

BEFORE THE SPECIAL BOARD OF ADJUSTMENT

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In the Matter of the Minor Dispute between

**BNSF RAILWAY COMPANY, CSX  
TRANSPORTATION, INC., NORFOLK SOUTHERN  
RAILWAY COMPANY, and UNION PACIFIC  
RAILROAD COMPANY,**  
Carriers,

JS Case No.  
3750

**OPINION  
AND  
AWARD**

and

**AMERICAN TRAIN DISPATCHERS ASSOCIATION,  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
AND TRAINMEN, BROTHERHOOD OF  
MAINTENANCE OF WAY EMPLOYEES,  
BROTHERHOOD OF RAILROAD SIGNALMEN,  
INTERNATIONAL ASSOCIATION OF MACHINISTS,  
AND AEROSPACE WORKERS, NATIONAL  
CONFERENCE OF FIREMEN AND OILERS, SHEET  
METAL WORKERS INTERNATIONAL  
ASSOCIATION, TRANSPORT WORKERS UNION,  
TRANSPORTATION COMMUNICATIONS  
INTERNATIONAL UNION, UNITED SUPERVISORS  
COUNCIL OF AMERICA, and UNITED  
TRANSPORTATION UNION,**  
Labor Organizations,

Re: Substitution of Paid Contractual Leave for Unpaid  
Family and Medical Leave Act Leave.

-----X

**Before the Special Board of Adjustment:**

**JOHN E. SANDS, Chairman and Member  
WILLIAM H. HOLLEY, JR., Member  
JEROME H. ROSS, Member**

## OPINION

On February 4, 2008, the parties agreed to submit the following issue to arbitration by us:

Do the carriers' policies requiring employees to substitute paid vacation and/or paid personal leave for unpaid FMLA leave violate the requirements of the national vacation and/or national personal leave agreements?

[Joint Appendix ("JA"), p. 2.]

Their Arbitration Agreement goes on to impose these further limits on our arbitral jurisdiction:

The Board shall have jurisdiction only to decide this question. . . . The Board is not empowered and has no jurisdiction to act or decide the matter(s) before it as an "interest arbitration" board. The Board shall not have the authority to create any new rules, add contractual terms or change existing agreements governing rates of pay, rules and working conditions. In its Award, the Board shall confine itself strictly to a decision as to the question submitted to it. The Board shall not have jurisdiction to interpret any statutes.

[*Id.*]

In accordance with our authority under the parties' Arbitration Agreement and arrangements made in case management conference calls with counsel, we received their Joint Appendix of agreed exhibits as well as each side's Appendix and Supplemental Appendix of additional exhibits and their initial and reply submissions. We conducted a hearing in Washington, D.C. on November

12, 2008 at which counsel had full opportunity to make additional arguments and to respond to each other's points. The Board met in person following the hearing on November 12<sup>th</sup>, and we met by telephone conference call as well. Each of us prepared an initial draft of separate portions of this Opinion, and we all contributed to and endorse this final document. Neither party has raised any objection to the fairness of this proceeding.

On the entire record so produced, we find the following relevant facts.

## **FACTUAL BACKGROUND**

### The Parties

This matter of arbitration is between four (4) Class 1 rail freight carriers ("carriers") and twelve (12) labor organizations ("unions"). The carriers are

BNSF Railway Co. ("BNSF"), CSX Transportation, Inc. ("CSXT"), Norfolk Southern Railway Co. ("NSR"), and Union Pacific Railroad Co. ("UP").

The twelve unions are

American Train Dispatchers Association ("ATDA"), Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BLET"), Brotherhood of Maintenance of Way Employees ("BMWE"), Brotherhood of Railroad Signalmen ("BRS"), International Association of Machinists and Aerospace Workers ("IAM"), International Brotherhood of Electrical Workers

("IBEW"), National Conference of Firemen and Oilers District of Local 32BJ, SEIU ("NCFO"), Sheet Metal Workers International Association ("SMWIA"), Transport Workers Union ("TWU"), Transportation Communications International Union ("TCU"), The United Supervisors Council of America ("USCA"), and The United Transportation Union ("UTU").

These carriers operate across the continental United States and transport more than 90 percent of the nation's rail freight service. The unions represent virtually all of the carriers' unionized employees.

This Board recognizes the unusual characteristics of the railroad industry that distinguish it from other major industries in the United States. These include

- Railroads are a critical part of the nation's industrial infrastructure.
- Railroads are a 24-hour, 7-day-a-week operation.
- Railroads must operate on time.
- The service demands on railroads are increasing.
- Crafts are divided between operating and non-operating employees.
- Unionized railroad employees are highly paid and receive lucrative benefits.
- Some operating employees do not work fixed schedules.
- Non-operating employees tend to work in fixed shifts.
- Railroad employees take contractual unpaid leave in addition to paid leave.

- Railroad attendance policies govern use of non-FMLA unpaid leave.

The parties have historically engaged in national multi-employer bargaining. The carriers bargain nationally through the National Carriers Conference Committee (“NCCC”). National Agreements may be formed between the carriers and one or more of the unions. The unions and the carriers are party to numerous individual agreements that supplement and, in some cases, modify their national agreements.

#### National Vacation Agreements

The issue in this arbitration has a significant bargaining and contractual history. As the result of recommendations of the Emergency Board appointed by the President of the United States on September 10, 1941 and the subsequent report on November 5, 1941, the parties agreed to the National Vacation Agreement (“NVA”) dated December 17, 1941, which covers non-operating crafts. There are also several other NVAs. There is one for the operating crafts, dated April 29, 1949 (“Ops NVA”), and one for the dispatchers, dated February 2, 1965 and thereafter modified (“Dispatchers NVA”). There are also three 1996 national agreements that allow for use of vacation time in single-day increments. 1996 BMW Agreement (“BMW NVA”); May 31, 1996 BLET Agreement (“BLET NVA”); May 8, 1996 UTU Agreement (“UTU NVA”).

These NVAs differ in various minor respects. All of the NVAs, however, share several basic characteristics. First, they all provide that employees are entitled to a set number of paid vacation days each calendar year. The most senior employees are entitled to five weeks of vacation per year. See, e.g., BMW NVA § E (J.A. 163-64). Second, the NVAs anticipate that the parties will jointly set a schedule for vacations.

The 1941 NVA provides, in relevant part:

4. (a) Vacations may be taken from January 1<sup>st</sup> to December 31<sup>st</sup> and due regard consistent with requirements of service shall be given to the desires and preferences of the employees in seniority order when fixing the dates for their vacations.

The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates.

(b) The Management may upon reasonable notice (of thirty (30) days or more, if possible, but in no event less than fifteen (15) days) require all or any number of employees in any plant, operation, or facility who are entitled to vacations to take vacation at the same time.

The local committee of each organization affected signatory hereto and the proper representative of the carrier will cooperate in the assignment of remaining forces.

5. Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employee so affected is given as much advance notice as possible; not less than (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the

designated date, at least thirty (30) days' notice will be given affected employee.

If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided.

On July 20, 1942, the Participating Labor Organizations and Participating Carriers selected the Honorable Wayne Morse to resolve differences between them concerning the interpretation and application of several provisions of the NVA, including Articles 4(a) and 5. As to those provisions, Referee Morse wrote,

**Referee's Answers to Questions  
Raised Under Article 4 of the Vacation Agreement**

Thus in interpreting Article 4 (a) the referee has reached the following general conclusions:

(1) It was the intention of the parties when they agreed upon Article 4 to cooperate in administering the granting of vacations. To that end, they specifically provided in paragraph 2 of Article 4 (a) that the local committee of each organization signatory to the agreement and the representatives of the carriers would cooperate in assigning vacation dates. Thus, they restricted the management's control over the administering of the granting of vacations. The adoption of a procedure whereby representatives of the employees and of the carriers shared a joint responsibility in assigning vacation dates necessarily gave to the representatives of the employees and of the carriers shared a joint responsibility in assigning vacation dates necessarily gave to the representatives of the employees the right to a voice in determining whether or not in given instances the desires and the preferences of the employees in seniority order as to vacation dates

were consistent with requirements of service, some of the carriers took the position that the employees were attempting to interfere with managerial rights.

\* \* \*

(5) It is the opinion of the referee that the interpretation which the carriers seek to place upon the clause "consistent with requirements of service" is a too narrow one. It does not appear from the language of the first paragraph of Article 4 (a) that it was the intention of the parties that the carriers could disregard the desires and preferences of the employees in fixing vacation dates or could deny a vacation altogether just because the granting of a vacation at a particular time might increase operating costs or create problems of efficient operation and maintenance. Obviously, the putting into effect of the vacation plan is bound to increase the problems of management, but, as the employees point out, the carriers cannot be allowed to defeat the purpose of the vacation plan or deny the benefits of it to the employees by a narrow interpretation of the clause "consistent with requirements of service."

It is the opinion of the referee that it was not intended by the parties that the desires and preferences of the employees in seniority order should be ignored in fixing vacation dates unless the service of the carrier would thereby be interfered with to an unreasonable degree. To put it another way, the carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences, unless by so doing there would result a serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by making of some other reasonable adjustment. The mere fact that the granting of a vacation to a given employee at a particular time may cause some inconvenience or annoyance to the management, or increased costs, or necessitate some reorganization of operations, provides no justification for the carriers refusing to grant the vacation under the terms of Article 4 of the agreement.

\* \* \*

**Referee's Answers to Questions  
Raised Under Article 4 of the Vacation Agreement**



It is the opinion of the referee that no disagreement of substance exists in fact between the parties as to the meaning and intent of the first paragraph of Article 5. The language of the paragraph gives to the management the right to defer vacations. As pointed out in the contentions of the employees, the language does not mean that management can defer vacations on the basis of trivial or inconsequential reasons. What the language of the paragraph does do is lay down a statement of policy that when a vacation schedule is agreed to and the employees have received notice of the same and have made their vacation plans accordingly, the schedule shall be adhered to unless the management, for good and sufficient reason, finds it necessary to defer some of the scheduled vacations. When such a situation arises, the management is obligated to give the employee as much advance notice as possible and in any event, not less than ten days' notice, except in case of an emergency. In case it becomes necessary to advance the scheduled vacation date, then the employee is entitled to a thirty days' notice under the language.

Article 5 must be read in connection with Article 4. . . .

\* \* \*

. . . The important point for the parties to keep in mind is that the primary and controlling meaning of the first paragraph of Article 5 is that employees shall take their vacations as scheduled and that vacations shall not be deferred or advanced by management except for good and sufficient reason, growing out of essential service requirements and demands.

On April 29, 1949, (effective July 1, 1949) a Vacation Agreement was reached between certain Eastern, Western and Southeastern carriers and their employees in the operating crafts represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen and Switchmen's Union of North America. Relevant provisions include these:

Section 6 – Vacations shall be taken between January 1<sup>st</sup> and December 31<sup>st</sup>; however, it is recognized that the exigencies of the service create practical difficulties in providing vacations in all instances. Due regard, consistent with requirements of the service, shall be given to the preference of the employee in his seniority order in the class of service in which engaged when granting vacations. Representatives of the carriers and of the employees will cooperate in arranging vacation periods, administering vacations and releasing employees when requirements of the service will permit. It is understood and agreed that vacationing employees will be paid their vacation allowances by the carriers as soon as possible after the vacation period but the parties recognize that there may be some delay in such payments. It is understood that in any event such employee will be paid his vacation allowance no later than the second succeeding payroll period following the date claim for vacation allowance is filed.

In an Agreement dated February 2, 1965, those carriers and the American Train Dispatchers Association agreed to the following “Notes” to Article III (“Vacations”), Section 2(a) of that Agreement:

(a) Local officers of the carrier and employees and their representatives will cooperate in arranging to meet annual vacation requirements in each office, giving due regard to business conditions, availability of a relief employee, and to the desires and preferences of train dispatchers in seniority order, but an individual train dispatcher may not waive his right to earned vacation and accept compensation in lieu thereof. Nor may a carrier elect to compensate any train dispatcher in lieu of granting earned annual vacation except when unavoidable emergency prevents furnishing relief.

Then, on May 30, 1979, Mr. Charles I. Hopkins, Jr., Chairman, National Railway Labor Conference, confirmed the parties’ understanding with respect to the application of vacation provisions of the February 2, 1965 Vacation

Agreement in his letter to Mr. B.C. Hilbert, International President, American Train Dispatchers Association. Mr. Hopkins wrote:

(a) No employee or his representative, or local officers of the carrier, may refuse to cooperate in arranging advance annual vacation requirements as provided in the Notes to Section 2(a) of the February 2, 1965 Agreement, as amended. Each employee who is entitled to vacation shall take same at the time provided even though the carrier may be required to pay an employee at a penalty rate. While it is intended that such vacation time will be adhered to so far as practicable, the carrier may without penalty defer, such time on one occasion only during the calendar year provided the affected employee is given advance notice of not less than ten (10) days except when emergency conditions prevent.

On May 31, 1996, the carriers reached a National Agreement with BLET on splits in annual vacation and single day splits. The relevant language appears in Article V (“Benefits Eligibility”), Section 2 (“Vacation Benefits”):

- (e) An employee may make up to two splits in his annual vacation in any calendar year.
- (f) An employee may take up to one week of his annual vacation in single day increments. . . .
- (g) Existing rules and practices regarding vacations not specifically amended by this Section, including (but not limited to) scheduling of vacations, shall continue in effect without change.

Article VII, Section 11 of the 1996 BMW National Agreement states

11. A. While the intention of this Agreement is that the vacation period will be continuous, the vacation may, at the request of an employee,

be given in installments if the management consents thereto.

B. Effective January 1, 1997, employees shall be permitted to take one week of their vacation allowance per year in less than forty (40) hour increments, provided that such vacation days will be scheduled in accordance with existing rules on the carrier applicable to the scheduling of personal leave days.

(Art. VIII-09/26/06 National Agreement)  
(Section 11-12/17/41 Agreement)

Also in 1996, the carriers and the United Transportation Union engaged in interest arbitration. On May 8, 1996, the Arbitration Board ruled on single day increments. The resulting Agreement provided, in relevant part:

Section 2 – Vacation Benefits

\* \* \*

(f) An employee may take up to one week of his annual vacation in single day increments, provided, however that such employee shall be automatically marked up for service upon the expiration of any single day vacation.

National Personal Leave Agreement

On November 10, 1981, the carriers and the Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees entered a Personal Leave Agreement granting three days' time effective December 11, 1981.

On December 11, 1981, a Personal Leave Agreement (PLA) covering Shopcraft employees was made. Section 2 reads,

- (a) Personal leave days provided in Section 1 may be taken upon 48 hours' advance notice from the employee to the proper carrier officer provided, however, such days may be taken only when consistent with the requirements of the carrier's service. It is not intended that this condition prevent an eligible employee from receiving personal leave days except where the request for leave is so late in a calendar year that service requirements prevent the employee's utilization of any personal leave days before the end of that year.
- (b) Personal leave days will be paid for at the regular rate of the employee's position or the protected rate, whichever is higher.
- (c) The personal leave days provided in Section 1 shall be forfeited if not taken during each calendar year. The carrier shall have the option to fill or not fill the position of an employee who is absent on a personal leave day. If the vacant position is filled, the rules of the agreement applicable thereto will apply. The carrier will have the right to distribute work on a position vacated among other employees covered by the agreement with the organization signatory hereto.

Other PLAs were reached between the carriers and BMW on December 11, 1981 and between the carriers and BRS on January 8, 1982.

On May 31, 1996 the carriers and the BLET agreed to the following in Article VI ("Personal Leave"), Section 3:

- (a) Personal leave days provided in Section 1 shall be scheduled with the approval of the proper carrier officer upon forty-eight (48) hours' advance notice from the employee.

#### Family and Medical Leave Act

In 1993, Congress passed the Family Medical Leave Act (FMLA) which allows eligible employees to take up to 12 workweeks of leave for family or

medical reasons. Under the FMLA, eligible employees are entitled to take up to 12 workweeks of unpaid leave during any 12-month period for (1) the birth of a child; (2) the placement of a child with the employee for adoption or foster care; (3) the care of a spouse, child, or parent with a serious health condition; or (4) a serious health condition that makes the employee unable to perform the functions of his or her position. FMLA leave can be taken for a single extended period, i.e., on a “block” or “continuous” basis, or intermittently, i.e., on a recurring basis. An employee who takes FMLA leave is immune from discipline for absenteeism that results from the use of leave.

FMLA leave is unpaid. Section 2612(d)(2) of the Act states, however, that an “employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee” for unpaid FMLA family leave. Employees may also be required to substitute paid leave, including sick leave, when taking intermittent FMLA leave because of a serious health condition. In either event, the “employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis.” (“[I]f an employer provides paid leave for fewer than 12 workweeks . . . the additional weeks of leave necessary to attain the 12 workweeks . . . may be provided without compensation. . . .”)

FMLA permits an employer to require an employee to provide medical certification to substantiate that leave sought is being taken for an FMLA-qualifying purpose. In the case of intermittent FMLA leave, the health care provider must certify the expected duration of the employee's need for intermittent leave. If the employer has reason to doubt the validity of the medical certification, it may require a second opinion from a health care provider of its choice. There is a tie-breaking third doctor procedure if the employee's doctor and the employer's doctor disagree.

In a letter dated October 8, 2001, Mr. John J. Fleps, Vice-President - Labor Relations, sent the following letter to "All BNSF General Chairmen:"

As for the other items, the substitution of paid leave for unpaid FMLA leave is expressly provided for in the FMLA for all FMLA leaves. See 29 U.S.C. § 2612(d)(2)(A) and (B). However, for now BNSF has only modified its policy with respect to the use of paid vacation in cases of intermittent medical leaves and only for employees who are entitled to paid sick leave. The company is not now requiring substitution of vacation with other FMLA leaves. Further, BNSF has structured the new policy so that sick leave and other available paid leave days would be exhausted before any vacation days. Finally, if a particular employee elects intermittent FMLA leave so frequently that vacation days are affected, the policy gives the employee some choice in determining which vacation days to substitute for the intermittent FMLA leave.

The FMLA is a fairly new statute and all of us have been on a learning curve with its administration. I hope you will recognize that the upcoming changes to BNSF's FMLA policy have been narrowly tailored so as to fairly

balance employee rights and responsibilities with those of the company, in a manner which is fully consistent with our agreements and the law.

On January 1, 2004, Ms. Gloria Zamora, Vice President - Human Resources and Medical, BNSF, issued its Policy No. HR - 30.10, "Family and Medical Leave Policy." Then, on March 18, 2004, Mr. Fleps announced the following change to the FMLA Policy in his letter to "General Chairman [sic]:"

The change involves BNSF waiving the requirement for use of paid leave when an employee is taking continuous medical leave for his or her own condition when they are eligible to receive benefits under a paid disability program.

CSX issued a similar policy on January 1, 2004; Union Pacific Railroad issued a similar policy on January 1, 2004, and Norfolk Southern issued one on August 1, 2004.

#### Arbitrator Benn's Decision

On October 5, 2001, the Burlington Northern and Santa Fe Railway Company notified all BNSF General Chairmen of the Transportation Communication International Union (TCU) that the carrier was modifying its FMLA policy. Effective January 1, 2002, the carrier would be requiring (a) substitution of paid vacation for intermittent FMLA medical leave for those employees who were entitled to paid leave and (b) that sick leave and other available leave days be exhausted before any vacation days. In a letter dated



November 8, 2001, TCU objected to the carrier's announced modification to its FMLA policy and contended that the carrier had violated both the NVA and the FMLA. The parties agreed to submit both the statutory provisions of the FMLA and the contractual provisions of the NVA to arbitration.

On August 8, 2002, Arbitrator Benn rendered the following conclusion:

. . . Given that the parties have incorporated the FMLA issue into this case, our task is to read the NVA and FMLA together. Stated, differently, in deciding this case we shall view the NVA as incorporating the FMLA. Given that the Organization relies upon a contract and the Carrier upon a statute, there is no other realistic way to approach and analyze this dispute.

Again, because the Organization claims that the Carrier's actions violated the NVA, the Organization must bear the ultimate burden to show that its interpretation must prevail.

\* \* \*

The Organization's position that under the NVA the Carrier cannot require that employees who have exhausted available paid sick leave and other leave substitute accrued but unused paid vacation leave for intermittent FMLA leaves is understandable. The NVA establishes an employee's vacation entitlements and the Morse Interpretation states that vacation schedules shall be adhered to "and that vacations shall not be deferred or advanced by management except for good and sufficient reason, growing out of essential service requirements and demands." It therefore makes sense that employees would object to the Carrier's designating paid vacation leave for intermittent FMLA leaves. But the NVA and FMLA must be read together and the FMLA specifically states that the Carrier ". . . may require the employee, to substitute any of the accrued paid vacation leave. . . for leave provided under. . ." the FMLA. These cases are decided on burdens met and rebutted. Here, the burden is on the Organization to demonstrate a violation of the relevant language. Given that language from

the FMLA which specifically permits the Carrier to “. . .require the employee, to substitute any of the accrued paid vacation leave. . .for leave provided under. . .” the FMLA, the Organization cannot meet its burden.

\* \* \*

The Carrier did not violate the National Vacation Agreement when it amended its FMLA policy to require that employees who have exhausted available paid sick leave and other leave substitute paid vacation leave for intermittent FMLA leaves.

### Federal Court Litigation

After the Benn Award, the Organizations and the carriers filed several lawsuits, and both parties sought declaratory judgments on the FMLA and its relationship to the collective bargaining agreements. The pending lawsuits were consolidated, and on December 28, 2005, Federal District Court Judge J. Wayne R. Anderson ruled,

The FMLA does not allow employers to violate pre-existing contractual obligations. If CBA provisions grant employees the right to determine when, or in what manner, they utilize certain types of paid vacation and personal leave, those CBA provisions prevent employers from substituting such leave for FMLA leave.

The carriers appealed that decision to the U.S. Court of Appeals, Seventh District, which ruled,

Speculation aside, we see our role as reconciling important competing principles. That is done by seeing § 2612 for what we think it is—a statement that substitution is not forbidden—but also by recognizing the important seniority rights at issue under the CBAs, rights specifically long protected by the RLA. It is not at all clear that such long-standing, statutorily protected, and important rights are abrogated by § 2612. And we

find they are not. The carriers must comply with the RLA in implementing their actions under the FMLA.

In short, the FMLA does not allow the carriers to violate contractual obligations protected by the RLA regarding paid vacation and personal leave time. Accordingly, we AFFIRM the judgment of the district court.

On these facts, the parties made the following arguments.

### **UNIONS' ARGUMENTS**

The policies at issue permit the carriers to require employees to take contractual leave when they take family or medical leave under the FMLA. The unions assert that by forcing employees to use vacation leave under those circumstances deprives employees of vacations selected pursuant to the 1941 NVAs and, accordingly, violates the NVAs. The unions recognize that an employee's right to use vacation leave when scheduled is not absolute, but contend that the carriers' right to advance or defer such vacations is clearly limited to situations in which an employee's absence would interfere with the "requirements of service." That standard was the subject of a 1942 Award by Referee Morse who concluded that vacation schedules should be honored unless it would result in a "serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by the making of some other reasonable adjustment." The unions note that Referee Morse specifically excluded "inconvenience or annoyance to the management, or increased costs" as a basis for the railroads disregarding employee scheduled vacations. The unions cite numerous awards in the railroad industry following Morse's interpretation of the standard. They assert that the carriers failed to meet this standard here.

The unions also cite a number of arbitration awards in other industries in which arbitrators have concluded that contract provisions similar to the NVAs do not permit employer policies requiring the substitution of vacation leave for FMLA leave.

The unions further argue that the carriers' policies require all employees to use NVAs leave in lieu of FMLA leave and therefore constitute a *per se* rule. In his 1942 Award, Referee Morse concluded that the NVAs called for union-management cooperative efforts in dealing with vacation scheduling and contemplated action on "individual problems." Application of such a rule fails to apply the identification of a particularized operational need as a showing of serious interference with the "requirements of service" and is in conflict with the NVAs which specify a notice period for advising an employee of a change to a scheduled vacation. The unions, citing awards in both the railroad industry and others, viewed the across the board nature of the policies as incompatible with consideration of individual situations contemplated by the NVAs.

The unions note that the vacation scheduling procedures established by the NVAs were predicated on an individual employee's seniority. As a consequence, they assert the carriers' policies can result in the denial of vacation to a senior employee while recognizing those vacation days for a junior employee contrary to the mandates of the NVAs.

The unions also argue that, contrary to the carriers' assertion, in this dispute is no inherent management right to unilaterally alter an employee's vacation schedule when the employee uses FMLA. They contend that the "requirements of service" criterion is the sole exception to the NVAs and no additional management right continues. The carriers have failed to establish

“requirements of service” as the basis for its policies.

In response to the carriers’ argument that a 2002 Award by Arbitrator Benn authorized the required substitution of NVA leave for FMLA leave, the unions argue that the Award was issued prior to the decision of the Federal Circuit Court which was the precursor of the instant dispute. The unions specifically point out that the current dispute solely involves the provisions of the NVAs, not the interplay between those contract provisions and the FMLA. The 7<sup>th</sup> Circuit decision, the unions argue, established that the FMLA identifies what employers may do, but not what they must do. Thus, the unions contend that only the NVA provisions, not the FMLA provisions, are relevant in the consideration of this matter.

The unions assert that the carriers’ policies violate the PLAs. The unions contend that the PLAs’ language gives employees alone the right to take personal days as long as the request for such days is made in a timely manner, with the criterion for denying PLA requests limited to whether granting such requests would be not “consistent with the requirements of the carrier’s service.” The unions argue that this criterion is at least as stringent as that for changing an employee’s NVA leave and assert that the carriers have failed to meet the standard.

Finally, the unions respond to several equitable arguments presented by the carriers. To the carriers’ argument that they are entitled to require the substitution of NVA leave for FMLA leave as part of the FMLA statutory bargain, the unions assert that such a position was rejected by the 7<sup>th</sup> Circuit. Concerning the carriers’ claim that employee abuse of FMLA leave warrants the policies at issue, the unions assert that the carriers’ statistical evidence in support of its claim

falls far short of establishing widespread abuse. Moreover, even if abuse exists, the unions argue that there are far more equitable means for addressing any abuse than initiating the broad policies at issue which far exceed any possible level of corrective action needed.

### **CARRIERS' ARGUMENTS**

The carriers assert that the language of the NVAs does not prohibit their ability to substitute NVA leave for FMLA leave and, absent such a prohibition, they retain an inherent right to require employees to substitute scheduled leave for FMLA leave. As the NVAs were entered into more than 50 years before the FMLA was enacted, the parties to the 1941 NVA could not have intended to foreclose the right to require that substitution; and, accordingly, the carriers retain that right. The carriers urge that, contrary to the unions' assertions, the language of the NVAs does not give employees unilateral control over the scheduling of paid leave or provide that "such choices are set in stone." Rather, relying on the Morse Award, the carriers argue that the NVAs provide "at least an equal say about how employee vacations may be taken." Thus, they argue further that the NVAs do not address the circumstances in which employees exercise their rights to take FMLA leave, thereby altering the basic assumptions of the NVAs for a reasonably certain work and leave schedule.

The carriers read the Morse Award to limit a carrier's right to alter employees' vacation schedules when it fails to anticipate business needs or for reasons that are arbitrary or capricious. They also take from the Morse Award the principle that neither party to the NVAs should be permitted to manipulate the NVAs in ways not contemplated by the drafters. Thus, the carriers argue that the

NVAs do not address the issue of substituting vacation leave for FMLA leave and that they retain the right to implement the policies at issue here.

The carriers also rely on the Benn Award in which the arbitrator concluded that the NVAs and the FMLA must be read together. They contend that the Benn Award held that the NVAs did not nullify the express statutory right of employers to require the substitution of paid leave for FMLA leave. The carriers argue that the statutory provision permitting an employer to require the substitution of paid leave for FMLA leave supports the policies at issue in this matter. They cite the Benn Award language holding that the carriers' policies requiring the substitution of paid leave for intermittent FMLA leave did not violate the NVAs. They further contend that the Benn Award and the 7<sup>th</sup> Circuit decision rejected the unions' statutory argument that Section 2652(a) of the FMLA preserves vacation scheduling rights against the power to require substitution under Section 2612(d)(2). Given that reading of the court's opinion, the carriers assert that the Benn Award is applicable to this proceeding.

The carriers argue that the policies' having not been initiated until more than six years after the FMLA's enactment raises a past practice issue and that several carriers actually required substitution of paid leave for FMLA leave during that period. They also contend that, during the period, all the carriers expressly reserved the right to alter their FMLA policies at any time. Moreover, the carriers argue that, even had they failed to assert that right during the intervening time, an employer does not forfeit its rights by virtue of a failure to enforce those rights.

The carriers note that, although substitution of prescheduled leave is the core of this dispute, the unions have also raised an issue concerning

unscheduled leave, specifically personal days and single-day vacations. They assert that the relevant agreements, PLAs, do not restrict the carriers' right to require substitution of that leave for FMLA leave. They argue further that the carriers have the right under the PLAs to approve or reject requests for such leave based on "requirement of service" considerations.

The carriers assert that the concept of substitution of paid leave for FMLA leave is part of the statutory bargain. They argue that substitution of leave does not occur in a vacuum and that the right to take FMLA leave comes with the right of employers to establish the obligation to use paid leave. To argue otherwise is to give the employees the benefits of FMLA without the obligations.

The carriers argue that adding FMLA leave rights on top of existing contract leave rights, sometimes referred to as "stacking," imposes a burden on other employees by allowing employees to be absent for extended periods of time. The carriers point to the situation in which an employee with 11 weeks of contract paid leave could, with the addition of FMLA leave, be off work for close to one-half a year. Not only does this impose a burden on other employees, but it imposes a significant burden on employers, who are dependent on employees to furnish regular and consistent satisfactory service. Moreover, the carriers assert that the stacking of leave is inherently contrary to the intent of the FMLA, which is to balance the demands of the workplace with the needs of employees.

The carriers contend that data indicate that some employees are abusing FMLA leave to avoid working on weekends and holidays. They argue that the substitution policies are reasonable responses to such abuse.

Finally, the carriers assert that the FMLA has significantly changed the nature of employee leave usage in the railroad industry. The carriers'



substitution right found in the FMLA is a reasoned way of minimizing the impact of the statutory change.

### RATIONALE

On the entire record before us, we must sustain the union's position and find that the carriers' policies at issue to substitute paid vacations and/or paid personal leave for unpaid FMLA leave do violate the requirements of the national vacation and/or national personal leave agreements. We reach that conclusion for the following reasons.

First, as noted above, the parties' Arbitration Agreement imposes significant limitations on our arbitral authority:

The Board is not empowered and has no jurisdiction to act or decide the matter(s) before it as an "interest arbitration" board. The Board shall not have the authority to create any new rules, add contractual terms or change existing agreements governing rates of pay, rules and working conditions. In its Award, the Board shall confine itself strictly to a decision as to the question submitted to it. The Board shall not have jurisdiction to interpret any statutes.

[Joint Appendix ("JA"), p. 2.]

In exercising that authority, we may not interpret any statutes; nor may we modify the parties' existing agreements in any way.

Second, in those respects, our arbitral jurisdiction is very different from that of Arbitrator Edwin H. Benn in *BNSF v. TCIU* (JA 229-49; "Benn

Award”) and distinguishes the case before him from ours. In that case, which involved only one union and two crafts, the parties had expressly authorized the Board to consider the FMLA’s statutory provisions along with the NVAs’ contractual provisions. As Arbitrator Benn observed,

Given that the parties have incorporated the FMLA issue into this case, our task is to read the NVA and FMLA together. Stated differently, in deciding this case we shall view the NVA as incorporating the FMLA.

[JA 233.]

In this case, Benn’s incorporation process would violate these parties’ express limitation of our arbitral authority. The Benn Award’s conclusions and rationale are accordingly inapposite to the issues before us.

Benn’s initial analysis of the parties’ respective burdens in that case, however, does reveal how he would have ruled had he been operating under the same jurisdictional limitations as we do. Speaking of the Organization’s burden with respect to the contractual question –as distinguished from the carrier’s burden on the statutory issue– Benn wrote,

Because the NVA entitles employees to vacations, the Organization has shown as a matter of contract that the Carrier cannot take away those contractually earned vacation entitlements by substituting earned vacation for intermittent FMLA leaves.

[JA, p. 232.]

Third, in this case the federal district and appeals courts have contradicted Arbitrator Benn's conclusion that the parties' contracts must be read to incorporate and give way to the FMLA's Section 2612(d)(2). The United States District Court for the Northern District of Illinois concluded, ". . . that the FMLA does not allow an employer to take away any contractual rights" and

If a CBA gives employees the right to determine when, or in what manner, they take accrued vacation and/or personal leave, an employer cannot force employees covered by that CBA to use such vacation and/or vacation leave at a time of the employer's choosing.

\* \* \*

If an employee has some right in addition to the mere accumulation of vacation and/or personal leave that would prevent the employer from substituting vacation leave for FMLA leave, the employer may not unilaterally override or ignore this contractual right. The FMLA provisions that merely *allow* an employer to substitute leave are not provisions that supercede [*sic*] contractually guaranteed rights.

[JA, pp. 250, 255; emphasis in original.]

On March 2, 2007, the United States Court of Appeals for the Seventh Circuit affirmed that judgment, holding that the FMLA's permissive, substitution provision did not impliedly repeal Section 152 Seventh of the Railway Labor Act ("RLA"). It wrote, in relevant part:

Section 152 of the RLA tells railroads what they must not do –change working conditions except in the manner dictated by the agreements or in §156, which requires notice, a conference, and, in some cases, mediation. Section 2612 of the FMLA simply tells employers what they may do –require substitution– not what they must do. A reasonable conclusion is

that, while substitution is allowed, the carriers cannot require substitution without complying with procedures set out in the RLA. Using those procedures, the carriers can bargain for substitution provisions. [Footnote omitted.]

[JA, p. 261.]

The court went on to find that the NVAs and PLAs are hard-won rights that the unions negotiated with the railroads in a bargaining process that “balanced the needs of the carriers and the needs of the workers.” (JA, p. 262.) It concluded,

In short, the FMLA does not allow the carriers to violate contractual obligations protected by the RLA regarding paid vacation and personal leave time. Accordingly, we AFFIRM the judgment of the district court.

[JA 263.]

Fourth, we find that the parties’ contracts at issue here do, as the District Court posited at JA p. 255, “. . . grant employees rights in addition to the accrual of vacation and/or personal leave, such as the right to determine when to use their accrued vacation and/or personal leave.” Although differences exist among the various contracts, they all empower employees to participate in a meaningful way in the scheduling of their vacations, subject to considerations of seniority and their employers’ operational needs. In all cases, employers may not unilaterally change scheduled vacations without good cause and appropriate notice. Similarly, employees have the right to schedule personal leave and

individual vacation days subject to employers' approval; but, once those days are set, no unilateral employer changes may occur without meeting specified contractual standards.

These are not insignificant contractual benefits. Arranging family vacations involves advance planning and financial commitments that are not easily changed. Personal leave and individual vacation days for specific purposes like doctors' appointments, legal commitments, and family obligations also address date-specific needs that, once scheduled, cannot lightly be missed. Certainty in scheduling for both vacations and personal leave is therefore an important benefit that unions negotiate with care and commitment to bargaining unit member interests. As the Court of Appeals wrote, "The right to time one's vacation and, to perhaps a lesser degree, personal leave days, is a hard-won right of railroad workers." (JA, p. 262.) Little wonder that court observed, with respect to RLA Section 156 ("Procedure in changing rates of pay, rules, and working conditions"), "Using those procedures, the carriers can bargain for substitution provisions." (JA, p. 261.)<sup>1</sup>

---

<sup>1</sup>We note as well that the 1996 Single Day NVAs, which were negotiated *after* the FMLA's enactment, expressly give employees the right to decide to take one week of their annual vacation allowances in increments of less than 40 hours or as single days off. (JA. pp. 162, 167, 181.)

Fifth, consistent arbitral interpretation of the contracts at issue confirms this conclusion. We start with Referee Wayne Morse's 1942 Award interpreting Sections 4 and 5 of the parties' December 17, 1941 Agreement and holding that they must be read together. It reads, in relevant part:

It is the opinion of the referee that it was not intended by the parties that the desires and preferences of the employees in seniority order should be ignored in fixing vacation dates unless the service of the carrier would thereby be interfered with to an unreasonable degree. To put it another way, the carrier should oblige the employee in fixing vacation dates in accordance with his desires or preferences, unless by so doing there would result a serious impairment in the efficiency of operations which could not be avoided by the employment of a relief worker at that particular time or by the making of some other reasonable adjustment. The mere fact that the granting of a vacation to a given employee at a given time may cause some inconvenience or annoyance to the management, or increased costs, or necessitate some reorganization of operations, provides no justification for the carriers refusing to grant the vacation under the terms of Article 4 of the agreement.

\* \* \*

. . . [W]hen the vacation schedule is agreed to and the employees have received notice of the same and have made their vacation plans accordingly, this schedule shall be adhered to unless the management, for good and sufficient reason, finds it necessary to defer some of the scheduled vacations.

\* \* \*

Article 5 must be read in conjunction with Article 4. . . .

\* \* \*

. . . [T]he primary and controlling meaning of the first paragraph of Article 5 is that employees shall take their vacations as scheduled and that vacations shall not be deferred or advanced by management except for good and sufficient reason, growing out of essential service requirements and demands.

[JA, pp. 52, 64-65.]

Sixty-plus years of subsequent arbitral interpretation have followed the Morse Award's lead. In *IAMAW v. Union Pacific Railroad Co.* (Union Exhibit 5; Dennis, 1995), the employer proposed to shut down its North Little Rock shops and charge employees' vacation leave balances during the weeks of Independence Day and Christmas 1995 in order to save \$1.4 million in potential overtime coverage costs and to perform necessary maintenance work. It argued that those purposes were consistent with its requirements of service. Arbitrator Rodney Dennis concluded, however, that the \$1.4 million potential savings were the carrier's true motivation and rejected its argument with this rationale:

. . . To agree with the Carrier that savings of potential overtime payments is sufficient reason to justify a vacation shutdown, however, could be extremely mischievous and would be contrary to the intent of the parties to the 1941 Vacation Agreement, as well as to the 1942 Morse interpretation of that Agreement.

\* \* \*

. . . We cannot . . . agree that saving money, or increasing profits, is a sufficient reason to justify a blanket diminution of employe [*sic*] rights in regard to the selection and assignment of vacations on a seniority basis.

\* \* \*

. . . This board is sympathetic to the need to effectuate savings, but we see no basis in this case for supporting Carrier's position that cost savings are a requirement of service that would justify a major change in the standards that apply to granting group vacations.

[Rail Unions' Appendix ("RUA"), pp. 191, 193, 194.]

*CSX Transportation, Inc. v. UTU* (Union Exhibit 15; Cluster 1989)

involved operating crafts under the 1949 National Vacation Agreement, which provides, in relevant part, “Due regard, consistent with the requirements of service, shall be given to the preference of the employee in his seniority order in the class of service in which engaged when granting vacations.” (JA, p. 118.) There the local parties had worked out vacation schedules similar to the prior year’s. Carrier officials on a higher level, however, repudiated those schedules and, without giving reasons based on the requirements of service, insisted on reducing the number of employees permitted to be off at any one time. Providing guidance for the parties’ efforts to resolve the particular scheduling issues, the Board wrote,

. . . In asserting operational requirements as the reason for declining an employee’s requested vacation date, it is Carrier’s responsibility to identify and discuss with the Organization the particular operational requirements relied on.

\* \* \*

In this procedure, it is not sufficient for Carrier to simply state generally that so many employees on average will be permitted off each week, or that it is too costly in terms of overtime or other factors to grant requested vacations, or that manpower problems the previous year require less employees on vacation this year, or to overrule schedules locally agreed-to on the asserted basis of operating problems without identifying and discussing specific operating problems involving specific employees at specific locations. . . . It is the existence or nonexistence of exigencies or requirements of the service as demonstrated by actual facts which determines the rights of the



employee to his vacation at a particular time – not the attitudes, opinions or unrelated goals of Carrier and Organization officials.

[RUA, pp. 257-58.]

Other cases requiring particularized showings of local operational needs rather than across-the-board rules changing employees' scheduled vacation periods include *CSX Transportation, Inc. v. UTU* (Union Exhibit 17; Harris, 1996) (rejecting a carrier formula to require spacing of vacations equally over the year, "even if stated in terms of the requirements of service, [as not] meet[ing] the requirements of the agreement" and failing "to meet particular local needs" [RUA, pp. 276-77]; *CSX Transportation, Inc. v. UTU* (Union Exhibit 16; Cluster, 1988) (rejecting an across-the-board rule imposed through the carrier's new and centralized Crew Management Center ("CMC") requiring a standard number of employees allowed to be on vacation each week that local officials applied literally regardless of local conditions or that CMC used to overrule non-conforming schedules that local carrier and union officials had agreed to); and *CSX Transportation, Inc. (former Baltimore & Ohio Railroad Co.) v. UTU* (Union Exhibit 18; Petersen, 2004) (citing Arbitrator Harris, *supra*, rejecting the carrier's claimed "right to establish a rigid formula for the granting of vacations on a flat-line or modified flat-line basis [where its] proposals, for the most part,

call for vacations to be evenly spread throughout the vacation period” [RUA, p. 290].)

In this connection, we find distinguishable the carriers’ citations of authority for centralized decision-making on vacation schedules without reference to the impact of grievants’ absences on local requirements of service. In *BNSF v. UTU* (Employer Exhibit 22; Suntrup, 2005), the parties had, over time, jointly moved to a vacation scheduling process that involved participation of central management in the cooperative process of arranging vacation periods. In only one location –Glasgow, Montana– where local union personnel were insisting on strict application of seniority rights, were the parties unable to reach a mutually-acceptable schedule. Instead, they agreed to a compromise schedule at Glasgow for that year “pending arbitration.” Arbitrator Suntrup held that the union failed to bear its burden of proof that the employer had imposed a straight-line method to allocate vacation schedules in violation of the 1949 NVA, writing,

A review of the schedule currently in place at Glasgow, Montana “... pending arbitration...” shows that it is the obvious result of compromises of the type that are required by both the spirit and intent of Section 6 of the Vacation Agreement and that it does take into consideration both central planning considerations *as well as local variables bound to the Glasgow employees’ seniority rights.*

[Employer Exhibit 22, pp. 23-24; emphasis added.]

In *Chicago, Burlington & Quincy Railroad Co. v. Brotherhood of Railway and Steamship Clerks* (Employer Exhibit 27; Dorsey, 1962), the Board rejected grievant's claim, finding that "Carrier was faced with an emergency which comes within the exception to the 10 days notice of deferment of vacation as provided for in Article 5 of the [1941 NVA]." (Employer Exhibit 27, p. 940.) In *Illinois Central Railroad Co. v. Transportation- Communication Employees Union* (Employer Exhibit 29; Myers, 1969), the union did not contradict the carrier's assertion that local circumstances were such as to require rescheduling of vacations. The carrier had given more than the contractually-required 10 days' notice of deferral to a later date and offered grievant the opportunity to request further deferral to a date that he would prefer. Grievant declined that offer, took the rescheduled vacation, and then sought penalty pay for the original vacation period that he had worked. The Board rejected grievant's claim, writing that the situation he complained of "was because of [grievant's] adamant position, and not the Carrier's fault." (Employer Exhibit 29, p. 30.) Finally, in *Burlington Northern Railway Co. v. Brotherhood of Railway Carmen* (Union Exhibit 24; Marx, 1992), the requested personal leave day at issue was December 22, 1990, within the governing agreement's express limitation "that a personal leave day may be denied 'where the request for leave is so late in a calendar year that service requirements

prevent the employees utilization of any personal leave days before the end of that year’.” (Union Exhibit 24, pp. 2-3.)

We see nothing in any of these cases that would justify unilateral employer policies such as those at issue, which alter established individual employees’ scheduled vacations without any reference to the operational impact of those employees’ vacations on requirements of service at the locations involved or to express exceptions in the parties’ contract language.<sup>2</sup> Those policies not only write requirements of service out of the parties’ contracts; they eliminate as well employee participation and seniority as elements of the vacation scheduling process. See *Local Union 689, ATU and Washington Metropolitan Area Transit Authority* (Union Exhibit 20; Brogan, 2006) (rejecting employer’s unilateral implementation of a FMLA policy requiring employees on FMLA leave to relinquish their vacations and use accrued vacation time as “fl[y]ing in the face of explicit contract language” providing vacations to be picked according to district seniority and “scheduled during the vacation year . . . as may be to the least detriment of the service. . . .” (RUA, pp. 313, 321.)

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<sup>2</sup>In this connection, we reject as unfounded in the record the carriers’ suggestion that a minimal, “arbitrary and capricious” standard is the appropriate test for proposed unilateral changes to scheduled vacations. Carriers must establish reasons for proposed changes that are grounded in local operational needs and that are consistent with contractual standards. A rational basis alone will not suffice.

Sixth, clear contract language and similar consistent arbitral precedent protect use of personal leave days and individual vacation days from arbitrary or unreasonable unilateral employer action unrelated to operational needs or other contractual standards. As noted above, the PLAs require carriers to grant personal leave to employees “upon 48 hours’ advance notice” when the requested days are “consistent with the requirements of the carrier’s service.” That section goes on to specify the parties’ intent that the requirements of service condition not “prevent an eligible employee from receiving personal leave days except where the request for leave is so late in a calendar year that service requirements prevent the employee’s utilization of any personal leave days before the end of that year.” (See, e.g., JA, p. 182.)

In *Conrail v. BRAC* (Union Exhibit 22; Eischen, 1987), the carrier had denied an employee’s request for two days’ personal leave to avoid having to pay overtime to other employees covering grievant’s proposed absence. The Board rejected the carrier’s position that avoiding overtime pay to replacement workers met the PLA’s requirements of service standard, writing,

Carrier might decline an employee’s [*sic*] timely request for allowance of Personal Leave days but, if challenged, Carrier must demonstrate that it had good and sufficient reasons *consistent with the needs of the service* for denying the requested Personal Leave days.

[RUA, p. 336; emphasis added.]

In *Brotherhood of Railroad Signalmen and Long Island Rail Road* (Union Exhibit 23; Franden, 1979), the carrier had denied an employee's request for personal leave under its policy of granting only one leave day on each work day tour per subdivision where it had already granted leave to another employee in that subdivision for that tour. The Board rejected the carrier's grounds for denial where the governing agreement imposed specific limitations on employees' personal leave rights, writing,

Rule 70 clearly states that personal leave will be granted subject to the limitations set out in the rule. The carrier's attempting to add a further limitation, to wit: in accord with its adoption policy. The language of the rule itself along with the interpretation following creates a right in the employe [*sic*]. The carrier has infringed on the right by limiting the time when an employe [*sic*] can take his personal leave beyond those limitations set out in the rule. This is a violation of the agreement. The carrier deprived claimant of a right bargained for and granted under the agreement.

[RUA, p. 340.]

The following cases cited by the carriers, where arbitrators held that carriers had properly denied requested personal leave days under circumstances specifically permitted by PLAs' terms, are not inconsistent with this conclusion. *Burlington Northern Railway Co. v. Brotherhood of Railway Carmen* (Union Exhibit 24; Marx, 1992) (*supra* at p. 36) (request for personal leave on December

22<sup>nd</sup> was too late in the calendar year and many other employees were already scheduled to be off); *Campbell and New Orleans Public Belt Railroad Co.* (Union Exhibit 25; Klaus, 1983) (employee sought personal leave for December 29<sup>th</sup> but admitted she would not be able to complete required work by years' end). These decisions all properly focused on the specific language of PLAs' exceptions and related them to the specific circumstances at the time and place when the employee was seeking to take a personal leave day. Nothing in any of these cases would justify the unilaterally-imposed policies of general application at issue here, which require employees to use personal leave days when taking unpaid FMLA leave.

Seventh, we reject as inapposite and unpersuasive the carriers' remaining arguments with respect to their inherent managerial rights to control employee absenteeism and time off and with respect to what they call "the equities" at issue. In the first place, it is holy writ of labor-management relations that inherent managerial rights cannot trump express contract language controlling subject matter like vacation and personal leave scheduling. As we have found, the NVAs and PLAs expressly govern this subject matter and establish the carriers' obligations with respect to scheduling. And, as the federal district and appeals courts have ruled, the FMLA's permissive substitution provision does not

overcome those obligations. These employers must negotiate new contract language to permit their use of Section 2612(d)(2)'s permissive authority; we are powerless to award in the arbitration rights the employers have neither sought nor won in bargaining.

Moreover, the carriers' "equity" arguments are misplaced to us. They are more properly addressed to the unions across the bargaining table under RLA Section 156 or to a Board with interest arbitration authority. As noted above, the parties have strictly limited our jurisdiction to deciding the contract question they have put before us and have expressly withheld authority for us to modify their existing agreements in any way. On the entire record before us, we are satisfied that our conclusions are entirely consistent with, and that this Award draws its essence from, the parties' NVAs and PLAs.

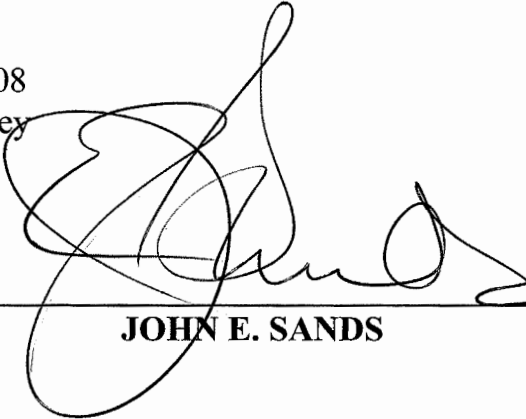
By reason of the foregoing, we issue the following



**AWARD**

The carriers' policies requiring employees to substitute paid vacation and/or paid personal leave for unpaid FMLA leave do violate the requirements of the national vacation and/or national personal leave agreements.

Dated: December 2, 2008  
West Orange, New Jersey



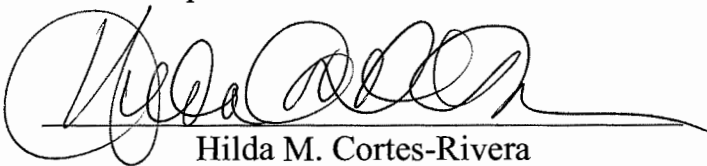
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**JOHN E. SANDS**

**ACKNOWLEDGMENT**

STATE OF NEW JERSEY)  
>ss.:  
COUNTY OF ESSEX )

On December 2, 2008, JOHN E. SANDS, whom I know, came before me and acknowledged that he had executed the foregoing as and for the Special Board of Adjustment's Opinion and Award in the above-captioned matter.



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Hilda M. Cortes-Rivera  
A Notary Public of New Jersey  
My Commission expires October 10, 2013

William H. Holley, Jr.  
WILLIAM H. HOLLEY, JR.

**ACKNOWLEDGMENT**

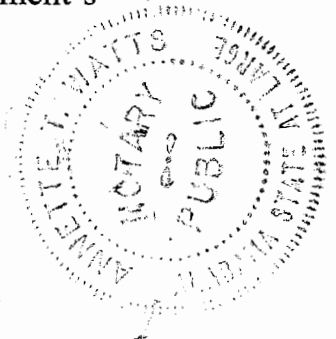
STATE OF ALABAMA)

>ss.:

COUNTY OF LEE )

On December 2, 2008, WILLIAM H. HOLLEY, JR., whom I know, came before me and acknowledged that he had executed the foregoing as and for the Special Board of Adjustment's Opinion and Award in the above-captioned matter.

Annette J. Watts  
A Notary Public of Alabama



MY COMMISSION EXPIRES 11/19/11

  
\_\_\_\_\_  
**JEROME H. ROSS**

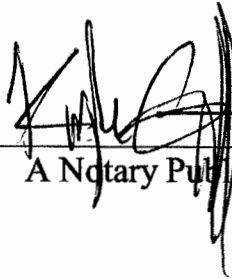
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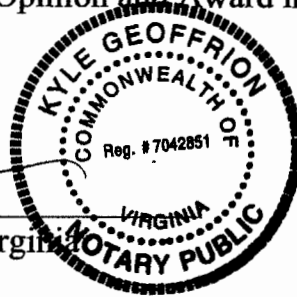
COMMONWEALTH OF VIRGINIA)

>ss.:

COUNTY OF FAIRFAX )

On December 2, 2008, JEROME H. ROSS, whom I know, came before me and acknowledged that he had executed the foregoing as and for the Special Board of Adjustment's Opinion and Award in the above-captioned matter.

  
\_\_\_\_\_  
A Notary Public of Virginia



**JOHN E. SANDS**  
**ARBITRATOR AND MEDIATOR**  
800 EXECUTIVE DRIVE - SUITE 100  
WEST ORANGE, NEW JERSEY 07052

January 5, 2009

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Re: Special Board of Adjustment  
(Substitution of Contractual Paid Leave for Unpaid FMLA Leave)  
JS Case No. 3750

Dear Colleagues:

We have received the carriers' December 19, 2008 request for interpretation of our December 2, 2008 Opinion and Award and the unions' December 23<sup>rd</sup> response. The carriers raise these two questions:

1. Does [our Award] mean that the carriers are permitted to require substitution of paid personal leave and/or single vacation days if they do so *before* those days are set?
2. Does the Award bar substitution of paid personal leave provided under the BLET national personal leave agreement?

We have considered both documents carefully and conducted an executive session by conference call on January 5, 2009 to discuss the parties' arguments as well as relevant portions of the record and of our Opinion and Award. Based on that consideration, we have reached the unanimous conclusion that the answer to the first request for interpretation is "no" and to the second is "yes."

Our December 2<sup>nd</sup> Award reads,

**JOHN E. SANDS**  
**ARBITRATOR AND MEDIATOR**

The carriers' policies requiring employees to substitute paid vacation and/or paid personal leave for unpaid FMLA leave do violate the requirements of the national vacation and/or national personal leave agreements.

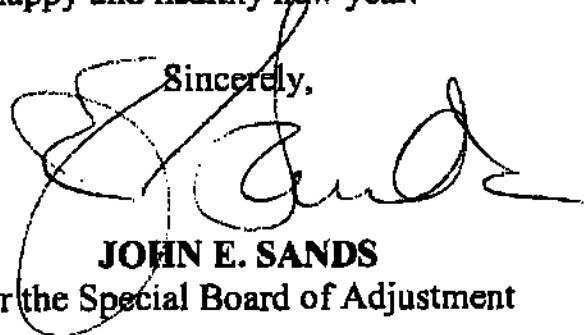
With respect to "unscheduled leave" like paid personal leave and individual vacation days, the cited portion of our Opinion on pages 28-29 makes clear our conclusion that, ". . . once such days are set, no unilateral employer changes may occur without meeting specified contractual standards." We unanimously agree that, just as no substitution of such days for FMLA leave may occur after such days are set, neither can it occur *before* those days are set. We see no legitimate distinction between the two. The carriers are therefore *not* permitted to require substitution of paid personal leave and/or single vacation days for FMLA leave before those days are set.

With respect to "personal leave" under the BLET national personal leave agreement, we similarly see no distinction that would vary the impact of our Award, which we intended to apply to that agreement's subject matter just as it does to all the others. Our Award therefore bars substitution of paid personal leave under the BLET national personal leave agreement.

With respect to Ms. Parcelli's December 30, 2008 letter concerning scheduling a follow-on hearing on remedy issues, all three of us have April 7<sup>th</sup> available. Please let us know if that date will be convenient for the parties.

We wish you all a happy and healthy new year.

Sincerely,



**JOHN E. SANDS**  
For the Special Board of Adjustment

JES:hcr

cc: William H. Holley, Jr., Esq.  
Jerome H. Ross, Esq.