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November 17, 2000

By Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of the Secretary

NOV 17 2000

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Public Record

Re: Major Rail Consolidation Procedures, STB Ex Parte No.582 (Sub-No. 1)

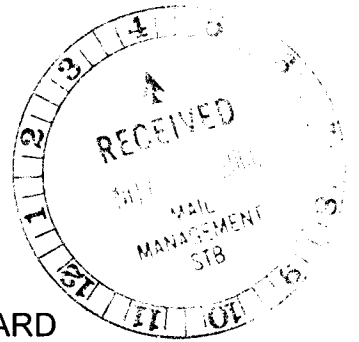
Dear Mr. Williams:

Enclosed for filing in the referenced docket are the original and 25 hard copies of the Comments of the National Railway Conference, as well as a copy of the comments in WordPerfect 7/8/9 format on a 3.5 inch IBM-compatible floppy diskette.

Very truly yours,

Eugenia Langan
Eugenia Langan

cc: All parties of record



BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

ENTERED
Office of the Secretary

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November 17, 2000

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COMMENTS OF THE NATIONAL RAILWAY LABOR CONFERENCE

The National Railway Labor Conference ("NRLC") submits these comments in response to the Board's Notice of Proposed Rulemaking ("NPR") served October 3, 2000. The NRLC is an unincorporated association of 54 member railroads, including all the nation's Class I railroads. The NRLC submits these comments on behalf of its member railroads^{1/} and the National Carriers' Conference Committee ("NCCC"), which represents railroads in national multi-employer collective bargaining.

These comments address proposed § 1180.1(e) ("Labor Protection") in the NPR, and, in particular, the third sentence in the proposed regulations and the last paragraph of commentary on page 17 of the NPR (STB web site slip op.)

I. PROPOSED § 1180.1(e)

The third sentence of proposed § 1180.1(e) would state that

"the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction."

Section 11321(a) of the Interstate Commerce Act provides that a carrier "is exempt from the antitrust laws and from all other law . . . as necessary to let [the carrier] carry out" an approved transaction. 49 U.S.C. § 11321(a). Congress can change that; the Board has no power to modify the statutory necessity standard or to create presumptions against its application. We urge the Board either to delete the third sentence from the proposed regulation entirely, leaving it to the statute to state the applicable standard, or, if the Board decides to set forth the standard in the regulation,

^{1/} Except Canadian National Railway and its U.S. affiliates.

to do so in the even-handed words of the statute itself: that collective bargaining agreements ("CBAs") are not affected by the approval of a merger except "as necessary . . . to carry out" the authorized transaction. The third sentence of the proposed regulation (1) reflects an unfortunate choice of words that could serve only to confuse and mislead arbitrators and others in the future application of the Board's settled standards; and (2) is at odds with the purpose of the proposed new "Consolidation Procedures" generally, to "ensure balanced and sustainable competition in the railroad industry" and improved railroad service through consolidations that yield "substantial and demonstrable public benefits that cannot otherwise be achieved." (Proposed § 1180.1).

A. Potential for Misleading Arbitrators and Parties

The Interstate Commerce Act gives the Board the power to approve mergers and consolidations that are in the public interest. 49 U.S.C. § 11323. The proposed new "Consolidation Procedures" set forth standards for a Board determination in that regard, and specify the information the Board will require to make such a determination. Whatever the merits of the proposed new regulations generally (which we do not address in these comments), and whatever form they finally take, the Board will, in the future, as in the past, approve only those transactions that it has determined to be in the public interest by virtue of the public benefits they will yield.

Under the statute, when the Board makes such a determination, *i.e.*, when it determines that a proposed consolidation *is* in the public interest and therefore approves or exempts the transaction:

"A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation or person carry out the transaction" 49 U.S.C. § 11321(a).

The Supreme Court has held that this self-executing statute means exactly what it says. *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128 (1991).

Otherwise, carriers would be relegated to the "almost-interminable" procedures of the Railway Labor Act to attempt to secure changes necessary to implement authorized transactions, with the threat of strikes at the end of the process. *Id.* at 133. Moreover, *New York Dock* protections, mandated by § 11326(a) of the Act, embody a fundamental trade-off: employees receive uniquely generous protective benefits, and carriers are entitled to implement approved transactions notwithstanding CBA provisions that may stand in the way.

Congress has repeatedly recodified the statutory predecessors of §§ 11321(a) and 11326(a) without making any substantive changes in those provisions except to increase the extraordinarily generous labor protection provided for rail employees. The most recent recodification came in the ICC Termination Act of 1995, after the Supreme Court's *Dispatchers* decision. In considering the Termination Act, Congress was well aware of the *Dispatchers* decision and the ICC's longstanding policy and practices with respect to CBA modifications in mergers and consolidations.^{2/} Congress enacted a

^{2/} See 141 Cong. Rec. S 19076 (Dec. 21, 1995) (remarks of Senator Wellstone); *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings before the Subcommittee on Railroads, House of Representatives*, 103d Cong., 2d Sess. at 148 (Jul. 12, 1994) (prepared statement of Edward Wytkind, Transportation (continued...)

provision prohibiting modifications of CBAs in certain small railroad consolidations, 49 U.S.C. § 11324(e), but enacted no such provision with respect to consolidations involving Class I carriers, and re-enacted §§ 11341(a) and 11347 as §§ 11321(a) and 11326(a) without substantive change. When Congress is aware of the "interpretation placed on a statute by an agency charged with its administration" and reenacts the statute "without pertinent change," that is "persuasive evidence that the [agency's] interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).^{3/}

When, as in this case, Congress has ratified an agency's interpretation of a statute, the agency is "not now free" to "read a new and more restrictive meaning into the Act." *Bell*, 416 U.S. at 289 (internal punctuation omitted). But the statement in the proposed regulation that the Board looks with "disfavor" – indeed "extreme disfavor" – on so-called "overrides" of CBAs, except in the "limited circumstances" – indeed "very limited circumstances" – necessary to carry out transactions could be misconstrued by arbitrators as changing the existing necessity standard (which is statutory) or the settled understanding that override of CBAs is needed in certain respects in virtually all consolidations. The proposed regulation cannot be intended to change the statutory standard (for only Congress could do that). Presumably the regulation is not intended to repudiate the Board's settled past precedent recognizing that CBAs may be modified

^{2/} (...continued)
Trades Department, AFL-CIO).

^{3/} Accord *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951) ("it is a fair assumption that by reenacting a statute without pertinent modification . . . Congress accepted the construction placed thereon by the Board").

as necessary to realize the public transportation benefits of approved mergers. The regulation should not be phrased in ways that may be misconstrued to cast doubt on the current and necessary rule under the statute, recognized in the UTU-NRLC agreement: that when duplicative operations are integrated to realize public transportation benefits of a merger, rules such as seniority, scope and work jurisdiction rules that would preclude integration must be modified; and because two different CBAs cannot apply to the same operations or the same employees, when operations are integrated or transferred, the choice of the applicable CBA must somehow be made, by somebody. The regulation would better serve its purpose, and the general purpose of the proposed new merger procedures, by omitting the third sentence and, if any substitution is made, including the language of § 11321(a) itself.

While CBA adjustments are necessary in virtually all mergers and consolidations, employee rights are preserved to a far greater extent than the unions have indicated. Even the situation where a single agreement is selected for a craft in a consolidated work-force involves only the selection of one local agreement rather than another, generally similar, local agreement; many employee rights are conferred by national rather than local agreements in any event; and employees are protected against reduction of their income and benefits for up to six years under *New York Dock*.

The Board should not adopt any rule that could confuse arbitrators and parties. The third sentence of proposed § 1180.1(e) should be deleted, but if not, it should be rephrased in the terms of the statutory standard itself.

B. Potential Conflict with the Proposed New "Consolidation Procedures"

The Board states in its proposed General Policy Statement (proposed § 1180.1) that it "seeks to ensure balanced and sustainable competition in the railroad industry" and that, among other things, it does not favor consolidations "that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved" – "improved service, enhanced competition, and greater economic efficiency" – advancing "our nation's economic growth and competitiveness through provision of more efficient and responsive transportation." (Proposed § 1180.1(a).) The Board therefore proposes to require merger applications to "include provisions for enhanced competition." (Proposed § 1180.1(c).)

This general approach would call on carriers proposing a consolidation to focus on developing arrangements to enhance competition and improve service to the public. But enhancing competition and improving service to the public will require operational changes. The third sentence of proposed § 1180.1(e) marches off in the opposite direction, for it may be interpreted to discourage the changes needed to accomplish these objectives. Those changes will necessarily give rise to issues as to the selection and assignment of forces, such as adjustment of seniority, scope and work jurisdiction rules, and the assignment of employees in a consolidated operation to work under a single CBA. The Board should not adopt any regulation suggesting that such CBA modifications will not be approved when they are necessary to realize the public transportation benefits of mergers, contrary to the goals of the Board's proposed Consolidation Procedures.

C. Negotiations with Unions

The commentary on proposed § 1180.1(e) on page 17 of the NPR expresses approval of the industry's agreement with the UTU regarding these matters and asks that the Board be advised about the progress of negotiations with other unions. While the other unions have suspended their participation in such negotiations, we hope the negotiations will be restarted and that consensus can be reached based on the UTU-NRLC agreement. The railroads will keep the Board advised. We must say, however, that it does not help negotiations very much for the Board to suggest that it views "overrides" with "extreme disfavor" and that it believes that such "overrides" are justified to only a "very limited extent," in the absence of any explanation that adjustments of the kind outlined above are necessary in virtually all consolidations.^{4/}

II. OTHER PROPOSALS

The Board says on page 17 of the NPR that

"[W]e have proposals before us, which we are seriously considering, for new rules to govern contentious issues, such as the need for employees to relocate in order to retain their jobs."

^{4/} We note that the fourth sentence of proposed § 1180.1(e) states that the Board would "review negotiated agreements to assure fair and equitable treatment of all affected employees." The same language appears in existing 49 C.F.R. § 1180.1(f), which proposed § 1180.1(e) would replace, and in that context clearly means only that the Board reviews negotiated labor protection arrangements, as the Supreme Court has held the Board is required to do. *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971). The placement of this language in the NPR, however, makes it susceptible to the reading that the Board is now proposing to review voluntarily negotiated implementing agreements, something the Board has never done and no one has asked it to do. We assume that the Board did not intend to make such a suggestion, which would serve only to frustrate the Board's goal of encouraging voluntary agreements.

Apart from the references to the relocation of employees, the NPR does not specify what proposals the Board may be "seriously considering." We assume, however, that if the Board decides to propose additional rules, it will do so by further Notice of Proposed Rulemaking in accordance with the Administrative Procedure Act. 5 U.S.C. § 553. Therefore we will not attempt to guess at this time what the Board may be "seriously considering" and comment on it here.

The Board likewise has not proposed any rule regarding relocation of employees, and therefore we will not speculate as to what rule the Board might propose in an appropriate proceeding under the Administrative Procedure Act. We note, though, that the proposal that was made to the Board regarding relocation, by the Rail Labor Division ("RLD") of the AFL-CIO and its allies, would require *New York Dock* to be amended to define as a "dismissed" employee anyone whose position is transferred more than 30 miles from its original location due to a consolidation. RLD Comments on Advance Notice of Proposed Rulemaking ("ANPR") at 29. That would permit employees to stay home and draw dismissal allowances instead of following their work where they are needed. The RLD proposal is at odds with the objectives of the proposed new Consolidation Procedures, just as the third sentence of proposed new § 1180.1(e) is, and for the same reasons.^{5/}

In addition, the RLD relocation proposal would make a change in *New York Dock* that has no justification whatever under § 11326(a). In the Washington Job Protection

^{5/} "[S]uch an expansion of employee protection would unduly restrict [a] carrier's ability to establish economical operations and use its employees productively." *Rio Grande Industries – Control – Southern Pacific Transp. Co., et al.*, 4 I.C.C.2d 834, 953-54 (1988).

Agreement of 1936 ("WJPA"), the unions agreed that employees could be "required" to relocate in consolidations. WJPA § 10(a). When Congress first required labor protection in mergers, it intended "a plan which would embody the basic principles of the" WJPA. *Southern Ry. – Control – Central of Georgia Ry.*, 331 I.C.C., 151, 158 (1967). Section 5(2)(f), the first statutory predecessor of § 11326(a), was essentially a "codification" of the WJPA's principles, which had previously been adopted in labor protections imposed on mergers by the ICC as a matter of discretion. *Maintenance Employees v. United States*, 366 U.S. 169, 173-74 (1961); see *United States v. Lowden*, 308 U.S. 225, 233-35 (1939); *Southern Ry.*, 331 I.C.C. at 159. All standard labor protective conditions imposed by the ICC and this Board, including *New York Dock*, have recognized that employees may be "required" to relocate. See *New York Dock*, Art. I § 9 (1979). In all recodifications of the predecessors of § 11326(a), Congress has never cast doubt on this long-held understanding.

In the recent CSX/NS/Conrail transaction, the Board rejected the claim that employees should have the option of receiving labor protection for doing no work rather than relocating to follow their work when it is transferred. *CSX Corp. – Control & Operating Leases/Agreements – Conrail, Inc.*, STB Finance Docket No. 33338 at 127-28 (served Jul. 20, 1988)("CSX/NS/Conrail"). As the Board concluded:

"A basic part of the bargain embodied in the Washington Job Protection Agreement upon which the *New York Dock* conditions are based is that rail carriers are permitted to move employees around in order to achieve the benefits of a merger transaction in return for up to 6 years of income protection and various other benefits, such as retraining and moving allowances. Such displacements do result in hardships for employees whenever they are required to move their place of residence, whether the move is a relatively short one or a

longer one. In either case, however, *New York Dock* compensates the employee for the cost of the move and provides for up to 6 years of income protection. Labor's proposal would alter the *New York Dock* conditions to provide that monetary allowances are paid to employees who are offered continued employment, but refuse to take advantage of it, a result not envisioned under the *New York Dock* conditions" *Id.*

This is only one of a series of cases in which the Board and the ICC have concluded that the *New York Dock* conditions impose an obligation upon employees to accept relocation as a predicate to eligibility for protective benefits.^{6/}

RLD has claimed that this basic bargain is no longer valid because future consolidations of Class I railroads will be transcontinental, requiring some employees to move greater distances than in past mergers. RLD claims that these moves will unduly disrupt the personal lives of the employees and their families, and that many employees will be forced to resign and forfeit their seniority rather than suffer these consequences. According to RLD, employee effects of this magnitude were never contemplated by *New York Dock*. See NPR at 179.

That is simply untrue. As long ago as 1939, the Supreme Court recognized that rail consolidations "necessarily" require "wholesale" transfers of employees, with "harsh consequences" for them, in a case that involved a more than 1,000-mile transfer of employees from Fort Worth, Texas to Chicago, Illinois. *United States v. Lowden*,

^{6/} See, e.g., *Canadian National Ry. – Control – Illinois Central Corp.*, STB Finance Docket No. 33356 at 43 (served May 25 1999); *CSX Corp. – Control – Chessie Sys., Inc.*, STB Finance Docket No. 28905 (Sub-No. 28) at 7 n.10 (served Aug. 21, 1997); *Wilmington Terminal R.R. – Pur. & Lease – CSX Transp., Inc.*, 6 I.C.C.2d 960, 963-64 (1990); *Rio Grande Industries*, supra, 4 I.C.C.2d at 953-54; *Burlington Northern, Inc. – Control & Merger – St. Louis- San Francisco Ry.*, 360 I.C.C. 788, 946-47, 1167 (1980)(rejecting proposal for modified *New York Dock* conditions).

supra, 308 U.S. at 228, 233.^{7/} That was a great distance 60 years ago when large numbers of Americans never ventured more than a few miles from their home towns or family farms, before the days of interstate highways and low-cost air transportation. Yet in *Lowden*, the Court upheld the ICC's authority before enactment of § 5(2)(f) to impose discretionary labor protective conditions to "mitigate" the effects of such relocations on employees. *Id.* 233-35. *Lowden* demonstrates that as a matter of historical fact, RLD's contention that existing labor protection conditions did not contemplate long-distance relocations is simply incorrect. What the labor protection conditions have never contemplated is that employees "who are offered continued employment, but refuse to take advantage of it" because they do not wish to move, are entitled to protection pay, "whether the move is a relatively short one or a longer one." *CSX/NS/Conrail Conrail*, *supra*, at 127-28 (emphasis added).

As we pointed out in our comments on the ANPR, mergers in all major industries, not just the railroad industry, require long-distance relocation of employees. See Comments of the National Railway Labor Conference on ANPR at 23-24. Transcontinental relocations are not unusual. For example, in the merger of the Bank of America with NationsBank, employees were relocated from California to North Carolina.^{8/} The difference – in fact, the only difference – between rail employees and employees in other industries in this regard is that under *New York Dock*, rail employees receive six years of guaranteed compensation, in addition to generous

^{7/} See *Chicago, R..I. & G. Ry. Co. Transfers Leases*, 233 I.C.C. 21, 25 (1939).

^{8/} See "A Year Later, Merger Sinks In," *Law News Network* (May 4, 1999), <http://www.lawnewsnet.com/stories/A1123-1999May3.html>.

relocation benefits, including moving expenses, wages for up to three days while they move, reimbursement for losses on the sale of homes or unexpired leases, and moving expenses to return if they are furloughed within three years of relocation. *New York Dock*, Art. I §§ 9 & 12. The most generous merger protection arrangements in other industries do not afford comparable benefits to employees. Even the protection arrangement provided by Mobil in its recent merger with Exxon, regarded as remarkably generous in outside industry, was not nearly as generous as *New York Dock*.^{9/}

Recent census data show that hundreds of thousands of workers in all sectors of the economy relocate every year.^{10/} There is no reason why rail employees, who have uniquely generous relocation benefits, should be exempt.^{11/}

CONCLUSION

The third sentence of proposed § 1180.1(e) should be withdrawn because it is framed in terms that might confuse and mislead arbitrators and parties in future application of the Board's settled standards, thwarting realization of the public

^{9/} See NRLC Comments on ANPR at 24.

^{10/} U.S. Census Bureau, *Annual Geographic Mobility Rates, By Type of Movement: 1947-1999*, Table A-1 (July 12, 2000); U.S. Census Bureau, *General Mobility of Employed Civilians 16 Years and Over, by Sex, Age, and Major Occupation Group*, Table 9 (July 12, 2000).

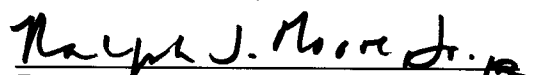
^{11/} The NPR notes that RLD claims that the superiority of *New York Dock* protection to that available in other industries is irrelevant, because mergers in other industries are subject to antitrust scrutiny and are not exempt from other law. NPR at 180 n.170. But the fact that mergers in other industries are not subject to any provision such as § 11341(a) is immaterial, because the carriers' right to require employees to relocate is not a matter of modification or override of collective bargaining agreements. As noted, *New York Dock* itself requires employees to relocate to follow their work as a condition of eligibility for labor protection.

transportation benefits of rail consolidations the Board approves. If the Board believes that the standard for adjustment of CBAs should be set forth in the regulation, it should be phrased in the objective language of the governing statute, not the confusing and misleading language of the third sentence of the proposed regulation. Moreover, the third sentence, as presently drafted, will not be conducive to negotiation of an agreed-to resolution of these issues.

With respect to other changes in rules that the Board may have under "serious consideration," we reserve comment to an appropriate occasion. RLD's proposal to change the *New York Dock* conditions with respect to relocation of employees, referred to on page 17 of the NPR, is unjustified and is in conflict with fundamental objectives of the proposed new Consolidation Procedures.

Respectfully submitted,

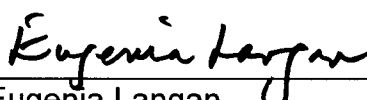
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November 17, 2000

CERTIFICATE OF SERVICE

I certify that I have this 17th day of November, 2000, served the foregoing
Comments of the National Railway Labor Conference by causing copies thereof to be
delivered by first-class mail to all parties on the service list.



Eugenia Langan