PA-AMTRAK\NEC\NYSDOT-4R

BEFORE THE BOARD OF ARBITRATION

In the Matter of the Arbitration of a Dispute Between

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION, INTERNATIONAL BROTHEHHOOD OF TEAMSTERS

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Appearances:

Richard S. Edelman, O'Donnell, Schwartz & Anderson, P.C. Attorneys at Law, 1300 L. Street, N.W., Suite 1200, Washington, D.C., appeared on behalf of the Organization

Richard F. Palmer, Director, Labor Relations, Carrier, 30th Street Station – 2 North, 2955 Market Street, Philadelphia, Pennsylvania, appeared on behalf of the Carrier

ARBITRATION AWARD

Brotherhood of Maintenance of Way Employees Division, International Brotherhood of Teamsters, hereinafter "Organization," and the National Railroad Passenger Corporation (AMTRAK), herein "Carrier," jointly agreed to submit the dispute specified below to arbitration before a Board of Arbitration consisting of a single arbitrator selected by the National Mediation Board. The National Mediation Board appointed Stanley H. Michelstetter II, as said arbitrator. The parties timely made their pre-hearing submission and the arbitrator held a hearing in Washington, D.C. on December 14, 2012. The record in this matter was closed after the last post-hearing submission on December 21, 2012.

ISSUES[1]

This matter is before the Board by virtue of the parties' submission agreement. The submission agreement includes the stated issue. The submission agreement reads in relevant part:

> WHEREAS, the State of New York Department of Transportation (NYSDOT) obtained grants under PRIIA for improvements to the lines leased by Amtrak and other lines currently operated by Amtrak in the Albany District; and
>
> WHEREAS, NYSDOT is responsible for the employee protective conditions attached to those grants under 49 U.S.C. §24405(c) and Amtrak has agreed to provide those protections in connection with the lease and improvements requested by NYSDOT; and

[1] A main focus of the Carrier's presentation was that there is no authority upon which the Organization's position could be adopted. I view this as an issue as to whether the Organization's positions is substantively arbitrable.

WHEREAS, the provisions of 49 U.S.C. §24405(c) impose the protective conditions established under Section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210)(4R Act Conditions) for the protection of employees affected by the grants; and

WHEREAS, Section 4 of the 4R Act conditions requires the negotiation and/or arbitration of an agreement regarding the assignment of employees and selection of forces required by implementation of the grant; and

WHEREAS, Amtrak and BMWED have been unable to reach voluntary agreement on an implementing agreement, it is hereby

AGREED, that the parties will engage in arbitration under Section 4 of the 4R Act according to the following procedures;

1. Arbitration will take place before a single Neutral Referee appointed by the National Mediation Board. The parties will share equally in the cost of the Neutral Referee.

2. The parties will exchange written briefs and evidence prior to the arbitration hearing according to a schedule determined by the Neutral Referee in consultation with the parties.

3. The record in the proceeding will remain "open" for the submission of argument and evidence until the completion of the arbitration hearing or as otherwise directed by the Neutral Referee.\\

4. The question to be arbitrated is the following:

   Amtrak proposes including the additional territory acquired by lease from CSXT in connection with operation of the Empire Service as part of the existing Albany District covered by the Agreement of March 1, 1976, *as amended (Corporate Agreement). BMWED proposes application of the Agreement of May* 19, 1976, *as amended (Northeast Corridor Agreement) as appropriate for application to the acquired lines and changes* in *operations contemplated by the lease and financial grants from New York State. Which Agreement should apply?*

5. Although the parties may proceed to arbitration prior to the Amtrak CSXT lease transaction being finalized, any decision that may be rendered at arbitration pursuant to this agreement shall not be effective until the lease transaction between CSXT and Amtrak is completed and approved by the Surface Transportation Board.

FACTS

This matter involves the labor relations impact of the Carrier's lease of part of the Hudson line, defined below. There is no significant dispute about the background facts.

The Carrier provides passenger rail service throughout the United States. The Organization is the representative of the Carrier's rank and file employees in the maintenance of way craft. Maintenance of way employees perform work constructing, repairing, rehabilitating, upgrading, renewing, inspecting, and/or maintaining railroad track, right of way, buildings, and other structures.

The Carrier's operations are different in the North East Corridor from its operations in the rest of the United States. The Carrier operates essentially conventional passenger rail service over rail lines owned and operated by freight railroads in the United States. There is some high speed service in other parts of the United States, but it is not part of the Northeast Corridor. However, its main operation is in the Northeast Corridor (herein "NEC"). It provides frequent

service (many times per day) at high speed (at speeds running up to 125 miles per hour) along the NEC and its feeder lines. It operates a premier service, Acela service, at high speed with a top speed of 150 miles per hour from Boston to Washington, D.C. The Carrier owns virtually all of the track and facilities in the NEC. There are exceptions to the ownership of the main line. Fifty-five miles of NEC main line track are owned by the New York and Connecticut departments of transportation and 37 miles are owned by the Massachusetts Bay Transportation Authority. The Carrier employs maintenance of way craft employees in its facilities. Outside of the NEC, these facilities tend to be isolated and employ a relatively small number of maintenance of way employees. Within the NEC the Carrier employs a large number of employees. The parties have two collective bargaining agreements. One agreement, herein termed the "Corporate Agreement,"[2] was negotiated early in the parties' relationship. It covers the employees in the isolated facilities outside the NEC. There are approximately 170 craft employees within the scope of that agreement. The other agreement applies primarily to the NEC. There are approximately 1800 employees covered by that agreement.

The pre-existing services and properties which are the subject of this dispute connect New York City to Albany. The property in dispute goes from Hoffmans through Albany to Poughkeepsie. The service then continues over other carrier's lines to New York City. The line between Hoffmans and New York is referred to herein as the "Hudson Line." The Carrier operates conventional service from New York through Albany to Buffalo and beyond through the area in dispute. I refer to the entire corridor between New York and Buffalo as the "Empire Corridor." It also runs 26 trains a day (13 round trips) from Albany to New York.

The Hudson Line is divided as follows. The Carrier owns about 20 miles of track running from Albany to Niverville and 10 miles of yard and station track in the Albany area.[3] In 1980 it leased from Consolidated Rail Corporation (herein "CSXT") about 44 miles of track from Hoffmans running through Albany and ending at Stuyvesant. This is referred to as the "1980 Lease" property. CSXT retained the next segment of property of about 48 miles of track from Stuyvesant to Poughkeepsie.[4] The Carrier has employed an average of about 15 employees stationed in the Albany area. Ordinarily, 3 are assigned to bridges and buildings. Twelve are assigned to track work at all relevant times until the expansion caused by the transactions which are the subject of this dispute. Their track work involves routine inspection and maintenance. The area under Carrier management and the group of employees regularly assigned to that area are herein referred to as the "Albany District." The Carrier has sometimes used its Albany District employees to perform heavy repairs and upgrades, but it has also occasionally done so with employees from the NEC covered by the NEC agreement. The Carrier has also called upon specialized crews and heavy equipment from the NEC to perform specialized operations.

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[2] This the term the Carrier uses. It is also known as the "Off-Corridor Agreement" or the "Interim Agreement."

[3] It owns track from Rensselaer to Niverville of about 12 miles which is included in this figure. This is known as the "Port Line." The maintenance of way work on this line is performed by the Albany employees, but the line is connected to the Hudson route at only one point.

[4] This is referred to herein as to the "New Lease" property because it was leased to the Carrier as part of the transactions in dispute. The 1980 lease contemplated that the Carrier would lease property from CSX in the future from Stuyvesant to Poughkeepsie.

The remaining portion of the line running from Poughkeepsie is essentially owned by the Metro-North Commuter Railroad (herein "MNR") and is operated as an instrumentality of the State of New York. The line runs about 65 miles into the heart of Manhattan at Grand Central Station. The Carrier owns the connecting track between Grand Central Station and Penn Station in Manhattan. The MNR's future plans include more trains running through to Penn Station.

The Carrier, CSXT and the New York Department of Transportation (herein "NYSDOT") entered into a series of transactions financed largely by federal funds to upgrade the infrastructure and service on the Hudson line. The purpose of these transactions and funding was to further the master plan for the NEC: reduce travel time of the Carrier's conventional intercity service; increase the frequency of the Carrier's commuter service from Albany from 26 trains per day to 44 trains per day; and to increase the maximum speed along the Hudson route from 90 miles per hour to 125 miles per hour. This was to be partially accomplished by eliminating various "choke points" and expanding yards and other facilities. It also involves removing impediments to higher speed and to install facilities to allow higher speeds to occur.

As part of that series of transactions, the Carrier entered into a new lease in September, 2011, with CSXT for a period of 25 years with an option to renew for 23 more years. The new lease incorporated and continued of the 1980 leased property and additionally leased the CSXT property from Stuyvesant to the end point in Poughkeepsie where it abutted the MNR property described above. The Carrier became responsible for all of the relevant maintenance and upgrades on the entire leased line. In another of these related transactions, NYSDOT obtained a federal grant in September, 2011, from the Federal Railroad Administration of which $58 million was designated for the matters in dispute. NYDOT then contracted with the Carrier to provide the upgrades to the Hudson line service provided in the grant and to lease the New Lease property from CSXT. The funds provided by the grant were effectively to be used to have the Carrier convert the single track line on the 1980 Lease Property to dual main line. The Carrier accepted responsibility under the grant to comply with the labor protective requirement of the Railroad Revitalization and Regulatory Reform Act of 1976, herein ("4R Act"), 45 U.S.C. 836 as imposed by 49 U.S.C. 24405(c).[5] Those protections involve providing both minimum economic and other benefits to affected employees and that the parties negotiate implementation agreements. The parties agreed to the minimum individual employee guarantees but disagree concerning the terms to be included in an implementation agreement required by those statutes.

POSITIONS OF THE PARTIES

ORGANIZATION:

The implementation agreement negotiation/arbitration process under the 4 R Act is essentially the same as the implementing agreement negotiation/arbitration process imposed by the Surface Transportation Board in railroad mergers, line sales, and leases under the New York Dock process.[6] Arbitrators developing implementing agreements under Section 4 of those

[5] See footnotes 10 and 11 below.
[6] See footnote 16 and 17 below.

conditions are to devise arrangements to effect the changes necessary for implementation of the transaction. Those awards may involve modifications of the collective bargaining agreement.

The NEC agreement should be applied to the Hudson line territory and the Albany District facilities. The main reason is that the Hudson Line will now be connected to the NEC. The Carrier's own documents list the Hudson Line as part of the NEC. Even if it did not, the Carrier's plans, the State of New York's plans, and the Federal Rail Administration's plans (herein "FRA"), all militate strongly in favor of including in the NEC Agreement. Now that the Carrier is actually in control of the improvement and maintenance of that line, it should necessarily be covered by the NEC Agreement.

The type of service on the line supports placing the Hudson Line under the NEC Agreement. The Hudson Line is the second highest category of Carrier train frequency. The Hudson Line is already a higher speed line (90 MPH maximum) that will soon be improved for even higher speeds reaching the definition of "high speed" (110 MPH). There is a commonality of the type of work maintenance of way employees will be doing in the Albany District with that done by employees in the NEC.

The parties' own practice has been to include newly acquired facilities under the NEC Agreement which are connected to, or otherwise related to the NEC, rather than the Corporate Agreement. This was demonstrated when the parties included the properties the Carrier acquired into the NEC agreement of the Washington, D.C. terminal, Lorton, Virginia, Auto-Train facility and the Atlantic City Line.

The express language of the Part B, Article IC of the NEC's Scope provision states that the Scope Rule will apply when the Carrier assumes responsibility to maintain a property that it does not own. This situation falls squarely within the purpose of this rule. The NEC Agreement applies to about 1800 craft employees whereas the Corporate Agreement applies only to about 170 craft employees. Those latter employees are in isolated areas.

There are reasons why the Corporate (Off Corridor) Agreement should not apply. It was negotiated by the parties before the Carrier obtained the NEC. It was entitled as an "interim" agreement and it was so intended. It was intended to apply only to the odds and ends of the Carrier's craft work force. The operations of those areas are far different than the NEC and Hudson Line operations. The routine maintenance work, rehabilitative maintenance and construction work is different on high frequency, high speed lines.

The NEC Agreement is superior to the Corporate Agreement with respect to dealing with contracting out issues. The Corporate Agreement merely requires notice by the Carrier of intent to contract out and discussion with the Organization. The NEC Agreement defines craft work more clearly, has definite prohibitions of certain types of contracting out, and provides for arbitration of contracting out disputes. Over the last three decades, there has been a substantial erosion of craft work and explosion of contracting out. It is of the utmost importance for the Organization to have rules which protect the work of the craft as much as possible.

The Carrier may argue that it needs to have broad contacting out authority because of the magnitude of the construction and improvement work required by the transactions in dispute. However, the NEC Agreement's contracting out provision allows for exceptions.

In the negotiations to resolve this issue the Carrier stated that it did not want to ramp up the size of this unit because the work will be done in five years. However, it is likely that there will be substantial attrition due to retirement in the NEC. In any event, the NEC Agreement has adequate provisions to allow for the reduction in the size of the Albany District. However, the issue is not just which agreement applies now, but which agreement will apply for the decades to come as the Hudson Line is improved.

The Carrier's argument that the Corporate Agreement should apply because it historically has applied is without merit. The Corporate Agreement applied to the Albany District only because at the time it was created it was an isolated unit. Since that time it changed dramatically. It will change further with the current transactions. It will become even more indistinguishable with future changes.

The Organization notes that in order to place the Albany District in the NEC Agreement, the parties will have to create a new seniority district and work zones in the NEC Agreement. The Organization proposes to amend Rule 14 of the NEC Agreement to add the following:

> A new seniority district is established for the territory leased by Amtrak from CSX Transportation known as the East Hudson line (the lines between Hoffmans and Poughkeepsie, New York, and all facilities of the CSXT on the "Post Road" line between Niverville and Rennselaer, New York) and the lines stations and facilities currently owned by Amtrak in the Albany/Rennselaer area including all track, shops, stations and yards. This new seniority district will be known as the Albany/east Hudson district. There will be two work zones within that district: a north zone (lines and properties north and west of Albany) and a sought zone (lines and properties south of Albany).

The Organization also proposes to add the following to Rule 89:

> Units established under this Rule may be assigned to work on the Albany/east Hudson district.

CARRIER:

The maintenance of way employees have always been covered by the current agreement. The current agreement was negotiated based upon the fact that most of the employees would come from freight railroads. By contrast, the NEC Corridor agreement was negotiated for the takeover of the main line from Boston to Washington. Meanwhile the rights and benefits of all of the employees in the Albany area have always been controlled by the current agreement.

There is no legislative basis for the request of the Organization. Section 1 of the Grant agreement is focused on keeping the CURRENT agreement in effect. Section 3 of the grant agreement maintains current levels of protection. There is no basis in this for the application of a different agreement. Neither is there a basis under the 4 R Act, 45 U.S.C. 836. As noted, the Carrier has agreed to provide protective benefits under Paragraph B of that statute. The

Organization may argue Paragraph C of that statute applies.[7] However, the Carrier has followed the terms of the existing subcontracting provisions of the Corporate Agreement, Rule 24. No Carrier employees will be adversely affected by these transactions. There is no transfer of CSX employees and, therefore, no existing employees are being placed under less favorable conditions.

The Organization's request to change the agreement application through arbitration violates the Railway Labor Act ("RLA"). The RLA requires that parties maintain their agreements and that negotiation of the provisions of those agreements be handled under Section 6 of the Act and it is contrary Section 1 of the Grant Agreement that requires the parties to keep agreements in effect.

Changing agreements would put restrictions on subcontracting which were negotiated in the NEC agreement in 1987. It is inappropriate to expand those restrictions outside the NEC corridor. These restrictions were part of a *quid pro quo* exchange for eliminating the Minimum Force Agreements which had been in effect until then.

The Organization is attempting to do this expansion solely for the benefit of its NEC employees and at the expense of Amtrak's ability to timely meet its contractual commitments. Arbitration panels have long been held to not have the authority to change the agreements they administer.

There is no operational reason to alter the agreement. The Organization proposed incorporating this unit into the NEC Southern district and to grant the employees in this district seniority rights only to their specific positions. This is not operationally feasible. The Carrier has in the past placed certain newly obtained locations into the NEC agreement when the parties voluntarily negotiated it and it made operational sense. However, it does not make good business sense to do so in this situation. This territory is separated from the NEC by 65 miles of the MNR. There has always been sufficient work here to justify a dedicated work force. In fact, the new track will require the addition to the work force. We could not use the New York employees on a daily basis because they are 140 miles away. Any movement of equipment would require operation over MNR. This would require special permission.

DISCUSSION

1. Authority[8]

One main issue between the parties is whether I have the authority to adopt the NEC Agreement and/or the other aspects of the Organization's offer. The Carrier accepted responsibility under the lease from the State of New York to comply with the employee protection requirements specified in the Passenger Rail Investment and Improvement Act (herein "PRIIA"), specified in 49 U.S.C. Sec. 24405 (c)[9] These provision incorporate the employee

[7] The provisions are quoted in notes 10 and 11 below.

[8] The parties agreed that I would have the final and binding authority to determine whether I have jurisdiction to grant the request of the Organization.

[9] 49 U.S.C. Sec. 24405 (c)(1) provides in relevant part:

protective conditions of the 4 R Act, 45 U.S.C. Section 836.[10] One of the express requirements of Sec. 24405(c), itself, is that the Carrier keep ". . . collective bargaining agreements . . . in full force and effect." The application of this statutory provision is ambiguous in this dispute. There are two relevant collective bargaining agreements which arguably apply to the CSXT

(C)an assurance by the railroad that collective bargaining agreements with the railroad's employees (including terms regulating the contracting of work) will remain in full force and effect according to their terms for work performed by the railroad on the railroad transportation corridor; . . . .

49 U.S.C. Sec. 24405(c)(2) provides in relevant part:

. . .

(B)the protective arrangements established under section 504 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 836) with respect to employees affected by actions taken in connection with the project to be financed in whole or in part by grants under this chapter.

[10] 45 U.S.C. Section 836 provides in relevant part:

a) General

Fair and equitable arrangements shall be provided, in accordance with this section, to protect the interests of any employees not otherwise protected under title V of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 771 et seq.), who may be affected by actions taken pursuant to authorizations or approval obtained under this subchapter. Such arrangements shall be determined by the execution of an agreement between the representatives of the railroads and the representatives of their employees, within 120 days after February 5, 1976. In the absence of such an executed agreement, the Secretary of Labor shall prescribe the applicable protective arrangements, within 150 days after February 5, 1976.

(b) Terms

The arrangements required by subsection (a) of this section shall apply to each employee who has an employment relationship with a railroad on the date on which such railroad first applies for applicable financial assistance under this subchapter. Such arrangements shall include such provisions as may be necessary for the negotiation and execution of agreements as to the manner in which the protective arrangements shall be applied, including notice requirements. Such agreements shall be executed prior to implementation of work funded from financial assistance under this subchapter. If such an agreement is not reached within 30 days after the date on which an application for such assistance is approved, either party to the dispute may submit the issue for final and binding arbitration. The decision on any such arbitration shall be rendered within 30 days after such submission. Such arbitration decision shall in no way modify the protection afforded in the protective arrangements established pursuant to this section, shall be final and binding on the parties thereto, and shall become a part of the agreement. Such arrangements shall also include such provisions as may be necessary—

(1)for the preservation of compensation (including subsequent general wage increases, vacation allowances, and monthly compensation guarantees), rights, privileges, and benefits (including fringe benefits such as pensions, hospitalization, and vacations, under the same conditions and so long as such benefits continue to be accorded to other employees of the employing railroad in active service or on furlough, as the case may be) to such employees under existing collective-bargaining agreements or otherwise;

(2)to provide for final and binding arbitration of any dispute which cannot be settled by the parties, with respect to the interpretation, application, or enforcement of the provisions of the protective arrangements;

(3)to provide that an employee who is unable to secure employment by the exercise of his or her seniority rights, as a result of actions taken with financial assistance obtained under this subchapter, shall be offered reassignment and, where necessary, retraining to fill a position comparable to the position held at the time of such adverse effect and for which he is, or by training and retraining can become, physically and mentally qualified, so long as such offer is not in contravention of collective bargaining agreements relating thereto; and

(4)to provide that the protection afforded pursuant to this section shall not be applicable to employees benefited solely as a result of the work which is financed by funds provided pursuant to this subchapter.

(c) Subcontracting

The arrangements which are required to be negotiated by the parties or prescribed by the Secretary of Labor, pursuant to subsections (a) and (b) of this section, shall include provisions regulating subcontracting by the railroads of work which is financed by funds provided pursuant to this subchapter.

property; the NEC Agreement and the Corporate Agreement.[11] The Carrier essentially contends that the Corporate Agreement automatically applies to the CSXT property because it applies to 1980 Lease Property and automatically extends to the contiguous newly Leased Line.[12] The Organization contends that the NEC Agreement's Scope provision automatically extends that agreement to apply to the Hudson Line property (CSXT property and existing Carrier-owned property) because circumstances have changed.[13] The dispute over this ambiguity is a dispute between the parties within the meaning of Sec.24405(c) as to what it means to keep the "collective bargaining agreements" in "full force and effect."[14] It is within the parties' submission.

The fact that the parties have two collective bargaining agreements covering employees who have worked in the Albany area creates another ambiguous situation. 45 U.S.C. 836 (c) requires that the parties negotiate "arrangements" about the work which is financed by funds provided pursuant to this subchapter." The Carrier contends that this provision extends protection only to the current Albany District employees and is limited to applying only existing contracting out provisions. Essentially, it argues that it should be free to contract out the new work as it has been in the past. The Organization contends that the interests to be protected are those of the employees in the NEC who have occasionally been called upon to do projects which require specialized crews or larger crews. It also argues that the interests to be protected are those of current and future employees hired in the Albany District. It also contends that the new work will be new construction not normally done by the Albany District employees and of a greater amount than existing employees could do. In its view, the statute authorizes an arbitrator to increase contracting out protection to protect the craft's right to the new work. Statutory construction demonstrates that the proposals of the Organization are arbitrable. First, the statue emphasizes the issue of contracting out over other collective bargaining issues. Second, it emphasizes contacting out provisions over the work to be financed rather than merely keeping in place existing contracting out provisions. I conclude that the dispute is fully arbitrable under the submission agreement.

The Organization is alternatively asserting that its proposal to apply the NEC Agreement to the Hudson Line is within the scope of the Board's authority irrespective of the Scope provision of that agreement. As noted above, 49 U.S.C. 24405 (c) (2) requires the parties to negotiate and arbitrate, if necessary, the "protective arrangements" required by the 4 R Act "with respect to employees affected by actions taken in connection with the project to be financed in whole or in part by grants under this chapter." These are effectively the New York Dock conditions that were established by the Interstate Commerce Commission.[15] The Surface Transportation Board discussed the history of arbitration of "protective arrangement" disputes

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[11] There were no CSX employees regularly assigned to this specific property. There is no dispute that the issues as to those employees and as to the CSX collective bargaining agreement covering them have been resolved and are not part of this arbitration.

[12] It alternatively may be arguing that it has the unilateral authority to do so because it has no obligation to bargain with the Organization or the Organization has by the terms of the Corporate Agreement waived the obligation to bargain over the accretion of the CSX property. I note that were the Carrier to concede that the subject would still be a matter of bargaining under the Railway Labor Act, the arbitration provisions in dispute are designed to bring such implementation disputes to a expeditious resolution. See, CSX and Seaboard Coast Line, etc., 3 S.T.B. 901, 910 (1998).

[13] The Organization is also alternatively asserting that it has collective bargaining rights to negotiate that result. The authority to arbitrate that dispute is discussed below.

[14] This is true even if the resolution involves making the changes which are ordered herein. Those changers are merely to adapt them to changed circumstances. See page 10 of 23 of CSX, *supra.*

[15] New York Dock Railway, 360 I.C.C. 60 (1979)

and concluded that arbitrators have the broad authority to modify existing collective bargaining agreement so long as the modifications were "necessary" to carry out a transaction.[16] The parties agree that the main issue presented herein is effectively what contracting out provisions should be adopted. The Organization's contentions cited above are arguably necessary to meet the statutory contracting out objectives and to protect the interests of the broad range of employees in both the Albany District and the entire NEC. Irrespective of the Scope provision of the NEC Agreement, this dispute is arbitrable under the submission agreement

The Carrier's argument that the requirement for employee protective conditions should be deemed already satisfied is without merit. In its view, since they are allegedly satisfied, the arbitrator has no authority to award the Organizations request. The employee protective conditions were a condition precedent to the Federal Railroad Administration making the grant in dispute. The parties executed a satisfactory agreement concerning the protections of individual employees. However, the parties continued to disagree about the "implementing agreement" and did not reach agreement. Thereafter, the FRA completed the grant. It argues that since the FRA no longer withheld the grant, that the FRA must have concluded that all of the protective requirements were met. The fact the FRA allegedly waived the condition precedent nature of those provisions does not mean that it concluded that all the requirements were met. They still remain a condition (a condition subsequent). The fact that the FRA suggested that this dispute be arbitrated is sufficient evidence that they did not waive those conditions. I conclude that this matter is fully arbitrable under the submission agreement.

2. Standards

The Organization correctly argues that the nature of this dispute is primarily an interest dispute.[17] This concept is recognized in Norfolk, *supra* and CSX, *supra*.[18] Under CSX, *supra*, arbitrators of disputes concerning the required arrangements may make changes in the parties' existing agreements necessary to accommodate the transactions but not in a manner inconsistent with the protective benefits required by law. The other standards which are customarily applied in interest disputes and that are relevant to this dispute are:

1. The express agreements of the parties;
2. The parties' reasons for their proposals;
3. The bargaining history of the parties;
4. The parties' own practice under similar circumstances;
5. The industry practice under similar circumstances;
6. The public policy as expressed by Congress in the guiding statutes; and
7. The totality of the scheme of regulation.

These standards are applied below.

3. Merits

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[16] CSX, et al., 3 S.T.B. 701, 711-713 (1998) That decision flowed from Norfolk and Western Railway Company v. American Train Dispatchers Association, 499 U.S. 117 (1991)

[17] An" interest" dispute is a dispute to establish new or changed agreements between the parties. A "rights" dispute is one involving the application or enforcement of those agreements.

[18] See note 16.

a. Newly Leased CSXT Property

The Newly Leased Property, Poughkeepsie to Stuyvesant segment, is properly under the NEC Agreement as a result of the changed circumstances occasioned by all of the transactions in dispute. The Scope provision of the NEC Agreement requires that the parties consider applying the NEC agreement when the Carrier leases new property. The Carrier is correct that it does not automatically make the NEC Agreement applicable. The parties have negotiated applying the NEC Agreement to accretions along the NEC Corridor. Nonetheless, when the Carrier leased the 1980 leased property the parties did not apply the NEC Agreement to the Albany District even though the Scope provision of the NEC Agreement was identical in this respect. The reason for that is that the Albany District was relatively isolated and the Hudson line was not an integral part of the NEC.

The circumstances have since changed. It is appropriate to place the Newly Leased property under the NEC Agreement. The Hudson Line is directly connected to the NEC.[19] The Carrier has listed the Hudson line as a major feeder, if not a direct part, of the NEC. The service now has been upgraded since 1980 to higher speed (90 mph). It is frequent service between Albany and New York City. The addition of the new leasehold and the revision of the 1980 lease give the Carrier control over the vast majority of the maintenance and development of the Hudson Line. The Hudson Line is a vital part of the NEC because it gives a large part of the State of New York nearby higher speed access to the NEC.

The changes made by the grant in dispute to increase the main line from one track to two tracks in the 1980 lease area will increase the efficiency of this area. Other likely improvements will increase the capacity along the Hudson line.

The Carrier and other interested parties' goals on the Hudson line are to increase the frequency of service between Albany and New York City from 13 daily roundtrip local trains to 22 roundtrip local trains and to increase the maximum speed in the Hudson from 90 MPH up to 110 MPH. These are likely to occur. The Hudson line is thus likely to become an even more important part of the NEC. Under these circumstances, the Hudson Line is much like the Harrisburg and Springfield Lines which are under the NEC Agreement. The Carrier's arguments are mainly based on history and are outweighed by the fundamental changes in circumstances.

b. Contracting Out

The main reason that the Organization seeks to apply the NEC Agreement is that it contain a contracting out provision that is more restrictive of the Carrier's right to contract out craft work than the Corporate Agreement. This is the main point of disagreement between the parties.

[19] The fact that the MNR owns about 65 miles of the Hudson line is consistent with the ownership of other parts of the NEC mainline by other commuter railroads. The interests of the commuter railroads and the Carrier are sufficiently aligned in the passenger operations that the ownership is consistent with the conclusion that the Hudson Line is part of the NEC.

Rule 24 of the Corporate Agreement applies in relevant part only to the Albany District employees. It requires that the Carrier notify the Organization of any plans it has to contract out work and to meet with the Organization to attempt in good faith to reach agreement on the matter. If there is no agreement, the Carrier is free to contract that work out. By contrast, the NEC Agreement Scope provision which restricts contracting out would apply to employees beyond the Albany District if it were adopted. It would apply to specialized crews who might have skills to do the construction work contemplated. While the provision recognizes that it may be necessary for the Carrier to contract out large projects to achieve prompt completion, it requires that if the meeting process of the type used in the Corporate Agreement is unsuccessful, the Organization may submit contracting out disputes to a Special Board of Adjustment for arbitration.

The more restrictive terms sought by the Organization are consistent with the public policy as expressed by Congress in the requirement that the "arrangements" required by 45 U.S.C Sec. 836 include terms with respect to contracting out. I conclude that by emphasizing the contracting out issue over other possible terms that could be included in the required "arrangements" Congress recognized that the additional financing could lead to unforeseen problems. Second, taken with overall purpose of the structure of requiring that the parties resolve issues concerning "arrangements," Congress demonstrated its concern that funding not be used as a vehicle to undermine an existing collective bargaining relationship. The current NEC Agreement provision already reflects recognition that contracting out be allowed to meet other requirements of funding, namely handling projects too big for the bargaining unit to handle and projects which cannot be handled quickly enough.

The circumstances have changed such that the current language is inadequate to protect existing employees in the long run. The new funding requires construction of new track which is specifically covered under the contracting out provisions of the NEC Agreement. Other projects go beyond the work which Albany District employees have historically performed. In the future, it is likely that the amount of maintenance work will increase and the sophistication of the maintenance work will increase with higher maximum speeds. The new language will strike the appropriate balance between the interests of all craft employees in protecting maintenance of way work opportunities and the Carrier in performing the work in a timely and cost-effective manner. The former agreement will not.

The Carrier's concern that under the NEC language it will have to expand the unit and then contract it once the work is done, is without merit. First, an expanded unit will be available to perform projects along the entire Empire Corridor. Second, there is significant retirement turnover in the NEC and any surplus employees are likely to be absorbed in the NEC by attrition. Third, both agreements provide adequate provisions for the layoff of employees should there be a need to do so. Finally, the Carrier can give prospective new employees a fair warning in its interview process. The better view of the evidence is that the restrictive language will give rise to a better and more flexible work force over time. The contracting situations still require

cooperation by the Organization if it wants to maximize the work available to the employees it represents and to new employees who could be added.

Finally, the Carrier's argument that the contracting out memorandum should not be extended to this unit because it was a product of *quid pro quo* bargaining to replace a pre-existing minimum manning clause is without merit. The minimum manning provisions were most likely added to the agreement because of the employee protection requirements in effect at that time. In short, satisfaction of the contracting out employee protection provisions which are the subject of this dispute are an appropriately similar *quid pro quo* for the application of the NEC Agreement's contracting provisions. The Memorandum itself reflects that it applies to federally funded work. This suggests that the minimum manning was created in response to employee protective provisions. For all the reasons specified above, the application of the NEC Agreement's contracting out provisions is necessary and appropriate to deal with the new circumstances.

c. Remainder of Albany District

The efficient administration of collective bargaining agreements requires that the employees of the Albany District be under the same agreement. The parties agree that the main work force will be the Albany District employees. Accordingly, it is a practical necessity that all of the Albany District properties administered by the Carrier be under the same agreement. Accordingly, I direct that the NEC Agreement be applicable to all of the Carrier's properties in the Albany District.

The parties agreed that it was necessary to address seniority issues in order to apply the NEC Agreement to the Albany District. The Carrier is correct that the Albany District must be a separate seniority district under the NEC Agreement, not just a work district. The Organization has proposed that it be both a new seniority district (district 6 a) and a separate work district. The organization' proposal is adopted as specified in the Award herein.

AWARD

The NEC collective bargaining agreement shall apply to the lines leased by the Carrier. It is necessary in order to implement that agreement to include all Carrier owned or leased property in Albany area as described in the addition to Rule 14 below under the NEC Agreement.

Rule 14 of the NEC Agreement shall be amended to add the following:

> A new seniority district is established for the territory leased by Amtrak from CSX Transportation known as the East Hudson line (the lines between Hoffmans and Poughkeepsie, New York, and all facilities of the CSXT on the 'Post Road" line between Niverville and Rennselaer, New York) and the lines stations and facilities currently owned by Amtrak in the Albany/Rennselaer area including all track, shops, stations and yards. This new seniority district will be known as the

Albany/east Hudson district. There will be two work zones within that district: a north zone (lines and properties north and west of Albany) and a south zone (lines and properties south of Albany).

The Organization also proposes to add the following to Rule 89:

Units established under this Rule may be assigned to work on the Albany/east Hudson district.

Dated at Sun Prairie, Wisconsin, this 13th day of January, 2013

Stanley H. Michelstetter II

Stanley H. Michelstetter II, Arbitrator