UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA
OMAHA DIVISION

INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS, TRANSPORTATION DIVISION

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Case No. 8:25-cv-00740

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

INTRODUCTION

Section 9 of the Railway Labor Act makes it exceedingly difficult to do what SMART-TD asks this Court to do: overturn a final and binding interest arbitration award. It permits impeachment, as relevant here, only if the Board failed to conform or confine itself to the agreement to arbitrate. 45 U.S.C. § 159 Second, Third(b). SMART-TD itself acknowledges that judicial review in this context is "among the narrowest known to law," and the Board has "considerable discretion in interpreting any ambiguities in the arbitration agreement." (Dkt. No. 26-4 (SMART-TD Br.) at 18–19.)[1] Hence, the parties appear to agree that the proper question is not whether the Board made the right choices. It is whether the parties gave the Board authority to make them.

They plainly did. Articles V, VI, and VII authorized the Board to determine "whether and how" the referenced rules would be implemented, and the Agreement to Arbitrate authorized the "changes necessary" to implement them. (Dkt. No. 24-2 at 10, 12, 14; Dkt. No. 24-5 at 2, ¶ 1.) That was a broad mandate over an integrated set of rules governing rest, job bidding, pools, extra boards, and staffing. PEB 250 itself described those subjects as "inter-related," and SMART-TD urged the Board to consider them as a whole rather than "piece-by-piece." (Dkt. No. 24-1 at 91; Dkt. No. 24-8 at 11.) The Board was therefore not simply choosing among isolated proposals; it was charged with deciding how those interrelated rules would fit together and operate in practice—exactly the implementation judgment the parties could not resolve themselves and thus entrusted to the Board. (Dkt. No. 24-5 at 2, ¶ 1.)

---

[1] Citations to the parties' summary judgment briefs (Dkt. Nos. 25-2 and 26-4) are to each brief's internal page numbers. Other record page citations are to the page numbers in the CM/ECF header of the filed document; paragraph and original transcript page-and-line references are identified as such. *See* NECivR 7.1(b)(2).

Against that backdrop, each of SMART-TD's challenges is merely a disagreement with how the Board carried out its assigned task.

First, SMART-TD argues that Article VII(E) exceeds the Board's authority because it changes local crew consist agreements that were not submitted to arbitration. (SMART-TD Br. at 20–23.) But crew consist is fundamentally about crew size—the number of employees required to operate a train—and the Award is silent on that issue. In any event, the provision was well within the Board's authority. The Agreement to Arbitrate expressly authorized the Board to make the "changes necessary" to implement the submitted staffing rules. (Dkt. No. 24-5 at 2, ¶ 1.) Whether and to what extent a change affects an existing agreement has no bearing on the Board's authority to make it. The relevant question is whether Article VII(E) permissibly implements the staffing rules the parties submitted. And here, the "qualified employee" provision was a direct response to other changes authorized by Articles V and VII that substantially increase employee unavailability, making it much more difficult to staff trains. In the Board's view, the provision was necessary to make those other changes workable. It was properly included in the Award.

Second, SMART-TD argues that Smart Rest exceeds the Board's authority because it does not provide the fixed, calendar-based rest SMART-TD wanted. (SMART-TD Br. at 23–26.) But Article V expressly authorized the Board to determine "whether and how" rest would be implemented for extra boards. (Dkt. No. 24-2 at 10, 42–43.) The Board answered that "how" question by adopting Smart Rest, a voluntary rest mechanism tailored to extra board employees. (Dkt. No. 24-16 at 6–7, 12–13.) SMART-TD's objection is to the *answer* the Board chose, not to the Board's *authority* to answer the question. Whether Smart Rest was the best—or even the correct—implementation of Article V is precisely the merits inquiry Section 9 forecloses. *See infra* Part II.B.

Third, SMART-TD argues that the Board lacked authority to eliminate existing extra rest provisions because Union Pacific first proposed eliminating them in its best-and-final proposal, which, pursuant to the Board's Preliminary Order, was not supposed to "exceed parameters or topics already presented and argued." (SMART-TD Br. at 26–27.) That argument shifts from jurisdiction to procedure. The National Agreement and the Arbitration Agreement defined what the Board could decide; the Preliminary Order governed how the parties presented issues within that jurisdiction. (Dkt. No. 24-2 at 10, 12, 14; Dkt. No. 24-5 at 2, ¶ 1; Dkt. No. 24-13 at 2–3.) And even on its own terms, SMART-TD's procedural argument fails: extra rest was already before the Board—SMART-TD itself had asked the Board to preserve those provisions. (Dkt. No. 24-6 at 26, 60–61.)

Finally, the same history gives rise to an independent problem with all three claims: waiver. SMART-TD litigated these issues on the merits without preserving the jurisdictional objections it now asserts and, in several instances, affirmatively asked the Board to resolve them. (Dkt. No. 25-2 at 24–28.) Having treated these matters as properly before the Board while seeking a favorable result, SMART-TD cannot now challenge the Board's authority simply because it received an unfavorable Award.

The consequence SMART-TD seeks is sweeping: *vacatur of the entire Award*. (SMART-TD Br. at 28; 45 U.S.C. § 159 Fourth.) That consequence helps explain why Congress directed courts to construe awards "liberally . . . with a view to favoring [their] validity." 45 U.S.C. § 159 Third(c). SMART-TD must therefore show more than error—even serious error—in the Board's implementation choices; it must show that the challenged terms fall outside a permissible reading of the Board's assignment. *Maine Cent. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 873 F.2d 425, 429 (1st Cir. 1989). It cannot. Each challenged provision addresses the very rest-and-staffing framework the parties empowered the Board to implement. (Dkt. No. 24-2 at 10, 13–14; Dkt. No. 24-16 at 12–13, 18.) SMART-TD's motion should be denied.

RELEVANT BACKGROUND

Union Pacific's memorandum supporting its motion for summary judgment sets out the full bargaining and arbitration history in greater detail. (Dkt. No. 25-2 (Union Pacific Br.) at 3–14.) Below, Union Pacific provides a more focused account of the background most relevant to SMART-TD's arguments and the challenged provisions of the Award.

This dispute began with competing proposals concerning various aspects of employee scheduling and staffing. Union Pacific staffs through-freight service through pools of employees who generally work on call, while extra boards provide employees to fill vacancies when others are unavailable. (Dkt. No. 25-1 (UP SMF) ¶¶ 8–17.) Against that backdrop, SMART-TD sought scheduled rest days, while the carriers sought changes to certain staffing and job bidding rules. Presidential Emergency Board No. 250 treated those proposals as related and recommended that the parties bargain over them together, with binding arbitration if negotiations failed. (Dkt. No. 26-1 (SMART-TD SMF) ¶¶ 15–18, 20.)

That framework became Articles V, VI, and VII of the 2022 National Agreement, whose terms Congress imposed through Public Law No. 117-216 after the tentative agreement failed ratification. (UP SMF ¶¶ 29–31.) The three Articles address different components of the same scheduling-and-staffing framework. Article V addresses voluntary assigned days off; Article VI addresses automated bid scheduling; and Article VII addresses self-supporting pools and pool and extra board regulation. (UP SMF ¶¶ 32, 34, 36–37.) If bargaining failed, each Article authorized an arbitration board to determine "whether and how" its rules would be implemented. (UP SMF ¶¶ 33, 35, 38.)

When negotiations ultimately failed, SMART-TD invoked arbitration, and the parties established Special Board of Adjustment No. 1208 under a written agreement authorizing "changes necessary to implement" Articles V, VI, and VII. (UP SMF ¶¶ 40–44.) After opening and rebuttal submissions and a three-day hearing, the Arbitrator issued Preliminary Findings that certain proposals exceeded the Board's jurisdiction. (UP SMF ¶¶ 45–47.) The Arbitrator then directed the parties to submit best-and-final proposals limited to matters within the Board's jurisdiction and confined to "parameters or topics already presented and argued." (SMART-TD SMF ¶ 55.) Both parties submitted revised proposals in May 2025. (*Id.* ¶ 56.)

The resulting Award resolved the employee rest, job bidding, and staffing issues together. (UP SMF ¶¶ 62–65, 68–72.) For pool employees, the Board rejected Union Pacific's proposed 4/1 schedule (under which employees would have received one rest day every five days) and adopted a 6/2 model (meaning that employees would instead receive two rest days every eight days). (UP SMF ¶¶ 62–63.) For extra boards covering road assignments, the Board adopted voluntary Smart Rest, allowing qualifying employees to elect twenty-four hours of undisturbed rest at the home terminal after five consecutive trips or tours of duty. (UP SMF ¶ 64.) The Award also implemented new job bidding procedures, established self-supporting pools, changed the way pools were regulated, and doubled the prearranged-layoff threshold, allowing substantially more employees to be off work on any given day. (UP SMF ¶¶ 68–72.)

The Award also included the two other provisions SMART-TD now challenges. As part of the new rest framework, Article V(D) eliminated existing extra rest provisions. (UP SMF ¶ 67.) And as part of the new staffing framework, Article VII(E) addressed assignments that could not be filled because no rested and available personnel were available. When leaving such an assignment unfilled would cause unavoidable customer harm, Article VII(E) permits a qualified employee to cover the assignment, subject to notice and an assignment-by-assignment evaluation. (UP SMF ¶ 74.)

The parties later sought clarification of those provisions. The Board confirmed that Article V(D) eliminates certain extra rest provisions and that "qualified employee" under Article VII(E) does not distinguish between union and non-union personnel. (UP SMF ¶¶ 76–77.) It also anticipated further implementation discussions consistent with Article VII(E)'s specific conditions. (UP SMF ¶ 77.) SMART-TD now seeks to set aside Article VII(E), Smart Rest, and Article V(D) as beyond the Board's authority. (SMART-TD Br. at 19, 28.)

LEGAL STANDARD

Summary judgment is appropriate when "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); *see Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). The facts material to the scope of the Board's authority are undisputed, and whether the Award exceeded that authority presents a question of law.

ARGUMENT

I. SECTION 9 FORECLOSES MERITS REVIEW WHEN THE BOARD PERMISSIBLY EXERCISES ITS BROAD JURISDICTION.

SMART-TD does not dispute the governing framework. Section 9 makes an arbitration award "conclusive on the parties as to the merits and facts of the controversy submitted to arbitration" and permits impeachment on only three specified grounds. 45 U.S.C. § 159 Second, Third. SMART-TD invokes only Section 9 Third(b), which applies when an award "does not conform, nor confine itself, to the stipulations of the agreement to arbitrate." (SMART-TD Br. at 18–19.) And even that limited review proceeds under Congress's express direction that an award "shall be construed liberally by the court, with a view to favoring its validity." 45 U.S.C. § 159

Third(c). SMART-TD accordingly acknowledges that judicial review in this context is "among the narrowest known to law" and that the Board has "considerable discretion in interpreting any ambiguities in the arbitration agreement." (SMART-TD Br. at 18–19.)

Those principles establish the line Section 9 draws. The Board must act within the jurisdiction the parties conferred, but a reviewing court cannot revisit the merits of decisions made within that jurisdiction. The question is therefore not whether SMART-TD has a better reading of Articles V through VII, whether the Board chose the best implementation terms, or whether the Court would have struck the same balance. It is simply whether the Board was at least arguably exercising the authority the parties gave it. If the Award rests on a "viable, permissible interpretation" of that authority, that is "the end of [the] inquiry." *Maine Cent.*, 873 F.2d at 429.

Here, the Agreement to Arbitrate gives the Board jurisdiction "only over changes necessary to implement the rules referenced in Articles V, VI and VII of the National Agreement." (Dkt. No. 24-5 at 2, ¶ 1.) Each Article, in turn, authorizes the Board to determine "whether and how" its rules will be implemented. (Dkt. No. 24-2 at 10, 12, 14.) "Whether" allows the Board to reject a proposed arrangement; "how" allows it to choose the terms that make an adopted arrangement work. And the authority to make necessary "changes" allows the Board to revise existing rules rather than simply add new benefits to an untouched status quo. The parties entrusted those unresolved choices to the Board precisely because they could not agree on them. (Dkt. No. 24-5 at 2, ¶ 1.)

Even serious error in those implementation choices would not justify vacatur. The Supreme Court has made clear that an arbitration award stands as long as the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Under the Federal

Arbitration Act's analogous standard, "convincing a court of an arbitrator's error—even his grave error—is not enough." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013). The required showing is that the arbitrator *left* the assigned task, not that he performed it badly. *Id.* at 571–72.

The Eighth Circuit has applied the same distinction in an RLA dispute between these parties. An award need only have a contractual basis "at least rationally inferable" from the agreement—a standard that, the Court emphasized, "is not a high bar." *Union Pac. R.R. Co. v. Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers–Transp. Div.*, 988 F.3d 1014, 1017 (8th Cir. 2021). Even though the Court questioned the arbitrator's result, it refused to revisit the merits. *Id.* at 1018. As another court put it, the question is "not whether [the arbitrators] grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1194–95 (7th Cir. 1987).

SMART-TD's grievance-arbitration cases reinforce rather than undermine that rule. (SMART-TD Br. at 19, 22.) Those cases hold that an arbitrator may not substitute personal preferences for the parties' agreement. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209, 1212–13 (8th Cir. 1997); *Alcan Packaging Co. v. Graphic Commc'n Conf.*, 729 F.3d 839, 841–43 (8th Cir. 2013). But they also make clear that a court may not substitute its judgment for the arbitrator's. Indeed, in reversing vacatur, *Alcan* emphasized that even when "a court is convinced [the arbitrator] committed serious error," that "does not suffice to overturn his decision." 729 F.3d at 841 (quoting *Misco*, 484 U.S. at 38). The question remains whether the arbitrator was carrying out the authority the agreement conferred—not whether the court agrees with the result. *Id.* at 841–43.

That principle has particular force here because this Board was given broader authority than an arbitrator merely interpreting an existing agreement. The parties expressly authorized the Board to determine "whether and how" the rules in Articles V, VI, and VII would be implemented and to make the "changes necessary" to implement them. (Dkt. No. 24-2 at 10, 12, 14; Dkt. No. 24-5 at 2, ¶ 1.) The Board therefore had to exercise judgment in choosing among competing approaches to rest, staffing, cost, workability, and service needs, and in deciding how those interrelated rules would operate together. That exercise of judgment was not a departure from the Board's assignment—it *was* the assignment. (Dkt. No. 24-13 at 3, ¶ 2; Dkt. No. 24-16 at 6–7, 10.)

The breadth of that assignment makes SMART-TD's burden especially demanding. It is not enough to show that the Board made the wrong implementation choice, or even that it committed serious error in making it. SMART-TD must show that the Board left the assigned task altogether and decided something outside any permissible reading of a mandate that expressly encompassed rest, bidding, staffing, pools, and extra boards. *See Maine Cent.*, 873 F.2d at 429. Given that broad mandate, the line for vacatur lies well beyond ordinary—even serious—error. None of SMART-TD's challenges approaches it; each concerns how the Board implemented the very rest and staffing rules the parties empowered it to decide. (Dkt. No. 24-2 at 10, 13–14; Dkt. No. 24-16 at 12–13, 18.)

II. EACH CHALLENGED PROVISION IMPLEMENTS THE REST AND STAFFING RULES WITHIN THE BOARD'S JURISDICTION.

That demanding standard resolves all three Counts. SMART-TD cannot obtain vacatur by showing that the Board made the wrong implementation choice—or even a seriously erroneous one. It must show that the Board left its assigned task altogether and decided something outside any permissible reading of its mandate. That burden is particularly heavy here because the mandate itself was broad: the Board was authorized to determine "whether and how" Articles V through

VII would be implemented and to make the "changes necessary" to implement them. (Dkt. No. 24-2 at 10, 12, 14; Dkt. No. 24-5 at 2, ¶ 1.) The question for each Count is straightforward: is the challenged provision at least arguably an exercise of that authority? Each plainly is.

Article VII(E) determines how an assignment may be covered when the new staffing system cannot supply a rested and available employee. Smart Rest determines what voluntary rest mechanism applies to extra board employees. And Article V(D) determines how to reconcile existing extra rest provisions with the new rest regime. (Dkt. No. 24-16 at 12–13, 18.) Those may or may not be the implementation choices SMART-TD wanted, but they are implementation choices about the very subjects the parties submitted. The sections below address each in turn.

A. Count I: The "Qualified Employee" Provision Was Within the Board's Jurisdiction

SMART-TD's first challenge rests on a mismatch between the question before this Court and the problem SMART-TD says Article VII(E) may create. SMART-TD argues that the provision exceeds the Board's authority because, in the Union's view, it amends local crew consist agreements that were not submitted to arbitration. (SMART-TD Br. at 20–23.) But a claimed effect on other agreements does not establish that Article VII(E) exceeds the Board's implementation authority. The jurisdictional question comes first: did the Board have authority to decide how an assignment would be staffed when the new Article VII system could not supply a rested and available employee? It plainly did. Article VII placed pools, extra boards, vacancies, and staffing before the Board, and the Agreement to Arbitrate authorized the "changes necessary" to implement those rules. (Dkt. No. 24-2 at 13–14; Dkt. No. 24-5 at 2, ¶ 1.)

Indeed, Article VII(E) answers exactly that staffing question. Under the provision, if no rested and available personnel can fill an assignment and leaving it unfilled would cause unavoidable customer harm, a qualified employee may perform the service, subject to notice and an assignment-specific evaluation. (Dkt. No. 24-16 at 18.) That is a direct response to a contingency arising within the staffing system the Board was charged with implementing: what happens when the ordinary mechanisms for filling an assignment are exhausted? The parties authorized the Board to determine "how" Article VII would operate, and Article VII(E) supplies that answer. It therefore bears far more than the "rationally inferable" connection to the Board's mandate sufficient to affirm the award. *See Union Pac.*, 988 F.3d at 1017.

The Award as a whole reinforces that connection. The Board expanded employee rest opportunities and doubled the prearranged layoff threshold, increasing the circumstances in which employees could be unavailable for service. (Dkt. No. 24-16 at 6–7, 10, 12–13, 18; UP SMF ¶ 72.) Article VII(E) addresses the corresponding operational problem: what happens when those and other sources of unavailability leave no rested and available employee to cover an assignment? The Board described the provision as "narrowly tailored" relief for periods of "extraordinary unavailability." (Dkt. No. 24-16 at 10.) Article VII(E) was part of the Board's effort to make the Award's interrelated rest and staffing provisions work together. That is not the Board dispensing its own "industrial justice." (SMART-TD Br. at 22.) It is the implementation judgment the parties authorized.

Against that straightforward jurisdictional basis, SMART-TD's reliance on the crew consist agreements misses the point. Those agreements were negotiated separately, and Article VII does not expressly use the words "crew consist." But Section 9 asks whether the subject the Board decided was within its mandate, not whether an authorized implementation rule might implicate rights arising under another agreement. And, even if that were not so, the qualified employee provision does not impinge on crew consist agreements.

Crew consist is fundamentally about crew size—the number of employees required to operate a train—and the Award says nothing about that issue. *See, e.g.*, Dkt. No. 24-1 (PEB 250 Report and Recommendations) at 43 (framing the crew consist dispute as being about "whether trains would be operated with both an Engineer and a Conductor on board or only with an Engineer on board").[2] Article VII(E) does not establish a permanent crew size or otherwise resolve the crew consist dispute one way or another. It addresses a particular staffing contingency under Article VII. Even if applying that rule in a particular circumstance could implicate a crew consist agreement—and here it does not—that would not retroactively deprive the Board of authority to adopt the staffing rule in the first place.

That distinction also identifies the proper forum for SMART-TD's concern. If Union Pacific invokes Article VII(E) in circumstances where SMART-TD believes a particular crew consist agreement prohibits its application, the parties can resolve that concrete conflict through the grievance or arbitration procedures governing those agreements. *See* 45 U.S.C. § 153 First(i). What SMART-TD cannot do is convert a potential future application dispute into a jurisdictional defect requiring vacatur of the Award itself. Section 9 asks whether the Board was at least arguably exercising the authority delegated to it. *Maine Cent.*, 873 F.2d at 429; *Hill*, 814 F.2d at 1194–95. Here, the chain is direct: Article VII governs staffing; the Board was authorized to decide how Article VII would operate; and Article VII(E) addresses how an assignment will be staffed when

[2] For the same reason, SMART-TD's criticism that, through the "qualified employee" provision, Union Pacific obtained what it tried unsuccessfully to obtain before PEB 250 (SMART-TD Br. 22) falls flat. The Carriers' crew consist proposal to PEB 250 was aimed at operating with one-man crews; it did not include anything like the "qualified employee" provision. *See* Ex. 2 (Carriers' Submission to PEB 250 re: Crew Consist Proposal) at 1 ("The debate between the Carriers and SMART-TD . . . concerns whether, when, and how to redeploy road service conductors from their current primary work location—riding in the locomotive cab—to ground-based positions."); *see also id.* at 14 (arguing that "the conductor's role is no longer needed in the cab of the locomotive").

ordinary staffing mechanisms fail. Any dispute about how that rule interacts with another agreement concerns *application*, not *authority*. Count I therefore fails.

B. Count II: "Smart Rest" Was Within the Board's Authority to Determine How Rest Would Be Implemented.

SMART-TD's Smart Rest challenge suffers from the same basic flaw. SMART-TD does not dispute that the Board had authority over rest for extra board employees. Indeed, it concedes that the Board "was certainly free to decline to impose scheduled rest on extra board employees." (SMART-TD Br. at 26.) Its argument is instead that, once the Board chose to provide rest, it could not choose Smart Rest because Smart Rest does not provide the fixed, calendar-based days off SMART-TD believes Article V requires.[3] (SMART-TD Br. at 23–26.) But that is a dispute over *how* the Board exercised its conceded authority over extra board rest, not whether the Board possessed that authority. The parties expressly authorized the Board to determine "whether and how" the Article V rest rules would be implemented. (Dkt. No. 24-2 at 10.) SMART-TD cannot concede the Board's authority to answer "*whether*," yet insist that there was only one permissible answer to "*how*."

Article V's text confirms the Board had room to make that choice. Article V applies to extra boards protecting through-freight service and expressly gives the Board jurisdiction to determine "whether and how" voluntary assigned days off will be implemented. (Dkt. No. 24-2 at 10, 42–43 (Art. V Q&A Nos. 4, 7).) The accompanying Q&As contemplate different "versions" of work-rest rules and leave the number and frequency of days off to bargaining and arbitration. (*Id*. at 42–43 (Art. V Q&A Nos. 1, 6).) Nothing requires pools and extra boards to operate under the same rest model or confines the Board to SMART-TD's preferred fixed-calendar schedule. Exercising the

[3] Smart Rest allows employees the option of 24 hours of rest after working five consecutive trips. *See* Union Pacific Br. 10–12 (explaining Smart Rest).

discretion Article V gave it, the Board adopted a 6/2 cycle for pool employees and Smart Rest for extra boards, which protect vacancies and other less predictable staffing needs. (Dkt. No. 24-16 at 6–7, 12–13; UP SMF ¶¶ 15–17.) Consistent with Article V's express limitation, the Board made Smart Rest voluntary. (Dkt. No. 24-2 at 43 (Art. V Q&A No. 9); Dkt. No. 24-16 at 12.)

What remains is SMART-TD's complaint that Smart Rest is not predictable enough because employees cannot know in advance when they will complete five consecutive trips. (SMART-TD Br. at 25; Edington Decl. ¶¶ 7–8, 12–13.) But the Award fixes the trigger, duration, and guarantee status in advance. (Dkt. No. 24-16 at 12–13.) SMART-TD therefore disputes the *degree of predictability* the Board provided, not the Board's *authority* to provide it. That distinction resolves the claim. Article V expressly authorized the Board to decide "whether and how" extra board rest would be implemented, and Smart Rest directly answers that assigned question. Whether a different model would have been more predictable goes to the merits of that answer; Section 9 asks only whether the Board was at least arguably exercising its delegated authority. *See Maine Cent.*, 873 F.2d at 429; *Hill*, 814 F.2d at 1194–95; *Oxford Health Plans*, 569 U.S. at 572. It plainly was. Count II therefore fails.

C. Count III: Eliminating Existing Extra Rest Was Within the Board's Authority to Implement the New Rest System.

SMART-TD's final challenge again attacks the Board's exercise of its authority rather than the existence of that authority. SMART-TD argues that the Board exceeded its jurisdiction because Union Pacific did not propose eliminating existing extra rest provisions until its best-and-final offer. (SMART-TD Br. at 26–27.) This argument lacks merit. The parties authorized the Board to determine "whether and how" the new rest rules would be implemented and to make the "changes necessary" to implement them. (Dkt. No. 24-2 at 10, 14; Dkt. No. 24-5 at 2, ¶ 1.) That authority necessarily included deciding whether existing extra rest rules would remain alongside the new rest regime. SMART-TD's arguments concern how that issue was presented and how the Board resolved it—questions of *procedure* and *merits*, not *jurisdiction*.

Start with procedure. SMART-TD relies on the Preliminary Order's direction that the parties' best-and-final offers not exceed "parameters or topics already presented and argued." (SMART-TD Br. at 26–27.) But the Preliminary Order did not define the Board's jurisdiction; the National Agreement and Agreement to Arbitrate did. (Dkt. No. 24-2 at 10, 12, 14; Dkt. No. 24-5 at 2, ¶ 1); *see also* Dkt. No. 24-5 at 3, ¶ 5 (the Board "will establish rules of procedure not inconsistent with the provisions of this Agreement"); *Maine Cent.*, 873 F.2d at 429 ("the actions of the parties cannot determine the scope of arbitration"). Indeed, SMART-TD acknowledges that the Board "*arguably* lacked the authority to narrow its jurisdiction to proposals already presented and argued." (SMART-TD Br. at 27 n.12 (emphasis added).) That concession is difficult to square with its theory of vacatur. Even if Union Pacific had violated the Preliminary Order, that would establish at most a procedural objection to how an issue within the Board's jurisdiction was presented—not transform that issue into one the parties never authorized the Board to decide.

In any event, extra rest was already "presented and argued." SMART-TD's opening submission expressly addressed eliminating extra, voluntary, or extended rest, devoted a section to "Elimination of Rest Outside of RSIA Requirements," and asked the Board to preserve those provisions. (Dkt. No. 24-6 at 18, 26, 60–61; UP SMF ¶ 57.) Union Pacific's pre-hearing rebuttal likewise identified the elimination of extended, additional, or voluntary rest and fatigue mitigation provisions as an Article V issue. (Dkt. No. 24-9 at 44, item 9.) Well before the best-and-final offers, then, the parties had placed before the Board the question whether existing extra rest provisions would survive the new rest regime. Union Pacific's final proposal changed the answer it urged—it did not introduce a new subject.

SMART-TD also argues that Union Pacific Director of Labor Relations Jennifer Powell's testimony shows elimination of extra rest was not properly before the Board. (SMART-TD Br. at 26–27.) That argument is a red herring. Powell testified only that Union Pacific's then-current proposal did not eliminate Eastern District extra rest. (Dkt. No. 24-12 at 38–40 (Day 3 Hearing Tr. 36:12–38:8).) Her testimony establishes *Union Pacific's position* at that stage of the proceeding—not the *scope of the Board's jurisdiction*. In any event, extra rest had already been presented and argued, and the Preliminary Order later directed the parties to submit "revised/modified proposals" and best-and-final offers on previously presented topics. (Dkt. No. 24-13 at 3.) Union Pacific's later change in position did not introduce a new subject; it proposed a different resolution of a subject already before the Board. Powell's testimony may show that Union Pacific's position evolved, but it does not show that the Board lacked authority to decide the issue. Count III likewise fails.

III. SMART-TD WAIVED ITS CLAIMS.

As explained more fully in Union Pacific's Motion for Summary Judgment, SMART-TD's claims fail for the independent reason that it waived them. (Dkt. No. 25-2 at 24–28.) A party cannot participate in arbitration, litigate an issue on the merits, lose, and then attack the award on a ground it never presented to the arbitrator. *See Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593–94 (8th Cir. 1998). That rule applies equally to an objection framed as "jurisdictional": unlike a federal court's subject-matter jurisdiction, an objection to an arbitrator's authority is waivable. *See Union Pac. R.R. Co. v. Am. Ry. & Airway Supervisors' Ass'n*, 838 F. App'x 846, 851–52 (5th Cir. 2020) (per curiam). If SMART-TD believed the Board lacked authority to decide these issues, it had to say so while the Board could address the objection—not litigate the merits, await the result, and then recast its losing position as jurisdictional.

That is precisely what happened. On the qualified employee provision, SMART-TD argued to the Board that Article VII(E) conflicted with crew consist agreements—but never argued that the Board lacked jurisdiction over the staffing issue. It even asked the Board to interpret "qualified employee" after the Award. (Dkt. No. 25-2 at 25–26.) On Smart Rest, SMART-TD litigated the merits extensively, urging the Board to reject Union Pacific's model and adopt its own rest proposal—but never argued that the Board lacked authority to choose between them. (*Id.* at 26–27.) And on extra rest, SMART-TD itself placed the issue before the Board by arguing that existing provisions should be preserved. (*Id.* at 27.)

That history exposes the fundamental problem with SMART-TD's position. These questions cannot be within the Board's authority when SMART-TD seeks a favorable answer, yet somehow outside the Board's authority when the answer goes the other way. SMART-TD asked the Board to reject the qualified employee provision, adopt its preferred rest model, and preserve existing extra rest provisions—requests that necessarily treated those issues as properly before the Board. Only after the Board ruled against it did SMART-TD recast those merits disputes as jurisdictional defects. Having litigated these issues before the Board, SMART-TD cannot now challenge the Board's authority simply because it lost. Its waiver independently defeats all three Counts.

CONCLUSION

For the foregoing reasons, SMART-TD has not established any basis for impeaching the Award under Section 9. The parties gave the Board broad authority to determine "whether and how" Articles V, VI, and VII would be implemented, and each challenged provision addresses the very rest and staffing issues that mandate placed before it. SMART-TD's objections concern how the Board exercised its authority, not whether it had that authority—and even serious error in exercising that judgment would not justify vacatur. SMART-TD also independently waived its jurisdictional objections by litigating these same issues before the Board without preserving the challenges it now asserts. (Dkt. No. 25-2 at 24–28.)

Because the Board remained within its assigned task and SMART-TD waived any contrary objection, the Court should deny SMART-TD's Motion for Summary Judgment, grant Union Pacific's Motion for Summary Judgment, and enforce the Award in full.

Dated: September 25, 2026

Respectfully submitted,

s/ Scott P. Moore
Scott P. Moore
NE Bar No. 20752
Attorney for Defendant
BAIRD HOLM LLP
1700 Farnam St., Suite 1500
Omaha, NE 68102
Telephone: (402) 636-8268
Fax: (402) 344-0588
E-mail: spmoore@bairdholm.com

s/ Donald J. Munro
Donald J. Munro
(Pro Hac Vice)
DC Bar No. 453600
Attorney for Defendant
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Telephone: (202) 879-3922
Fax: (202) 626-1700
E-mail: dmunro@jonesday.com

Thomas R. Chiavetta
(Pro Hac Vice)
DC Bar No. 985370
Attorney for Defendant
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Telephone: (202) 879-3975
Fax: 1.202.626.1700
E-mail: tchiavetta@jonesday.com

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will serve all counsel of record.

s/ Thomas R. Chiavetta

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, as indicated by Microsoft Word's word-count function as applied to include all text, including the caption, headings, footnotes, and quotations, this brief contains 6,075 words and thus complies with NECivR 7.1(d)(1).

s/ Thomas R. Chiavetta