on the SCL was a vital element of its decision to close the Savannah plant and consolidate it with the Nashville facility. The Carrier emphasizes that since the 1988 consolidation, it has used CWR from Nashville throughout its system, including the former B&O and C&O, and it has used CWR from Russell on the former SCL.

The Carrier further asserts that if it were required to use CWR only from Nashville on the SCL, it would lose the efficiency associated with being able to decide whether to supply a project on the SCL from Russell or Nashville. As an example, Russell is better suited to welding second-hand rail into CWR. If the Carrier were restricted to using Nashville to supply projects on the SCL, it would not be able to use less expensive second-hand rail and would be required to use more costly new rail on these projects. Moreover, the Carrier would not be able to achieve the efficiencies that flow from being able to maintain steady work loads at the two facilities.

The Carrier goes on to contend that given the Organization's conflicting interpretation of the 1988 Implementing Agreement, it is possible that the phrase "work which is currently performed at Savannah," found in that Agreement, might be considered ambiguous. The Carrier argues, however, that its consistent application of this language since the 1988 consolidation supports its interpretation that the 1988 Implementing Agreement allows it to supply projects on the former SCL with CWR from either Nashville or Russell.

The Carrier further argues that its practice of using CWR from both plants for projects on the former SCL establishes the proper interpretation of the Implementing Agreement. The Carrier emphasizes that the Organization cannot show that its members have exclusively welded CWR installed on the SCL. The Carrier maintains that the Organization clearly was on notice of the Carrier's interpretation of the 1988 Implementing Agreement, both through the Carrier's statements during the June 1988 negotiations and through its practice every year since the Implementing Agreement was executed, as allowing it to obtain CWR from both plants for use on the SCL. Moreover, the Organization never initiated or pursued a formal claim until October 18, 1994, when it filed the claim at issue. The Carrier contends that its practice is binding on the BMWE and precludes the Organization's new interpretation.

The Carrier then argues that because of its consistent practice under the 1988 Implementing Agreement, the Neutral need not reach the Organization's argument that prior to the 1988 consolidation, Rule 23 of the SCL-BMWE agreement required that all CWR used on the former Seaboard property be welded at the Savannah shop. If the Neutral does reach this question, however, the Carrier maintains that it has shown that SCL followed a practice, prior to 1988, of obtaining CWR from welding plants of affiliated carriers, in addition to rail welded in its own shop in Savannah. The Carrier emphasizes that the Organization never claimed that this practice violated Rule 23 of the SCL agreement until its October 1994 claim, more than ten years after the fact. The Carrier points out that although the Organization has attempted to plead ignorance, the

Organization never has refuted the existence of this Carrier practice. The Carrier maintains that the past practice of obtaining CWR from Russell for use on the SCL precludes the Organization's interpretation of Rule 23. The Carrier contends that Rule 23 therefore does not support the Organization's position because it never has been construed to require that all CWR used on the SCL come from the Savannah shop. The 1988 Implementing Agreement, in addition, did not transfer to Nashville any welding work done at the Russell shop, including the welding of rail used on the former SCL.

The Carrier then argues that the Organization's assertions relating to Rule 38 of the L&N-BMWE agreement are similarly flawed. Rule 38 governs the assignment of welding performed on the former L&N, and it requires that rail welded for use on the former L&N be welded at the Nashville shop. The Carrier points out, however, that the issue in this matter is not the use of Russell-produced CWR on the former L&N. By its own terms, Rule 38 applies only to welding done on the former L&N, while the welding work on the former SCL that belongs to Nashville is controlled by the 1988 Implementing Agreement.

The Carrier further emphasizes that the 1988 Implementing Agreement did not make the L&N agreement applicable to the former SCL. Instead, the Implementing Agreement merely provided that the rail welding done at Nashville, which would have been performed at Savannah, would be done pursuant to the work rules and other terms of the L&N agreement. Moreover, the Carrier asserts that the Organization's arguments relating to Rule 38, as with its arguments relating to Rule 23, are refuted by the Carrier's past practice, the Organization's acquiescence in that practice, and the Organization's

failure to raise its claims in a timely fashion.

As for the Organization's claim that it was ignorant of the Carrier's practice, the Carrier contends that the Organization undeniably has been aware of the Carrier's practices since 1988, when the parties were negotiating over the Implementing Agreement. During these negotiations, the Carrier told the Organization that after closure of the Savannah shop, it planned to continue obtaining some CWR from Russell for use on the SCL; this is confirmed both by a June 1988 letter from the Organization to the Carrier and by the sworn statement of Donald Bates, who was present during the negotiations.

The Carrier then points out that the Organization easily could have ascertained where CWR was produced because the various plants brand each ribbon of CWR with a string number that clearly indicates which facility produced the rail. The source of welded rail used on the former SCL never has been a secret; this information always has been available to the Organization, principally because its members install the CWR. Moreover, the Organization occasionally has questioned the propriety of using rail welded at Russell at various locations, including on the former SCL, thus demonstrating the Organization's actual awareness of the Carrier's practice. Among other instances, the Organization informally complained to the Carrier in 1991 and 1992 about its practice of using Russell-welded rail on the former SCL. Despite the Organization's demonstrated knowledge of the Carrier's practice of using CWR from Russell on the former SCL, the Organization never filed a formal claim that challenged this practice.

The Carrier further maintains that General Chairman Knight's statement does not

support the Organization's contention that it was unaware of the Carrier's practice on the former SCL. This statement refers only to the period before 1988, thus failing to refute the Carrier's practices from 1988 onward, which is the most relevant period. Moreover, Knight's statement cannot credibly challenge the Organization's awareness of the Carrier's post-1988 practice, given the Organization's informal protests in 1991 and 1992. The Carrier also points out that other Referees and Arbitrators have held that ignorance of a past practice does not constitute a valid defense.

The Carrier then emphasizes that it is well settled that a union cannot challenge a past practice with an informal protest; it must file a formal claim. In this case, despite the Organization's awareness of the Carrier's long-standing practice, the Organization did not file a formal claim until October 1994, long after the practice was established. To the extent that it relies on Rule 23, the Organization has waited more than a decade to present this claim. By failing to pursue its claim for so long a period of time, the Organization must be deemed to have abandoned its right to pursue the instant claim; it is bound by the Carrier's established practices. Moreover, the Organization's delay in pursuing its claim means that it failed to meet the relevant time limits set forth in both the SCL and the L&N agreements. The Carrier acknowledges that it has waived the time limits that apply to the Organization's filing of a claim, but this is true only for a claim brought under Section 11 of the *New York Dock Conditions*. The Carrier never waived any of the time limits for the Organization to bring a challenge under the SCL or L&N agreements. The Carrier ultimately contends that the Organization's claim should be denied in its entirety.

Decision

This Panel has carefully reviewed all of the evidence and testimony in the record, as well as the written briefs submitted by the parties. The Organization initiated these proceedings by filing a claim charging that the Carrier violated scope rules found within certain collective bargaining agreements, as well as the provisions of a 1988 Implementing Agreement between the parties, when it procured continuously welded rail ("CWR") from a non-union CSXT subsidiary shop at Russell, Kentucky, to be installed on former Seaboard lines. The Organization bears the burden of proof as to the merits of this dispute.

Before reaching the merits, however, it is necessary to deal with a complex procedural issue. The parties fundamentally disagree as to what constitutes the proper jurisdictional basis for the resolution of their dispute. The Carrier has argued that this entire dispute should be decided under the Section 11 dispute procedures of the *New York Dock* conditions, while the Organization has asserted that some aspects of its claim should be heard pursuant to the Railway Labor Act's arbitration procedures. Because the parties could not agree on a jurisdictional basis for this proceeding, they reserved the matter for decision by the Neutral; they also agreed to proceed with simultaneous arbitrations under each of these two procedural systems. This three-member Panel therefore sits both as a Special Board of Adjustment under the Railway Labor Act and as a Section 11 Arbitration Panel under the *New York Dock Employee Protective Conditions*, and it will issue appropriate findings in both capacities.

Which type of panel, then, holds jurisdictional authority to resolve this dispute? Or

are certain aspects of this matter properly decided by one type of panel, with the remaining aspects within the jurisdiction of the other? The relevant precedent as to these procedural questions all point in the same basic direction. The SBT and its predecessor agency, the ICC, has issued a series of decisions that establish that in matters relating to rail consolidations and *New York Dock* implementing agreements, the SBT and the panels deriving their authority from it have exclusive jurisdiction to resolve disputes arising from such transactions. In addition, various decisions in the federal courts, culminating in the United States Supreme Court's decision in *Norfolk and Western Railway Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991), expressly hold that a fundamental part of the process through which a rail consolidation is effectuated is represented by the authority, granted by Sections 11341(a) and 11347 of the Interstate Commerce Act to the SBT and arbitration panels deriving authority from the SBT, to override the Railway Labor Act and collective bargaining agreements as necessary to achieve the economies and efficiencies that are the purpose of the rail consolidation. This definitive finding establishes that it is not uncommon for a *New York Dock* arbitration panel to consider, interpret, and apply the terms of a collective bargaining agreement; in fact, such an analysis is an integral part of such a panel's authority and well within its jurisdiction.

In this particular case, the parties' dispute is centered on their 1988 *New York Dock* Implementing Agreement; the dispute clearly arises from the interpretation and application of this Agreement. Although certain portions of one or more collective bargaining agreements may be relevant to the resolution of this matter, a Section 11 *New York Dock*

arbitration panel is competent to analyze such provisions as necessary, and it has the jurisdiction to do so. Accordingly, the Special Board of Adjustment under the Railway Labor Act shall defer to the jurisdictional authority of the Section 11 *New York Dock* Arbitration Panel. All findings and decisions on the merits of this dispute shall be made under the arbitration provisions of the *New York Dock Employee Protective Conditions.*

The answer to the first Question at Issue Posed by the Carrier therefore is that an arbitration panel designated under Article I, Section 11, of *New York Dock* does, in fact, have exclusive jurisdiction over this dispute.

Turning now to the merits of the Organization's claim, it is necessary to establish the proper context for analysis of the record. This dispute arises, as explained above, from the Carrier's interpretation and application of the parties' 1988 Implementing Agreement, which dealt with the closing of one of the Carrier's welding shops and the consolidation of work from that shop into another welding shop. This *New York Dock* transaction, as is the case with virtually all such transactions, opened the way for certain operational changes that were designed to allow the Carrier to achieve a more efficient and economical operation. These changes, however, were disruptive in several respects, particularly to the affected employees.

The Organization's claim, and its heavy reliance on the scope rules found in the collective bargaining agreements between the Organization and the former L&N and former SCL, is an attempt to minimize the disruption for the affected employees. The collective bargaining agreements, however, are not controlling in this matter. Because the

dispute at issue arises from an Implementing Agreement executed in connection with a *New York Dock* transaction, the *New York Dock Employee Protective Conditions* represent the primary source of protection for employees affected by the transaction.

The type of transaction that underlies this dispute, coordinating work that had been performed in three locations so that it now is performed at two sites, is a common event in rail consolidations. To the extent that it allows a carrier to achieve additional economies and efficiencies in its operations, this type of transaction is, in fact, to be encouraged as contributing to one of the most important goals of a rail consolidation.

In pursuing the instant claim, the Organization essentially is arguing that the scope rule of the L&N-BMWE collective bargaining agreement, and possibly the scope rule found in the SCL-BMWE agreement, controls some aspects of the application of the 1988 Implementing Agreement. The weight of authority on this point, however, does not support the Organization's contention. As explained above, both the ICC/SBT and the federal courts have found that in the context of implementing rail consolidations under the Interstate Commerce Act, the SBT has full authority to override specific provisions in collective bargaining agreements as necessary to achieve the economies and efficiencies that are the purpose of the rail consolidation. The importance of this point to the instant matter cannot be overstated.

Even if the record were to show that, without exception, the only CWR ever installed on the former Seaboard property prior to the Savannah shop's closing was from that shop, this would not be enough, by itself, to establish the Organization's claim.

Moreover, although the work that had been performed at Savannah was moved to the Nashville shop and made subject to the L&N-BMWE collective bargaining agreement, that does not necessarily mean that this contract supersedes the overall meaning and intent of the 1988 Implementing Agreement and the underlying transaction. One of the primary purposes of the transaction underlying the 1988 Implementing Agreement was to allow the Carrier to achieve certain economies and efficiencies in its welding operations. A strict application of the scope rule found in the L&N-BMWE would completely frustrate this purpose by preventing the Carrier from being able to procure CWR from whichever of its two remaining welding shops is the more efficient and economical source.

As the voluminous record shows, however, the now-closed Savannah shop was not the sole source for CWR installed on the former SCL property, either before or after the 1988 transaction; CWR from the Russell shop was installed on the former SCL both before and after the 1988 Implementing Agreement was executed. Although the Organization has asserted that it was unaware that CWR from anywhere but Savannah had been installed on the former SCL, the record indicates that the Organization knew from at least 1991, when it informally protested the fact, that Russell-produced CWR had been installed on the SCL. Moreover, the Organization easily could have ascertained, both prior to 1988 and at any time since, that CWR from Russell had been installed on the former SCL property. The record leaves no doubt that Russell-produced CWR was installed on the former SCL both before and after execution of the 1988 Implementing Agreement.

Because it is evident that the Carrier installed Russell-produced CWR on the SCL

property prior to 1988, it is equally certain that the 1988 Implementing Agreement was not intended to place new restrictions on the Carrier's ability to choose the sources of CWR than already existed. The addition of any such new restrictions again would frustrate the primary purpose and overall intent of the 1988 Implementing Agreement, which was to allow the Carrier to achieve additional efficiencies and economies of operation. For this reason, if the parties intended to place new restrictions on the Carrier's ability to choose the source of CWR to be installed in a particular project, then such new restrictions would have to be expressly stated within the Implementing Agreement. The Implementing Agreement does not contain any express restrictions, and the reference to the consolidated welding work being subject to the L&N-BMWE collective bargaining agreement is not enough to support the strict application of a scope rule when such a strict application had not applied before.

The relevant binding precedent and the extensive record compiled in this matter fully supports the Carrier's position. Throughout the years, the Carrier occasionally has installed Russell-produced CWR on the former SCL property. Upon execution of the 1988 Implementing Agreement, the Carrier retained the right to continue doing so, and it sometimes chose to exercise that right. It is fully consistent with the meaning and intent of the parties' 1988 Implementing Agreement that the Carrier be authorized to obtain CWR for each project from whichever of its welding plants can provide it more economically and efficiently. The scope rules in the L&N-BMWE and the SCL-BMWE collective bargaining agreements do not take precedence over the 1988 Implementing Agreement.

Award

The first Question at Issue posed by the Organization is answered in the negative.

The second Question at Issue posed by the Organization is answered in the affirmative; the L&N-BMWE collective bargaining agreement does not take precedence over the parties' 1988 Implementing Agreement.

The third Question at Issue posed by the Organization is answered in the affirmative; no such express exemption is necessary, however, because the Implementing Agreement controls this issue and allows the Carrier to continue its practice of installing CWR from sources other than the Savannah or Nashville shops.

The first Question at Issue posed by the Carrier is answered in both the affirmative and the negative. The arbitration panel designated under Article I, Section 11, of *New York Dock* does have exclusive jurisdiction over this dispute.

The second Question at Issue posed by the Carrier is answered in the negative.

PETER R. MEYERS
Arbitrator

Organization Board Member

Carrier Board Member

Dated this 12th day of November 1997
at Chicago, Illinois.