SURFACE TRANSPORTATION BOARD

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	)	
	)	
UNITED TRANSPORTATION UNION	)	
	)	
and	)	Pursuant to *New York Dock*
	)	Conditions
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,	)	
	)	STB Finance Docket No. 33388
Unions,	)	
	)	Fireman Seniority/Locomotive
and	)	Engineer Training
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Carrier.	)	

OPINION AND AWARD

Date of Hearing:	July 27, 2000
Location of Hearing:	Norfolk, Virginia
Date of Award:	September 9, 2000
Arbitrator:	Barry E. Simon

Appearances:

For the Norfolk Southern Railway Company:

Kenneth J. O'Brien, Assistant Vice President, Labor Relations
Scott Weaver, Director, Labor Relations
Robert J. Kuhn, Assistant Director, Labor Relations
Greg Edwards, Assistant Director, Labor Relations
Randy Rowan, Labor Relations Officer

For the United Transportation Union:

Clinton J. Miller, III, Esq., General Counsel
Delbert G. Strunk, Jr., General Chairman

For the Brotherhood of Locomotive Engineers:

Harold A. Ross, Esq., General Counsel
Paul T. Sorrow, Vice President
Stephen D. Speagle, General Chairman

Background: On July 20, 1998, the Surface Transportation Board ("STB") entered a decision in *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388, which approved, with certain conditions, the acquisition of control of the Consolidated Rail Corporation ("Conrail" or "CRC") by CSX Transportation ("CSX") and the Norfolk Southern Railway ("NSR" or "Carrier"), and the division of the assets of Conrail between CSX and NSR. Among those conditions, the STB imposed the conditions set forth in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), *aff'd sub. nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) ("*New York Dock* Conditions"), for the protection of the employees of the carriers involved. On the closing date, June 1, 1999, CSX, NSR and Conrail assumed operational control over former Conrail lines and facilities consistent with the STB's decision.

The STB's decision took into consideration the detailed operating plans of the involved railroads. For its part, NSR proposed the integration of Conrail properties into the NSR system, with the establishment of new and more flexible train routes and schedules. NSR established an integrated "hub network system" comprised of a series of rail "hubs" grouped into three separate

network systems. According to the Carrier, each hub system consists of a combination of existing NSR and former Conrail lines radiating from a central hub selected to reflect major traffic flows.

To effectuate the hub network system, the Carrier and Conrail entered into implementing agreements with the various labor organizations, including the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers ("BLE"), designed to integrate the seniority of the affected employees and permit the Carrier to use employees for through-train operations within each designated hub network. The UTU agreement, dated August 6, 1998, included provisions for the establishment of the Lake Region Hub Network, which included NSR and Conrail territory from Kankakee, Illinois, to Croxton, New Jersey. This agreement established a single seniority district for UTU-represented employees[1] on the Lake Region and adopted the Nickel Plate/UTU Agreement as the applicable labor agreement for the district. This seniority district, however, is divided into thirteen geographic zones. Additionally, the parties agreed to place all former Conrail employees on the existing NSR-Nickel Plate/UTU rosters, but below all NSR employees. The former Conrail employees were afforded prior rights to positions on the former Conrail properties, though.

A similar agreement was reached with the BLE on February 12, 1999. The only significant difference from the UTU agreement was that Conrail engineers were dovetailed onto the NSR engineer seniority roster, *i.e.*, they were placed on the roster interspersed with the NSR engineers

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[1]The UTU is the exclusive bargaining representative for the crafts of conductors, trainmen, switchmen and firemen.

in accordance with their Conrail seniority dates. The agreement with the BLE, as with the UTU agreement, created a single seniority district, with geographic zones, for the Lake Region and adopted the Nickel Plate/BLE Agreement for the BLE represented employees on this district.[2]

A dispute subsequently arose concerning the entry of trainmen into the Locomotive Engineer Training (LET) program. These disputes centered around the manner in which employees would be selected for LET, and the fireman seniority dates they would acquire. The latter issue was particularly concerned with employees with trainman seniority dates prior to November 1, 1985.[3] That date is significant as it was the effective date of the National Agreement between the UTU and the nation's carriers represented by the National Carriers' Conference Committee. The 1985 National Agreement, through Article XIII, dictated that:

> The craft or class of firemen (helpers) shall be eliminated through attrition except to the extent necessary to provide the source of supply for engineers and for designated passenger firemen, hostler and hostler helper positions. Trainmen shall become the source of supply for these positions as hereinafter provided.

The Agreement went on to amend the July 19, 1972, Fireman Manning Agreement in a manner that will be detailed herein.

The Carrier conducted several meetings with representatives of the UTU and the BLE in an attempt to resolve these matters. A final meeting was held in Atlanta on January 7, 2000. As no

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[2]The BLE is the exclusive bargaining representative for the craft of locomotive engineers.

[3]While there may be trainmen who were hired in November and December 1985, the parties have referred to employees hired on or before October 31, 1985, as "pre-1985 employees," and those hired on November 1, 1985, or later, as "post-1985 employees." For the sake of simplicity, this Award will use the same terminology.

resolution was reached at this meeting, the Carrier, on January 18, 2000, served notice upon the General Chairmen of the UTU and the BLE of its intent to refer this dispute to arbitration in accordance with Sections 4 and 11 of the *New York Dock* Conditions. In a letter dated February 2, 2000, the Carrier advised the General Chairmen that an impasse had been reached with regard to the selection of a neutral referee, and by copy of the letter requested the National Mediation Board to designate a neutral referee in accordance with the provisions of Sections 4 and 11 of the *New York Dock* Conditions. In response to the National Mediation Board's request for comments, UTU President C. L. Little wrote that he had no objection to the Carrier's request. By letter dated February 23, 2000, however, BLE President Edward Dubroski objected. His letter to Roland Watkins, Director, Arbitration Services, reads as follows:

> Please refer to your letter dated February 14, 2000 to Mr. David N. Ray, Assistant Vice President Labor Relations, Norfolk Southern Corporation, copied to me, in which you solicit my comments with respect to the Carrier's request for the designation of a referee to resolve a purported dispute between the Carrier, UTU and this Organization, in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions imposed pursuant to Surface Transportation Board Finance Docket No. 33388. For the following reasons, this Organization vehemently objects to the Board's characterization of this dispute as one falling under Sections 4 or 11 of New York Dock and its designation of a referee in connection with this matter as inappropriate and improper.
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> The purported dispute that the Carrier and UTU seek to resolve via the New York Dock arbitration process in neither a transaction nor a dispute contemplated by either Sections 4 or 11 of the Protective Conditions. The problem that the Carrier and UTU are attempting to solve via their attempted abuse of those arbitration provisions concerns the manner in which candidates for engineer training are selected from the ranks of trainmen and ultimately establish seniority as engineers. Rules currently exist that control this process; however, Carrier and UTU are unhappy with the status quo and wish to reach an agreement that is, in their view, easier to administrate.
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> Section 4 of the Protective Conditions contains an arbitration provision to be invoked in the event the parties are unable to voluntarily reach an implementing agreement. Section 11 of

> the Protective Conditions governs the arbitration of disputes over the application of certain elements of the Protective Conditions themselves. Both UTU and this Organization reached voluntary implementing agreements in connection with the establishment of the NS Lake Region Hub Network. Both Implementing Agreements left unchanged, for employees promoted after the date of the transaction, pre-existing rules governing, in the case of UTU, the selection and rank of engineer trainees and, in the case of this Organization, the establishment of engineer's seniority. During the meetings that have been held to discuss this problem, our position has been that there is really no dispute over the interpretation of any existing rules, but rather a desire of the Carrier and UTU to change the existing rule to make it easier to administrate, at the expense of fairness to a certain group of employees, namely those who take promotion to engineer at their earliest opportunity. They are reluctant to effect this change voluntarily because to do so would involve alienating these people, and the imprimatur of a New York Dock referee will give them the plausible deniability they need.
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> The Carrier will undoubtedly argue, in support of their request for the appointment of a referee, that this "dispute" is a function of the NS/Conrail acquisition. While post-transaction developments have heightened concern over the issues underlying this "dispute," the parties were engaged in an ongoing dialogue over this matter long before the transaction. Were it truly transaction related, it would have been addressed in the Implementing Agreements. The parties should not be allowed to conduct what should be negotiations under Section 6 of the Railway Labor Act as an orchestrated "dispute" under the guise of New York Dock.
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> We emphasize our strong objection to the designation of a referee in connection with this matter, inasmuch as no dispute properly referable to a referee under Sections 4 or 11 of the New York Dock Protective Conditions exists.

Notwithstanding the BLE's objections, the National Mediation Board furnished the parties with a list of arbitrators, from which the undersigned was selected to hear this matter. A hearing was scheduled for July 27, 2000, in the Carrier's offices in Norfolk, Virginia. Prior to the hearing, however, the BLE petitioned the United States District Court for the Northern District of Ohio to enjoin the arbitration proceeding. The BLE's motion was heard before Judge Ann Aldrich, who denied it on July 21, 2000. In her Memorandum and Order, Judge Aldrich wrote:

> The BLE argues that this Court has jurisdiction to hear this case because the disagreement between the BLE and the defendants is a major dispute under the Railway Labor Act ("RLA"), that therefore, the procedures identified for major disputes under the RLA must be followed by the parties, that these procedures are not being followed, and that

this Court has the jurisdiction to enjoin the parties from not following the dictates of the RLA (such as submitting the dispute to binding arbitration). This Court agrees that it would have jurisdiction over this matter if this were a major dispute under the RLA; however, since this Court finds that the disagreement between the BLE and the defendants is not a major dispute under the RLA, this Court has no jurisdiction at this state of the proceedings. This Court expresses no opinion as to whether this dispute should be resolved under the *New York Dock* conditions, or as a minor dispute under the RLA, as such a determination is not necessary to this Court's decision.

Essentially, the difference between a major dispute under the RLA and a minor dispute, is that a major dispute involves the altering or changing of a contract or agreement governed by the RLA (such as a collective bargaining agreement), whereas a minor dispute deals with the interpretation of such agreements. . . . Major disputes must follow the provisions set forth in the RLA, which would not include, at this stage of the proceedings, binding arbitration; and a federal district court has the power to enjoin actions that are not in accordance with the RLA. See *United Transportation* 979 F.2d at 435; and 45 U.S.C. § 156. On the other hand, minor disputes may be sent to binding arbitration and federal district courts do not have the same power to intervene. *Id.*

The dispute between the BLE and the plaintiffs is not a major dispute. The BLE maintains that the defendants are seeking to abrogate Article 30 and that the dispute between the parties therefore constitutes a major dispute. However, the BLE has not pointed to anything that would abrogate or change Article 30. Article 30 provides that newly promoted locomotive engineers receive their seniority date on the date when they successfully pass their qualifying exams and are issued a certificate of qualification as an engineer, subject to their keeping the same relative standing that they hold on the firemen's roster. The BLE maintains that the defendants' suggestion of giving all pre-November 1, 1985 trainmen firemen seniority dates of December 31, 1999, regardless of when they become firemen, would abrogate Article 30. However, since firemen seniority is defined by agreements between the defendants, i.e., between the UTU and NSR, and Article 30 expressly creates a relationship between engineer seniority and firemen seniority, it is by no means clear that such an arrangement violates Article 30. This Court is not expressing an opinion on the proper interpretation of Article 30; but, since the parties' dispute revolves around an interpretation of Article 30, this case would clearly qualify as a minor dispute under the RLA. Consequently, this Court has no jurisdiction over this matter.

The BLE's motion having been denied, the hearing before the Arbitrator was held as scheduled, with the parties filing their respective submissions in advance of the hearing. At the outset, it was agreed among the parties that the Arbitrator would serve as the sole member of the Arbitration Board.

Issues Presented:

(1) Are the issues referenced below referable to arbitration in accordance with the New York Dock Protective Conditions imposed pursuant to Surface Transportation Board Finance Docket No. 33388?

(2) Will employees with trainmen seniority prior to November 1, 1985, who establish engine service seniority on or after January 1, 2000, be given an engine service training rank and an engineer seniority rank in their relative order from the order of selection roster and rank ahead of employees whose trainmen seniority is after November 1, 1985 and who attend the same or subsequent LET class?

(3) If the answer to Question No. 2 is no, what method is appropriate?

(4) May employees with trainmen seniority on or after November 1, 1985 request to enter locomotive engineer training in their zone or will such employees be selected solely in seniority order in their zones, fitness and other qualifications being equal?

Position of the Carrier: The Carrier first asserts the dispute herein is arbitrable and subject to Article I, Section 11 of the *New York Dock* Conditions. It explains that disputes over the interpretation or application of the *New York Dock* Conditions, or implementing agreements adopted thereunder, are subject exclusively to arbitration under Section 11.

In this case, says the Carrier, the dispute arises from the integration of former Conrail and NSR territories pursuant to STB Finance Docket No. 33388, and the rearrangement of operating employees through implementing agreements with the BLE and the UTU. It is because of the creation of a combined seniority district, the Lake Region Hub Network, the division of that district into thirteen zones, and the manner in which Conrail trainmen and engineers were incorporated into their respective seniority rosters, according to the Carrier, that it became apparent it would be

necessary to fashion a promotion process that would ensure the seniority of the Conrail employees would be respected. The Carrier asserts the following four questions involving promotion and seniority surfaced as a result of this new seniority district and zones:

1. Will we accept/force trainmen from the entire seniority district or from the zone where the need for engineers existed?

2. If we accept/force trainmen from the zone where engineers are needed, how will they be ranked on fireman and engineer seniority rosters so that issues related to relative seniority are addressed (e.g. creation of an order of selection list based upon train service seniority)?

3. How will ranking/seniority issues be handled relating to pre-11/01/85 trainmen who are not required to accept promotion and post-10/31/85 trainmen who are required to accept promotion?

4. Will post-10/31/85 trainmen continue to submit requests to accept promotion out of order or will they be promoted strictly in seniority order?

The Carrier insists that the rearrangement of forces pursuant to the NSR/Conrail transaction is the genesis of these issues, and that they are inextricably related to STB Finance Docket No. 33388. It contends the disputed issues must be resolved to fully implement the consolidation of the workforce. It cites decisions of the courts and the Interstate Commerce Commission in support of its position that these disputes are referable to arbitration in accordance with Article I, Section 11.

According to the Carrier, the UTU agreed that this dispute is arbitrable under the *New York Dock* Conditions. It avers the BLE also agreed to submit to such resolution on the condition that the Carrier remained neutral on the issue of fireman seniority dates. As the BLE has already been party to a *New York Dock* Section 11 arbitration proceeding concerning other unresolved issues arising from this STB Docket, the Carrier argues its position seems disingenuous. The Carrier

further refutes the BLE's contention that the Carrier is attempting to change its collective bargaining agreement under the guise of *New York Dock*. It notes this assertion was rejected by the District Court. The Carrier notes that Article 30, Section 1 of the BLE Agreement provides:

> The seniority date of a promoted locomotive engineer shall be the date he successfully passes qualifying examinations and is issued a certificate of qualification as engineer, subject to his keeping the same relative standing as he holds on the fireman helpers' seniority roster.

By operation of this provision, says the Carrier, the seniority standing of a locomotive engineer is determined by his seniority date on the fireman roster, which is governed by the UTU Agreement. It denies it is attempting to modify this provision of the BLE Agreement.

Turning to the merits, the Carrier argues a consistent process addressing issues relating to the promotion to locomotive engineer is required because of the hub/zone configuration of the new Lake Region Seniority District. It contends that, by operation of the UTU/Nickel Plate implementing agreement, it is permitted to promote post-1985 trainmen in seniority order within their respective zones, and is not required to fill LET vacancies either by an application process or by promotion based upon relative seniority on the entire seniority district. Carrier notes that post-1985 trainmen have been advised upon hiring that they stand to be promoted to locomotive engineer. The Carrier says there is no justification for allowing relatively more experienced trainmen to avoid promotion via an application process, thereby forcing it to promote relatively less experienced employees. Carrier wishes to be able to identify the eligible candidate for each LET opening from among the trainmen in the applicable zone, which would foster workforce stability by promoting employees within the immediate geographic area. Otherwise, contends the Carrier, it would be

required to force post-1985 trainmen at distant locations to accept promotion, even though eligible trainmen might be available within the immediate geographic area. This, says the Carrier, is the type of situation the zone arrangement was intended to prevent.

The Carrier complains that the UTU objective of maintaining a district-wide application procedure is inconsistent with the hub/zone arrangement agreed to in the implementing agreements, and would increase the number of avoidable seniority disputes due to the administrative difficulty. Instead, the Carrier desires an order of selection list containing those trainmen who have not been promoted in order to respect the relative seniority of all trainmen on the seniority district. Pre-1985 trainmen, under the Carrier's plan, would be slotted on the order of selection list in their relative rank, but would not be required to accept promotion. When trainees are needed in a particular zone, the Carrier says it would take the senior post-1985 trainman, unless a pre-1985 trainmen requests promotion. Consequently, the Carrier says it would rank employees on the fireman roster in the same order as the selection list. According to the Carrier, this method is uniform, predictable, consistent with train service seniority, and would minimize seniority disputes. The Carrier concludes such a resolution is appropriate and consistent with the language and intent of the UTU/Nickel Plate implementing agreement.

Position of the UTU: The UTU argues the disputes herein are arbitrable under both Sections 4 and 11 of the *New York Dock* Conditions. In doing so, the UTU notes that the correspondence from the Carrier regarding the resolution of these disputes refers to both provisions.

Noting the Carrier's characterization of the dispute as an "omitted case," in that nobody had considered how the LET would apply to former Conrail employees, the UTU says it is necessary to craft an agreement to rectify this omission. Such an arbitration would be under the aegis of Section 4, says the UTU.

The UTU rejects the BLE's arguments with regard to the Arbitrator's authority. It, too, contends the BLE had agreed to refer the dispute to arbitration on the condition the Carrier remained neutral. It further notes the District Court's decision that the dispute is not a major dispute under the Railway Labor Act leaves the Arbitrator without jurisdiction to find otherwise. The UTU concludes nothing before the Arbitrator would alter the current BLE Agreement. For this reason, the UTU contends BLE should not be a party to this arbitration.

The UTU explains that the BLE's problem in this case stems from its own Agreement, in that the BLE negotiates the seniority status of locomotive engineers. The BLE has, says the UTU, adopted a rule that incorporates the fireman seniority date of these employees. The UTU avers it has exclusive jurisdiction over the establishment of fireman seniority dates, and does not care how employees stand on the engineers' roster. If the BLE does not like the seniority dates conferred upon fireman, the UTU suggests it negotiate a change of BLE Article 30.

The UTU objects to the Carrier's plan to call trainmen for LET according to an order of selection list. It asserts the bulletin and application process is established by a rule through collective bargaining. To change or abrogate such a rule through this arbitration, says the UTU, the Carrier must show a public transportation benefit. There is no evidence of a necessity to change the

rule, the UTU concludes. It notes the Carrier's concern about having inexperienced applicants may be remedied by Carrier exercising its right to disapprove candidates with whom it is not satisfied, subject to the grievance process. If the bulletin and application process does not yield sufficient qualified candidates, the UTU explains the Carrier then has the right to force the senior post-1985 trainmen to enter the LET program.

The UTU argues that the use of relative seniority standing as trainmen for selection to LET is required by the October 31, 1985 UTU National Agreement, even without regard to a carrier's affirmative action plan. It cites the "Hays Award" involving the Union Pacific and the UTU (December 16, 1990), as well as Award No. 1 of Public Law Board No. 5916 (CSX v. UTU, Ref. Peterson), Award No. 33 of Public Law Board No. 3572 (Norfolk and Western v. UTU, Ref. Moore), Award No. 141 of Public Law Board No. 3510 (CSX v. UTU, Ref. Marx) and Award No. 2 of Public Law Board No. 5478 (BN v. UTU, Ref. Cluster), all requiring the carriers to select applicants for engine service training based upon their relative train service seniority.

The UTU further cites the November 19, 1998 BLE-UTU Agreed-Upon Statement of Principles to be Incorporated into a Unification Agreement and Constitution as evidence of a recognition that BLE has no agreement covering firemen or trainees. Paragraph 13 of that document reads as follows:

> Membership in existing General Committees of Adjustment of both organizations shall not change for a period of 12 months after unification date. Thereafter, General Committees of Adjustment holding jurisdiction over the labor agreement(s) the members are working under shall have the membership of said members transferred to them. GCAs holding agreements for engineers will at that time acquire jurisdiction over the former UTU agreements for firemen, hostlers, and trainees.

For these reasons, the UTU asks that the method for LET selection on this property proposed by the Carrier be adopted, except that Carrier should be required to bulletin LET availability and accept applications before force assigning post-1985 conductors and trainmen into LET in seniority order.

Position of the BLE: The BLE first argues that the instant dispute is not arbitrable under *New York Dock* Conditions. Although it recognizes the District Court has found this not to be a major dispute within the meaning of the Railway Labor Act ("RLA"), the BLE contends the dispute is not covered by or overridden by the order of the STB and the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§10101, *et seq*. Instead, the BLE characterizes the dispute as a labor-management relations problem, which the RLA obligates unions and employers to negotiate.

The BLE avers Section 2 First of the RLA obligates the parties "to make and maintain agreements concerning rates of pay, rules and working conditions," and that Section 2 Seventh prohibits changes in the status quo of the "rates of pay, rules or working conditions . . . as embodied in agreements" except as permitted in the agreements themselves or as provided by Section 6 of the RLA. That Section, notes the BLE, requires written notice of intended changes in agreements and the exhaustion of the bargaining and mediation procedures before any changes can be made.

According to the BLE, the dispute herein is a "major" dispute, as defined by the Supreme Court in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-04 (1989),

in that the Carrier and the UTU are seeking to abrogate Article 30 of the BLE Agreement and replace it with a totally different and unique provision. In describing the major dispute, the BLE insists the Carrier wishes to (1) alter the seniority standing of future locomotive engineers who come from sources other than the corresponding trainmen's roster on a particular seniority district, and (2) convert the trainmen/conductor roster into the engineers' roster, irrespective of whether a pre-1985 or post-1985 conductor takes promotion at the first available opportunity. In *United Transportation Union v. Cuyahoga Valley Ry.*, 979 F.2d 431 (6th Cir. 1992), the BLE says the Sixth Circuit noted that arbitral boards have no jurisdiction over major disputes under the RLA, and concluded:

> The second rule, which follows inexorably from the first, is that the question of arbitrability — whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance — is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

In this case, says the BLE, the Carrier is seeking to have a "future" effect upon the employees' working conditions, which includes seniority, through the elimination or change of an existing agreement provision or the creation of a new provision. The BLE likens this case to *Brotherhood of Locomotive Engineers and United Transportation Union v. Springfield Terminal Ry.*, 163 LRRM 2961 (1st Cir. 2000), wherein the First Circuit held:

> Major disputes, on the other hand, relate to carrier attempts to modify rates of pay, rules or working conditions in a fashion not even arguably covered by the collective bargaining agreement.

The BLE avers the Carrier realizes it may amend or modify Article 30 only by agreement with the BLE, and notes the Carrier admits it tried to do so. It asserts the Carrier is barred from serving a Section 6 notice because of a five-year moratorium. According to the BLE, the Carrier's invocation of *New York Dock* Conditions is an attempt to accomplish its purpose without having to serve a Section 6 notice. The BLE further contends the Carrier has never served the required notice under Article I, Section 4 of the *New York Dock* Conditions. It says the Carrier's first notice of its plan to proceed under *New York Dock* Conditions was served on January 18, 2000.

Referring to the Carrier's statements that it is not proposing to modify any agreement it has with the BLE, it questions why it would be a necessary party to this arbitration. Further, the BLE insists there could be no power conferred on the STB and its arbitral delegates to modify an RLA agreement to the extent necessary to permit the Carrier to carry out the STB-approved transaction. Since its Agreement is not being modified, the BLE says there cannot be any necessity or need for the Agreement's modification to carry out the STB-approved acquisition of Conrail or for the BLE to be forced to arbitrate its agreement under the *New York Dock* Conditions. Since the predicate for the use of *New York Dock* does not exist, argues the BLE, any dispute the Carrier has with it must necessarily be resolved through the RLA notice, negotiation and mediation procedures.

The BLE asserts it and the UTU have reached an agreement with the Carrier on all matters that would have been subject to arbitration under Section 4 of the *New York Dock* Conditions. It says the Carrier is estopped from attempting to reinvoke Section 4 for the instant similar purpose. Furthermore, says the BLE, the fact that the transaction was completed and went into effect

establishes that there is no necessity for an override of BLE's Article 30 in order to accomplish the financial transaction or any need to bypass the RLA's major dispute resolution procedures.

The BLE also denies this is a dispute that is arbitrable under Section 11 of the *New York Dock* Conditions in that it does not involve any "controversy with respect to the interpretation, application or enforcement" of any *New York Dock* provision. Rather, says the BLE, the dispute seeks to remove its promotion and seniority provisions from its collective bargaining agreement and replace them with another provision fashioned by the Carrier and the UTU. Even if the UTU and the Carrier were to argue the dispute requires an interpretation or application of the implementing agreements, the BLE continues to deny it would be arbitrable under Section 11, asserting the agreements, once in effect as to the rates of pay, rules and working conditions of the employees, become part of the collective bargaining agreement and may be changed only in accordance with the RLA.

The BLE concludes that the instant case presents a major dispute and should be handled as such. If it is found to be a minor dispute, it contends it is not arbitrable under either Section 4 or Section 11 of the *New York Dock* Conditions, but should be handled under the RLA. Accordingly, the BLE asks the Arbitrator to dismiss the invocation of the *New York Dock* proceedings and deny the claims for lack of subject matter jurisdiction.

Notwithstanding its position with respect to the Arbitrator's jurisdiction, the BLE argues that pre-1985 trainmen who establish an engineer's seniority date after January 1, 2000, should stand on the engineers' seniority roster ahead of post-1985 trainmen who attend the same or later locomotive

engineer training class. It requests, however, that both pre- and post-1985 trainmen stand behind anyone who is already on the engineers' seniority roster before they attend and complete a locomotive engineer training class.

The BLE insists that engineer seniority standing is inherent to the craft of locomotive engineers, for which it serves as the exclusive bargaining representative. Such seniority, says the BLE, is not disruptive of railroad operations even though it might be inconsistent with the standing of the same individuals in the entry level craft. Therefore, it contends, any modification is not necessary to the Carrier's attempt to coordinate the segments of rail involved in the Lake Region Hub Network. Further, because engineer seniority is controlled by neither the UTU nor its agreements, the BLE says the seniority standing of engineers must be based upon the time when they enter the engineers' craft. It submits that any portion of the UTU Agreement pertaining to engineers' working conditions and/or rules is void *ab initio*. The BLE cites Award No. 10 of Public Law Board No. 4975 (UTU-CSX, Harris, 1991), holding:

> . . .[T]his Board finds that the BLE has the exclusive right to determine the basis for acquiring seniority as an engineer. The UTU no more has power to modify engineer seniority than the BLE has to determine the seniority of an individual as a fireman.

The BLE submits that persons already listed on the engineers' seniority roster are qualified as engineers and have dutifully worked as such for months and years, if not decades. It contends the trainmen the Carrier and the UTU are attempting to reward in this case were aware of opportunities to enter engineer training, but failed to do so. It asserts such employees should not

be permitted to runaround experienced engineers and use their "superseniority" to take better assignments, bypassing the lower paying and more onerous jobs.

The BLE argues the Carrier has been unable to identify an approved transaction pursuant to which action will be taken that will affect its employees. It says the Carrier has never posted a notice or identified the manner in which the particular finance docket bears any relationship to its proposed action. The BLE submits it is obvious that the proposed action is not pursuant to authority granted in Finance Docket No. 33388. It contends the proposed symmetry to seniority standings in the employee crafts has nothing to do with the acquisition and control of Conrail, and there is no causal nexus between the basic transaction approved by the STB and the Carrier's proposal.

The BLE also denies the Carrier's proposal is necessary to carry out the transaction approved in Finance Docket No. 33388. It suggests the Carrier is seeking to disregard the implementing agreement it entered into with the BLE prior to the STB's decision, as well as the collective bargaining agreement placed into effect after the merger.

The BLE cites the Award of Special Board of Adjustment No. 1058 between the Southern Pacific Chicago St. Louis, the UTU and the BLE (Eischen, 1993), involving a dispute over the placement of trainmen on the engineers' seniority roster ahead of employees who had established engineer seniority one year earlier. In describing the scope rules and craft autonomy prescribed by law, the Board wrote:

> To the extent that §2(c) of the SPCSL/UTU Implementing Agreement addresses collective bargaining agreements to which SPCSL and UTU are partners, it is a perfectly valid and enforceable exercise of their legitimate bargaining authority. However, the negotiators of the SPCSL/UTU Implementing Agreement had no legitimate authority to amend or modify, let

> alone nullify, the plain and unambiguous language of BLE Rule 25(a) of the BLE Schedule Agreement or Paragraph H of the BLE Engineer Training Agreement of January 1987. It is simple black letter law that a negotiator representing UTU has no authority to negotiate with Carrier for changes in BLE collective bargaining agreements. That point is so obvious that it hardly requires argument.

The BLE additionally argues that the currently provided method for establishing an engineer's seniority date and relevant standing on the roster is the only appropriate method. Any other method would require an abrogation or modification of BLE Article 30, which it finds unacceptable. It questions the Carrier's purported neutrality on the issue of seniority, noting that the Carrier supports the UTU's proposal that would create numerous runaround situations that would lead to a lessening of employee morale and an increase in employee agitation. It says the Carrier's real concern is that it would prefer to use an automatic system to force train service employees to enter the locomotive engineer training program. It submits the current seniority lists and method for placement serve the same purpose of carrying over the trainmen's seniority standing into the engineer craft if the trainmen had to enter LET when their seniority first entitles them to do so. The sole purpose of this arbitration is met, reasons the BLE, if post-1985 trainmen are selected solely in seniority order in their zones, as proposed by the Carrier. The BLE concludes that if Question 4 is answered in the affirmative, most, but not all, of the runarounds would be eliminated, without resorting to the abrogation of Article 30.

Discussion:

> ***Issue No. 1*** *Are the issues referenced below referable to arbitration in accordance with the New York Dock Protective Conditions imposed pursuant to Surface Transportation Board Finance Docket No. 33388?*

Three jurisdictional issues have been raised by the parties. The BLE first asserts the Arbitrator is without jurisdiction because the underlying dispute is a major dispute and must be handled pursuant to Sections 5, 6 and 7 of the Railway Labor Act. This, however, is not the appropriate forum to raise such an argument in that the District Court has already determined, "The dispute between the BLE and the plaintiffs is not a major dispute." In the absence of a contrary decision by the Court of Appeals, this Arbitrator must respect that decision.

The second jurisdictional issue was avoided by the District Court when it held, "This Court expresses no opinion as to whether this dispute should be resolved under the *New York Dock* conditions, or as a minor dispute under the RLA, as such a determination is not necessary to this Court's decision." It is appropriate for this Arbitrator to make a determination as to whether this ~~dispute~~ arises pursuant to the *New York Dock* Conditions, as imposed in Finance Docket No. 33388.

A minor dispute under Section 3 of the Railway Labor Act has been defined by the Supreme Court in *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945) as follows:

> A minor dispute contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. (*ibid.* at 723)

Historically, however, employee protective conditions, whether agreed upon by the parties or imposed by the Surface Transportation Board or its predecessor, the Interstate Commerce Commission ("ICC"), have contained dispute resolution procedures, beginning with the Washington Job Protection Agreement of 1936. The *New York Dock* Conditions, like many others promulgated

by the STB or the ICC, contain provisions for the arbitration of disputes arising from the parties' inability to reach agreement with respect to the application of the terms and conditions of the *New York Dock* Conditions (Section 4) or with respect to the interpretation, application or enforcement of any provision of the *New York Dock* Conditions other than Sections 4 and 12.[4] While some disputes might arguably appear to be either RLA minor disputes or protective condition disputes, it is important that a distinction be made as to the appropriate forum. In addition to differences concerning the funding of the arbitration tribunal, the requisite elements of proof and the avenues of appeal are different.

The primary distinguishing characteristic of an arbitration under employee protective conditions is that it arises as a result of a transaction authorized by the STB. In this case, the initial transaction was the STB authorized acquisition and control of certain lines of Conrail. Agreements designed to effectuate and implement that transaction would be negotiated, and possibly arbitrated under Section 4 of the *New York Dock* Conditions. Disputes over the interpretation and application of those agreements would be arbitrated under Section 11. Unless the dispute is related to an STB authorized transaction, this Arbitrator would not have jurisdiction.

It is evident this dispute arose out of the creation of the Lake Region Hub Network, which was a product of the implementing agreements with both the UTU and the BLE in anticipation of the approval of the Conrail acquisition. It is because the seniority district is composed of thirteen

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[4]Section 12, dealing with losses from home removal, contains a separate dispute resolution procedure solely to determine the value of the home, the loss sustained in its sale, or other related questions. That Section is not relevant to this dispute.

zones that the Carrier found problems in the order in which trainmen will be called for LET. Without the establishment of the single seniority district in this manner, the Carrier would not have had a problem. The Arbitrator finds, therefore, that the dispute has as its origin the acquisition of Conrail lines. It is, therefore, appropriately brought under the aegis of the *New York Dock* Conditions.

The fact that the Carrier has already entered into implementing agreements with both the BLE and the UTU does not estop it from seeking additional provisions. The UTU's counsel characterized this dispute as an "omitted case." It is a matter that the parties could have addressed in their initial implementing agreements, but apparently did not have sufficient foresight to envision the problem that would develop. Absent any showing of bad faith, the Carrier should not be penalized for this oversight.

One remaining jurisdictional question remains; is this dispute brought under Section 4, Section 11 or both? The Arbitrator finds the Carrier's assertion that only Section 11 applies to be disingenuous. In all correspondence to the Unions, as well as the February 2, 2000, letter to the General Chairmen, with a copy to the National Mediation Board, wherein the Carrier requests the designation of a neutral referee, the Carrier cited both Sections 4 and 11 of the *New York Dock* Conditions. As it requested the establishment of this tribunal on the basis of Section 4, the Carrier cannot now be heard to argue that Section 4 is not applicable.

Section 11 addresses disputes with respect to the interpretation, application or enforcement of the provisions of the *New York Dock* Conditions. The Arbitrator does not find this dispute to fall

within that class. Instead, the dispute deals with the combination of seniority rosters necessitated by the acquisition of the Conrail lines. The parties are attempting to amend or modify the implementing agreement between the UTU and the Carrier. Thus, the Arbitrator finds his jurisdiction in this case lies in Section 4 of the *New York Dock* Conditions. Issue Number 1, therefore, is answered in the affirmative.

Both the UTU and the BLE have raised questions about the participation of the latter organization in this proceeding. The UTU contends entry to LET training and the granting of fireman seniority is exclusively within its purview. The BLE's concerns are broader, and go to the jurisdictional issues it has raised, stemming mostly from its assertion that the Carrier is attempting to abrogate or modify its Article 30. The Arbitrator rejects both arguments. First, the Arbitrator does not see Article 30 as being jeopardized by this proceeding. That Rule provides as follows:

> The seniority date of a promoted locomotive engineer shall be the date he successfully passes qualifying examinations and is issued a certificate of qualification as engineer, subject to his keeping the same relative standing as he holds on the fireman helpers' seniority roster.

Neither the Carrier nor the UTU has proposed any modification to the establishment of an engineer's seniority date as of the date he/she successfully passes the qualifying examinations and is issued a certificate of qualification. That has been, and will remain the sole determinant of when engineer seniority commences. Nor have the parties requested any change in the order in which engineers stand on the roster, irrespective of their seniority dates. Under Article 30, that standing is determined by the employee's standing on the firemen's seniority roster, and will remain that way. What the Carrier and the UTU are proposing are changes in the way trainmen are placed on the

firemen's seniority roster. However they are placed, though, it is that standing, in accordance with Article 30, that determines their relative standing on the engineers' roster. If the BLE objects to the use of fireman standing, however that may be determined, as a basis for standing on the engineers' roster, it must realize such an outcome is the result of its own Agreement. Subject to moratorium considerations, it is free to negotiate with the Carrier concerning any changes to Article 30 it desires.

While the UTU is correct in asserting the BLE may not negotiate with the Carrier over the issue of fireman seniority, the BLE and its members are certainly affected by any modification to fireman seniority to the extent it would have an impact upon the standing of engineers on their roster. Accordingly, the Arbitrator considers the engineers to be interested employees in this matter, and, pursuant to Section 4 of the *New York Dock* Conditions, would be entitled to representation in an arbitration proceeding. Thus, the BLE will be heard to have a voice in this arbitration, notwithstanding the fact they might not have been entitled to a seat at the bargaining table. The Arbitrator will consider the arguments of the BLE to the extent engineers would be affected by the proposed changes. For its part, the BLE has expressed no opinions in this arbitration in matters it has considered to be beyond the interests of its members.

Finally, the BLE has argued the Carrier has failed to serve the requisite notice under Section 4. The Arbitrator does not agree. This arbitration is merely an extension of the notice served by the Carrier, resulting in the creation of the Lake Region Hub Network. No additional notices would be required to invoke the arbitration provisions.

Issue No. 2 *Will employees with trainmen seniority prior to November 1, 1985, who establish engine service seniority on or after January 1, 2000, be given an engine service training rank and an engineer seniority rank in their relative order from the order of selection roster and rank ahead of employees whose trainmen seniority is after November 1, 1985 and who attend the same or subsequent LET classes?*

Issue No. 3 *If the answer to Question No. 2 is no, what method is appropriate?*

The dispute herein derives from the history of the relationship between the crafts of trainman, fireman and engineer; a relationship that began to be altered when Arbitration Board No. 282 reduced the number of fireman positions on railroads. The 1972 National Agreement between the UTU[5] and the National Railway Labor Conference ("NRLC") altered the fireman craft to the extent it became a training ground for locomotive engineers. A similar agreement was reached locally between the UTU and the Wabash Railway. Both agreements require firemen to accept training for and promotion to engineer positions according to their relative standing on the firemen's seniority roster in their respective seniority district. In the 1985 National Agreement, the UTU and the NRLC eliminated all fireman positions except to the extent necessary to provide a source of supply for engineers. This Agreement further established the trainman craft as the source of supply for firemen/engineer trainees. All trainmen hired after the effective date of that

[5]As an aside, it is noted that the United Transportation Union is the result of the merger of several organizations, including the Brotherhood of Locomotive Firemen and Enginemen (BLF&E), which generally represented the fireman class, the Order of Railroad Conductors and Brakemen (ORC&B), which generally represented the conductor class, and the Brotherhood of Railroad Trainmen (BRT), which generally represented the trainman class. This merger allowed a single organization to negotiate the flow from one craft to another.

Agreement, October 31, 1985, would be required to accept promotion to engine service. Article XIII, Section 4 (3) of the 1985 National Agreement provides:

> Trainmen who establish seniority on or after November 1, 1985 will be selected for engine service in accordance with Section 3 of this Article XIII. However, if a sufficient number of trainmen (including those promoted to conductor) do not make application for engine service to meet the carrier's needs such needs will be met by requiring trainmen (including promoted conductors) who establish seniority on or after November 1, 1985 to take engine service assignments or forfeit seniority in train service.

Section 4 (1), however, exempts employees with seniority dates prior to November 1, 1985, but retains for them the right to enter engine service. That provisions states:

> Trainmen who established seniority prior to November 1, 1985 will be governed by existing rules with respect to promotion to conductor/foreman and will not be required to accept promotion to engine service.

The Carrier and the UTU, to effectuate the 1985 National Agreement in the Lake Region Hub Network, desire to place all pre-1985 trainmen on the firemen's seniority roster with a fireman seniority date of December 31, 1999, and have them rank ahead of post-1985 trainmen who take the same or subsequent LET classes. The BLE's objection to this proposal is essentially that the pre-1985 employees would be able to remain in the trainman ranks for years before deciding to attend LET, and then runaround engineers who chose or were required to attend LET and then performed service as engineers.

The BLE's concern is certainly valid. There is nothing in the 1985 National Agreement, or any other agreement reviewed by the Arbitrator, that requires pre-1985 trainmen to take promotion to engine service in seniority order, or that entitles them to any special placement on the firemen's seniority roster. The 1985 Agreement simply gives them the right to take promotion, but only if they

elect to do so. Thus, the Carrier/UTU proposal would extend rights to these employees that they did not enjoy before. Such a right would, by necessity, be at the expense of other employees. A post-1985 employee, who took promotion when he was required to do so, and has diligently worked in the engineer class of service, should not be required to lose his seniority standing to an employee who had numerous opportunities for promotion, but passed them up.

The Carrier/UTU proposal would constitute a change in the existing agreement. This Arbitrator, while holding the authority to make, modify or abrogate agreements, may only exercise that authority when the proponents of the change demonstrate the change is necessary to the completion of the STB-approved transaction. See *American Train Dispatchers Association v. ICC*, 26 F.3d 1157 (D.C. Cir. 1994). In this case, the Arbitrator sees nothing in the proposed change that would yield a transportation benefit. The failure to grant this seniority standing to the pre-1985 employees would not impede or impair the acquisition of the Conrail trackage nor the consolidation of the seniority rosters. The only benefit arising from such a change would be to the pre-1985 trainmen. The Arbitrator, therefore, does not find the change to be appropriate or within his authority.

Apparently, though, all the parties agree that the pre-1985 trainmen should be allowed one opportunity to enter LET and obtain a December 31, 1999 fireman seniority date. After waiving that first opportunity, the employee would take whatever seniority date and standing he would be entitled to at the time he does elect to enter LET.

Accordingly, the Arbitrator answers Issue No. 2 in the negative, and answers Issue No. 3 by imposing the following provision:

> Employees with trainmen seniority prior to November 1, 1985 who establish engine service seniority on or after January 1, 2000 and who enter LET at their first opportunity in their zone, will be given an engine service seniority date of December 31, 1999 in their relative order from the order of selection roster and will rank ahead of employees whose trainmen seniority is after November 1, 1985 who attend the same or subsequent LET classes. Such employees who do not enter LET at the first opportunity in their zone will establish an engine service seniority date and rank on the date that they enter LET.

> ***Issue No. 4*** *May employees with trainmen seniority on or after November 1, 1985 request to enter locomotive engineer training on their zones or will such employees be selected solely in seniority order in their zones, fitness and other qualifications being equal?*

The Carrier has asserted it will achieve operating efficiencies by selecting trainmen for LET based upon the need for engineers in each of the thirteen geographic zones within the Lake Region. It wishes to avoid a situation where it has applicants for LET in areas where there is no need, while the needs in another area cannot be satisfied because there are no applicants. If the Carrier were required to treat the Lake Region as a single source of supply, it would be required to train other employees to be trainmen before it could reach employees where the need for engineers exists. Alternatively, it would be required to force employees to take engineer vacancies far from their homes because that is where the need exists. Neither the Carrier nor the UTU has any desire to require employees to relocate for engine service vacancies as long as there are promotable employees where the need exists. The Arbitrator finds that the achievement of such objectives would facilitate the STB-approved transaction by affording the Carrier with operating efficiencies,

while, at the same time, minimizing the adverse impact upon the employees as a consequence of the establishment of the Lake Region seniority district.

To the extent the UTU-represented employees currently enjoy a contractual right to make application for LET, the Arbitrator finds the public transportation benefits outweigh such rights, thereby permitting him to override any agreements to the contrary. The Carrier may establish order of selection lists for each zone within the Lake Region seniority district, placing employees on such lists in seniority order, giving former Conrail employees consideration for their service with that Carrier. It may then select employees for LET from such lists, based upon the needs of the Carrier within the respective zones. The Arbitrator understands there may be instances where an employee from another zone desires to voluntarily relocate for an engineer position. Such instances, however, may be resolved between the Carrier and the Organization on an *ad hoc* basis, with due consideration to the seniority rights of other employees.

Accordingly, the Arbitrator answers Issue No. 4 by imposing the following provisions:

> An order of selection roster indicating earliest trainmen seniority dates (including earliest CRC trainmen seniority dates) will be created by dovetailing all NKP trainmen (including Detroit (Wabash) and HMD (Wabash) Districts).
>
> Employees with seniority prior to November 1, 1985, may request promotion to locomotive engineer training in the zone where they are working at any time and will be selected for locomotive engineer training in seniority order within their zone, fitness and qualifications being equal, prior to forcing employees who established seniority on or after November 1, 1985.
>
> Employees who establish seniority on or after November 1, 1985, will be selected for locomotive engineer training in seniority order, fitness and other qualifications being equal, within each zone where the Carrier determines the immediate need for engineers.

If no employees are qualified to attend locomotive engineer training within a zone, the Carrier will select employees in seniority order from the zone nearest the zone where the need for engineers exists.

Barry E. Simon, Arbitrator

Dated: Sept. 9, 2000
Arlington Heights, Illinois

SURFACE TRANSPORTATION BOARD

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	)	
	)	
UNITED TRANSPORTATION UNION	)	
	)	
and	)	Pursuant to *New York Dock* Conditions
	)	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,	)	STB Finance Docket No. 33388
	)	
Unions,	)	Fireman Seniority/Locomotive Engineer Training
	)	
and	)	
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Carrier.	)	

INTERPRETATION

On September 9, 2000, the Arbitration Committee issued an Award resolving certain issues presented to it regarding the assignment of trainmen to the Locomotive Engineer Training (LET) Program, and their seniority as Firemen. That Award was rendered pursuant to Section 4 of the protective conditions imposed by the Surface Transportation Board pursuant to *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), *aff'd sub. nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) ("*New York Dock* Conditions") in *CSX Corporaton and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreement — Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388.

In its Award, the Arbitration Committee prescribed how the Carrier shall select trainmen for LET, based upon their seniority standing and their point of employment. A dispute has now arisen as to whether that means of selection was effective as of the date of the Award, or whether it was retroactive to January 1, 2000. Accordingly, the parties have requested an interpretation of the Award. By letter dated June 4, 2001, the Referee requested the Carrier and the General Chairmen of the United Transportation Union ("UTU") and the Brotherhood of Locomotive Engineers ("BLE") to submit their respective positions on this question.

Position of the UTU: The UTU argues the language of the Award demonstrates it was understood by all three parties that January 1, 2000, would be the effective date for the order selection list to be used with respect to LET. In particular, it refers to the handling of trainmen hired prior to November 1, 1985, and the assignment of a December 31, 1999, seniority date to such employees when they choose to enter LET. From this, the UTU concludes it was the Referee's intent to make the Award retroactive to January 1, 2000.

Position of the BLE: The BLE opposes any retroactive application of the Award, arguing it would create an injustice as it would have the effect of modifying the establishment of engineer's seniority dates for employees who have entered LET subsequent to January 1, 2000, and engineers who have established seniority in that class of service since that date. This, says the BLE, would allow some of the same people to be runaround by those who had opportunities for promotion

but passed them up. The BLE avers that the number of employees who might be so affected is significant.

Additionally, the BLE cites Article I, Section 4(b) of the *New York Dock* Conditions, reading as follows:

> (b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

The BLE contends retroactivity would effectively ignore this provision. It notes the Award was signed and dated on September 9, 2000. Absent any agreement that makes the Award retroactive, the BLE believes the Award should be effective as of the date it was signed.

Position of the Carrier: The Carrier argues the order of selection list was intended to be effective January 1, 2000, and thereafter. It believes this position is consistent with the record before the Arbitration Committee, the language of the Award, and the implementation of the Award by the Carrier and the UTU. It asserts that all of the proposed agreements offered by the Carrier in its negotiations with the BLE and the UTU prior to arbitration refer to January 1, 2000, as being the operant date. It avers this was understood by both unions during the negotiations.

The Carrier says it maintained its position, throughout the handling of the dispute, that the proposed changes relating to the dovetailed order of selection list must be effective January 1, 2000, so that the new promotional framework would be in place to consistently resolve the seniority issues facing the newly combined Norfolk Southern and Conrail workforce. These issues, according to the Carrier, became apparent in 1999 when the Carrier attempted to maintain a seniority based

application process that was skewed by former Conrail trainmen being bottomed on the trainmen's seniority roster. The concept of giving pre-1985 trainmen a fireman seniority date of December 31, 1999, says the Carrier, implies an effective date of January 1, 2000.

The Carrier cites the Award and its use of the phrase "on or after January 1, 2000," particularly in reference to the pre-1985 trainmen. For instance, the Carrier refers to the statement, on page 17 of the Award, in regard to the BLE's position "pre-1985 trainmen who establish an engineer's seniority date after January 1, 2000, should stand on the engineers' seniority roster ahead of post-1985 trainmen who attend the same or later locomotive engineer training class." This, argues the Carrier, is a clear recognition that the parties intended January 1, 2000, to be the effective date for the order of selection list.

The Carrier further notes it and the UTU had formulated agreed-to guidelines relating to implementation of the Award. The Carrier contends these guidelines recognized that the Award required implementation on January 1, 2000, and the UTU General Chairman had sent a letter to all NKP local chairmen advising that the guidelines were retroactive to January 1, 2000.

The Carrier concludes that it has implemented the Award in the appropriate manner, and in good faith. It asks, therefore, that it be affirmed that the Award, and the order of selection list, were meant to be effective January 1, 2000.

Discussion: During the argument before the Referee, the issue of the effective date was never raised. It is, nevertheless, appropriate for the Referee to interpret the Award, addressing this issue.

The BLE is correct in its argument that an Award is effective when it is rendered. This is not, however, an absolute rule. Nor does it preclude the Award from containing some effective date, either retroactive or prospective. To be sure, in its statement of position, the BLE states, "Absent any agreement that makes the Award retroactive, this Committee believes that the Award should be effective on the date it was signed." The Referee believes the UTU and the Carrier are empowered to make such an agreement, notwithstanding the failure of the BLE to concur.

As noted in the Award, the BLE was given standing in the arbitration proceeding to protect engineers who might be adversely affected by the decision. It was recognized by the Referee, however, that the BLE might not have had standing at the bargaining table as the parties were simply negotiating the process by which trainmen would be selected for LET, and how they would receive their seniority dates as firemen. Both of these issues were exclusively within the domain of the Carrier and the UTU. The fact that the fireman date might play a part in the employee's subsequent engineer's seniority date was merely the result of the BLE Agreement providing for such. That did not give the BLE the right to negotiate how fireman's dates are granted. Thus, the Referee finds it entirely appropriate for the UTU and the Carrier to agree upon an effective date of the Award.

The BLE's concerns were recognized by the Arbitration Committee when it was decided that pre-1985 trainmen would have only one opportunity to enter LET and obtain a December 31, 1999,

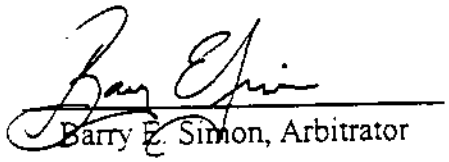
seniority date. That artificial seniority date was established as part of the Award. The Referee understood the BLE's concerns about allowing those pre-1985 trainmen to continue to delay their entry into LET and still get a retroactive seniority date while other employees "toiled in the fields." Whether the Award is retroactive or effective on the date it was issued, the Referee does not see the BLE's concerns that additional engineers would be runaround. The only employees who might runaround the working engineers are the pre-1985 trainmen, and they would have only one opportunity to do so. This was a point to which the BLE did not object during the presentation to the Arbitration Committee. Furthermore, based upon the representations of the various advocates, it was unlikely that many, if any, of the pre-1985 trainmen will take the opportunity to enter LET. It must be remembered that these are employees who have had fifteen years to exercise their rights, but have chosen not to do so.

Even if the UTU and the Carrier could not reach an agreement without the concurrence of the BLE, the nature of the dispute mandates a January 1, 2000, effective date. The arbitration occurred because the parties were negotiating an implementing agreement pursuant to the *New York Dock* Conditions. The Arbitration Committee was convened because the parties were unable to come to agreement on certain terms of the implementing agreement. The task of the Committee was to resolve those open issues. The Award, therefore, was the imposition of the entire implementing agreement, with the resolution of the open issues being made part of it. That Agreement, by its very terms, was to "govern the selection of trainmen for locomotive engineer training (LET) on or after January 1, 2000." The parties, being the UTU and the Carrier, never

expressed an intent to change the effective date once January 1, 2000, had come and gone without an agreement.

Finally, common sense dictates the effective date be January 1, 2000. The BLE apparently has no problem with the artificial December 31, 1999, seniority date for pre-1985 trainmen. It is evident the selection of such a date was to coincide with the effective date of the new selection procedures on January 1, 2000. The Award did not establish a seniority date for the pre-1985 trainmen based upon the day prior to its effective date. Had the Award done so, it might have reflected an intent to have a variable effective date. Instead, the Award provided for a date certain. That date, by its very nature, suggests a January 1, 2000, effective date.

In conclusion, the Referee finds, by three different theories of construction, that the effective date of the Award was intended to be January 1, 2000, in so far as the order of selection list to be used in the placement of engineer trainees and promoted engineers.



Barry E. Simon, Arbitrator

Dated: July 26, 2001
Arlington Heights, Illinois