UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS, TRANSPORTATION DIVISION,	)	Civil Action No. 8:25-cv-00740-RJR
Petitioner,	)	
v.	)	
UNION PACIFIC RAILROAD COMPANY,	)	
Defendant.	)	

PLAINTIFF SMART-TD'S BRIEF IN OPPOSITION TO DEFENDANT UNION PACIFIC'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1, Plaintiff, the International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division ("SMART-TD"), by and through the undersigned, states as follows in opposition to Defendant Union Pacific Railroad Company's ("Union Pacific" or "the Carrier") Motion for Summary Judgment.

INTRODUCTION

The present matter pertains to an arbitration award ("the Award") issued by Special Board of Adjustment No. 1208 ("the Board"). The Award was the result of a lengthy labor dispute between SMART-TD, a union representing employees working in the conductor craft, and Union Pacific, a railroad that employs said conductors. The mandate conferred upon the Board by both the parties' collective bargaining agreements ("CBA") and the agreement to arbitrate that led to the Award, was to determine whether and how certain work rule changes would be implemented into existing CBAs. As the below demonstrates, the jurisdiction of the Board was exceedingly narrow, limited only to proposals that were legitimately before it. Nonetheless, the Board failed to conform or confine itself to the scope of the agreement to arbitrate in violation of the Railway Labor Act ("RLA"), 45 U.S.C. § 157 by implementing new agreement terms that were outside the scope of what the parties agreed.

Union Pacific argues that SMART-TD's position is merely a dispute regarding the merits of the Award, rather than a challenge to the Board's authority. To the contrary, as the following establishes, the CBA, the agreement to arbitrate, the parties' conduct, and the Board's own findings with respect to jurisdiction demonstrate that the Board was acting outside the scope of its jurisdiction, and thus violating the stipulations of agreement to arbitrate. The Board did not have the authority to alter crew consist agreements. The Board did not have the authority to impose a schedule on employees that failed to provide for scheduled rest. The Board did not have the authority to eliminate certain CBA provisions after narrowing the scope of arbitration proceedings with the parties' acquiescence. Based on the following, the Award must be set aside as it is in violation of the requirements of the RLA.

FACTUAL BACKGROUND[1]

A. The 2019 Round of National Handling.

The Award at issue here is the end result of the lengthy "national handling" process that began on November 1, 2019. Under the RLA, collective bargaining agreements do not expire; rather, the parties are free to negotiate changes to existing agreements after the expiration of a mutually agreed-upon moratorium period contained within the agreement from the past round of negotiations. (ECF No. 26-2 at ¶6). In national handling, railroads typically bargain together in a coalition through their representative, the National Carriers' Conference Committee ("NCCC"). (*Id*. at ¶5). Carriers are not required to participate in the coalition and may instead bargain independently. (*Id*.). On the other side in national handling, railroad unions typically form bargaining committees comprised of various union officers who then bargain with the Carriers' chosen representative. (*Id*.). Sometimes, like carriers, different unions will bargain together in a coalition in national handling. (*Id*.). The resulting agreements from this process are referred to as "national agreements." (*Id*.).

In contrast to national handling, "local handling" is collective bargaining that occurs on a carrier-by-carrier basis relating to matters of concern that are particular to that railroad or its

[1] As the parties are currently submitting responses to cross-motions for summary judgment, the included factual background is substantially the same as in SMART-TD's Brief in Support of its Motion for Summary Judgment. For ease of reference, additional factual statements not found in SMART-TD's Brief in Support are included in Subsection H, entitled, "The Parties' Dispute Over the Scope of Arbitration."

predecessor lines. (ECF No. 26-2 at ¶9). Such negotiations are typically between representatives of the carrier and general committees of adjustment, who represent employees on certain territories of a carrier.[2] (*Id*. at 11). Certain topics are strictly limited to local handling as a matter of law and cannot be pursued in national handling absent the express agreement of both parties. *See Alton & Southern Ry. Co. v. Bhd. of Maintenance of Way Employes*, 883 F.Supp. 755, 760-61 (D.D.C. 1995) ("[w]hether [national handling] is obligatory will depend on an issue-by-issue evaluation of the practical appropriateness of mass bargaining on that point and of the historical experience in handling any similar national movements.") (quoting *Atlantic Coast Line R.R. Co. v. Bhd. of R.R. Trainmen*, 262 F.Supp. 177, 187 (D.D.C. 1967)).

On November 1, 2019, the NCCC, which represents a number of large and small carriers including Union Pacific, served a "Section 6 notice" on SMART-TD, which began a new round of national handling.[3] (ECF No. 24-1 at pg. 10). At issue were changes to wages, health and welfare benefits, and certain work rules. Union Pacific, through the NCCC, sought changes pertaining to these topics, but also extended an "invitation" to SMART-TD to bargain over changes to "crew consist" agreements. (ECF No. 26-2 at ¶14). Put simply, these agreements establish a required minimum number of employees working in the conductor craft to work on a train crew. (*Id*.) The negotiation of crew consist agreements is subject to local handling as a matter of law, and cannot be discussed in national handling absent the express agreement of both parties. *Atlantic Coast Line, supra*. Here, the parties proceeded to national handling over their

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[2] Many railroads comprise of a number of smaller, defunct railroads that have been acquired over time. (ECF No. 26-2 at ¶10). General committees of adjustment typically have jurisdiction over the negotiation and enforcement of agreements that cover the territory of a defunct railroad that remains in effect under the larger, current railroad. (*Id*.).

[3] The term "Section 6 notice" derives from Section 6 of the RLA, which governs the negotiation of collective bargaining agreements. 45 U.S.C. § 160.

respective notices, but SMART-TD declined the carriers' invitation to negotiate crew consist in national handling and instead those negotiations proceeded to local handling.[4] (ECF No. 26-2 at ¶14).

After nearly three years of bargaining and following mediation by the National Mediation Board ("NMB"), the parties failed to come to terms on a national agreement. Pursuant to 45 U.S.C. § 155(c), the parties were released from mediation by the National Mediation Board on June 17, 2022. (ECF No. 24-1 at pg. 10). Thereafter, the parties prepared to engage in self-help with the Section 6 bargaining process exhausted. In order to prevent economic disruption, President Biden invoked his authority under 49 U.S.C. § 160 to appoint Presidential Emergency Board 250 ("PEB 250"). (*Id*. at pgs. 10-11). The invocation of this process forbade the parties from engaging in self-help for a period of 30 days, to allow PEB 250 to "investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation." 45 U.S.C. § 160. Under this process, the parties to the dispute present their respective proposals to the board, which then issues a report and recommendation that is non-binding on the parties, but serves as a pathway for future negotiations to occur.

B. <u>Proceedings Before and Report and Recommendation of PEB 250.</u>

The parties presented numerous proposals before PEB 250. Of import here, SMART-TD sought more predictable work schedules. (ECF No. 24-1 at pg. 91). Many conductors work schedules with no assigned time off. For example, a conductor may work six consecutive days with different starting times each day, or they may work one day and then not be called for an assignment the next day though they are available for work. (ECF No. 26-3 at ¶7). Then the next

[4] The history regarding these negotiations cannot be described fully herein and are not relevant to the question before this Court, instead it suffices to say that the parties began bargaining crew consist locally, where such negotiations were not barred by existing agreements.

day they may or may not be called into work though they are available as the cycle continues. (*Id.*). Importantly, an employee who has made his or herself available for work on any given day must be ready to report to their assignment within one-and-one-half or two hours, depending on location, of being notified by Union Pacific or face potential discipline. (*Id.* at ¶ 8). This of course creates a highly unpredictable schedule where employees cannot know in advance when they may be off work.

On the other hand, Union Pacific and other carriers represented by the NCCC sought to modernize the job bidding process of their employees by instituting "automated bid scheduling." (ECF No. 24-1 at pgs. 87-88). Under this proposal, the employer maintains a system of all job assignments and all job bidding, and electronically assigns employees to those jobs. (*Id.*). In addition to the changes to the actual bidding process, the carriers sought changes to how job assignment is staffed when it is currently "vacant," meaning no employee is assigned to it at that time. (*Id*. at pgs. 88-89). Additionally, the carriers sought more reliance on the use of "pools" instead of "extra boards." (*Id*.). Put simply, "pools" are a roster of employees who work an assignment and function on a first-in, first-out basis as job assignments arise. (ECF No. 26-3 at ¶5). "Extra boards" are a list of employees who are available to fill an assignment where no employee is assigned. (*Id*. at ¶6).

In addition to the above, the carriers sought a conclusion to local handling of crew consist negotiations. (ECF No. 24-1 at pg. 43). Specifically, rather than the Section 6 process required by the RLA for negotiating changes to agreements, the carriers requested that PEB 250 recommend binding arbitration if the parties were unable to reach new agreements, which is in direct contrast to the Section 6 process which does not require mandatory arbitration to resolve negotiations. (*Id.*); 45 U.S.C. § 160.

With respect to the union's proposal regarding work/rest cycles and the carrier's proposal regarding automated bidding and pool/extra board regulation, PEB 250's Report and Recommendation stated:

> "We remand for further negotiation both the Carriers' requests regarding automated bidding and scheduling, self-supporting pools, pool regulations, and extra boards, and those of the BLET and SMART-TD relative to the issues of scheduling (including the scheduling of scheduled days off for unassigned road service). If no agreement can be reached, those disputes are to proceed to binding arbitration. The Board hopes that this may prove to be a "win-win" in which the Carriers obtain a more efficient and reliable system for manning the locomotives, with both operational benefits and cost savings, and employees will obtain preferred schedules with more control over their personal lives when not otherwise scheduled."

(ECF No. 24-1 at pgs. 36-37). Accordingly, PEB 250 recommended that the proposals be subject to further negotiation, with an arbitration backstop to follow if unsuccessful. (*Id.*).

With respect to the local handling of crew consist, PEB 250 declined to recommend the Carriers' request for an arbitration backstop. (ECF No. 24-1 at pg. 44). In doing so, it recognized that crew consist negotiations are a matter of local handling, and that "no persuasive basis has been shown to supplant the customary RLA process." (*Id.*). Under this process, PEB 250 noted, crew consist negotiations were in active mediation by the NMB, and it is the NMB that has the sole authority to release the parties from negotiations. (*Id.*). As PEB 250 put it, "[n]o reason exists for this Board to make a recommendation that would alter the statutory process by mandating binding arbitration." (*Id.*). Accordingly, PEB 250 recommended that the carriers withdraw their request for an arbitration backstop for local handling of crew consist. (*Id.*).

C. <u>Follow-Up National Handling Based on PEB 250's Report and Recommendations.</u>

SMART-TD and the NCCC began negotiations based on the Report and Recommendations of PEB 250. This resulted in a tentative agreement that delayed any threat of self-help pending a ratification vote by SMART-TD members. Pertinent here, Articles V, VI, and

VII of the tentative agreement addressed the issues of scheduled days off, automated bidding, and pool/extra board regulation. (ECF No. 24-2 at pgs. 8-13). Specifically, Article V addressed scheduled days off, and referred the matter to local handling by allowing any general committee of adjustment to serve a Section 6 notice on a carrier "to establish rules creating voluntary assigned days off in thru freight road service." (*Id.* at pg. 8). Following service of the notice, the carrier could respond with its own notice establishing such rules. (*Id.*). Per the agreement, the parties then had a minimum of 180 days to negotiate, following which, either party could submit the matter to final and binding arbitration. (*Id*. at pgs. 8-9).

On the other hand, Articles VI and VII addressed "automated bid scheduling" and "pools and extra board" regulation, respectively. (ECF No. 24-2 at pgs. 9-13). Similar to Article V, Articles VI and VII referred the matters to local handling by allowing carriers to serve Section 6 notices "of its intent to implement some or all of the items below and, in doing so, may identify any carrier-specific implementation matters that it believes must be addressed in connection with such implementation." (*Id*. at pgs. 9;11). The union could then respond "with its own list of carrier-specific implementation issues that it believes must likewise be addressed." (*Id*.). Like Article V, the negotiations over the items in Articles VI and VII were subject to an 180-day period, after which either party could move the matter to arbitration. (*Id*. at pgs. 10-12).

The tentative agreement failed the ratification vote by SMART-TD members, leaving the parties again on the precipice of self-help. (ECF No. 22-24 at pgs. 2-3). In response to the threat, Public Law 117-216 was enacted by Congress and the President on December 2, 2022, which imposed the terms of the rejected tentative agreement on the parties. (*Id*.). The effect of the law was that the terms of the tentative agreement became a new national agreement and the 2019 round of national handling was thus concluded with the tentative agreement imposed on the parties.

D. Ongoing Local Handling of Crew Consist Agreements.

As PEB 250 did not adopt the NCCC's proposal regarding an arbitration backstop with respect to crew consist negotiations, the parties continued such negotiations in local handling and crew consist was not part of the tentative agreement that was imposed on the parties. (ECF No. 26-2 at ¶18). This process resulted in voluntary local agreements between Union Pacific and three SMART-TD general committees of adjustment dated June 7, 2023, November 4, 2024, and June 3, 2025, which definitively resolved any changes to existing crew consist agreements. (*Id.*). Importantly, these agreements made no changes to long-standing language that prohibited any "Carrier supervisor, official, or non-craft employees (including yardmasters) [from being] used to supplant or substitute in the exclusive work of any train or yard crew working under UTU[5]… Agreements."[6] (*Id.* at ¶¶13;16).

E. Local Handling of Articles V, VI, and VII.

With the tentative agreement imposed on the parties, SMART-TD served its Section 6 notice with respect to Article V on December 28, 2023. (ECF No. 26-3 at ¶9) Union Pacific served its notices on Articles VI and VII on January 15, 2024. (*Id.* at ¶10). The parties then engaged in negotiations over their respective proposals, but were unfortunately unable to reach a voluntary agreement. (*Id.* at ¶11). Accordingly, on September 16, 2024, the parties entered into

[5] "UTU" stands for the United Transportation Union, which merged with the Sheet Metal Workers International Association in 2011, forming the International Association of Sheet Metal, Air, Rail and Transportation Workers ("SMART"). The Transportation Division of SMART is the successor of the UTU. (ECF No. 26-2 at ¶17).

[6] The same or substantially similar language is contained within at least nine crew consist agreements between Union Pacific and various SMART-TD General Committees of Adjustment. (ECF No. 24-17 at pgs. 5-7).

an agreement to arbitrate pursuant to 49 U.S.C. § 157 and 158 of the RLA. (ECF No. 24-5 at pg. 2, ¶1).

F. <u>Establishment of Special Board of Adjustment 1208.</u>

The agreement to arbitrate established Special Board of Adjustment 1208 ("the Board"), which consisted of three members: a union representative member, a carrier representative member, and a neutral member. (ECF No. 24-5 at pg. 2, ¶2). SMART-TD's member was International Vice President Gary Crest, while Union Pacific's member was Vice President of Labor Relations Maqui Parkerson. (*Id.*). The parties subsequently agreed on neutral member Earlene Baggett-Hayes. (ECF No. 24-16 at pg. 2). Articles V, VI, and VII's plain terms established that an arbitrator's jurisdiction was "whether and how the rules referenced in this Article will be implemented." (ECF No. 24-2 at pgs. 8;10;12). Further, the agreement to arbitrate limited the scope of the Board's jurisdiction to "only [those] changes necessary to implement the rules referenced in Article V, VI, and VII of the National Agreement." (ECF No. 24-5 at pg. 2, ¶1).

The parties exchanged written opening submissions on January 2, 2025, which consisted of their respective proposals and supporting reasoning regarding the rules referenced in Articles V, VI, and VII. (ECF Nos. 24-6;24-7). Rebuttal submissions were submitted on January 13, 2025. (ECF Nos. 24-8;24-9). Following submissions, a live arbitration hearing was held from January 21-23, 2025, in Phoenix, Arizona. (ECF No. 24-16 at pg. 3).

G. <u>The Parties' Proposals to the Board.</u>

In their written submissions and during the live hearing, the parties' proposals were broad-ranging and diverged drastically from each other. Accordingly, the summation contained herein is limited to those relevant to the matter before the Court. Of import here, a primary issue was what work/rest cycle would employees work under in order to meet the mandate of Article V with respect to scheduled rest days. Such cycles require an employee to work or be available for work for a certain amount of days, followed by a certain number of rest days before the cycle begins again. (ECF No. 24-16 at pg. 5). The parties exchanged proposals regarding cycles for pool employees and, separately, extra board employees.

With respect to scheduled rest for extra board employees,[7] SMART-TD advocated for a work/rest cycle of five days working or available for work followed by two voluntary days off. (ECF No. 24-6 at pgs. 89-91). By contrast, Union Pacific proposed so-called "Smart Rest" for extra board employees, which requires an employee to work five consecutive days before receiving one day off. (ECF No. 24-7 at pgs. 20;39). Under Smart Rest, an employee does not know when they will get a day off work because if an employee is available for work but is not called, the "clock" resets, resulting in a lack of the predictability that is present in SMART-TD's proposal. (ECF No. 26-3 at ¶13). In addition to the Smart Rest proposal, Union Pacific further sought the inclusion of an agreement provision with respect to extra board employees that "[i]f no crew is available due to observance of rest days or lay-offs, a qualified employee may be used to perform service." (*Id*. at pg. 39).

In addition to the work/rest cycles proposed above, SMART-TD sought to maintain the status quo regarding so-called "extra rest" provisions in existing agreements. (ECF No. 24-6 at pg. 26). Extra rest simply allows employees performing road service to observe additional time off between assignments at their option when they have worked a pre-determined number of hours. (ECF No. 26-3 at ¶14). For its part, Union Pacific made no proposed changes to the

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[7] The parties submitted divergent requests with respect to pool employees, but the Award's findings with regard to that matter are not challenged here and are thus not discussed.

observance of extra rest in its opening submission, rebuttal, or at the hearing. Indeed, during the hearing, Union Pacific Director of Labor Relations Jennifer Powell stated unequivocally that Union Pacific was not seeking the elimination of extra rest provisions stating, "[t]hat is not what our proposal is talking about… we don't propose to eliminate that provision." (ECF No. 24-17 at pgs. 3-4).

H. The Parties' Dispute Over the Scope of Arbitration.

The scope of the arbitration became a hotly contested issue during the proceedings. As stated previously, the agreement to arbitrate limited the scope of the Board's jurisdiction to "only over changes necessary to implement the rules referenced in Article V, VI, and VII of the National Agreement." (ECF No. 24-5 at pg. 2, ¶1). During arbitration, SMART-TD sought the inclusion of agreement language that would provide employees with certain additional pay and time off opportunities. (ECF No. 24-13 at pg. 2). In response, Union Pacific argued vigorously these proposals were outside the scope of the Board's authority. The core of its argument was that those items were not mentioned in Articles V-VII, and were just a rehashing of requests SMART-TD made to PEB 250 that were rejected. Specifically, Union Pacific argued, "[t]he language of the 2022 National Agreement provides no basis to impose changes in matters that are not mentioned in Articles V, VI, and VII…" (ECF No. 24-7 at pg. 46). Union Pacific argued that these were items that SMART-TD argued in favor of before PEB 250, but that "[PEB 250] rejected those requests" and "[h]aving done so, it makes no sense to suggest that the Board nevertheless allowed the union to obtain those changes through the process provided under Article V, VI, and VII, all of which address different and limited subjects." (*Id.*).

With respect to the meaning of the "whether and how" language of Articles V-VII, Union Pacific stated, "[i]n contract interpretation, we start, as always, with the text of the agreement."

(ECF No. 24-10 at pg. 9, lines 22-23). Advocating for a narrow scope under Article VII, Union Pacific argued that this plain text contained "carrier specific implementation of a set of particular scheduling, vacancy, and assignment rules." (*Id*. at pg. 10, lines 10-12). Further, in its opening submission, Union Pacific favorably quoted an arbitration decision regarding Article VII, wherein a different board found, "[a] careful reading of Article VI and VII reveal the PEB's clear intent to allow the Carrier to select from a short list of pre-determined issues and in doing so, control a very limited dialogue," rejecting "the union's attempt to address 'measures beyond the scope of the Article VII items proper for negotiation and subsequent arbitration." (ECF No. 24-7 at pg. 47).

By contrast, SMART-TD advocated for a broader view of the Board's authority, arguing that voluntary agreements entered into on other railroads regarding the implementations of Articles V, VI, and VII contained similar terms to what it was proposing. (ECF No. 24-6 at pgs. 68-70). In support, SMART-TD stated, "[t]he affected employees received an improved quality of life and compensation through various provisions, resulting in an equitable *quid pro quo* between the parties." (*Id*. at pg. 69); (ECF No. 24-8 at pgs. 27-28).

Notwithstanding its broader view of jurisdiction, SMART-TD argued that certain proposals by Union Pacific were outside the bounds of Articles V-VII. For example, SMART-TD read into the record crew consist language that prohibited non-SMART-TD represented conductors from performing work. (ECF No. 24-11 at pg. 38, lines 4-8). It argued that PEB 250 had rejected the NCCC's request for an arbitration backstop with respect to crew consist, and that the operative crew consist agreement language prohibiting any qualified employee from performing work remained intact. (*Id*. at pg. 38, lines 12-21). Indeed, SMART-TD specifically stated that "[the] use of qualified employee[s] to fill vacancies… [t]hat's not allowed by crew consist… [t]hat provision hasn't changed… [i]t wasn't changed by the PEB… [i]t wasn't changed in public law…" (ECF No. 24-11 at pg. 117, lines 14-20). Further, SMART-TD repeatedly argued that Smart Rest is not scheduled rest, as it does not allow for any predictability because predictable time off is entirely contingent on the needs of Union Pacific. (ECF No. 24-11 at pg. 23, lines 11-21); (ECF No. 24-14 at pg. 7). Importantly, Union Pacific witness Grant Janke, when testifying regarding costing Union Pacific's proposals regarding rest, admitted the that Smart Rest is not scheduled rest, stating that "…we have only offered scheduled rest for the pool and Smart Rest for… the pool extra board." (ECF No. 24-10 at pg. 248, lines 4-7).

I. <u>Preliminary Findings and Order to Provide Post-Hearing Submissions.</u>

On March 17, 2025, Neutral Baggett-Hayes issued her Preliminary Findings and Order to provide Post-Hearing Submissions ("Preliminary Findings"). (ECF No. 24-13). In this order, Neutral Baggett-Hayes found: "[t]he Board's jurisdiction is limited in scope to items that are legitimately before it," and further found that "[t]he Board lacks jurisdiction over a number of the specified Union requests." (ECF no. 24-13 at pg. 2). The order then listed requests by SMART-TD that were within the scope of the Board's jurisdiction and further identified certain SMART-TD requests that it deemed outside the Board's jurisdiction, stating, "the Board is not authorized to rule on these matters that are outside of its jurisdictional scope." (*Id.*). Notably, in finding that the scope of the matter before the Board was narrower than SMART-TD had argued, Neutral Baggett-Hayes failed to apply the same reasoning to proposals by Union Pacific that were outside the Board's jurisdiction.

After issuing her findings with respect to the Board's jurisdiction, Neutral Baggett-Hayes ordered that the parties submit post-hearing submissions with best and final offers within 60 days. (ECF No. 24-13 at pg. 3). In addition to narrowing the scope of proposals argued previously, she ordered that the best and final offers "may not exceed parameters or topics already presented and argued." (*Id.*).

J. The Parties Post-Hearing Submissions Following the Preliminary Findings.

The parties submitted their respective best and final offers on May 13, 2025. (ECF No. 24-16 at pg. 6). Relevant here, Union Pacific retained its proposal regarding the use of any qualified employee to perform service, despite the fact that changes to crew consist were not before the Board. (ECF No. 24-15 at pg. 18). As justification, Union Pacific stated, "[i]n response to the Organization's objections at arbitration, the Carrier has tailored its proposal to require a separate evaluation prior to each job that the Carrier cannot fill because of a lack of available personnel." (*Id.*). Finally, in an attempt to downplay the change, Union Pacific stated, "the use of this provision will be limited to extraordinary and necessary circumstances" and in a conclusive fashion stated that such changes "would not violate any crew consist provisions." (*Id.*).

Further, Union Pacific proposed for the first time to eliminate extra rest unless SMART-TD chose to keep the provision in place in lieu of employees receiving a work/rest schedule. (ECF No. 24-15 at pg. 7). This proposal had not been submitted to the Board in any fashion prior to its inclusion in Union Pacific's post-hearing submission in contradiction to Neutral Baggett-Hayes' Preliminary Findings that limited proposals to those already presented and argued. Indeed, as explained previously, Union Pacific explicitly stated during prior proceedings that it was not seeking the elimination of extra rest at all. (ECF No. 24-17 at pgs. 3-4).

Finally, Union Pacific maintained its proposal regarding the application of Smart Rest to extra board employees. (ECF No. 24-15 at pgs. 7-9). In support, it argued that to impose any other model would require Union Pacific to maintain more employees on extra boards, which would result in higher costs unless it was willing to risk an inability to service customers. (*Id.*).

K. <u>The Award.</u>

On August 5, 2025, Neutral Baggett-Hayes transmitted the Award to the parties. While the Award is broad-reaching, of note were certain concessions it provided to Union Pacific. First, the Award adopted the proposed language from Union Pacific that allows it to protect service by using "any qualified employee in limited circumstances that could result in unavoidable harm to the customer." (ECF No. 24-16 at pg. 10). As authority to do so, Neutral Baggett-Hayes stated that she "acknowledges [SMART-TD's] vehement opposition to this provision, but appreciates [the] Carrier's need to protect service in the face of period of extraordinary unavailability." (*Id.*). While Neutral Baggett-Hayes explained that "[t]he intent of the provision is to provide narrowly tailored relief to the Carrier in limited circumstances," the result is an inexplicable alteration to the parties' existing crew consist agreements, which were not before the Board. (*Id.*).

Additionally, the Award provided pool employees with a 6/2 work rest model, which requires said employees to be available for six consecutive days, after which they are entitled to two optional days off. (ECF No. 24-16 at pg. 6). However, the Award adopted Union Pacific's proposal applying Smart Rest to extra board employees, which does not provide assigned rest days. (*Id.* at pgs. 6-7). As justification, Neutral Baggett-Hayes stated she was adopting Smart Rest "[in] order to balance the additional costs associated with a 6/2 work-rest model" that had been adopted for pool employees. (*Id.* at pg. 6).

Finally, the Award adopted Union Pacific's proposal to eliminate extra rest despite previously asserting it was not seeking to do so during arbitration proceedings. (ECF No. 24-16 at pg. 13, Art. V.D.). It was not until after Neutral Baggett-Hayes Preliminary Findings that

Union Pacific sought this change, despite her clear circumscription of the parties' best and final offers to not include any proposals that had not been introduced previously.

L. <u>Questions for Interpretation Submitted by the Parties.</u>

On September 17, 2025, the parties submitted three questions for interpretation regarding the Award. (ECF No. 24-18 at pg. 3). Pertinent here, the parties asked for the definition of "qualified employee" with respect to Article VII.E of the Award, which permits Union Pacific to use any qualified employee to perform work as a conductor. (*Id.*). In response, Neutral Baggett-Hayes explained, "[a] qualified employee is any employee who meets the requirements of the job, whether it is the skills level, certification(s), and/or experience," and she further stated "[t]he Award does not differentiate between Union and non-Union employees in Article VII.E when it refers to 'a qualified employee.'" (*Id.*). Accordingly, the Award's terms as clarified by the interpretation allow any employee, even potentially management, to perform the work of a conductor, amending the parties' crew consist agreements that explicitly prohibit such a practice.[8]

M. <u>SMART-TD's Dissent to the Award.</u>

SMART-TD Board Member Gary Crest issued a dissent, disagreeing with numerous aspects of the Award. (ECF No. 24-17). Pertinent here, the dissent first objected to the failure of the Award to provide assigned rest days to road extra boards by instead imposing Smart Rest, "which requires an employee to obtain five consecutive RSIA[9] starts before becoming eligible for a 24-hour rest period, effectively creat[ing] a system with no assigned off days, in

[8] Additionally, the parties asked whether the Award eliminated extra rest provisions on pools and extra boards on the Eastern District, which was answered in the affirmative. (ECF No. 24-18 at pg. 3).

[9] "RSIA" refers to 49 U.S.C. § 21103(a), which establishes mandatory rest for railroad employees and is discussed in further detail herein.

contravention of Article V of Public Law No. 117-216." (*Id*. at pg. 3). Further, the dissent challenged the Award's elimination of extra rest provisions in existing agreements, citing Union Pacific Director of Labor Relations Jennifer Powell's testimony during the hearing that it was not seeking to eliminate extra rest. (*Id*. at pgs. 3-4). Lastly, the dissent objected to the Award's grant of authority to Union Pacific to use any qualified employee to perform work that exclusively belongs to conductors. (*Id*. at pgs. 5-7). In support, SMART-TD submitted excerpts from nine existing crew consist agreements that contain some variation of a prohibition preventing any "Carrier supervisor, official, or non-craft employees" to "supplant or substitute in the exclusive work of any train or yard crew working under [SMART-TD] Agreements." (*Id*.). The dissent pointed out that "nowhere in Articles V-VII is it contemplated that a carrier would be permitted to use non-craft employees in such a manner." (*Id*. at pg. 7).

N. **The Present Situation.**

With the arbitration process completed, on December 19, 2025, Union Pacific filed the Award in this Court pursuant to 45 U.S.C. 159 First, in Case No. 8:25-mc-00548 (D. Neb.). On December 29, 2025, SMART-TD filed its Complaint seeking impeachment of the Award pursuant to 45 U.S.C. § 159. (ECF No. 1). The basis for impeachment is discussed in more detail below, but put briefly, the Board failed to conform with the stipulations of the agreement to arbitrate by: (1) altering the parties' existing crew consist agreements; (2) failing to provide extra board employees with scheduled rest; and (3) eliminating extra rest provisions from agreements after the jurisdiction of the Board was narrowed to exclude such a proposal.

LEGAL STANDARD

A. Federal Rule of Civil Procedure 56.

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). "The movant 'bears the initial responsibility of informing the district court of the basis for its motion,' and must identify 'those portions of [the record] ... which it believes demonstrate the absence of a genuine issue of material fact.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting *Celotex Corp.v. Catrett*, 477 U.S. 317, 323 (1986)). "If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out "specific facts showing that there is a genuine issue for trial." *Id*. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Ricci v. Destefano*, 557 U.S. 557, 586 (2009).

B. Impeachment of Arbitration Award Under Section 9 of the RLA.

Under Section 9 of the RLA, an arbitration award resulting from a Section 7 arbitration "shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration… unless, within ten days after the filing of the award, a petition to impeach the award… shall be filed in the clerk's office of the court in which the award has been filed…" 45 U.S.C. § 159 Second. An award may be impeached only upon three limited grounds. 45 U.S.C. § 159 Third. Relevant here, an award may be impeached where it "does not conform, nor confine itself, to the stipulations of the agreement to arbitrate." 45 U.S.C. § 159 Third(b). Where a court "determine[s] that a part of the award is invalid on some ground or grounds… but shall determine that a part of the award is valid, the court shall set aside the entire award" unless the parties agree that the "valid and invalid parts are separable." 45 U.S.C. § 159 Fourth. In such a case, "the court shall set aside the invalid part, and order judgment to stand as to the valid part." *Id*.

"The determination of whether or not the Board exceeded its authority in making the Award must be made by reference to the four corners of the instrument constituting the agreement between the parties." *Gibbons v. United Transp. Union*, 462 F.Supp. 838, 844 (N.D. Ill. 1978) (citing *Nat'l Maritime Union of Am. v. Federal Barge Lines, Inc.*, 304 F.Supp. 256, 258 (E.D. Mo. 1969)). "It is common ground that an arbitrator may decide only those questions posed in the submission agreement of the parties." *Maine Central R.R. Co. v. Bhd. of Maintenance of Way Workers*, 663 F.Supp. 425, 429 (D. Me. 1987). Under a Section 7 arbitration, the board has "considerable discretion in interpreting any ambiguities in the arbitration agreement." *Southern Pacific Transp. Co. v. United Transp. Union*, 789 F.Supp. 9, 13 (D.D.C. 1992) (citing *United Paperworkers v. Misco*, 484 U.S. 29 (1987)). It is broadly accepted that the scope of review of an arbitration award pursuant to the RLA is "among the narrowest known to law." *Southern Pacific Transp. Co. v. United Transp. Union*, 789 F.Supp. 9, 13 (D.D.C. 1992) (citing *Maine Central R.R. Co. v. Bhd. of Maintenance of Way Workers*, 873 F.2d 425, 428 (1st Cir. 1989)). Narrow review, however, does not mean none at all. Importantly, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209, 1213 (8th Cir. 1997) (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

ARGUMENT

The Board acted outside the scope of its jurisdiction in violation of the agreement to arbitrate and Articles V-VII by imposing certain CBA changes that were not within its authority. First, the Board altered the parties' longstanding crew consist agreements to permit non-SMART-TD personnel to perform work belonging exclusively to conductors. Changes to crew consist agreements were not before the Board. Indeed, they were distinctly excluded from the process that led to the creation of Articles V-VII, rendering the Board without jurisdiction to alter them. Second, when the Board decided to implement a work/rest cycle on extra board employees, it did not have the authority to impose a schedule that fails to provide employees with scheduled rest. There is no dispute that the provisions of Article V require that rest be scheduled. Nonetheless, the Board imposed a work/rest schedule where time off for employees is entirely subject to the needs of Union Pacific in violation of Article V and the agreement to arbitrate. Finally, the Board ignored its own order and eliminated extra rest provisions from existing agreements, despite limiting the parties' proposals during the best and final offer stage of arbitration. The result is an Award that fails to conform to the requirements of the RLA, and one that must be set aside.

Union Pacific argues, in chief, that SMART-TD has merely disputed the merits of the Award, rather than properly raising a jurisdictional argument. This entirely mischaracterizes SMART-TD's position. While SMART-TD initially sought a broader view of the Board's jurisdiction, the fact remains that SMART-TD repeatedly put the Board on notice that crew consist was not properly before it and that imposing Smart Rest would not comply with Article V's requirement of scheduled rest. Further, Union Pacific tacitly concedes that the elimination of extra rest was not raised until the best and final offer stage in violation of the Board's Preliminary Findings, thus it was improperly before the Board at that stage. As explained below, these errors are fatal, and the Award must be set aside in accordance with the requirements of the RLA.

A. <u>The Board's Actions Permitting Any Qualified Employee to Perform Conductor Work Was Outside the Scope of the Agreement to Arbitrate.</u>

1. The Board's Alteration of the Parties' Crew Consist Agreements Renders Vacatur Proper.

As explained in SMART-TD's Brief in Support, the Award amends the parties' existing crew consist agreements, which expressly prohibit the use of any "Carrier supervisor, official, or non-craft employees (including yardmasters) [from being] used to supplant or substitute in the exclusive work of any train or yard crew working under [SMART-TD]… Agreements," by adding an exception where "the Carrier is unable to fill an assignment due to lack of rested and available personnel, the blanking of such assignment would result in unavoidable harm to the customer." (ECF No. 26-4 at pg. 21). This aspect of the Award violates Articles V-VII and the agreement to arbitrate because crew consist was not among the matters submitted to the Board. The agreement to arbitrate specified that the Board's jurisdiction was limited to "only [those] changes necessary to implement the rules referenced in Article V, VI, and VII of the National Agreement." (ECF No. 24-5 at pg. 2, ¶1). In its Preliminary Findings, Neutral Baggett-Hayes held that "[t]he Board's jurisdiction is limited in scope to items that are legitimately before it," and further found that "[t]he Board lacks jurisdiction over a number of the specified Union requests." (ECF no. 24-13 at pg. 2). While declining to entertain certain proposals from SMART-TD that it deemed fell outside that scope, the Board failed to apply the same limitation to Union Pacific's proposal to change the parties' existing crew consist agreements.

There can be no serious question that the topic of crew consist was not before the Board. There is no mention of such issues in Articles V-VII and that is no mistake; changes to crew consist were part of entirely separate and distinct local handling negotiations, which was outside of the dispute resolution procedures of the Articles. Before PEB 250, which led to the creation of Articles V-VII, Union Pacific, through the NCCC, sought a recommendation for an arbitration backstop with regard to those ongoing local crew consist negotiations, but PEB 250 rejected that proposal. (ECF No. 24-1 at pg. 44). Instead, the parties continued local handling and reached voluntary agreements with respect to crew consist without the need of arbitral or governmental intervention.

As Union Pacific itself argued during arbitration proceedings regarding the limitations of the Board's authority, where PEB 250 has rejected a proposal, "it makes no sense to suggest that the Board nevertheless allowed the [party] to obtain those changes through the process provided under Article V, VI, and VII, all of which address different and limited subjects." (ECF No. 24-7 at pg. 46). Nevertheless, the Board here altered the parties' crew consist agreements, despite lacking the authority to do so. Where "an arbitrator issues an award that does not 'draw its essence from the contract,' because it reflects instead the arbitrator's 'own notions of industrial justice,'" the Award should be vacated. *Alcan Packaging Co. v. Graphic Communication Conf., Int'l Bhd. of Teamsters & Local No. 77*, 729 F.3d 839, 841 (8th Cir. 2013) (quoting *Enterprise Wheel*, 363 U.S. at 599).

2. Union Pacific's Arguments Regarding Article VII(E) Lack Merit.

In its Brief, the Carrier argues that SMART-TD's challenge to the Award's allowance for any qualified employee to perform conductor duties "is not a jurisdictional challenge – it is a merits dispute about how the Award should interact with other agreements in future applications." (ECF No. 25-2 at pgs. 18-19). In support, the Carrier claims that because the Award "effectively doubl[ed] the number of employees who can be off work at any given time," the Board was acting within its authority under the "whether and how" language in Articles V and VII to determine "what, if any, adjustments were necessary in light" of the changes to employee time off. (*Id*. at pg. 19). Further, in misclassifying SMART-TD's argument, the Carrier claims that the Union "does not argue that service protection falls outside the scope of Article VII, or that the Board lacked authority to address what happens when no rested employee is available," but rather objects "that the Board's solution may conflict with separate local agreements – a challenge that necessarily assumes the Board had authority to adopt a service-protection provision in the first place." (*Id*. at pgs. 19-20). Union Pacific concludes that if "Article VII(E) violates a local crew-consist agreement, the remedy is a grievance or arbitration under that agreement – not vacatur of the Award that created that provision." (*Id*. at pg. 20).

As an initial matter, the scope of SMART-TD's jurisdictional challenge is not directed at the Board's authority to decide matters actually within Articles V-VII. Instead, its challenge is that when the Board so decided, it failed to act within the scope of the agreement to arbitrate and its own findings with respect to jurisdiction. The facts of this matter establish that by altering the parties' crew consist agreements the Board failed to conform or confine itself to the scope of the agreement to arbitrate. Union Pacific's attempts to classify this merely as a "merits dispute" for future arbitration pertaining to the interaction of Article VII(E) with existing crew consist agreements strains credulity. The question here is not how these provisions "interact" with each other, because it is self-evident that Article VII(E) alters the parties' longstanding crew consist agreements. Rather, the issue here is whether the Board had the authority to alter such agreements, which must be answered in the negative as explained above.

With respect to the "whether and how" language of Articles V-VII and the agreement to arbitrate, we need look no further than the Carrier's explanation during the live proceedings. In discussing the meaning of "whether and how" with respect to Articles V-VII while arguing for a narrow view of the Board's jurisdiction. There, the Carrier stated, "[i]n contract interpretation, we start, as always, with the text of the agreement." (ECF No. 24-10 at pg. 9, lines 22-23). With respect to Article VII, the Carrier argued that this plain text contained "carrier specific implementation of a set of particular scheduling, vacancy, and assignment rules." (*Id*. at pg. 10, lines 10-12). Further, in its opening submission, Union Pacific favorably quoted an arbitration decision regarding Article VII, wherein a different board found, "[a] careful reading of Article VI and VII reveal the PEB's clear intent to allow the Carrier to select from a short list of pre-determined issues and in doing so, control a very limited dialogue," rejecting "the union's attempt to address 'measures beyond the scope of the Article VII items proper for negotiation and subsequent arbitration." (ECF No. 24-7 at pg. 47). As Union Pacific succinctly put it, "[i]f it's not encompassed within those rules, it's not before [the Board]." (ECF No. 24-10 at pg. 10, lines 13-14).

Applying UP's own construction here, Article VII does not mention crew consist or what a carrier may do when no rested employee is available, it merely allows a carrier to seek to implement rules that establish self-supporting pools and reduce reliance on extra boards to fill vacancies. The "whether and how" language does not authorize the Board to reach beyond those subjects and amend unrelated agreements. If Union Pacific sought such authority, it was free to do so during the local handling of crew consist or negotiate for its inclusion in Article VII of the National Agreement. It did not. Instead, it bootstrapped a crew consist proposal though its submission before the Board, which had no authority to provide such a change.

Finally, Union Pacific's waiver argument has no merit. In its Brief, Union Pacific argues that SMART-TD has waived its jurisdictional argument with respect to Article VII(E) because its argument that the provision conflicted with existing crew consist agreements was merely a "merits argument about the effect of other agreements, not objections that the issue fell outside the Agreement to Arbitrate or beyond the Board's authority." (ECF No. 25-2 at pg. 25). According to Union Pacific, SMART-TD "cannot now repackage the same contention as a challenge to the Board's jurisdiction." (*Id*. at pg. 25). In support, it relies on the general principle that "[i]f a party believes an arbitrator lacks authority over an issue, it must say so while the arbitrator can still address the objection… [i]t cannot litigate the issue on the merits, await the result, and then recast its losing position as a jurisdictional challenge," (*Id*.). However, SMART-TD unequivocally argued that crew consist was not before the Board. During live proceedings, SMART-TD representative Luke Edington paraphrased an excerpt from one of the existing crew consist agreements that "[n]o Carrier supervisor official non-craft employees, including yardmasters, shall be used as a plan or substitute in the exclusive work of any trained or yard crew working under UTU, which is now [SMART]… agreements." (ECF No. 24-11 at pg. 38, lines 4-8). Mr. Edington then asked rhetorically whether the Carrier sought changes to this language before PEB 250, and pointed to its findings that the "Board recommends that the Carriers withdraw their proposal with respect to crew consist" and that "those agreements remain intact in that regard." (*Id*. at pg. 38, lines 12-21). Mr. Edington further stated, "[the] use of qualified employee[s] to fill vacancies… [t]hat's not allowed by crew consist… [t]hat provision hasn't changed… [i]t wasn't changed by the PEB… [i]t wasn't changed in public law…" (ECF No. 24-11 at pg. 117, lines 14-20). Likewise, SMART-TD representative Shawn McKinley stated during proceedings that PEB 250 "rejected anything to do with crew consist… [t]he recommendations had nothing to do with affecting crew consist agreements or anything like that… they were clear."[10] (ECF No. 24-12 at pg. 114, lines 18-21).

By repeatedly arguing that changes to crew consist were not before the Board specifically in the context of the "any qualified employee language," SMART-TD clearly preserved the argument made here. Indeed, it is difficult to see how arguing that crew consist is not before the Board could be conceived as a merits argument at all, as it has nothing to do with such. Further, the cases Union Pacific relies upon involve scenarios where a party refused to participate in arbitration and attempted to disqualify the arbitration award in later enforcement proceedings, which did not happen here.[11] While case law is limited, the pertinent inquiry is whether a party placed the arbitration board on notice of its objection to the Board's authority and/or filed a timely motion to vacate. (*Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.* 380 F.3d 1084, 1102 (8th Cir. 2003) (where a party either places arbitration board on notice of

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[10] In support of its waiver argument, Union Pacific attempts to cast some importance to the fact that "SMART-TD invoked the Board's interpretation process and asked the Board to clarify the meaning of 'qualified employee.'" (ECF No. 25-2 at pgs. 25-26). The fact of the matter is that there is a final award governing Articles V-VII. It is certainly reasonable for SMART-TD to seek clarity with respect to a provision of the Award for the purposes of both the legal challenge here and, if this challenge is unsuccessful, future application of the Award to the parties. Indeed, in the absence of an interpretation, Union Pacific would likely argue here that "any qualified employee" is ambiguous and requires an interpretation by the Board.

[11] For example, in *Loc. 1982, Int'l Longshoremen's Ass'n v. Midwest Terminals of Toledo, Int'l, Inc.*, 944 F.3d 607, 610 (6th Cir. 2019), the employer refused to participate in initial arbitration proceedings on the basis that the grievance was procedurally invalid. *Id.* at 609. Following a district court's confirmation that the proceeding was valid, the employer then later raised an argument that the matter could not be progressed further when a post-arbitration interpretive dispute arose. *Id.* at 610. The court rejected this argument, stating, "Midwest chose not to participate in the initial proceeding… [i]t cannot argue now that the case is closed on an alternative ground when courts have already affirmed the legitimacy of the proceeding." *Id.* Similarly, *Brook v. Peak Int'l Ltd.*, 294 F.3d 668 (5th Cir. 2002), dealt with a subsequent challenge to the arbitration proceedings on the basis that the American Arbitration Association flouted procedures regarding the selection of arbitrators. i.e., the formation of the arbitration itself. *Id*. at 673.

objection to jurisdiction and/or files a timely motion to vacate, such argument is preserved for judicial review). While *Hope Elec. Corp.* dealt with the issue of substantive arbitrability, the reasoning behind the decision logically follows here.

As explained above, SMART-TD met that burden. It has maintained its position throughout that crew consist was rejected by PEB 250 and was not part of the collective bargaining agreement imposed by Congress and the President in Public Law No. 117-216. Notwithstanding such, crew consist was still subject to the arbitration here. While the Board may have rejected that argument, it was unquestionably preserved. Further, SMART-TD timely filed the present action to set aside the Award. Because the Board altered the parties' crew consist agreements beyond that scope, the Award should be vacated.

B. <u>The Award Failed to Provide Scheduled Rest in Violation of Article V By Imposing Smart Rest.</u>

1. The Board's Imposition of Smart Rest on Extra Board Employees Violates Article V.

As stated in SMART-TD's Brief in Support, the Award's imposition of Smart Rest on extra board employees fails to grant scheduled rest as required by Article V. (ECF No. 26-4 at pgs. 23-26). Instead, extra board employees working in road service are left with a continuation of the unpredictable scheduling where time off is entirely subject to factors outside of their control, the precise concerns that Article V was intended to address. By imposing a work schedule that fails to provide for scheduled rest, the Board failed to conform or confine itself to the scope of the agreement to arbitrate.

Article V of the National Agreement is entitled "Scheduled Days Off" and allows "[a]ny General Committee seeking to establish rules creating voluntary assigned days off in thru freight road service" to "serve a written Notice on the Carrier of its desire to establish voluntary assigned days off agreement rules." (ECF No. 24-2 at pg. 8). This notice was to "specify the rules the Union proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such rules." (*Id.*). In response, the Carrier was entitled to "respond with its own Notice specifying the rules that the Carrier proposes to establish and the conditions, if any, which it proposes shall govern the establishment of such rules." (*Id.*). When remanding the issues that formed Articles V-VII, PEB 250 noted that the three subjects of those Articles were "intertwined with the subject of flexibility, efficiency, <u>certainty, and fairness of work schedules, including (but not limited to) the subject of scheduled days off</u>…" (ECF No. 24-1 at pg. 87) (emphasis added).

As stated in SMART-TD's Brief in Support, the Board's imposition of a 6/2 work-rest model for pool employees was not what SMART-TD advocated for, but was certainly within the Board's authority under Article V and the agreement to arbitrate because it imposed scheduled rest as contemplated by Article V. (ECF No. 26-4 at pg. 25). On the other hand, the Board's imposition of Smart Rest on extra board employees merely instituted an unpredictable unscheduled rest system on employees in violation of Article V. The Board was free to decline to impose any schedule on such employees under the "whether and how" language in both Article V and the agreement to arbitrate, but once it chose to implement Article V for those employees, it could not do so through a system that fails to provide for scheduled rest. Accordingly, the Board failed to conform or confine itself to the agreement to arbitrate, and the Award should be vacated.

2. Union Pacific's Arguments Regarding Smart Rest Fail to Establish that the Board Acted Within its Authority.

Union Pacific asserts that SMART-TD's arguments regarding the imposition of Smart Rest on extra board employees "is a quarrel with the Board's *choice* of rest model, not a challenge to its *authority* to make the choice." (ECF No. 25-2 at pg. 20) (emphasis in original).

Like with crew consist argument, Union Pacific mischaracterizes SMART-TD's position as a "merits argument about which rest model Article V permits or requires" but that "[w]hat is missing is any claim that the Board lacked authority to resolve that question in the first place." (*Id*. at pg. 26).

Not only does this mischaracterize SMART-TD's argument, it ignores the mandate of Article V regarding scheduled rest. Indeed, SMART-TD does not challenge the Board's authority to impose <u>a</u> work-rest schedule on extra board employees; it challenges the Board's authority to impose <u>this</u> work-rest schedule. The quarrel over choice, as Union Pacific put it, is based on the fact that the Board could not impose Smart Rest, not that it was less desirable. By choosing to exercise its authority under Article V to impose a schedule on extra board employees, the Board could not then turn around and impose Smart Rest, which fails to provide for scheduled rest, as discussed above.

As has been stated, Articles V-VII conferred the Board with the authority to determine "whether and how" to implement the rules referenced therein. (ECF No. 24-2 at pgs. 8;10;12). But once the Board determined "whether" to award scheduled rest, it could not then determine that the "how" meant a work schedule that does not allow for scheduled rest. It is not merely a difference of interpretation that Article V required scheduled rest and that Smart Rest fails to fit that criteria. During live proceedings, Union Pacific acknowledged the interaction between Article V with Articles VI and VII, stating, "[SMART-TD] gets <u>scheduled rest days</u> under Article [V]; we get the benefits of Articles [VI] and [VII]." (ECF No. 24-12 at pg. 12, lines 3-4). (emphasis added). That scheduled rest was of primary import under Article V was echoed by NCCC Chairman Brendan Branon, who stated that Articles V-VII were "intended to provide a one-shot process for the parties to conclude at a Carrier level the terms of the provisions that would apply with respect to scheduled rest days, self-supporting pools and related pool regulation, and automated bid systems." (ECF No. 24-11 at pg. 218, lines 7-12) (emphasis added).

While acknowledging that scheduled rest was the primary concern of Article V, Union Pacific admitted that Smart Rest is not scheduled rest. During live proceedings, Union Pacific witness Grant Janke, when testifying regarding costing Union Pacific's proposals regarding rest, admitted the that Smart Rest is not scheduled rest, stating that "…we have only offered scheduled rest for the pool and Smart Rest for… the pool extra board." (ECF No. 24-10 at pg. 248, lines 4-7). This was not an inadvertent statement, but instead reflects the reality that Smart Rest is not scheduled rest, as explained herein and in SMART-TD's Brief in Support.

Finally, SMART-TD repeatedly argued that Smart Rest is not scheduled rest before the Board, unquestionably preserving the argument here. For example, SMART-TD Representative Luke Edington discussed the unpredictability and lack of a schedule under Smart Rest, stating, "Now, when will those five starts occur? They have to be five consecutive, meaning that you don't have a break of more than 24 hours between each time you're called to work. You go one day throughout the middle of your week, you're not going to get Monday, Tuesday I work consecutive; I'm off Wednesday; Thursday, Friday I start over another one, two, three, four, five, Now, if there's consistent breaks in there, when do you have a predictable day off you can observe? There is none." (ECF No. 24-11 at pg. 23, lines 11-21). Further, SMART-TD argued in its post-hearing submission that Smart Rest would not permit employees "consistent time off to manage personal affairs as their single day off would not be fixed but contingent upon working the required starts, creating a moving target that is impossible to plan around." (ECF No. 24-14 at pg. 7). Union Pacific acknowledged the substance of that objection, stating that SMART-TD had repeatedly criticized its Smart Rest proposal because employees "may go weeks before they acquire five consecutive starts, thus preventing them from observing a rest day." (ECF No. 24-10 at pg. 178, lines 14-19).

While arguing that Smart Rest is not scheduled rest, SMART-TD pointed out that the real purpose of Union Pacific's proposal is that employees are currently entitled to two days of rest after six consecutive starts under RSIA, and that imposing Smart Rest would result in employees utilizing a single rest day after five starts, thus increasing availability and lowering costs for Union Pacific. (ECF No. 24-8 at pg. 13; ECF No. at pg. 55, lines 9). Incredibly, the Board, in tacitly acknowledging that Smart Rest is not scheduled rest, but instead a money-saver for Union Pacific, agreed, justifying the adoption of Smart Rest "[in] order to balance the additional costs associated with a 6/2 work-rest model" that had been adopted for pool employees. (ECF No. 24-16 at pg. 6). Cost balancing cannot enlarge the Board's jurisdiction beyond Article V. Any desire to pass on savings to Union Pacific and impose a work-rest schedule that contradicts the plain terms of Article V does just that. In doing so, the Board failed to conform or confine itself to the scope of the agreement to arbitrate, and the Award should be vacated.

C. The Board's Elimination of Extra Rest Violated Its Own Order Regarding Proposals.

1. The Elimination of Extra Rest Provisions Was Outside the Board's Authority.

The Award eliminates existing extra rest provisions that permit employees to observe additional time off between assignments at their option when they have worked a predetermined number of hours. (ECF No. 26-3 at ¶14). As argued in SMART-TD's Brief in Support, in response to SMART-TD raising the issue of preserving extra rest during its opening submission, Union Pacific asserted during live proceedings that it was not seeking its elimination. Indeed, Union Pacific Director of Labor Relations Jennifer Powell unequivocally stated, "[t]hat is not what our proposal is talking about… we don't propose to eliminate that provision." (ECF No. 24-17 at pgs. 3-4).

Following the hearing, the Board's Preliminary Findings ordered the parties to submit best and final offers, and importantly, ordered that such "not exceed parameters or topics already presented and argued." (ECF No. 24-13 at pg. 3). Despite this limitation and Union Pacific affirmatively stating during proceedings that it was not seeking to eliminate extra rest, its best and final offer did just that. Specifically, its proposal sought to provide "the Organization with a one-time option to preserve any fatigue mitigation program or provisions that allow employees to extend, add, or observe extra rest in lieu of implementing the default work-rest schedule." (ECF No. 24-15 at pg. 7). In other words, SMART-TD could only preserve existing extra rest provisions by forfeiting the new work-rest schedule. Instead of denying Union Pacific's proposal regarding an exchange between it and SMART-TD regarding extra rest, the Award simply eliminated extra rest provisions wholesale and provided no justification for why it was doing so in violation of its jurisdictional scope as established in the Preliminary Findings. By doing so, the Board acted outside the scope of its authority, and the Award should be vacated.

2. Union Pacific's Arguments That the Elimination of Extra Rest Was Within the Board's Authority Lack Merit.

Union Pacific argues that the Board's jurisdiction to eliminate extra rest provisions "derives from the National Agreement and the agreement to arbitrate, not from whether a particular proposal was raised at the hearing or only at the best-and-final stage" and that "the actions of the parties cannot determine the scope of arbitration." (ECF No. 25-2 at pg. 23) (citing *Maine Cent. R. Co. v. Bhd. of Maintenance of Way Employees*, 873 F.2d 425, 429 (1st Cir. 1989). This argument ignores that in *Maine Central*, the court further stated that while the parties' actions cannot determine said scope, they can "take on significance" when read in the overall context of the arbitration board's decision. *Maine Central*, 873 F.2d at 429 (parties' conduct in negotiations informed arbitration board of scope regarding definition of "rates of pay" and "wages" to include lump sum payments).

Here, the parties' conduct is not in dispute. SMART-TD sought to preserve extra rest provisions and Union Pacific asserted that it was not seeking their elimination. The Board's Preliminary Findings held the parties to those positions, prohibiting either party from expanding their respective best and final offers beyond what was already presented and argued. Nonetheless, Union Pacific introduced its proposal to exchange extra rest for work/rest cycles for the first time after that. Then, the Board went beyond this proposal, and entirely eliminated extra rest altogether. Union Pacific contends that "[d]eciding whether older, overlapping extra rest provisions would survive the new system is part and parcel of deciding 'how' that system operates." (ECF No. 25-2 at pg. 23). While Union Pacific focuses on the "how" aspect, it ignores that by limiting the parties' proposals in its Preliminary Findings, the issue of "whether" extra rest was before the Board to eliminate was answered in the negative by the parties' own conduct and the Board's own decision.

Further, Union Pacific also argues that "whether the extra rest provisions would survive the new Article V regime was squarely before the Board – because SMART-TD placed it there" by raising the matter in its opening submission and arguing that extra rest should be preserved. (ECF No. 25-2 at pg. 23). According to the Carrier, "[h]aving affirmatively litigated whether those provisions should be retained, SMART-TD cannot now contend that the Board lacked authority to resolve that very question." (*Id*. at pgs. 23-24). This argument borders on the frivolous. While true that SMART-TD raised the issue of retaining extra rest during the initial stages of arbitration, Union Pacific conceded that position and was foreclosed by the Board from raising it following the Preliminary Findings Order.

Finally, Union Pacific asserts that SMART-TD waived its argument regarding extra rest by treating such provisions as "a merit issue." (ECF No. 25-2 at pg. 27). While the elimination of extra rest was initially a merits issue, it was clearly established during proceedings that Union Pacific was not seeking its elimination. There can be no argument that the Board was unaware of this based on Union Pacific's unequivocal statement during the proceedings. Nonetheless, after it limited the parties' proposals following its Preliminary Findings, the Board eliminated extra rest after Union Pacific's late-in-the-day request, even going further than what Union Pacific proposed. Such does not constitute waiver of any kind. The Board was on notice of its lack of jurisdiction regarding new proposals because it issued the Preliminary Findings proscribing new proposals. Nonetheless, it acted outside of that scope and eliminated the provisions wholesale. Accordingly, the Award must be vacated.

CONCLUSION

For the aforementioned reasons, SMART-TD respectfully requests that the Court find the Board failed to conform or confine itself to the stipulations of the agreement to arbitrate and impeach the Award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 25, 2026, the accompanying brief was filed using the Court's Electronic Case Filing system, which sent notice to all attorneys of record in the matter.

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CERTIFICATE OF COMPLIANCE

In accordance with Local Rule 56(d)(1), the undersigned certifies that the submitted brief contains a word count of 11,097 words.

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