

BEFORE THE
SURFACE TRANSPORTATION BOARD

304018

Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED, ET AL.
– CONTROL –
KANSAS CITY SOUTHERN, ET AL.

ENTERED
Office of Proceedings
February 28, 2022
Part of
Public Record**COMMENTS ON APPLICATION AND REQUESTS FOR CONDITIONS**

In accordance with 49 U.S.C. §11323 et seq., 49 C.F.R Part 1180, and Decision No. 11 in this proceeding, the Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (“Allied Rail Unions” or “ARU”)¹ submit these Comments and requests for conditions in response to the Application (“Application”) of Canadian Pacific Railway Ltd. and its subsidiaries/affiliates (collectively “CP”) and Kansas City Southern and its rail carrier subsidiaries/affiliates (collectively “KCS”) for Board approval of CP’s acquisition of control of KCS (“Transaction”).

1. The ARU do not support or oppose the proposed Transaction at this time, though the ARU are pleased to see that the Applicants project an increase in employment for the commonly controlled carriers-in contrast to the transactions in the 1980s and 1990s in which applicants projected and effected reductions in employment. Notwithstanding that, the ARU urge the Board

¹ There is no formal organization known as the “Allied Rail Unions”, rather that name has been adopted by these organizations for convenient collective reference in this proceeding; each organization is a separate participant in this proceeding

to impose certain conditions on any approval of the Application.

2. The Applicants have acknowledged that the employee protective conditions set forth in *New York Dock Railway—Control—Brooklyn Eastern District (Terminal)*, 360 I.C.C. 60 (1979) (“*New York Dock*”), will apply to any approval of their Application. Application Vol. 1 at 18/27; Verified Statement of Myron Becker Application Vol. 2 at 13-14/253-254. If the Board approves the Application, such approval must be conditioned on the *New York Dock* conditions (49 U.S.C. §11326).

3. Applicants have committed that they will abide by the agreement between the Rail Unions and most major carriers, including the ARU unions and CP and KCS, titled “Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act”, colloquially referred to as the “Cramdown Agreement”. Application. Application Vol. 1 at 18/27; Verified Statement of Myron Becker Application Vol. 2 at 13-14/253-254. A copy of that agreement is attached to these comments. A major feature of the Cramdown Agreement is that when work subject to a consolidation or coordination (as defined in the Cramdown Agreement) is covered by two or more collective bargaining agreements, the union or unions that represent the affected employees may choose from among the collective bargaining agreements which will apply to the consolidation or coordination; and that if a union fails to choose within the time frame for negotiations under the *New York Dock* conditions, a *New York Dock* arbitrator will make the choice based on their determination as to which agreement is most beneficial for the involved employees. Cramdown Agreement at 4-5.

As the colloquial name implies, the Cramdown Agreement was entered by the signatory

unions and carriers (including the ARU unions and CP and KCS) in 2001 in response to years of litigation before this agency, its predecessor, and the courts over efforts by carriers participating in Section 11323 transactions to use the Act and the *New York Dock* conditions (and similar conditions) to change the terms of collective bargaining agreements outside the procedures of the Railway Labor Act (e.g. *Norfolk & Western Ry v American Trains Dispatchers Ass'n*, 49 U.S. 117, 133 (1991); *American Train Dispatchers Ass'n v. ICC*, 26 F 3d 1157, 1164-65 (D.C. Cir. 1994); *United Transp. Union v. STB*, 108 F. 3d 1425, 1430-31 (D.C. Cir. 1997). Since Applicants have expressly committed to abide by their commitments under the Cramdown Agreement in the “Effect on Employees” section of their Application in accordance with 49 C.F.R. 1180.6(a)(2)(v), in order to obtain approval of the Application, the Board should impose compliance with the Cramdown Agreement as a condition of any approval of the Transaction.

4. In accordance with practice, especially recent practice, the ARU also urge the Board to incorporate as conditions on any approval of the Transaction, any and all commitments made by the Applicants in seeking Board approval of the Transaction.

5. The ARU take no position on any of the potential responsive applications that have been described to date, and will address any that are actually offered once we have had a chance to review them. But for any responsive application that would constitute a “major transaction” as defined in the Cramdown Agreement the ARU will expect applicants to commit to adherence to that agreement and will ask the Board to impose that agreement as a condition on approval of any such transaction.

Respectfully submitted,

/s/ Richard S. Edelman

Richard S. Edelman
Aaron S. Edelman
Mooney, Green, Saindon, Murphy & Welch, P.C.
1920 L Street NW, Suite 400
Washington, DC 20036
(202) 783-0010
Redelman@MooneyGreen.com
Aedelman@MooneyGreen.com

February 28, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served copies of the foregoing Allied Rail Unions' Comments and Requests for Conditions by First Class Mail to the offices all Parties of Record in this Finance Docket.

Date: February 28, 2022

/s/Richard S. Edelman

Richard S. Edelman

COPY

Revised Standards for Preemption of Collective Bargaining Agreements for Transactions Initiated Pursuant to Section 11323 of the Interstate Commerce Act

This Agreement made March 21, 2001 by and between the labor organizations listed in Attachment A hereto, and the Class I Carriers listed in Attachment B hereto, is intended to set forth standards to be applied by such Carriers and the involved Labor Organizations when the Carriers seek to override or modify Collective Bargaining Agreements in the implementation of consolidations, mergers, and acquisitions of control ("Major Transactions") pursuant to Section 11323 of the Interstate Commerce Act. The term "Major Transaction" as used in this Agreement and for the purposes herein only will also include a lease, grant of trackage rights and/or contract to operate by one or more Class I Carrier(s) of all or substantially all of its/their track and/or operations to another carrier or non-carrier in one or more transactions. This Agreement does not apply when a Carrier is not seeking to override or modify Collective Bargaining Agreements in such circumstances.

The term "Organization" when used in this Agreement shall include any signatory organizations whose members are involved in a transaction covered by this Agreement.

The term "Carrier" when used in this Agreement shall include any signatory carrier involved in a transaction covered by this Agreement.

Conditions

1. The procedures set forth herein will be prescribed by statute and not as a condition imposed and administered by the Surface Transportation Board, or any successor agency. The terms of this Agreement will become null and void when enacted into law. However, pending enactment of such statutory language, the Class I railroads signatory to this Agreement agree to be bound by its terms and conditions as they relate to any notices served pursuant to either protective conditions voluntarily reached by the parties or imposed by the Surface Transportation Board in the approval of a "Major Transaction" where the applicant Carriers are seeking to override or modify an existing collective bargaining agreement.

2. The terms of this Agreement when enacted in statutory form will not be subject to the current exemption provision in the Interstate Commerce Act, 49 U.S.C. Section 11321(a), or any future exemption provisions, and the parties will agree on appropriate statutory language to that effect. Until enactment of such statutory language, the Class I carriers signatory to this Agreement agree that they will not assert such exemption authority.
3. Except as provided in paragraph 4 below, the procedures set forth in this Agreement will apply to any notice for an implementing agreement by any carrier party that seeks to override or modify collective bargaining agreements, whether under existing merger, control or acquisition authority or any such authority sought or granted in the future by the STB or any successor agency.
4. The procedures set forth herein do not apply to any implementing agreements established prior to the date of this Agreement as a consequence of voluntary negotiations or arbitration pursuant to protective conditions imposed by the ICC or STB. Such implementing agreements will be conclusive and continue in effect as to all issues resolved, including provisions for procedures to be used in subsequent consolidations, coordinations or transfers of work and/or employees. Such provisions, however, shall not be used to change any collective bargaining agreement unless specifically provided therein. A list of implementing agreements containing provisions that provide for changes in collective bargaining agreements is attached as Addendum A. If an implementing agreement is, by oversight, not listed in Addendum A, it will subsequently be added to the list, although the carrier has the burden of showing that such addition is appropriate.
5. This Agreement only addresses the current authority of the STB to override or modify collective bargaining agreements in implementing issues for major transactions. This Agreement is not intended to alter or change the substantive provisions of existing protective benefit agreements or in any way address or restrict the authority of the STB to impose protective benefits in major transactions.

6. The provisions of this Agreement shall not deprive a Carrier of any right to take any action allowed under any applicable existing or future collective bargaining agreements, nor shall the Organization be deprived of asserting that no such right exists, all subject to any dispute resolution mechanisms provided in such agreements or under the Railway Labor Act itself.
7. This Agreement will not bar the parties, by mutual agreement, from addressing any matter contained in this Agreement in an alternative manner.
8. The parties to the Agreement agree to actively support "clean" legislation re-authorizing the Surface Transportation Board while opposing provisions or amendments which would change adversely the regulatory structure applicable to the railroads, provided that such legislation includes provisions adopting this Agreement.
9. It is understood that this Agreement does not address proposals pending before the Surface Transportation Board regarding employee relocation and severance pay.

Consolidation or Coordination

1. A consolidation or coordination is an operational change necessary to unify, consolidate, merge or pool, in whole or in part the facilities or any of the operations or services previously performed by two or more rail Carriers (or former rail carriers) through such separate facilities. A consolidation or coordination under this Agreement or the Washington Job Protection Agreement of 1936 does not include changes such as the imposition of a system-wide collective bargaining agreement and/or the creation of system-wide gangs not otherwise permissible under current collective bargaining agreements.

A modification to seniority district size shall not cause employees who were in service on the effective date of the "consolidation" or "coordination" to lose their seniority date on any territory where they

previously held seniority and they shall be permitted to exercise such seniority. Moreover, employees cannot be forced to a new location until they exhaust all seniority at their home location. Nothing in this Agreement shall be deemed to change the obligations of an employee to exercise seniority for purposes of protective benefits.

If a carrier proposes a consolidation or coordination of seniority districts, the carrier(s) must prove that its proposal is operationally justifiable and will provide a demonstrable public transportation benefit in the context of the demonstrable impact that change would have upon employees affected by the consolidation or coordination. Should the arbitrator determine that the change in seniority district size is operationally justifiable, yet will cause harm to the employees not otherwise remedied by application of the imposed protective conditions, the arbitrator has jurisdiction to fashion terms and conditions to ameliorate the harm. Such terms and conditions shall not change in any way the labor protective conditions applicable to the transaction involved. The decision of the arbitrator shall be final and binding upon the parties, provided, however, that the award shall not require the carrier to implement the proposed transaction but shall be accepted by the parties as the terms and conditions which shall be met by the carrier if and when such transaction is implemented.

The definitions of "consolidation" and "coordination" are intended to apply only to the operational changes contemplated by this Agreement and are not intended to change the definition of "coordination" or "consolidation" in the Washington Job Protection Agreement of 1936 or any other protective arrangement or agreement between the parties signatory to this Agreement.

2. Where the work subject to a Consolidation or Coordination is covered by two or more collective bargaining agreements, the Organization(s) may choose (from among those two or more agreements) which collective bargaining agreement will apply to the Consolidation or Coordination. If the union fails to select a single collective bargaining agreement within the time frame for negotiations contained in the New York Dock conditions, the single agreement to apply shall be determined by the

arbitrator. In making such determination, the arbitrator shall choose the agreement most beneficial to the employees involved as to rates of pay, rules and working conditions, including crew consist agreements. The Carrier(s) shall be permitted to attend the arbitration in order to answer questions presented by the arbitrator; however the Carrier(s) shall not have the status of a party to the proceeding and will not be permitted to file a written submission or present argument to the arbitrator.

3. In situations where the collective bargaining agreements chosen by two or more Organizations contain inconsistent provisions that would create inefficiencies in the operation which did not exist previously, the Organizations involved shall meet and confer in good faith to resolve the inconsistencies. For the purposes of this paragraph, an "inefficiency" shall not include an arrangement between Organizations providing for a single representative, including multiple Organizations, under a single collective bargaining agreement. If the involved Organizations fail to resolve the inconsistencies within the time frame for negotiations contained in the New York Dock conditions, the arbitrator shall resolve such inconsistencies by choosing the agreement provision(s) most beneficial to the employees involved as to rates of pay, rules and working conditions, including crew consist agreements.
4. For purposes of determining compensation protection, an Organization's selection of a collective bargaining agreement with lower wage rates shall not be treated as a decision by affected employees to "voluntarily" place themselves in a worse position regarding their compensation.
5. The collective bargaining agreement selected by the Organization(s) or arbitrator may only be modified to the extent that the selected agreement does not permit employees subject to it to perform work throughout the "consolidated" or "coordinated" territory.
6. Provisions relating to the integration of seniority rosters involved in the "consolidation" or "coordination" shall be by agreement between the involved Carrier(s) and Organization(s) with disputes to be resolved by the arbitrator. The Carrier(s) will give deference to an integration plan

devised by the Organization(s) so long as (1) it will not be a violation of law or present undue legal exposure; (2) it would not be administratively burdensome, impractical or costly; and (3) it would not create an impediment to carrying out the "consolidation" or "coordination." If the Carrier(s) do not accept an integration plan devised by the Organization(s) on one of the grounds listed above, the Carrier(s) must establish its/their objection in arbitration by clear and convincing evidence. Train Service Rosters and Engine Service Rosters shall not be consolidated with each other.

Transfer of Work

1. A "transfer of work" is defined as an operational change where work, positions and/or employees are transferred from one location to another location more than 30 miles away (including, but not limited to the transfer of the inspection and/or repair of rolling stock and maintenance of way work equipment between shop facilities where such work is performed) in a manner not otherwise permitted under existing collective bargaining agreements.
2. In the case of a "transfer of work" as set forth above, the collective bargaining agreement applicable at the location to which the work, positions, and/or employees are to be transferred will apply to the transferred work, positions, and/or employees.
3. Provisions relating to the integration of seniority rosters involved in the "transfer of work" shall be by agreement between the involved Carrier(s) and Organization(s) with disputes to be resolved by the arbitrator. The Carrier(s) will give deference to an integration plan devised by the Organization(s) so long as (1) it will not be a violation of law or present undue legal exposure; (2) it would not be administratively burdensome, impractical or costly; and (3) it would not create an impediment to carrying out the "transfer of work." If the Carrier(s) do not accept an integration plan devised by the Organization(s) on one of the grounds listed above, the Carrier(s) must establish its/their objection in arbitration

by clear and convincing evidence. Train Service Rosters and Engine Service Rosters shall not be consolidated with each other.

System Wide Issues

The Parties recognize that terms of collective bargaining agreements applicable to a portion of a Carrier's system may give rise to operating incompatibilities or may be inconsistent with the establishment of uniform system-wide administrative procedures. Accordingly, where collective bargaining agreements interfere with the Carriers' right to take the following actions, those agreements may be changed by the Carrier in the following limited circumstances as part of the implementing agreement process pursuant to Article I, Section 4 of the New York Dock Conditions (or counterpart provisions contained in other statutory-based labor protective conditions that may be applicable to a Major Transaction):

1. To ensure a uniform payroll system, including uniform system-wide practices regarding dates for the payment of wages. A Carrier shall have one opportunity (per Major Transaction) to exercise this right. The changes to be implemented pursuant to this paragraph must be based upon provisions contained in a collective bargaining agreement applicable to employees on a portion of such Carrier's system.
2. To provide for uniform crew calling practices for operating craft employees with respect to the following;
 - a. standard call time (no change to standard call rules for interdivisional service);
 - b. standard procedures for displacements (notice and period for exercise);
 - c. standard pool adjustment rule (frequency);
 - d. standard bid periods for vacancies;

- e. standard mark off/mark up times for rest days, personal leave, vacation, etc.;
- f. method of communication.

The changes to be implemented pursuant to this paragraph must be based upon provisions contained in a collective bargaining agreement applicable to employees on a portion of such Carrier's system. In the case of item "f" above, if there is an existing rule on the Carrier's system providing for use of an alternate number(s) to contact an employee where such number(s) is provided by the employee, such rule shall be incorporated in the provision(s) selected by the Carrier.

- 3. To allow cars, locomotives and other equipment to be repaired, maintained and/or utilized throughout the combined system.

Dispute Procedures

All disputes are to be resolved in accordance with Article I, Section 4 of the New York Dock conditions (or counterpart provisions contained in other statutory-based labor protective conditions that may be applicable to a Major Transaction).

Review Procedures

Prior to adoption of this Agreement by an Act of Congress, the signatory parties will jointly petition the Surface Transportation Board to enact a regulation providing that the award of an arbitrator under this Agreement shall be treated as a final decision of the Board. Thereafter, the award of an arbitrator under this Agreement shall be subject to review by the United States Court of Appeals for the District of Columbia under statutory provisions and standards applicable to review of agency adjudications.

Enforcement

The Agreement is enforceable in any United States District Court in whose jurisdiction the involved Carrier operates.

ATTACHMENT A

Edward Isbranski

Brotherhood of Locomotive
Engineers

M. A. Fleming / DFG

Brotherhood of Maintenance
Of Way Employees

Harold Mader

Brotherhood of Railroad
Signalmen

Robert Roach, Jr.

International Association of
Machinists

Don Buchanan

Sheet Metal Workers Interna-
tional Association

Robert Scandellotti ^{mk}

Transportation Communications
International Union

Richard Johnson ^{mk}

Carmen Division of Transpor-
tation Communications Inter-
national Union

Sammy Hall (SEU)

Transport Workers Union of
America

Don L. Davis

International Brotherhood of
Electrical Workers

George J. Conner Jr.

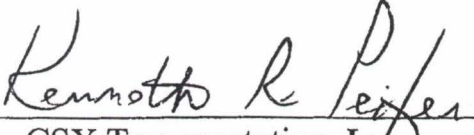
National Conference of Firemen
and Oilers, SEIU

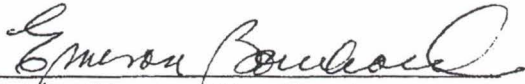
Joseph P. Stinger

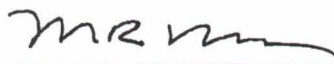
International Brotherhood of
Boilermakers and Blacksmiths

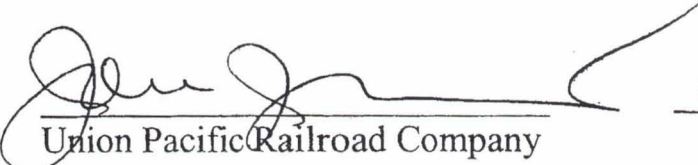
ATTACHMENT B


The Burlington Northern and
Santa Fe Railway Company


CSX Transportation, Inc.


The Kansas City Southern
Railway Company


Norfolk Southern Railway Company


Union Pacific Railroad Company


Canadian Pacific Railway

ADDENDUM A

[List of implementing agreements containing provisions that provide for changes in Collective Bargaining Agreements.] - To be added.