Award No. 1

3310 RRY - Award

PUBLIC LAW BOARD NO. 1830

Parties: Railroad Yardmasters of America

and

Consolidated Rail Corporation

Question at Issue: "Whether the arrangements made by Conrail with connecting railroads involving changes in handling of traffic in the Chicago area which resulted in the reduction of the amount of work at Conrail's 59th Street and 51st Street Yards, and in the number of Yardmasters employed at 59th Street Yard, constitute violations of the Regional Rail Reorganization Act of 1973, particularly Sections 503 and 506 thereof."

Discussion: Sections 503 and 506 of the Regional Rail Reorganization Act, the statute herein involved, states:

"Assignment of Work"

"Sec. 503. The Corporation shall have the right to assign, allocate, reassign, reallocate and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of Section 508 of this title."

"Contracting Out"

"Sec. 506. All work in connection with the operation or services provided by the Corporation on the rail lines, properties, equipment or facilities acquired pursuant to the provisions of this

Act, and the maintenance, repair, rehabilitation, or modernization of such lines, properties, equipment, or facilities which has been performed by practice or agreement in accordance with the provisions of the existing contracts in effect with the representatives of the employees of the classes or crafts involved shall continue to be performed by said Corporation's employees, including employees on furlough. Should the Corporation lack a sufficient number of employees, including the employees on furlough, and be unable to hire additional employees, to perform the work required, it shall be permitted to subcontract that part of such work which cannot be performed by its employees, including those on furlough, except where agreement by the representatives of the employees of the classes or crafts involved is required by applicable collective-bargaining agreements. The term 'unable to hire additional employees' as used in this section contemplates establishment and maintenance by the Corporation of an apprenticeship, training, or recruitment program to provide and adequate number of skilled employees to perform the work."

This present dispute stems from the efforts of the Congress to restructure the existing northeast railroads presently in judicial reorganization proceedings, into a single viable private profit making railroad corporation to operate over the northeast territory with the rail properties, facilities and employees of the acquired insolvent railroads. The Congressional efforts for this objective materialized in the passage of Public Law 93-236, signed by the President on January 2, 1974, which law is cited as Regional Rail Reorganization Act of 1973. The statutorily created corporation charged with furnishing this essential rail service is the Consolidated Rail Corporation, or more familiarly known as Conrail.

Conrail commenced operations on April 1, 1976 when it took title to all the component railroads conveyed to it. Conrail on this date sought to initiate certain changes in the traffic flow in the Chicago area pertaining both to eastbound and westbound rail movements.

The Organization protested that this Conrail action breached certain sections of Public Law 93-236, namely, Sections 503 and 506 when it made arrangements to divert portions of Conrail business away from the former Penn Central 55th and 59th street yards as well as the former Erie Lackawanna 51st yard, to the clearing yard of the Chicago Belt Railroad and the Blue Island and Gibson Yards of the Indiana Harbor Belt Railroad. Neither the Chicago Belt or the Indiana Harbor Belt Railroads were component railroads of the Consolidated Rail Corporation. While these two carriers were independent corporate entities, several of the component railroads constituting Conrail had an ownership interest in these two carriers.

The Organization protested to Conrail that the diversion of part of its former business to the non Conrail properties caused a loss of positions at the 59th Street, the 55th Street and the 51st Street Yards. The Organization's protest was initially filed on April 5, 1976 wherein it sought to have a Board of Arbitration established pursuant to Section 507 of Public Law 93-236. Conrail at first stated there was no violation of Sections 503 and 506 of the aforesaid Law, and later contended it did not agree with the Organization's statement as to questions which were to be submitted to arbitration. After the Organization set a deadline for striking Conrail, the Carrier sought a court order to restrain such direct action. As part of the resolution of the judicial proceedings, the Court directed Conrail to arbitrate the dispute.

On October 18, 1976 the parties executed an agreement to establish a Board of Arbitration. The following day, the partisan members of the Board selected the neutral member, and on November 2, the National Mediation Board issued its official certificate of appointment to the Neutral Member. On November 23, 1976 the Board met in Chicago,

Illinois to hear testimony and receive evidence from the parties in interest. All parties were accorded an opportunity to directly examine and cross examine all witnesses and to offer such rebuttal material as they deemed necessary.

The Organization took advantage of the opportunity offered both sides to file post hearing briefs, and filed its post hearing brief on December 6, 1976. The Carrier declined the opportunity to file a post hearing brief.

Organization's Position

The Organization stressed that the Board of Arbitration was construing a statute and not a collective bargaining agreement. It added it was a somewhat unusual statute wherein the Congress prescribed exactly what Conrail could do. The Organization asserted that Conrail is not in the same category as a privately owned railroad. It was created by Congressional act and financed by public moneys. The Law establishing Conrail required the affected Unions to agree to certain stipulations and, in turn, required Conrail to operate within prescribed operational requirements.

The Organization stated Sections 503 and 506 prescribe the limitations which the Congress has placed upon Conrail. Were it not for Section 503, Conrail would have no right to assign, allocate or consolidate the work formerly performed by the rail properties it acquired. It was only by statute that it has received the right to shift work around within its system. The Organization added that in return for the right to shift work within the confines of the properties conveyed to it, Conrail was restrained from taking work covered by one

collective bargaining agreement and shifting it to employees outside the coverage of the agreement.

The Organization stressed that no Conrail employee had any seniority rights either on the Belt Railway of Chicago or the Indiana Harbor Belt Railway. It added that the Implementing Agreement it executed with Conrail on August 21, 1975 establishing Yardmaster seniority districts on Conrail, conclusively proved this fact. When Conrail shifted work from the newly created seniority district to two railroads which were not included in the new seniority district, it breached the Implementing Agreement, as well as Section 503 and Section 504.

The Organization stated that the Carrier also violated Section 506 because it was in effect subcontracting work to the Belt Railway and the Indiana Harbor Railway contrary to the provisions of the aforesaid Section. The Chief Operating Officer of the Carrier admitted, in his letter dated April 23, 1976 to the UTU's Legislative Director, that Conrail was paying these two railroads for the switching services rendered it. The Organization stated that this is no different than Conrail paying General Motors Corporation for performing work on locomotives or Westinghouse Air Brake Company for repairing air brake equipment, or paying an outside contractor to rebuild a main line. The Organization stressed that Section 506 prohibits Conrail from subcontracting work unless Conrail lacks a sufficient number of employees to perform the work. In this case Conrail has a sufficient number of Yardmasters ready and available to do the work. Conrail Yardmasters formerly performed the work. Since the Implementing Agreement did not encompass the locations to which the work was transferred, Conrail also breached its

Implementing Agreement with the Organization.

The Organization also noted that the Carrier stressed that the operations in question involved "pre-blocking" of trains. It stated that this is not the issue. The Organization stressed that it interposes no objection to a given carrier pre-blocking trains for direct movement through the Chicago Gateway. What it is concerned with in this dispute is the switching of trains and then assembling them into "blocked" trains by the crews of the Chicago Belt Railroad and the Indiana Harbor Railroad. The Organization alluded to the switch lists, the inbound and outbound lists which it introduced into the record, which clearly reveal that cars are switched, blocked and assembled by the crews of these two carriers who are outside of, and not a part of, the Conrail Corporation. The Organization emphasized that the evidence shows that the Burlington Northern sends mixed freight to the "Clearing Yard" of the Belt Railway to be switched into blocked trains for dispatchment to points on the Conrail system. This is the nub of the instant dispute before this Board.

The Organization also alluded to the practices of other western railroads such as the Santa Fe, the Rock Island, the Soo Line and the Chicago and Northwestern, all of whom used to make direct interchange with the component railroads of Conrail at the facilities of these component railroads, but now send their eastbound traffic either to the Indiana Harbor Belt or Belt Railroad to be switched and blocked at the yards of these two carriers for outbound movement, thus eliminating the switching work formerly performed by the component railroads of Conrail. The Organization added that on November 1, 1976 Conrail issued instructions whereby its former Penn Central westbound

traffic will be sent directly to the Indiana Harbor Yard for switching and blocking by other than Conrail employees. The Organization stressed that "pre-blocked" or "run through" trains are not the issue in this dispute, but that traffic which is diverted from the former Penn Central and Erie Lackawanna yards and directed to the Indiana Harbor Belt and Chicago Belt Yards for switching and assembling, to the detriment of Conrail employees, is the issue here.

The Organization stated Conrail is engaging in clear and patent violation of Title V, Sections 503 and 506 of Public Law 93-236, and this Board should direct Conrail to return the work in question to be performed at the properties conveyed to Conrail, and require this work of switching, blocking and assembling the traffic be done by Conrail employees covered by existing collective bargaining agreements with Conrail.

Conrail's Position

The Carrier concedes that after April 1, 1976 certain changes were effected in the pattern of handling cars for eastbound movements by certain railroads. It added that certain of the changes reduced the amount of work that had to be performed at the Conrail Yard at 59th Street (formerly Penn Central) and the 51st Street Yard (formerly Erie Lackawanna) resulting in a reduction of two yardmaster positions at the 59th Street Yard. The Carrier stated that the Organization has particularly complained about the change in the traffic flow of BN, alleging that before April 1, 1976 the BN delivered cars in interchange to 59th Street Yard where they were classified for eastbound movement. After April 1, 1976 changes were made by the BN in the

pre-blocking of cars. The BN made up drafts in its Cicero Yard for various destinations on Conrail's lines such as Selkirk and Elkhart. These cars were delivered to Conrail at established interchange points to the Belt Railroad of Chicago or the Indiana Harbor Belt. The Conrail road crews then picked up these blocks and operated them as an eastbound road train. The Carrier stated that this was the reverse of a long existing pattern of westbound traffic. Since the Penn Central merger, and even prior to that on the New York Central, eastern roads pre-blocked cars and delivered them to the BN without further classification at Chicago. These cars generally moved by way of Cicero but occasionally used the Belt Railroad of Chicago if the regular route was blocked. Conrail asserted that this particular method of operation eliminated the need for handling or switching many cars through the 59th Street Yard and the 51st Street Yard.

The Carrier stated that under the existing tariff structure, the delivering carrier in interchange service determines whether to interchange by direct delivery to the next line haul railroad or to use an intermediate switching railroad. If it uses an intermediate switching road it pays the switching charges from its share of the line haul revenue. The receiving carrier has no control over this decision of the delivering carrier. The Carrier emphasized that this aspect of traffic routing is not subcontracting and bears no relationship to subcontracting as this term is used in the railroad industry.

The Carrier asserted that the Organization is in error when it contends that the changes in the handling of traffic constitutes a violation of the Regional Rail Reorganization Act of 1973,

i.e., Public Law 93-236, and particularly of Sections 503 and 506 thereof.

With regard to Section 503, Conrail stated that the Congress, in return for unprecedented employee protection benefits, gave this Carrier complete freedom to assign, allocate and consolidate work within its system. The only restriction placed on Conrail by Section 503 was that it could not remove work from the coverage of a collective bargaining agreement or invade the existing classification work rights of employees at the facilities to which the work was assigned.

The Carrier stressed that the purpose of Section 503 was to enable it to function more effeciently. It was recognized that there would be situations of cross representation and situations where work was performed by one craft on one railroad and by another on a different railroad when several railroads were combined which had bargaining relationships with 24 unions in approximately 280 agreements.

The Carrier stated that the Organization makes a basic error when it concludes that because Section 503 permits the transfer and assignment of work anywhere within the Conrail system, it therefore prohibits Conrail from assigning work off the system, i.e., to any outside railroad. The Carrier emphasized that Section 503 simply does not treat the subject of transferring work to a railroad who is not a part of the Conrail system. It only deals with the internal assignment of work within Conrail. This Section sought to remove existing restrictions from Conrail, but not to create new ones.

The Carrier stated that only is Section 503 not breached by the actions complained of by the Organization, but these actions by the western railroads to utilize the yards of the Chicago

Belt or the Indiana Harbor Belt is nothing more than a decision to use an interchange point which is a right these western roads have always had. Such a decision does not constitute any change in operating practices. Moreover, Conrail stated, such a decision by these western roads is a matter over which it has no control. In any event, Conrail emphasized that Section 503 has no relevance to this dispute and obviously has not been violated.

Conrail further asserted that the Organization is also in error in contending that Section 506 has been breached. It noted several reasons why the language of this Section has no application to the instant dispute. First, the language addresses itself to work "provided by the corporation" on the acquired lines cannot be read as a restriction on the performance of work by other carriers on their lines such as pre-blocking of cars, or the routing of through traffic, or the selection of interchange points. The Carrier stated that these matters are not the work or operations it provides, but rather is the work and operations consisting of traffic delivered to it by its connecting carriers. Conrail does not control other carriers in the delivery of traffic or in the determination of what interchange points or methods these delivering carriers may find desirable.

Secondly, Section 506 does not purport to expand the work which employees were entitled to perform beyond the level which they enjoyed before the conveyance. It refers to "work" which has been performed by a practice or agreement in accordance with the provisions of existing contracts in effect with the representatives of the employees of the classes or crafts involved. The Carrier stated this Section is part of Title V intended to prevent employees from being

placed in a "worse" position, but not to place them in a "better" position, as a result of the acquisition. Conrail asserted that Section 506 must be read in conjunction with Section 504 which requires it to assume and apply all existing collective bargaining agreements on the lines it acquired.

The Carrier stressed that Section 506 preserved existing scope rules and practices. It did not expand on them. The Carrier stated that the Organization has conceded that its Schedule Agreement was not violated by the complained of activities. The Carrier added that Section 506 looks to existing agreements and practices thereunder for its content. It imposes no obligation to assign work beyond those imposed by collective agreements.

Conrail noted that the Organization may contend that "practices" have been changed while Section 506 freezes all existing traffic patterns and work practices without regard to existing agreements. Conrail added that such a construction would militate against the Congressional mandate that Conrail should operate as a profit making company in an efficient manner consistent with safe operations. These objectives cannot be achieved if the Statute is construed as "freezing" all individual practices.

Conrail added that it should also be noted that Section 506 referred in detail to the maintenance, rehabilitation and modernization of properties, equipment or facilities. It stated that Section 506 was included in Public Law 93-236 primarily because of the concerns expressed by the Shop Craft and the Maintenance of Way organizations who have had long standing disputes with this Industry as to the

subcontracting of work. Conrail alluded to several national agreements negotiated with these organizations which dealt specifically with the issue of subcontracting. Conrail also noted that Section 506 contains language referring to the establishment of apprenticeship training programs when it is determined the Carrier has a lack of skilled employees to perform the work. It stressed that carriers in this Industry do not employ apprentices in the craft or classes of yardmasters, yard clerks, or yardmen. Yardmasters are almost invariably promoted from the ranks of yardmen, clerks or telegraphers. It is an on-the-job training process.

The Carrier stated, moreover, that even if "practice" was an issue in this case, it has not changed any practice but merely continued an existing one. Carriers in this Industry have long cooperated with each other in blocking cars for interchange delivery. It added that no other labor union has ever contended that the grouping of cars by one carrier is "contracting out" work. It is rather a reciprocal arrangement that works for the mutual benefit of the carriers, the employees and the shipping public. The Carrier also alluded to the National Agreements of May 1971 and January 1972 which now permitted a line haul carrier to move to a connecting carrier at a terminal for the purpose of picking up or delivering a train. Prior to these national agreements, only a yard crew could deliver cars to a connecting carrier in interchange service.

Conrail stated that its road crews now receive their over-the-road trains from the Belt Railway of Chicago or the Indiana Harbor Belt or other connecting carriers in lieu of receiving them at the former Penn Central 59th Street Yard or the former E-L 51st Street Yard, as it generally was done prior to April 1976.

Conrail also stated it is important to recognize that Title V is not a job freeze but an earnings protection provision for employees who may be adversely affected by the establishment and operations of Conrail. The Congress was aware that it was necessary for Conrail to be able to speed up the movement of traffic through terminals in order to help meet competition from other modes of transportation. The Public Law did not bar these changes but did require Conrail to protect the earnings of its employees who might be adversely affected. Conrail also alluded to the Final System Plan which was the blueprint for its operations. The Plan contemplated train blocking with the resultant reduction in employees including yardmasters.

In summary the Carrier stated that there are no provisions in Title V, including Sections 503 and 506, which impose restrictions on the Carrier's method of handling the interchange of traffic where such restrictions did not exist prior to the enactment of the Regional Rail Reorganization Act, and consequently, the Carrier asserted it has not committed any violation of the Act in making its traffic arrangements at the Chicago Gateway.

Findings: The Board is initially constrained to make a few preliminary observations about this case. It is not clear to the Board how Conrail could be in violation either of the requisite Public Law or the August 1975 Implementing Agreement if and when the Eastbound Delivering Carriers, such as the Burlington Northern, the Chicago and Northwestern, or the Santa Fe, etc., chose now to deliver their trains for switching,

blocking and assembling to the Belt Railroad of Chicago or the Indiana Harbor Belt, rather than the former Penn Central's 59th Street Yard or the former Erie-Lackawanna's 51st Street Yard, from which Conrail road crews could pick up the train and make their eastbound road trip. The Board is unaware of how the receiving carrier in an interchange delivery could mandate the delivering carrier as to where it should send its cars for pickup. Whatever violation, if any, that could occur, would have to take place in those situations where Conrail, in making its westbound trip, now had its cars broken up and reassembled at the Yards of the Belt Railroad of Chicago or the Indiana Harbor Belt rather than at the 59th Street or the 51st Street Yards. In the latter situation, the Organization may contend that Conrail has breached its statutory obligations.

The Board is also constrained to note that the evidence of record shows that there is involved in the case more activities and functions than "pre-blocked" or "run through" trains. The Board finds that the Organization has proved that the Belt Railroad and the Indiana Harbor Belt crews performed switching and classification services for both eastbound and westbound trains.

The Board now directs its analysis to the heart of the dispute, namely, whether Conrail in directing and permitting switching and classification work, on trains under its control and dominion, to be done by the Belt Railroad of Chicago and the Indiana Harbor Belt Railroad, violated Sections 503 and 506 of Title V of Public Law 93-236.

The Board's analysis and review of these two sections has to be made in the context of the entire statute and the Congressional debates surrounding the passage thereof. This analysis leads it to the conclusion that there has been no breach of the two aforementioned sections. The board finds that Title V is captioned "Employee Protection" and its basic and fundamental purpose was to ensure that no covered employee would be adversely affected by the establishment and operations of Conrail when it acquired the several northeast railroads being reorganized under the aegis of the Federal judiciary. The statutory protection, is aptly captioned in Section 505 as "employee protection" and not "job protection." The legislative scheme envisioned by the Congress of the United States was to protect and make whole the employees rather than their jobs of the acquired railroads. The legislative record shows that when the members of both the Senate and House Committees questioned sharply and critically the railroad representatives both of management and labor, concerning the liberality of the protection benefits being afforded the affected employees, the rejoinder always was couched in terms of granting the protection in order to permit the new entity, i.e., Conrail, to be able to function with the necessary freedom in order to become an economically viable private profit making corporation. While it is undoubtedly true that the Congressional colloquy was couched in terms of permitting Conrail to have the greatest latitude in making all the necessary assignments, relocations, and consolidation of existing personnel within the Conrail System, i.e., Section 503, nevertheless, there is not a scintilla of evidence in the Act that Conrail was to be proscribed from making any changes in the flow of its existing traffic patterns that would enable it to maintain adequate and efficient rail service in the

territory it served. The Board finds nothing in Section 503 or any other relevant portion of the Public Law that denies Conrail the right to initiate or to utilize sound operating procedures in the Chicago Gateway to maintain an efficient system. If the utilization of such procedures adversely affects protected employees, then they are to be made financially whole, but the Carrier is not required to "freeze" their jobs. In short the quid pro quo for employee financial protection was the right to eliminate jobs found unnecessary in the reconstituted operations of Conrail. To find that Section 503 granted the Carrier the right to reorganize and realign only its forces within Conrail system would not only negate the general Congressional intent and purpose in enacting Public Law 93-236, but would also fly in the face of the provisions of the Final System Plan which indicated that when the new entity, Conrail, commenced operations that there would be a decline of one percent per year for the entire 10-year planning period for yardmasters, switch tenders and hostlers. The Final System Plan on p 161 states:

> "Yardmasters and yard clerks, however, were assumed to vary directly with the projected reduction in switching requirements resulting from application of an improved blocking plan."

Table 2 on the same page 161, shows the projected manpower requirements of yardmasters for the period from 1976 to 1985 declining from 1,155 to 919.

It is in light of this Congressional intent and the plans of the architects of this new rail system that compel this Board to find that Section 503 has no relevance to this dispute because it did not address itself to the matter of Conrail devising and instituting

operational programs that would entail utilizing railroads and facilities outside corporate universe of Conrail. Nothing in Section 503 prohibits Conrail from so operating, and the expressed Congressional plan and purpose in establishing Conrail, indicate that it was to use all appropriate means to operate efficiently, subject to granting the prescribed financial protection to those covered employees adversely affected. There were other expressed limitations in Section 503, but they are not in issue in this case.

The Board also finds no support for the Organization's position in Section 506. It is a distortion and a misconstruing of the term subcontracting as applied and understood in this Industry, to hold that the use by a delivering line haul carrier of the services of a switching or belt line railroad to deliver cars in interchange, constitutes subcontracting. The Board states that it has never heard of such a concept advanced on the Fourth Division of the National Railroad Adjustment Board where this Organization normally and customarily processes its grievances against carriers for alleged violations that the use of a switching railroad is a violation of its schedule agreement. Nor is the Board aware of any grievance ever processed by trainmen on the First Division when their delivering carrier utilized a switching railroad to transport a cut of cars or a train to a receiving carrier it was using improper methods. It is an established practice in this Industry to use belt railroads in busy terminals to deliver cars in interchange from the delivering carrier to the receiving carrier when the delivering carrier deems it necessary or appropriate. The belt railroad has never been treated as a subcontractor of the delivering carrier. If such a concept is to be created and instituted, it should be done by a meeting of the minds of all the affected

parties and crystallized in a formal legal document. Such a far reaching arrangement, which is at variance with established Industry practice, should not be established by arbitral decree. While the Board is aware the Organization is contending that its rights on this case are derived from a statute and not an agreement, the Board finds that its analysis is still correct.

The Board, however, finds aside from Industry practice, there are other reasons why Section 506 does not support the Organization's position. The very language of this Section militates against this. For example, the Section deals with:

> "All work in connection with the operation or services provided by the Corporation on the rail lines, properties, equipment or facilities acquired . . ."

It must be noted, however, the work in issue is not being performed on the property of Conrail. The Organization is protesting about work being done by the Belt Railroad of Chicago or the Indiana Harbor Belt Railroad on their property. The switching and classification work is done on the property of these belt railroads, and it is not work provided for or done on the acquired lines. If Conrail finds that it does not have to have the work performed on its acquired lines or property, there are no provisions in Section 506, or any section of the statute, that requires it to have it performed thereat. The Board is also compelled to take notice that in this Industry for the past 15 years there have been extended and exacerbated controversy on the subject of subcontracting. The Second Division of the National Railroad Adjustment Board and the Special Board of Adjustment established pursuant the provisions of the September 25, 1964 National Agreement ha

long been the battleground for these disputes between the Carriers and the Shop Crafts. At no time to this Board's knowledge has the Yardmasters' Organization been a party to any subcontracting dispute. The Board concludes that Section 506 was enacted by the Congress to address itself to the subcontracting problems of the Shop Crafts, and it was not within the contemplatinn of the enacted legislative scheme to require Conrail to perform all the blocking, switching and classification of cars in transcontinental interchange movement on the properties that it acquired by conveyance on April 1, 1976, because of the subcontracting limitations. The language of Section 506 as well as the general history of subcontracting in this Industry lead the Board inexorably to the conclusion that this Section is not relevant to this dispute.

In summary, the Board finds no support for the Organization's position in the relied upon Sections of the cited Public Law.

Answer to Question At Issue:

The arrangements made by Conrail do not violate the Regional Rail Reorganization Act of 1973, particularly Sections 503 and 506, thereof.

Jacob Seidenberg

Jacob Seidenberg, Chairman and Neutral Member

A. T. Otto, Jr., Employee Representative

N. M. Berner

N. M. Berner, Carrier Representative

January 22, 1977

AWD 1

PUBLIC LAW BOARD NO. 1830

Parties: Railroad Yardmasters of America

and

Consolidated Rail Corporation

DISSENT OF A.T. OTTO, JR., EMPLOYEE REPRESENTATIVE

I dissent. The opinion of the majority of the Board evidences an inability to view Title V of the Regional Rail Reorganization Act of 1973 as a federal statute. The majority treats this unique statute as if it were a collective bargaining agreement being submitted to the National Railroad Adjustment Board; it is not. Title V is an integral part of a complex, extensive and bold design to save from certain collapse the economy of the Northeast and quite possibly the entire nation.

The entire statute is novel. Certainly Title V is unique in our history. Many of its provisions know no precedent in contract or law. Consequently, its provisions must be interpreted with great care and with considerable caution. Strict adherence to the canons of statutory construction is essential lest one interprets this statute in a manner which may be very desirable to the interpreter but contradictory of Congress' plan.

The Board fails to treat Title V as a federal law and subordinates the plain language of the governing statute, as well as the clear intent of Congress, to the Board's view of what it believes the law should be. The opinion also ignores the clear and positive legislative history of the governing sections of the law.

In order to support its conclusion that Sections 503 and 506 were not violated by ConRail, the majority has itself violated every applicable rule of statutory construction.

1. Sections 503 and 506 constitute specific statutory limitations on the actions of ConRail. They must be interpreted and applied together, in pari materia. The provisions of a statute must not be considered as isolated fragments of a law, but as a whole, or as parts of a connected, homogeneous system. The Board, however, considered and applied Sections 503 and 506 in vacuo.

2. The primary canon of statutory construction requires the plain language of the statute to govern its meaning. It has often been held that courts should be slow to impart any other than their commonly understood meaning to terms employed in the enactment of a statute, and it is the policy of the courts to avoid giving a new, strained or forced meaning. To the contrary, it is a general rule of statutory construction that words of a statute will be interpreted in their ordinary

acceptance and significance, and the meaning commonly attributed to them.

The plain language of the statute is clear and controlling. The majority opinion ignores it. Section 503 authorizes ConRail to move "work formerly performed on the rail properties acquired . . . to any location . . . on its system". In addition to the "plain language" canon here violated, the Board also contravenes that rule which holds that the expression of one - in this case the movement of work "on its system" - excludes all others - the movement of work to other systems. And while Congress did provide for the transfer of work to other railroads in Section 503, it provided for such transfers only to those railroads which purchased rail properties under the Act. The canon "expressio unius est exclusio alterius" obviously applies and just as obviously has been violated.

The majority opinion erred in requiring the Congress to present more evidence of the intend behind its law. While admitting the language of the statute seemed clear, the majority states it will ignore Congress' mandate unless the Railroad Yardmasters of America can produce "evidence in the Act that ConRail was to be proscribed from making any changes in the flow of its existing traffic patterns that would enable it to maintain adequate and efficient rail service in the territory it served", or produce a provision in the Regional

Rail Act "that denies ConRail the right to initiate or to utilize sound operating procedures in the Chicago Gateway to maintain an efficient system."

The opinion reaches the logical ultimate result of its error when it concludes:

> "To find that Section 503 granted the Carrier the right to reorganize and realign only its forces within ConRail system would not only negate the general Congressional intent and purpose in enacting Public Law 93-236, but would also fly in the face of the provisions of the Final System Plan which indicated that when the new entity, ConRail, commenced operations that there would be a decline of one percent per year for the entire 10-year planning period for yardmasters, switch tenders and hostlers. The Final System Plan on p. 161 states:
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> > 'Yardmasters and yard clerks, however, were assumed to vary directly with the projected reduction in switching requirements resulting from application of an improved blocking plan.'
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> Table 2 on the same page 161, shows the projected manpower requirements of yardmasters for the period from 1976 to 1985 declining from 1,155 to 919."

Here, the opinion not only violates the plain language of Section 503, it also substitutes the Board's judgment and authority for that of Congress and blithely informs the Congress that to do what Congress has quite plainly ordered to be done would be unwise. Its reliance on the Final System Plan is wholly misplaced. The reduction of one percent per year in the number of yardmasters, yard clerks, et al., because of an improved blocking plan refers to the blocking plan which

would result from the merger of the six bankrupt railroads into ConRail. The Final System Plan refers only to an intra-ConRail blocking plan, as indeed it had to be since the USRA had no authority over non-ConRail properties. The decline of the number of yardmasters, etc., therefore, is to be accomplished by such intra-ConRail operational changes.

The plain language of Section 506 also is ignored in favor of the Board's knowledge "of the term sub-contracting as applied in the industry".

Section 506 is unique in both form and content. Its design is not negative, but positive; it places certain affirmative obligations upon ConRail. ConRail quite simply is directed to continue to perform all work which had been performed by the bankrupt railroads. Only if ConRail finds itself physically unable to perform the work due to a lack of employees and it is unable to hire sufficient employees to perform the work can ConRail contract out that work. Even at this point, ConRail can subcontract only that part of the work which cannot be performed by its employees.

The Board makes the irrelevant determination, however, that "it has never heard of such a concept advanced on the Fourth Division of the National Railroad Adjustment Board where this Organization normally and customarily processes its grievances against carriers for alleged violations that

the use of a switching railroad is a violation of its schedule agreement."

The Board does not believe Congress should establish such a concept:

> "If such a concept is to be created and instituted, it should be done by a meeting of the minds of all the affected parties and crystallized in a formal legal document. Such a far reaching arrangement, which is at variance with established Industry practice, should not be established by arbitral decree. While the Board is aware the Organization is contending that its rights on this case are derived from a statute and not an agreement, the Board finds that its analysis is still correct."

Whether or not the Board agrees with Congress' actions, it must carry out Congress' will. Refusal to apply the plain language of a statute because, in the Board's opinion, the concept embodied therein should not have been addressed by the Congress but instituted by private agreement, constitutes so arbitrary and obviously abusive exercise of the authority granted by Section 507 as to render Award No. 1 invalid.

3. Specific language in a statute governs general language. Sections 503 and 506 impose specific, well-defined restrictions upon ConRail. Those restrictions govern here. The majority opinion, however, dismisses the particular limitations placed upon ConRail in favor of the general congressional desire that ConRail's operations be conducted in a sound, economical, efficient manner. The logical effect

of such reasoning is the ultimate rejection of all specific mandates of the Congress regarding ConRail in favor of the Board's concept of what constitutes a sound, economical, efficient operation.

In any given set of facts, any individual provision of Title V of the Regional Rail Reorganization Act of 1973, may be antithetical to a particular Board's concept of sound, efficient, economical operation. The specific provision of law, however, controls.

It is true, of course, that Congress desired ConRail to be successful. It provided financial aid and it provided certain operational freedom. But it also placed certain specific limitations upon it. Two of those specific limitations are found in Sections 503 and 506. Section 503 permits freedom of movement of work within and between the former rail properties that make up the ConRail system. Section 506 requires ConRail to continue to perform the work theretofore performed by its predecessor railroads unless it finds that it cannot do so due to lack of employees.

Such direct explicit Congressional mandates may not be subordinated to the general desire of Congress to create an "adequate and efficient rail service", to "utilize sound operating procedures", and to "maintain an efficient system". Congress, of course, desired the accomplishment of these ends, but within the framework of the specific restrictions it was convinced the public interest required.

This Board has no authority to disregard those specific restrictions simply because it disagrees with them.

4. Legislative history may be relied upon only if the statute involved is vague on its face. Despite the clarity of the language of Section 503, the Board, in considering that provision, referred to its legislative history. But in doing so, the Board has to admit that the history of Section 503 is "couched in terms of permitting ConRail to have the greatest latitude in making all the necessary assignments, relocations and consolidation of existing personnel within the ConRail system". The Board then disregards that legislative history with the argument that there is no evidence in the Act that ConRail was to be proscribed in its actions to maintain an efficient system. Of course, the evidence desired by the Board is to be found in the plain language of Sections 503 and 506.

5. No language contained in a statute is to be considered superfluous. In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose. It is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded every part of the act, including every phrase and word.

In an apparent effort to reinforce the weak, underpinning of its opinion, the Board engages in decisional overkill. Award No. 1 holds that Section 506 is limited in its application

to subcontracting involving Shop Craft unions and to work which is required to be performed on the property of ConRail. There is nothing in the language of Section 506 or its legislative history to support such an interpretation.

The interpretation errs in its limitation of Section 506 to "Shop Crafts". This is immediately apparent by Congress' refusal to limit the language of its provision and by Congress' inclusion of the words "all work in connection with the operation or services provided by the Corporation" in addition to the words "the maintenance, repair, rehabilitation or modernization of such . . . equipment." Only the words in the latter quotation would have been necessary to cover Shop Craft work. Congress went beyond the protection of Shop Craft work to the protection of "all work in connection with the operation or services provided by" ConRail. These words may not be rendered superfluous by interpretation.

Furthermore, Congress, it must be assumed in the interpretation of this statute, was aware of the history of subcontracting in the industry and knew that the problem extended well beyond the shop craft unions and the employees they represent: it involves clerical work, maintenance of way work, signal work, and communications work. Congress was aware that the organizations representing the employees engaged in that work had seen the jobs of thousands of employees they represent

lost through subcontracting. Congress well knew that in the opinion of some persons in the industry "sound, economical, efficient operation" was synonomous with "subcontracting" and Congress quite simply decided that such an opinion should not prevail on ConRail.

Section 506 clearly was intended as a protection to employees or - expressed in different terms - as a restriction on management. Had Congress intended otherwise, it would not have included the unique additional restrictions upon subcontracting which requires ConRail to perform all work unless it lacks sufficient employees and is "unable to hire additional employees" to perform that work; as well as requiring the institution of apprentice, training or recruitment programs.

Award No. 1 erroneously interprets Section 506 as a deliberate design by Congress to liberalize subcontracting in the industry; as such it thwarts the purpose and intent of Congress, violates its explicit command and is a disaster to the unions and the employees they represent. According to Award No. 1, ConRail is not restricted by Section 506 "or any section of the statute" from subcontracting any work which is not required to be performed on the property of ConRail.

While the Award holds that Section 506 is meant to apply only to the Shop Crafts, its conclusion effectively excludes even Shop Crafts from its coverage since virtually no Shop Craft work must be performed on the property of the employing railroad.

Virtually all clerical work can be performed on other premises. Indeed, some work of almost every craft can be performed beyond the property of the employing carrier. On the other hand, and contrary to the opinion's intent, the restrictions of Section 506 would apply to maintenance of way work since almost all of that work must be performed on the property of the carrier.

Award No. 1 views Title V as a contract and that is its basic error. Title V is not a contract, it is a federal statute. It is an essential part of a grand, ambitious design, first to save and then to revitalize the railroad system in the Northeast. Because of the tremendous human - as well as economic - upheaval caused by the effectuation of its plan, the Congress enacted a unique employee protection arrangement included in which is Section 506. In enacting this Section, Congress was not concerned with whether the Fourth Division, or any division, of the National Railroad Adjustment Board or the Special Boards of Adjustment established under the Railway Labor Act had ever entertained an RYA subcontracting case. Congress was interested only in creating a functional railroad system and in protecting the employees - all of the employees - against the unnecessary removal of their work beyond ConRail as a result of its creation of that system.

The Board limits its consideration to the exceedingly narrow view of one interpreting a contract, not a statute, and in doing so, not only misreads the plain language of

the law and its legislative history, but misunderstands its own role as substitute for a United States District Court.

ConRail, in directing and permitting switching and classification work, theretofore performed by its predecessor railroads on their property, to be done by the Belt Railroad of Chicago and the Indiana Harbor Belt Railroad, violated Section 503, because said acts constituted assignment of work formerly performed on acquired rail properties to a location outside its system. The switching and classification work in question was work in connection with operations provided by ConRail on rail facilities acquired from ConRail's predecessor railroads, which work theretofore had been performed by practice on said facilities. In determining that said work should not continue to be performed by ConRail employees on ConRail property, ConRail violated the explicit provisions of Sections 503 and 506.

A. T. Otto, Jr. / Employee Representative

Date:

7/24/97