INTRODUCTION AND SUMMARY OF ARGUMENT

A. The Issue Before the Board

This three-cornered dispute among the Brotherhood of Locomotive Engineers (“BLE”), the United Transportation Union (“UTU”), and the nation’s major freight railroads arises out of the carriers’ recent implementation of a sophisticated technology – a computerized application of remote locomotive control that eliminates the need for an engineer. With remote control, an on-board computer takes over the task of operating the locomotive’s throttle and brakes, automatically adjusting for the weight of the train, track grade, and a myriad of other factors. Using a small radio transmitter, an employee can direct the computer to move the locomotive at the speed and in the direction required, just as ground service employees in conventional operations direct locomotive movements by hand or radio signals to an engineer. Because this employee using the radio transmitter still performs all the traditional tasks of a ground service employee – throwing switches, coupling air hoses, aligning couplers, setting handbrakes – computerized remote control allows a “remote control operator” (“RCO”) to conduct rail operations safely and efficiently.

When the carriers announced plans to introduce remote control locomotives, both the UTU and the BLE claimed that RCO positions should be reserved to the employees they represent. The carriers, after considering the nature of the work, the collective bargaining agreements, safety, and the experience of Canadian railroads that are using this technology, elected to assign the work to ground service employees represented by the UTU. Accordingly, the UTU and the carriers signed an agreement that sets conditions for assignment of RCO jobs. The BLE, however, continued to insist that it should have exclusive rights to all remote control work. Despite the fact that the BLE has, in past rounds of collective bargaining, repeatedly
asked the carriers to agree to assign remote control work to engineers, the BLE now claims that it already has agreements that bar the carriers from assigning such work to anyone else.

The issue before this Board, therefore, is whether the carriers’ assignment of RCO positions to ground service employees under the new UTU Remote Control Agreement violates any supposed contractual commitment by the carriers to reserve such work to locomotive engineers represented by the BLE. In other words, is it really the case, as BLE claims, that engineers were promised an exclusive right to operate computerized remote control systems before the carriers entered into their Remote Control Agreement with the UTU?

B. The Burden of Proof

The BLE has the burden of showing that the carriers are contractually bound to assign this work to locomotive engineers exclusively. It is well-settled that railroads retain broad discretion to assign work as they deem appropriate, unless restricted by specific agreement terms. As the National Railroad Adjustment Board (“NRAB”) has said:

“We are well aware that enlightened railroad labor organizations recognize the principle that the schedule agreements do not deny the carrier the right to manage and operate its properties economically and efficiently and that the carrier is also under legal obligation to do so. The carrier’s fundamental management rights are restricted only to the extent that they are limited or surrendered in the schedule agreements.”

NRAB First Division Award No. 16032 (Exhibit 3) at 33 (emphasis added). Moreover, as many arbitration awards demonstrate, this burden of proving a specific restriction on the railroads’

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1 The Question At Issue presented by each of the three parties is provided at Attachment A of the Arbitration Agreement, which is attached hereto as Exhibit 1.

2 E.g. UTU v. CSXT, PLB No. 5529, Award No. 4 (Oct. 10, 1994) (Exhibit 2) at 2. (“[T]he burden of proof in a rules case . . . rests squarely on the Organization.”)
rights is especially heavy when advanced technology results in the elimination of old jobs and the creation of new ones. The strong presumption in this sort of case is that the employer retains discretion to assign the residual work.

C. **Summary of the Parties’ Arguments**

There is no dispute that the BLE lacks any agreement that specifically grants locomotive engineers jurisdiction over computerized remote control work. (Indeed, BLE has repeatedly failed to obtain such rights in collective bargaining.) Its case fails for that reason alone. Without a specific contractual restriction on the carriers’ discretion to assign remote control jobs, the BLE has no basis for claiming this work.

Instead of relying on any specific reservation of remote control work to engineers, the BLE points to a collection of local agreement provisions and past practices that vary somewhat from carrier to carrier, but which generally provide that *engineer jobs* must be assigned to engineers represented by the BLE. In the federal court litigation prior to this arbitration and elsewhere, the BLE has defined the job of an engineer as “operating the controls of the locomotive.” It now claims that one particular part of the job of an RCO – the task of using the remote radio transmitter – is the same as operating the controls of the locomotive. Relying on this critical threshold assumption that the job of an RCO can be equated to the job of an engineer, the BLE argues that its agreements and past practice require the carriers to assign RCO jobs to locomotive engineers, and prohibit the carriers from assigning such jobs to other crafts.

Generic provisions of this sort are simply insufficient to restrict the carriers’ right to assign the new RCO positions. But even apart from its failure to point to specific restrictions,

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3See *infra* pp. 37 - 38 and cases cited in notes 22 - 24.
the BLE’s claim that it is contractually entitled to all RCO assignments under existing rules and past practices is flatly wrong in two respects: (1) RCO jobs are not the same as engineer jobs, and (2) past practices and express agreements support the assignment of RCO jobs to employees represented by UTU, not BLE.

1. RCO Work is Not the Same as Engineer Work

First, it is simply not true that the new job of an RCO is the same as “operating the controls of the locomotive,” or any other definition of the traditional job of a locomotive engineer. Rather, the RCO position is much more like the traditional position of a ground service employee than the job of an engineer.

These propositions were conclusively established by a Canadian arbitration panel when the Canadian railroads introduced the very same technology that the Class I railroads in this case are implementing now. The neutral on that panel was Michel Picher, the well-respected, experienced, and permanent arbitrator who handles the great majority of railroad arbitrations in Canada. Mr. Picher concluded that the job of a “yard operations employee” – i.e., an RCO – cannot be equated with the job of a locomotive engineer because the on-board computer, not the RCO, takes over the job of “operating” the locomotive controls:

“Under the automated process, locomotive handling is not performed in any meaningful sense by the operator of the belt pack. . . . [I]t is the microprocessor which automatically makes the necessary adjustments to ensure the proper operation of the locomotive. While it is true that the yard operations employee can determine the speed and direction of the train by means of the belt pack, much as she or he previously did by radio communication with the locomotive engineer, it cannot be said that the yard operations employee is handling or operating the locomotive with anything approaching the degree of control and refinement previously exercised by a locomotive engineer. In my view, it is more accurate to say that the locomotive engineer’s position has been abolished and that that employee has been replaced by a microprocessor and interface system which automatically performs the functions previously assigned to the locomotive
engineer.”

Canadian National Railway Co. v. BLE, Case No. 2191 (Sept. 17, 1993) ("CN Award") (Exhibit 4) at 10. For these reasons, Mr. Picher ruled that the railroad was entitled to eliminate the engineer position and assign remote control operations to ground service employees represented by the UTU, instead of engineers represented by the BLE. Id.

The same technology is at issue in this case, and so the same answer applies. Here, just as in Canada, it is the “automated system which has taken over the core functions of the job that was abolished.” Id. at 11. The remaining work of using a remote transmitter – sending commands by radio to the on-board computer – is work which has always been within the purview of ground service employees, not engineers.

The BLE’s response that the RCO is really just operating miniature locomotive controls ignores the role of the on-board computer. By the BLE’s own admission, an engineer must account for innumerable tangible and intangible factors when operating a locomotive – it is a matter of “feel.” An RCO, by contrast, has no need for “feel;” he does not have to gauge the number of cars, or the grade of the track, or wheel slippage, or the electrical power available, or the differences in the locomotive’s independent and automatic brakes, or any of the many other factors considered by engineers. The RCO merely selects a speed, and the on-board computer uses algorithmic calculations to simulate the skill of an engineer in achieving and maintaining that speed.

The BLE’s further argument that RCOs are doing the engineer’s job if they occupy the locomotive cab is likewise unfounded. The vast majority of the time – ninety percent or more – RCOs work from the ground. Of course, when not engaged in ground work, RCOs may ride in
the locomotive cab, just as ground service employees often do. But if an RCO needs to change
the train’s speed or direction while in the cab, he continues to use the remote transmitter, and the
computer continues to do the work of the engineer. In other words, just because the RCO may
occasionally occupy the cab or sit in the engineer’s seat does not mean that the RCO is doing
engineer work. The physical location of the employee is irrelevant to how the technology
functions.

The dissimilarity between RCOs and engineers is highlighted by two additional key facts.
First, the two positions require different certifications under Federal Railroad Administration
(“FRA”) rules – an engineer’s certificate does not allow the employee to work as an RCO.
Second, the training programs approved by FRA are radically different: engineers generally train
for at least twenty weeks, whereas RCO training lasts only two weeks. Even a fully trained and
certified engineer must undergo this different training program and obtain a new certification
before he can operate a remote control device.

Moreover, the BLE’s focus on the use of the remote transmitter ignores the rest of the
duties of an RCO, which are exactly the same duties previously performed by ground service
employees. As Arbitrator Picher found:

“The basic function of identifying and marshaling cars, applying and releasing
hand brakes, manipulating air hoses, aligning drawbars and pulling pins remains
substantially unchanged and can fairly be said to occupy the preponderance of the
working time of the yard operations employee. By any account, in my view, the
core functions of the yard operations employee’s job are those which were
traditionally performed by the yard foreman and yard helper . . . .”

Id. at 9 (emphasis added). In short, if one examines the overall job, rather than picking out one
particular piece of it, it is absolutely clear that the RCO position is nothing like the job of an
engineer, and is much more similar to the job of a ground service employee.
2. Past Practices and Express Agreements Support Assignment to Ground Service

Because the work at issue encompasses the traditional job of ground service employees, the parties’ past practices and agreements favor assignment of RCO jobs to ground service rather than engineers. With respect to past practice, the uniform historical practice of all of the carriers has been to assign ground service work – pulling pins, throwing switches, passing signals, and so on – to ground service employees represented by the UTU. As for the task of passing signals in particular, the past practice has always been that ground service employees, not engineers, are in charge of all operations and give the commands to move or stop. There is no past practice of assigning such work to engineers.

The BLE’s own past practice argument amounts to nothing, because it looks to the wrong body of practice. The railroads’ practice of assigning engineers to “operate the controls of the locomotive” is not relevant, because that is not what RCOs are doing. Computers, not ground service employees, are operating the controls of the locomotive, the job that engineers used to do.

With respect to the parties’ agreements, the Incidental Work rule in the BLE’s 1986 National Agreement and the UTU’s 1985 National Agreement demonstrates that the carriers have substantial flexibility to assign work to “qualified ground service employees.” In particular, the Incidental Work rule provides that carriers may assign to ground service the use of “communication devices” – a broad category that easily encompasses the radio transmitters used to communicate with a computerized locomotive. This rule also provides that a “qualified ground service” employee may perform various minor tasks – even tasks that might be classified as engineer work such as starting or shutting down the locomotive’s engine or conducting
inspections or air brake tests – in the course of his duties as an RCO.

By contrast, the local agreement provisions on which the BLE relies – the so-called “scope rules” – are plainly inapplicable. While the specific language of the BLEs’ local agreements varies – and while a number of railroad agreements contain no relevant language at all – the general meaning of these provisions is that engineer positions cannot be assigned to other employees. Such rules do not, however, prohibit the carriers from eliminating engineer jobs through introduction of new technology. Literally dozens of arbitration awards confirm that “work eliminated by technological advances loses its contract protection.” As such, the carriers’ response to the BLE’s reliance on these rules is the same as their response to the BLE’s past practice argument. Under remote control, engineer work has been assumed by a computer, not a different craft of employees.

In fact, the BLE has effectively admitted that existing rules do not give it the protection that it now says it has. Its Section 6 notices during both this round and past rounds of collective bargaining specifically ask for the right to all remote control work. The carriers have never agreed to these proposals. In accordance with settled rules of contract interpretation, the fact that BLE has repeatedly and specifically sought in collective bargaining negotiations a contractual right to remote control work demonstrates conclusively that it lacks any such right under its current agreements.

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4See infra pp. 60-61 and cases cited in note 37.

5See infra pp. 63-66 and cases cited therein.
In sum, the basic argument of the carriers in this case is simple – the job of a remote control operator is not the same as the job of an engineer, and so is not reserved to locomotive engineers by either express agreements or past practice. The engineer’s job has been taken over by the remote control system’s computer. The remaining work of an RCO – involving tasks such as coupling cars, throwing switches, and signaling the locomotive to move or stop – is different than the job of an engineer, and in fact is virtually the same as the traditional job of ground service employees. As such, past practice, relevant collective bargaining agreements, arbitral authority, and underlying principles of contract interpretation completely support the carriers’ position that the assignment of RCO jobs to ground service employees represented by the UTU does not violate any contract rights of BLE-represented engineers.

D. The Proper Focus of This Case

Before turning to the specifics of the parties’ arguments, we must emphasize what this case is – and is not – really about. First, this case is not about whether technological change generally or remote control in particular is a good idea as a policy matter. The issue of whether remote control is safe, for example, is not before this Board. The Arbitration Agreement makes clear that this is a “rights” arbitration, meaning that the BLE must show that it has an existing contractual entitlement to this work. See Arbitration Agreement (Exhibit 1) at ¶ 6. Thus, arguments by BLE that remote control would be safer in the hands of locomotive engineers have no place here. Safety issues are within the jurisdiction of the Federal Railroad Administration (“FRA”), and the FRA has already approved the carriers’ plans, which call for training, certification, and use of ground service personnel to operate computerized remote control systems. Second, this is not a case about loss of jobs. Again, such considerations are not
relevant. If the carriers are not restricted by the terms of the parties’ agreements from eliminating locomotive engineer positions as a result of new technology, then they must be permitted to do so. But in any event, the truth of the matter is that engineers are not at risk of being deprived of employment as a result of this change. Virtually all locomotive engineers also hold seniority in ground service. As such, engineers who lose their position with the implementation of remote control and who lack sufficient seniority to obtain another job in engine service can “flow back” to ground service. In doing so, they displace more junior employees. This means that the only persons who could wind up without a job are the most junior ground service employees, all of whom are represented by the UTU. And labor protection is provided to ground service employees under the terms of the new UTU Remote Control Agreement.

Third, this is not a case about the future of the BLE or its members. Leaving aside the fact that, once again, such considerations are not relevant in a “rights” arbitration, the carriers are not seeking to eliminate the locomotive engineers’ craft altogether. Nor is this arbitration about the ongoing representation battle between the BLE and the UTU.

In sum, the focus of this case is solely on whether the BLE can prove that it has a contractual right to the jobs assigned to UTU under the new Remote Control Agreement, i.e., RCO jobs on “yard engines, road switchers, locals, and comparable assignments.” Because the BLE cannot prove any specific limitations on the carriers’ discretion to assign such work, the proper answer to the carriers’ question whether they may eliminate engineer positions and assign RCO jobs to ground service employees is clearly and simply “yes.”
HISTORY AND FACTUAL BACKGROUND OF THE DISPUTE

A. The Parties

The carriers in this case include most of the nation’s largest Class I freight railroads. The two union parties represent the carriers’ employees in the so-called “operating crafts.” The BLE is the collective bargaining representative of the craft or class of locomotive engineers almost everywhere on these railroads. The UTU is the collective bargaining representative of the other operating railroad employees, including conductors, brakemen, yard foremen, helpers, and/or switchmen (collectively called “ground service employees”).

B. The Nature of Rail Operations and Operational Assignments

In order to describe the parties’ dispute, we must first define the types of rail operations and operational assignments implicated by the carriers’ introduction of computerized remote control technology. Under the recent agreement between the carriers and the UTU, the carriers will assign operation of remote control technology to ground service personnel on “yard engines, road switchers, locals and other comparable assignments.” UTU Remote Control Agreement (Exhibit 5) at 1. The details and precise terminology vary from railroad to railroad, but the chief defining feature of these assignments is that they all involve “gathering or distribution of freight or equipment,” which generally requires members of the crew to work on the ground.

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6These railroads include The Burlington Northern and Santa Fe Railway (“BNSF”), Consolidated Rail Corporation (“Conrail”), CSX Transportation (“CSXT”), Kansas City Southern (“KCS”), Norfolk Southern Railway (“NS”), and Union Pacific Railroad (“UP”).

7The UTU represents the craft or class of locomotive engineers on relatively small portions of BNSF, KCS, and NS.

8On some properties, the UTU also represents some crafts or classes of employees in engine service, such as hostlers and firemen.
1. **Gathering or Distribution of Freight or Equipment**

As the Board is doubtless aware, the processes of “gathering or distribution of freight or equipment” include a number of different operations. First, railroads regularly perform movements known as “pick-ups and set-outs.” A pick-up is just what it sounds like – the addition of a car or group of cars (known as a “cut” or “block”) to an existing train. A set-out is just the opposite – the removal of a car or block of cars from a train. Both pick-ups and set-outs may occur essentially anywhere on a carrier’s system – in rail yards, terminals, industrial sites served by the carrier, and on sidings along the carrier’s lines. See Statement of John Quilty (Exhibit 8) at ¶ 3.

Second, gathering and distribution of freight or equipment includes “classification switching,” which is the sorting of cars by destination, type, or priority. Classification switching usually takes place inside yards. It encompasses both “flat switching” and “hump” operations. Flat-switching, as the name suggests, is done over flat ground. In hump operations, by contrast, a locomotive is used to push a cut of cars to the top of a small hill overlooking a group of tracks (the classification yard). After cars are humped, so-called “trimmer” crews rearrange cars within

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9 A “terminal” is any facility or collection of facilities at a beginning, end, or intermediate point on a rail line that is designed for delivery and receipt of freight, interchange with other carriers, and/or the forwarding and servicing of locomotives, cars, and other equipment. Some terminals are operated by a single carrier; others encompass the facilities of a number of different carriers that interchange in a particular region. See, e.g., BLE v. Southern Pacific, PLB No. 3604, Award No. 69 (Exhibit 6) at 18-19. A rail “yard,” by contrast, is a system of multiple tracks used for the assembly and disassembly of trains, storing rail cars, and similar purposes. Rail yards include receiving yards (which are used to clear traffic coming off the main line), classification yards (where cars are sorted by destination and priority), and departure yards (where cars are assembled into trains). A rail terminal is generally larger than a yard, as a terminal may contain one or more rail yards, as well as other facilities. See John H. Armstrong, *The Railroad: What It is, What It Does* (3rd ed. 1993) (Exhibit 7) at 163-176.
particular classification tracks and, in some cases, pull cuts of cars into the departure yards to be added into new trains. \textit{Id.; see also} Armstrong (Exhibit 7) at 169-176.

2. Categories of Operational Assignments

The gathering or distribution of freight or equipment that may be required on a yard, road switcher, local, or comparable assignment varies from carrier to carrier, job to job, and even from day to day for a particular job. But in general, the four categories of assignments that involve such work can be described as follows:

a) Yard Engines: Crews assigned to “yard engines” perform all gathering and distribution of freight or equipment to be done within “switching limits,” which are geographic boundaries between road and yard set by collective bargaining agreements with the operating crafts.\textsuperscript{10} For the most part, yard crews assemble and disassemble trains, and perform classification switching work, including both flat and hump switching.

Also encompassed within the general category of yard work are two further subcategories – industrial and transfer assignments – that are slightly different from flat or hump switching assignments. “Industrial assignments” generally require crews to move their equipment outside

\textsuperscript{10}Switching limits arose out of the historic division of operating crafts among different unions and jurisdictional competition among those unions. As the National Mediation Board has noted, the operating crafts originally grouped themselves into separate “road” and “yard” groups, distinguishing, for example, between “road conductors, road trainmen [and] yardmen.” \textit{American Airlines, Inc.}, 1 NMB 394, 399 (1945). Collective bargaining agreements that define geographic boundaries between “road” and “yard” assignments are the vestiges of those distinctions, and generally limit the territory within which carriers can assign yard crews to operate without incurring penalty pay. However, national agreements establish “road/yard service zones,” which allow carriers to send yard crews up to 25 miles beyond switching limits to perform service. \textit{See} Statement of A. Kenneth Gradia (Exhibit 9) at ¶ 10. Switching limits should be distinguished from terminal limits that are set unilaterally by carriers in their timetables or operating rules. Terminal limits define the area in which crews must observe yard operating rules and speed limits. \textit{Id.}
the yard to customers’ facilities. Once at the customer’s site, crews generally set out and/or pick up cars and may sometimes do classification switching as well. See Statement of John Quilty (Exhibit 8) at ¶ 6. Yard “transfer assignments” involve the movement of freight or equipment from one rail yard to another. crews may be required to perform either intra-carrier transfers or inter-carrier transfers. Id.

b) **Road Switchers:** The “road switcher” assignment is essentially a hybrid – it can operate both inside and outside of switching limits, with fewer contractual restrictions than other road assignments. Some road switcher agreements provide that crews may operate within a set radius (e.g. 40 miles) from their starting point. Statement of A. Kenneth Gradia (Exhibit 9) at ¶ 11; BLE-Seaboard Memorandum Agreement (Exhibit 10). Other such agreements do not set specific mileage limits. See, e.g. BLE v. Chicago & North Western, Arb. Board No. 499 (Apr. 10, 1990) (Exhibit 11) (establishing terms of road switcher agreement on C&NW). Within their operating limits, road switchers perform all of the same kinds work that yard and road crews perform, including classification switching, set-outs, pick-ups, industrial switching, and transfers. See Declaration of Don Seil (Exhibit 12).

c) **Locals:** Employees on “locals” also do gathering and distribution work. A local is a road assignment that generally sets out and picks up cars along its route (sort of like a postman picking up and delivering mail). Locals may also service industry sites or perform interchange work. Statement of John Quilty (Exhibit 8) at ¶ 7.

d) **Comparable Assignments:** This category covers other operating craft assignments that may perform some gathering or distribution of freight or equipment along with other tasks. Different carriers may adopt varying uses of remote control for such assignments depending on
their operational needs. See, e.g., Declaration of Jeff. H. Koch (Exhibit 13) at ¶ 3.

C. Conventional Ground Service Work

In all of the rail operations described above (yard jobs, road switchers, locals, and comparable assignments), a conventional crew consists of one or two ground service employees and an engineer. One of the ground service employees, usually called the conductor or foreman, is responsible for directing the operation and has command over the rest of the crew, including the engineer. See, e.g., Rule 1.47, General Code of Operating Rules (4th ed. 2000) (“GCOR”) (Exhibit 14).\(^{11}\)

When engaged in the gathering or distribution of freight or equipment, ground service employees generally walk along the cut of cars to be set-out, picked-up, or switched, throwing levers and physically lifting or moving pieces of the equipment into place before giving a signal to the engineer to move the train. Their specific duties include the following:

1) **Identifying and inspecting cars**: Ground service employees must properly select the cars to be set-out, picked-up, or switched. They do so by consulting a switch list (which is created by a yardmaster based on the railroad’s computerized service plan) or a computer monitor. Ground service employees are also responsible for inspecting rail cars to ensure that they are free of mechanical defects and other safety hazards.

2) **Coupling and uncoupling cars**: Typically, railroad cars are joined together by

\(^{11}\)All of the carriers maintain a compilation of operating rules that govern a wide variety of subjects associated with operating trains, such as employee duties, track signals, speed limits, and interchange rules. BNSF, KCS, and UP use the GCOR, while CSX, NS, and Conrail have their own operating rules. In addition to these general operating rules, each of the carriers maintains specific rules for locomotive engineers governing train handling and use of air brakes. See, e.g., Declaration of Jeffrey Minton (Exhibit 15). The carriers have created new and separate operating rules for RCOs. Statement of John Quilty (Exhibit 8) at ¶ 9.
devices known as couplers, which protrude from each end of a car or locomotive. At the end of the coupler is a moving part known as a knuckle that pivots on another moving part known as the pin. To uncouple a car, a ground service employee must “pull the pin,” which causes the knuckle to swing open. To couple cars, the ground service employee must align the couplers and ensure that the knuckles are open. Then, when the cars are pushed together, the force of the impact locks the knuckles together.

3) **Lacing air hoses:** Modern trains are equipped with air brakes. When cars are coupled together, ground service employees generally must couple or “lace” the hoses that link together the train’s pneumatic brake system.

4) **Bleeding air brakes:** Ground service employees also may be required to drain, or “bleed,” a car’s air brake system when the car is added to or removed from a train. This is done with a hand-operated lever or rod on each car’s brake valve.

5) **Setting and releasing hand brakes:** Hand brakes are used to secure detached cars left standing on tracks. They can be set or released by turning wheels or levers located at one end of each car.

6) **Throwing switches:** Trains and cars are diverted from one track to another by means of switches. Manual switches are controlled by a lever on a switch stand adjacent to the track. Ground service employees move this lever to throw the switch.

7) **Sending signals to the locomotive:** Finally, a ground service employee engaged in terminal operations in and around terminals must give directions (by hand, lantern, or radio) to the engineer in the locomotive cab, calling for movement of the train to the necessary location at an appropriate speed. For example, after a ground service employee has aligned the couplers in a
coupling operation, he or she will signal the locomotive to push the cars together. See UTU Submission to Presidential Emergency Board No. 213 (Exhibit 16) (‘‘UTU Submission to PEB 213’’) at 33-37 (detailing all duties of conductors, brakemen, yard foremen, and yard helpers).

Clear communications between the engineer and the ground service employee are vitally important to safety in conventional rail operations. Ground service employees spend a great deal of time in-between rail cars, and so are at risk if the train moves unexpectedly. Indeed, most of the injuries that occur in traditional switching are the result of misunderstandings, delayed response to commands, and similar errors in communication between the engineer and the employee on the ground. Statement of George A. Smallwood (Exhibit 17) at 1. In order to reduce these miscommunications, a clear chain of command among the members of the crew is critical. This is why it has always been the carriers’ practice and policy that the ground service employee – who usually has the better view and is the person most at risk from mistakes – is the one in command.12 Rule 1.47, GCOR (Exhibit 14); Rules 940-41, 951, NORAC Operating Rules (Exhibit 19); Declaration of John Quilty (Exhibit 20) at ¶ 7.

D. The Job of the Locomotive Engineer

By contrast to the job of the ground service employee, the job of a locomotive engineer is, according to the BLE, to “operate the controls of the locomotive to get the train between Point A and Point B.” Opening Brief on Behalf of the Brotherhood of Locomotive Engineers, 26 NMB

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12In recent rounds of collective bargaining, the BLE has asked the carriers to grant the engineers command over locomotive operations, instead of the conductor. See, e.g., BLE Section 6 Notice to Burlington Northern R.R. (June 1, 1988) (Exhibit 18) at 3. The carriers have not agreed to do so. Statement of A. Kenneth Gradia (Exhibit 9) at ¶ 4.
No. 54 (Aug. 2, 1999) (“BLE Opening Brief to NMB”) (Exhibit 21) at 14.  

The “controls of the locomotive” are a throttle and brake – fixed controls permanently mounted in the locomotive cab. The carriers likewise define the job of locomotive engineer in terms of operation of the throttle and brake.  See also, e.g., Reply Brief on Behalf of the Brotherhood of Locomotive Engineers, 26 NMB No. 54 (Aug. 2, 1999) (“BLE Reply Brief to NMB”) (Exhibit 22) at 27 (noting that “core function” of locomotive engineer is “operating the controls of the locomotive.”); Transcript of NMB Proceedings, BLE-UTU Representation Dispute (“NMB Transcript”), July 6, 1999 (Exhibit 23) at 113-14 (engineer’s “core function” is “operating the throttle on a locomotive engine.”). The carriers likewise define the job of locomotive engineer in terms of operation of the throttle and brake. See, e.g., Affidavit of John F. Scullin (Exhibit 24) at 5-6; Statement of John Quilty (Exhibit 8) at ¶ 8.

The “controls of the locomotive” are a throttle and brake – fixed controls permanently mounted in the locomotive cab. There are several different types of throttle/brake mechanisms used in modern locomotives, but most share the same basic features. See Control Stand Diagram (Exhibit 25). First, the control panel commonly has a lever that changes the direction of the locomotive, to go forward or back. Id. Second, the panel has a lever that serves as the throttle, with nine different horsepower settings, including idle. Id. The throttle adjusts the fuel injection system of the locomotive’s diesel engine to maintain a specific RPM at each level. See Armstrong (Exhibit 7) at 61; see also Declaration of John Hennecke (Exhibit 26) at ¶ 7.

Third, a brake stand provides two additional levers – one for the automatic brake and one for the independent brake. The automatic brake is an air brake system that allows the engineer to engage braking power along the entire train. It has multiple settings and requires the operator to build in some estimate for delay, as the air brake system takes time to transmit braking power down the length of the train. The independent brake, by contrast, works to brake only the locomotive itself. Declaration of John Hennecke (Exhibit 26) at ¶ 7. Some locomotives also have a separate “dynamic brake,” which is a traction motor that uses the train’s inertia to create braking force. Statement of John Quilty (Exhibit 8) at ¶ 8.
The engineer’s skill is the ability to adjust precisely the throttle and brakes (either the independent brake, the automatic brake, or some combination thereof) to account for the tonnage of the train of cars, the grade of the track, wheel slippage, the distance to be traveled, and any other factors in order to accomplish the moves called for by the ground employees’ signals. Id. Especially when the engine is pulling a long cut of cars, the engineer must constantly adjust the throttle and the brakes to account for build-up or release of slack in the train and maintain a constant speed. Id. In doing so, the engineer must interpret a variety of information inputs, including the electrical power output of the locomotive, motor temperature, wheel slippage, air brake pressure for both the locomotive and the entire train, and various other more intangible factors.14 See BLE Submission to Arb. Board No. 458: Railroad Engineman Task and Skill Study (Exhibit 27) at 9-11 (Flow chart of train braking procedures). As one BLE engineer put it, “You operate a train by the seat of your pants. It’s in the feel you get that comes right up through where you sit from all those thousands of tons behind you. There’s no other way to describe it.”15

As noted above, the engineer’s operation of the locomotive’s controls is subject to numerous rules, including both general operating rules and regulations that govern train handling in particular. See, e.g., Union Pacific Air Brake and Train Handling Rules (Exhibit 29); see also

14Because a diesel locomotive derives its power from electric traction motors powered by the diesel engine, manual operation of a locomotive requires understanding of diesel power, electric power and how they interact. See, e.g., Armstrong (Exhibit 7) at 52 (Figure 4-3, Different Horsepower Ratings). According to one source, “the engineman’s principal guide to locomotive performance is the ammeter, which shows the current actually going through the motors and, therefore, the rate at which they are heating up. It is marked to indicate the maximum continuous current draw allowable and the time limits which must not be exceeded at several values above this.” Id. at 61.

15“Remote-controlled trains make debut in St. Louis; Critics fear safety hazard,” Brotherhood of Locomotive Engineers Website, Aug. 7, 2002 (Exhibit 28).
16KCS is not subject to the 1972 Agreement, but requires a similar amount of training for engineers. See KCS Submission to FRA: Certification of Locomotive Engineers and Remote Control Operators (Nov. 30, 2001) (Exhibit 31) at 22-25.
and without rail cars, up and down grades, and in various weather conditions. Next, trainees are assigned to seventeen weeks of on-the-job training on their home territory, where they work under the supervision of a senior engineer. This period is devoted to becoming familiar with the home territory – learning the switches, curves, grades, radio bands, and the like. Trainees then return to Overland Park for two more weeks of classroom instruction, examinations and qualification. See BNSF Locomotive Engineer Training Program Manual (Exhibit 34); see also Declaration of William S. Hinckley (Exhibit 35) (detailing UP engineer training program). NS and CSXT require trainees to participate in even longer training programs, lasting up to twelve months. See Affidavit of Dennis L. Williams (Exhibit 30) at ¶¶ 4-5 (detailing NS engineer training program).

In addition to this extensive formal training, most engineers are former ground service employees who have been promoted to engine service. Indeed, for employees hired after October 31, 1985, progression from ground service to engine service is mandatory, as set forth in Article XIII of the 1985 UTU National Agreement. See 1985 UTU National Agreement (Exhibit 37) at 18. Employees are selected for promotion to engineer, usually in seniority order, depending on carrier needs. Once employees become qualified as engineers, they typically experience a period of “ebb and flow” between ground service and engine service. If the need for engine service employees increases, qualified ground service employees with the highest engineer seniority will be called up to engine service. Likewise, if the need for engineers decreases, the engineers with

\[17\] According to BLE, engineer training is “quantitatively and qualitatively much more demanding than the brief training period operating employees must complete prior to becoming trainmen and conductors.” BLE Pre-Hearing Brief, Arb. Board No. 564 (Dec. 11, 1996) (Exhibit 36) at 8, n. 11.
the lowest seniority will in most cases “flow back” to ground service. Declaration of John Hennecke (Exhibit 26) at ¶ 8.

E. The Introduction of New Technology in the Railroad Industry

The work performed on operational assignments such as yard engines, road switchers, and locals – like all work on the railroads – has evolved over time in response to the development and introduction of new forms of technology. From the early days of steam locomotives, railroads have regularly incorporated technological advances into their operations. Even during the darkest days of the American rail industry – the period from World War II to the late 1970s when rail traffic and financial health declined steadily – the railroads remained technologically innovative. As one government report noted in 1973, “It is a widely held belief that whatever the problems and shortcomings of the railways, railroad technology is not one of them. Indeed, for a mature industry the rate of innovation and speed of diffusion are striking.” Robert E. Gallamore, Regulation and Innovation: Lessons from the American Railroad Industry (Exhibit 38) at 8 (quoting from Task Force on Railroad Productivity, Improving Railroad Productivity (November 1973) at 282). Indeed, it could be said that the railroads’ ability to incorporate technological advances into their operations was all that kept them afloat during this period of economic decline. Id. at 9.

As new innovations come on-line, the jobs of railroad employees have changed to accommodate those advances. The contest in 1877 between John Henry and the steam drill may have been a short-term victory of man over machine, but the work soon changed nonetheless. Indeed, on occasion, entire crafts or classes of railroad employees have disappeared as a result of technological change. A prime example is the telegraphers’ craft, whose functions were taken

Examples of technological advances that have changed the jobs of railroad employees in the operating crafts include the following:

- **Diesel locomotives:** One of the most important advances in railroad history was the transition from steam to the diesel-electric locomotive. Among the many changes engendered by this technological advance was the elimination of the fireman position on train crews.

- **Hot box detectors:** Because the build-up of excess heat in the wheel axles of rail cars can damage equipment and lead to derailments, train service employees at both ends of the train were needed to watch for smoke and other signs of excessive heat. Now, a wayside electronic box scans rail cars as they go by, obviating the need for such work.

- **EOT devices:** In recent years, railroads have adopted the so-called “end-of-train” device, which is connected to the air hose on the rear car of a train. This device monitors air pressure throughout the train, which again eliminates the need for manual inspection. It also allows the crew in the cab of the locomotive to initiate air braking from the rear end of the train. This device allowed railroads to eliminate the caboose and associated unnecessary operating craft positions.

- **Computers:** Other than the diesel locomotive, perhaps nothing has changed railroads so much as the computer. In recent years, computers have been introduced into all manner of operations, including switching, dispatching, waybilling, trip data and train tracking, and repair and maintenance shops. The introduction of computers has frequently resulted in the elimination of jobs.

See Declaration of John Hennecke (Exhibit 26) at ¶ 9.

Remote control technology is also among the many innovations introduced on the railroads over the years. Remote control, broadly speaking, is any system that uses an electronic signal to communicate a railroad employee’s commands to an automated device, which then performs a function that previously had to be done by hand. Remote controlled track switches have been used for decades. On Norfolk Southern, for example, the carrier uses a computerized hump switching system that automatically throws yard switches and controls the speed of rail cars.
entering the classification tracks. See UTU (Yardmasters) v. Norfolk Southern Railway Co., PLB No. 5252, Award No. 1 (Exhibit 40) at 2; see also NS Locations With Remote Operations (August 2002) (Exhibit 41). In that case, as here, the use of technology resulted in elimination of unnecessary positions. Other long-standing examples of remote control technology include remote guidance systems for mobile overhead shop cranes and for mobile car spotters. See “Remote Control: Safe, Efficient, and Under Challenge,” Railway Age (Feb. 1997) (Exhibit 42). More recently, radio-based remote systems have been applied to the operation of gates on ballast cars and to the loading and unloading of intermodal trailers and containers. Id.; see also Declaration of John Hennecke (Exhibit 26) at ¶ 10.

Indeed, even prior to development of the modern computerized remote locomotive control technology giving rise to this case, the major Class I carriers had used some forms of remote locomotive control in certain circumstances. BNSF, for example, has for many years used a remote radio controlled “car mover” at its yard in Havelock, Nebraska. See BLE v. Burlington Northern R.R., PLB No. 5464, Award No. 11 (Exhibit 43) at 1. This car mover – which is a modified diesel locomotive – is operated by carmen (i.e., repair shop employees), not engineers, at the Havelock yard. Id. Likewise, CSXT has used a remote control system in some hump switching operations that allows the speed of the locomotive pushing cars over the hump to be set from a remote location. CSX Transportation, Inc. v. UTU, SBA No. 955, Award No. 351 (Exhibit 44) at 2.
F. The Nature of Modern Computerized Remote Control Locomotive Technology

Modern remote control systems incorporate two main components. First, each remote control locomotive is equipped with an on-board computer that is pre-programmed with the industry’s best train handling practices. Statement of Fred Horst (Exhibit 45) at ¶ 3; Canac Patent No. 5511749 (Exhibit 46) at 20. This computer is hooked directly into the locomotive’s major mechanical systems, giving it complete command over the electrical output to the traction motors, the independent and automatic brakes, and all of the locomotive’s secondary systems, such as the sanders, lights, horn, and bell. Canac Patent No. 5511749 (Exhibit 46) at 1; see also CSX Remote Control Manual (Exhibit 47). It is outfitted with a number of sensors, allowing it to read electrical output, horsepower, heat, wheel slippage, oil and air brake levels, and the like. Canac Patent No. 5511749 (Exhibit 46) at 21. Second, there is a radio transmitter unit that allows an employee to communicate with the computer from a distance. See Photographs of Transmitter (Exhibit 48). This transmitter (which is somewhat smaller than a loaf of bread) has eight pre-set speed settings, which typically range from “stop” to 15 miles per hour. See Statement of Fred Horst (Exhibit 45) at ¶ 6; Canac Patent No. 5511749 (Exhibit 46) at 23.

When the remote control system is engaged, the RCO simply selects a speed by dialing the knob on the radio transmitter. At that point, the on-board computer takes over control of the actual movement of the locomotive, automatically achieving the speed requested. See Canac Beltpack Promotional Materials (Exhibit 49); Cattron-Theimeg Promotional Materials (Exhibit 50). Thus, the remote operator has no need to consider the many informational inputs that an engineer must review, nor a need for any intangible “feel” of the train. Rather, the on-board computer by itself selects the proper combination of throttle and brakes (whether independent,
automatic, or some combination), while adjusting for train tonnage, the grade, and wheel slippage. The computer can, for example, accelerate a train from a standstill to seven miles per hour and consistently maintain that speed, regardless of whether there are five or fifty cars attached, regardless of whether the track is dry or wet, and regardless of whether the movement is on a steep hill or a flat stretch of track. Statement of Fred Horst (Exhibit 45) at ¶¶ 7-9.

In this fashion, the remote control system’s on-board computer replaces the traditional role of the engineer in controlling the locomotive. Michel Picher, the Canadian arbitrator, described the system this way:

“The automated locomotive is equipped with a number of features, including a radio receiver and a mobile controller which receives remote commands and relays control commands to the locomotive controls by means of a mobile interface. The yard operations employee directing the locomotive from a position on the ground, by means of the belt pack, can signal the engine to advance, reverse or stop, and has a certain discretion with respect to the speed of its movement. However, he or she does not become involved in locomotive ‘handling’ in the traditional sense. There is, in other words, no direct control of the throttle or braking functions by the operator of the belt pack. Rather, there is a simple direction made by radio communication through the belt pack as to the direction and speed of the yard engine’s movement. The amount of throttle or braking required, having regard to the weight of the cars being pushed or the grade of track, is determined automatically by the microprocessor system. The necessary brake and accelerator functions are directed by a computer program, and not by any human operator . . . . In the result, the skills traditionally exercised by the locomotive engineer, namely how much throttle and brake to apply to ensure the appropriate movement of the locomotive and the cars it is handling are now performed automatically by the microprocessor system.”

CN Award (Exhibit 4) at 4.

The modern remote control locomotive technology that was at issue in the Canadian arbitration and is at issue in this case is significantly more sophisticated than earlier versions of remote control. Older forms of remote control simply moved the throttle and brake controls from the cab of the engine to a portable control stand. Because these systems lacked any on-board
computer capable of independently manipulating the throttle and brake, an employee using one of these systems still had to exercise skill and judgment about how much throttle and brake to apply to accomplish a particular movement. Declaration of John Hennecke (Exhibit 26) at ¶ 10; Canac Patent No. 5511749 (Exhibit 46) at 19.

G. The Development and Regulation of Remote Control Locomotive Technology

Modern computerized remote locomotive control technology has been in use on North American railroads for more than a decade. In 1989, Canadian National Railroad (“CN”), in conjunction with the Canadian government, initiated a five-year pilot program to test the feasibility of remote control systems for locomotives. Using technology developed by Canac, Inc. (one of the two major suppliers of the equipment now being installed in the U.S.), CN introduced remote control operations at a hump yard in Winnipeg. It reported that the technology operated effectively and safely over 1,460 days, “representing some 7,300 shifts and over 58,000 hours of operation.” See “Remote Control: Safe, Efficient, and Under Challenge,” Railway Age (Feb. 1997) (Exhibit 42) at 1. Based on this success, the Canadian government approved use of remote control technology throughout Canada.

As the American carriers in this case have done, CN assigned operation of the remote transmitters to ground service personnel represented by UTU. Just as in this case, the BLE objected, claiming that locomotive engineers should operate the new technology. Likewise, just as in this case, the UTU supported the carrier’s decision to assign the work to ground service. A three-way arbitration involving the CN, UTU, and BLE was held in October, 1991. As noted

18Several versions of remote control locomotive systems have been in use in Europe for some time. See “Where’s the remote? At a railroad near you,” Railway Age (Jan. 1999) (Exhibit 51) at 38.

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above, the arbitrator concluded that the on-board computer replaced the engineer, and that the
remaining work involved in remote control operations was the work of ground service. CN
Award (Exhibit 4) at 11. Thus, the arbitrator’s award upheld the carrier’s decision to assign the
work to ground service personnel. Id.

Following this decision, remote control technology has been installed in rail yards across
Canada, both by CN and by Canadian Pacific Railway. By the late 1990s, remote control systems
were in use in 100% of CN’s hump operations, as well as in hundreds of flat switching and
industrial assignments. CN now operates more than 120 locomotives with remote control, with
1,100 crew starts per week and over 1.5 million cumulative operating hours. Canadian National
Experience With Locomotive Remote Control Technology (Exhibit 52) at 2. According to the
carrier, CN’s use of remote control has had a significant positive impact on safety – the carrier’s
accident rate in switching operations fell by almost half, from 0.71 accidents per 1000 engine
hours in conventional operation to 0.37 under remote control. Id. at 5-6; “Locomotive Remote
Control: A prize just out of reach,” Railway Age (Feb. 1999) (Exhibit 53) at 24.

At about the same time remote control technology was being introduced in Canada,
various U.S. railroads were examining the suitability of such systems for their own properties.
The FRA took the position that a remote control system is a locomotive “appurtenance,” which is
subject to regulation under the Locomotive Inspection Act, 45 U.S.C. §§ 22-34. In January, 1993,
the Wheeling & Lake Erie Railroad (“W&LE”), a Class III carrier, asked FRA for a “waiver”
from compliance with these regulations. FRA Notice, 58 Federal Register 18299 (Apr. 8, 1993)
(Exhibit 54). After holding public hearings (at which both BLE and UTU objected to remote
control based on alleged safety issues) and a delay of more than a year, the FRA rejected the
unions’ arguments and granted W&LE’s waiver request. See FRA Notice, 59 Federal Register 59826 (Nov. 18, 1994) (Exhibit 55). At the same time, FRA announced a two-year “test period” for remote locomotive control. Any railroad accepted into the test program was automatically granted a waiver. Id.

At least six carriers filed notice of intent to participate in the FRA’s test of remote control. See Letter from C.E. Dettman to Jolene Molitoris (Jan. 31, 1997) (Exhibit 56). One of these carriers was the Wisconsin Central. FRA Notice, 61 Federal Register 58736 (Nov. 18, 1996) (Exhibit 57). It sought to use remote control locomotives in switching operations at two yards. 19 Id. The FRA, however, ordered the carrier to delay its plans while the agency studied the carrier’s plan. Id. In December, 1996, the agency held an informal meeting regarding this issue in Appleton, Wisconsin. Id. Soon thereafter, the Wisconsin legislature passed a law requiring two-man crews, effectively ending the Wisconsin Central’s use of remote control. See “Locomotive Remote Control: A prize just out of reach,” Railway Age (Feb. 1999) (Exhibit 53) at 24.

On July 19, 2000, the FRA held a technical conference on remote control. FRA Notice, 65 Federal Register 31056 (May 15, 2000) (Exhibit 58). The purpose of this conference was to “discuss the current status of remote control and possible development of guidelines for remote operations.” Id. In its notice announcing the conference, FRA observed that “[l]ocomotives operated by use of remote control devices have been in use for a number of years.” It further

19 The Wisconsin Central already had some experience with remote technology. It introduced remote control on a limited basis in 1992, using it first in hauling gravel between a quarry and a rock crusher, and later in switching operations along one 77-mile route. See “Remote Control: Safe, Efficient, and Under Challenge,” Railway Age (Feb. 1997) (Exhibit 42) at 35.
noted that while it had gathered information on remote control in the past, it had never taken final agency action on the issue, but rather “continued to review RCL operations on a case-by-case basis.” \textit{Id.} FRA decided to restart the guidelines process because of “renewed interest in RCL operations” and the continuing evolution of the technology. \textit{Id.}

The technical conference included an exhaustive review of all aspects of remote operations, including design standards, employee training, operating practices, testing, and security procedures. See FRA Safety Advisory, 66 Federal Register 10340 (Feb. 14, 2001) (Exhibit 59). The BLE participated in that conference and filed written comments. The union continued to raise supposed safety risks but did not contest the right of the railroads to implement the technology. See BLE Statement to FRA (July 19, 2000) (Exhibit 60).

Based on the information supplied during the July 2000 conference, the FRA issued a “Safety Advisory” on February 14, 2001 that “establishes recommended minimal guidelines for the operation of remote control locomotives.” FRA Safety Advisory, 66 Federal Register 10340 (Feb. 14, 2001) (Exhibit 59). These guidelines cover all aspects of remote control operations, including (1) design requirements, (2) training, (3) operating practices, (4) security of devices when not in use, (5) inspection and testing, (6) warnings when remote control is in use, and (7) accident-reporting procedures. \textit{Id.}

The FRA did not mandate (as requested by the BLE) that remote control operations be reserved to persons trained and certified as locomotive engineers. To the contrary, the FRA expressed the view that RCO work is \textit{not} the same as engineer work. In particular, the agency concluded that “[t]he introduction of remote control operations is \textit{a significant departure from traditional on-board locomotive operations.}” \textit{Id.} at 10342 (emphasis added).
For this reason, the FRA required the carriers to adopt new training programs for remote control operators. It specifically stated that existing locomotive engineer training programs would not be appropriate – “material modifications” of those programs were required. Id. at 10344. Thus, even employees who are already certified as locomotive engineers are required to undergo new training and certification in order to work as an RCO. The carriers were directed to submit their new training proposals to the FRA for approval. Id.

In accordance with that order, each of the major carriers developed training programs for remote control operators. These programs are largely the same from carrier to carrier. In all cases, the training programs call for a total of two weeks of classroom and field training (as opposed to twenty or more weeks for engineers). See, e.g., BNSF Remote Control Operation Training (Exhibit 61); Affidavit of Dennis L. Williams (Exhibit 30) at ¶ 5. This training is specific to remote operations – it covers subjects such as the components of remote control systems, start up, shut down, and inspection of the equipment, and safety features. Id. The FRA approved these programs on all the carriers. Statement of A. Kenneth Gradia (Exhibit 9) at ¶ 6.

H. The Recent Implementation of Computerized Remote Control Technology

Soon after the FRA issued its Safety Advisory in 2001, all of the major American railroads announced plans to begin implementation of computerized remote control locomotive systems. The carriers’ initial implementation plan for remote control called for assignment of remote control operator jobs to ground service employees represented by the UTU. On September 26, 2001, in accordance with that plan, the railroads entered into a “Letter of Intent” with the UTU that provided for assignment of remote control jobs to these employees. Letter of Intent (Sept. 26, 2001) (Exhibit 62). The Letter covered “implementation and utilization of
remote control technology for assignments including, but not limited to, yard engines, road switchers, locals, and other comparable assignments.” Id.

The BLE raised objections at that point, claiming that it was entitled to the remote control operator jobs. Don M. Hahs, the President of the BLE, sent a letter to the carrier signatories of the Letter of Intent with UTU objecting to the carriers’ plans concerning remote control technology. Letter from Don Hahs to Emerson Bouchard, et al. (Oct. 5, 2001) (Exhibit 63). In this letter and in similar contemporaneous statements about the carriers’ plans, the BLE indicated that it was prepared to strike if its demands were not met. Id. Accordingly, on October 5, 2001, the carriers filed suit in federal court in Chicago, Illinois, seeking an injunction against the threatened strikes. Complaint (Oct. 5, 2001) (Exhibit 64).

The issue in that litigation was whether the dispute over remote control was a “minor dispute” subject to mandatory arbitration or a “major dispute” over which the BLE could strike. After a hearing on January 7, 2002, the Court issued an order finding that the dispute is minor and enjoining the BLE from engaging in strikes. Order (Jan. 14, 2002) (Exhibit 65).

In reaching that conclusion, the Court examined the parties’ collective bargaining agreements, past practices, and arbitral authority concerning the nature of the technology at issue. Id. at 6. With respect to the agreements themselves, the Court found that “there is no specific provision within the parties’ agreements that addresses the introduction of remote control technology or that gives exclusive jurisdiction over all operation of locomotives to members of the BLE.” Id. at 7. The Court also noted that the BLE’s Section 6 notices, which request new agreement provisions assigning remote control to engineers, “belie the BLE’s conclusion that the existing collective bargaining agreements clearly prohibit the assignment of remote control
technology to ground service personnel.” Id. at 14-15.

On the question of past practice, the Court concluded that there is no past practice of assigning remote control work to the BLE. Id. at 10. It also found that there is some history of assignment of remote control locomotive technology to employees other than those represented by the BLE. Id. at 9-10. Finally, the Court noted that arbitral authority – particularly the decision in Canadian National Railway Co. v. BLE – supports the railroads’ position that the on-board computer replaces the engineer and that the remaining work involved in remote control operations is more like the work of ground service than that of locomotive engineers. Id. at 11-12. The BLE appealed but later withdrew that appeal upon reaching agreement with the carriers and the UTU to arbitrate this dispute.20

Soon thereafter, the railroads and the UTU reached a final agreement regarding “implementation and utilization of remote control technology.” UTU Remote Control Agreement (Exhibit 5). This Agreement, which was signed on August 20, 2002, covers compensation, training, and bidding for positions as a remote control operator. Id. It also provides for protective benefits for employees who are deprived of employment as a result of the implementation of remote control. Id. at Attachment A. At locations where RCO positions are established, employees who cannot hold a position after the normal exercise of seniority will qualify for

20Before issuing its final order enjoining strikes, the Court addressed a further disagreement regarding the scope of the injunction. The BLE argued that the injunction should not protect all use of remote control “in or around terminals” because, it said, that would allow the carriers to use remote control too broadly. The Court rejected the BLE’s arguments. Its Order applies to all disputes arising from the carriers’ “use or plans to use remote control technology in the operation of locomotives in their terminal operations in or around terminals, or work assignments in connection therewith.” Injunction Order (Jan. 16, 2002) (Exhibit 66) at ¶ 1.
protection and will be paid at an agreed-upon rate. Id. This protection is provided on a one-for-one basis with new RCO positions, subject to (among other things) the carriers’ right to reduce protected slots in one of three ways, including offering buy-outs to employees.21 Id.

This protection provision in the UTU Agreement recognizes that the only employees who are at risk of losing their jobs because of remote control tend to be low seniority ground service personnel. Because of the ebb–and–flow process described above – whereby engineers without an available position can “flow back” to ground service – engineers who lose their positions to remote control and are unable to bid to another engineer position can take a position in ground service (including any available RCO position for which they are qualified). By doing so, they will displace more junior ground service employees, setting off a cascade that could result in an employee being laid off if there are not enough positions to go around. In that event, the UTU Agreement provisions ensure that the employee will continue to receive regular compensation. Id.

I. Ongoing Use of Remote Control Technology

Each of the railroads began implementation of remote control earlier this year with a pilot program designed to test the new systems at particular yards and terminals. The carriers’ pilot program began with flat switching, road switchers, and hump operations in and around terminals. These pilot programs initially used one or two locomotives at a few locations, and gradually expanded to additional locomotives, assignments, and locations as more remote control systems were purchased and brought on-line. Statement of A. Kenneth Gradia (Exhibit 9) at ¶ 7. In

21A side letter to this protection agreement with UTU allows the carriers to offer up to one-half of total buy-outs to employees in engine service and to establish engineer remote control reserve boards. Id. at 8.
recent months, the railroads have continued gradual implementation of remote control, expanding from the initial pilot program sites to dozens of locations on all of the major carriers combined. The carriers expect to have remote control operations in place at a number of additional work sites by the end of this year. Id. at ¶ 8; Declaration of Jeff H. Koch (Exhibit 13) at ¶ 3.

The carriers’ current remote control operations have been “in and around terminals.” Declaration of John Hennecke (Exhibit 26) at ¶ 13. In these assignments, one or two RCOs work together, performing traditional ground service tasks such as pulling pins to uncouple cars, throwing switches, aligning couplers, and so on, while using the remote transmitter to order the computer to move the locomotive as needed. When two RCOs work together, they use a function on their remote unit known as “pitch and catch,” which transfers command of the system from one RCO to the other, thereby ensuring that the individual with the best view of the operation is the one with control. Affidavit of John Irwin (Exhibit 67) at ¶ 4; Declaration of John Smith (Exhibit 68) at ¶ 9. Only one RCO can have control of the system at any one time, just as only one conductor or foreman can command movements in a conventional operation. Statement of Fred Horst (Exhibit 45) at ¶ 11.

As noted above, all current RCO assignments involve gathering or distribution of freight or equipment, and so usually require the employees to work from the ground. But some assignments involve industrial switching at customer facilities in or around the railroads’ terminals, or transfer work between yards within a terminal, in which case the locomotive must move some distance. In these circumstances, the employee handling the remote control transmitter rides along in the locomotive (just as ground service employees do in traditional operations), but continues to use the transmitter and does not manipulate the locomotive controls.
directly. E.g. Declaration of Michael Shircliff (Exhibit 69) at ¶ 3. Just like ground service employees, most RCOs are in locomotive cabs for only a fraction of their shift, and the reasons that RCOs would be in a locomotive cab are the same as the reasons that a ground service employee would be in a cab in a conventional operation, i.e., safety, comfort, or convenience. Statement of John Quilty (Exhibit 8) at ¶ 17; Declaration of John Smith (Exhibit 68) at ¶ 7.

The BLE, however, has taken special exception to the occasional presence of remote control operators in the locomotive cabs. It recently filed a motion with the court in Chicago, seeking a ruling that the Court’s injunction does not extend to circumstances where RCOs are in the cab. The Court found it would need to hold a full-blown evidentiary hearing to resolve the issue. Hence, without prejudice to their position that where the RCO stands or sits makes no difference regarding the nature of the work, the railroads agreed to restrict RCOs from using the remote transmitter to “effectuate locomotive movements” while inside the cab, until this case is decided. See Agreed Order (Exhibit 70). This means that pending the outcome of this arbitration, RCOs may continue to ride in the cab, but must step onto the locomotive’s running boards or platforms if they need to use the speed, brake, or directional controls. See Instructions Regarding Use of Operator Control Units in Locomotive Cabs (Exhibit 71).

To date, no employees in either ground service or engine service have been deprived of employment as a result of the implementation of remote control. This is due, in part, to increased attrition among senior engineers as a result of favorable retirement provisions incorporated in recent amendments to the Railroad Retirement Act. With senior engineers retiring at accelerated rates, there are more positions than employees even with the reduction in engineer slots. Indeed, several of the carriers have announced plans to hire operating craft employees in the coming
months. Declaration of Bruce Paterson (Exhibit 72); Affidavit of John Irwin (Exhibit 67) at ¶ 6; Statement of John Quilty (Exhibit 8) at ¶ 22; Declaration of Jeff H. Koch (Exhibit 13) at ¶ 5.
ARGUMENT

It is well-settled that management has the inherent right and authority to implement technological advances in the workplace, even if such technology results in the elimination of existing jobs.\textsuperscript{22} The obvious corollary to this principle is that management has the right – absent any specific restrictions in applicable collective bargaining agreements – to assign the jobs that remain following a technological change.\textsuperscript{23} Indeed, without this right to assign work, the power to introduce new technology would be almost meaningless. As one arbitrator explained:

“To freeze existing job classifications and duties for the life of the contract would significantly reduce management’s ability to effectively meet competition and adjust and adapt to technological advances and changes. If the parties intended that management’s function be thus limited, there must be specific contractual provisions providing therefor. . . . Technology and production processes change, and jobs change with them.”

\textbf{Beam Distilling Co.}, 96 Labor Arb. Rep. 844, 848 (1990) (Exhibit 78). The reasons for these basic principles are clear. In a world in which technological change, computerization, and

\textsuperscript{22} \textit{E.g.}, \textit{James River Corp.}, 102 Labor Arb. Rep. 893, 896 (1994) (Exhibit 73) (In the absence of “express language,” company has “the right to eliminate the job of Coal Handler in the interest of maintaining the efficiency of the employees.”); \textit{Dresser Industries}, 96 Labor Arb. Rep. 1063, 1068 (1991) (Exhibit 74) (“Management continues to have the reserved and inherent authority to make its operations more efficient and more productive by whatever means are available,” including elimination of jobs by technology). See also \textit{Chicago & N.W. Transp. Co. v. RLEA}, 908 F.2d 144, 155 (7th Cir. 1990) (Exhibit 75) (“What the agreements do not forbid, either explicitly or implicitly . . . the railroad is allowed to do as a matter of contract”).

\textsuperscript{23} \textit{E.g.}, \textit{Kessler, Inc.}, 84 Labor Arb. Rep. 1185, 1188 (1985) (holding that company’s decision to eliminate jobs and reassign residual work “must be accepted unless its managerial discretion has been limited ‘expressly’ by some other contractual provision.”) (Exhibit 76); \textit{Peoria Water Co.}, 80 Labor Arb. Rep. 478, 487 (1983) (“The majority of arbitral authority permits management to eliminate jobs and/or transfer all or part of the duties to a position when technological developments are produced to perform the work.”) (Exhibit 77); \textit{CSXT v. UTU}, SBA No. 955, Award No. 351 (Exhibit 44) at 3 (absence of “specific prohibition” means carrier is free to assign duties after technological change).
mechanization are facts of life, no company or industry can remain economically competitive without the ability to innovate and adapt.

These standards mean that unless employees are able to point to specific contractual provisions governing the consequences of technological change, such matters are left to management discretion. In this case, the BLE claims that its agreements restrict the carriers’ discretion to assign the jobs that are left over after implementation of new technology, i.e., the RCO jobs. But the BLE cannot and does not point to any specific language restricting the carriers’ rights to implement technology, nor to any language freezing job classifications in the face of technological change.

That is the end of this case. Without an unequivocal and specific contractual limit on the carriers’ discretion to assign remote control positions, there is no basis for finding any violation if the carriers decide to assign such work to ground service employees represented by the UTU, and thereby eliminate the engineer’s position. As many arbitrators have said in the past, “Work eliminated by technological advances loses its contractual protection.” UTU v. Norfolk Southern Ry., PLB No. 964, Award No. 855 (Exhibit 80).

Unable to muster any specific contractual right to remote control assignments, the BLE relies instead on a set of general agreement provisions and alleged past practices that, it says, reserve the job of locomotive engineer – which it defines as operation of “the controls of the locomotive” – to engineers represented by BLE. But even if such non-specific provisions could

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24 E.g. CSXT v. UTU, SBA No. 955, Award No. 351 (Exhibit 44) at 3; Kessler, Inc., 84 Labor Arb. Rep. at 1188 (Exhibit 76); UTU v. CSXT, PLB No. 4837, Award No. 6 (Exhibit 79) at 3; see also CN Award (Exhibit 4) at 9.

25 See also infra p. 60 & note 37 (collecting cases).
support a claim to the new RCO positions, the BLE’s reliance on these rules and past practices assumes that the job of an RCO is to “operate[e] the controls of a locomotive,” and thereby is the same as the job of an engineer. The first step, therefore, in assessing the BLE’s contractual claim to the RCO positions is to define the nature of the job in dispute. Is the job of an RCO really the same as the job traditionally performed by an engineer? Is the RCO merely “operating the controls of the locomotive”? As we show in Part I, the job of an RCO is clearly different from the job of an engineer, and in fact is just like the job of a ground service employee.

The second step, once we have defined the type of job in dispute, is to review the past practices and agreement provisions – if any – that relate to that particular kind of work. As we explain in Part II below, because the work of an RCO is not the same as the job of an engineer but instead is much like traditional ground service, the relevant agreements and past practices support the carriers’ decision to assign these jobs to ground service employees represented by the UTU, and do not support the BLE’s claim to the RCO positions.

Finally, we consider the underlying principles of contract interpretation implicated by the introduction of new technology, and what those principles tell us about the proper way to interpret the contractual provisions at issue here. We show in Part III that because of standards that favor technological innovation, the carriers’ decision to assign the use of new technology to ground service employees is entitled to extraordinary deference.

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26 See, e.g., UTU v. Norfolk Southern Ry., PLB No. 964, Award No. 855 (Exhibit 80) at 1 (assessing nature of residual work after technological advance for purposes of comparison to pre-existing jobs); UTU v. Norfolk Southern Ry., PLB No. 5252, Award No. 1 (Exhibit 40) at 3; TCIU v. Soo Line R.R., Award No. 1 (Exhibit 81); TCIU v. CSX, PLB No. 5532, Award No. 5 (Exhibit 82) at 6; TCIU v. BN, PLB No. 5555, Award No. 21 (Exhibit 83) at 5.
I. THE JOB OF A REMOTE CONTROL OPERATOR IS NOT THE SAME AS THE JOB OF AN ENGINEER, AND IS MORE AKIN TO THE JOB OF A GROUND SERVICE EMPLOYEE

As noted above, the BLE itself has defined the job of a locomotive engineer in very precise terms:

“[T]he core duties of a locomotive engineer are simply defined and easily understood: it is the engineer’s responsibility to ‘operate the controls of the locomotive to get the train between Point A and Point B.’

The physical control and handling of the train is the engineer’s exclusive province, requiring special skills and knowledge, and the constant exercise of judgment. As Mike Russell, a working engineer on the Union Pacific, aptly put it: ‘[W]hen we are out in the field it’s strictly up to the engineer as to how he wants to handle his train.’ That has always been the case: no conductor or trainmen ever put his hand on the throttle.”

BLE Opening Brief to NMB (Exhibit 21) at 14 (emphasis added); see also BLE Reply Brief to NMB (Exhibit 22) at 27 (noting that “core function” of locomotive engineer is “operating the controls of the locomotive.”); NMB Transcript (Exhibit 23) at 113-14 (engineer’s “core function” is “operating the throttle on a locomotive engine.”). In other words, the BLE defines the job of engineers in terms of direct control of the throttle and brake.27

During the litigation in Chicago earlier this year, the BLE argued at considerable length that the job of an RCO is really the same as the job of a locomotive engineer, just dressed up differently. See, e.g., Declaration of Richard Radek (Exhibit 85) at 7. It claims that the carriers have taken the controls of the locomotive out of the hands of the engineer and given them to an employee on the ground, who then proceeds to operate the locomotive just as engineers have

27The other, secondary aspects of the engineer’s job – such as daily inspections, air brake tests, and handling train orders – are duties that the parties’ agreements specifically allow the carriers to share with “qualified ground service employees.” See BLE 1986 National Agreement at 16 (Incidental Work Rule) (Exhibit 84). This issue is addressed in greater detail at pp. 56 - 58, infra.
always done. Id. As such, the BLE contends that “ground personnel, with the assistance of a hand-held control device, will become de facto engineers.” BLE Litigation Brief (Exhibit 86) at 15. This is particularly so, the BLE says, if the RCO enters the locomotive cab and uses the remote transmitter from that location to control the train’s movements.

A. Operation of the Remote Transmitter is Not the Same as an Engineer’s Job

There are several problems with the BLE’s argument. First, the RCO’s use of a remote radio transmitter is completely different from what engineers do, i.e., operate “the controls of the locomotive.” BLE Opening Brief to NMB (Exhibit 21) at 14. At its most prosaic level, what the RCO does with the remote transmitter is turn a knob. The computer on the locomotive responds by accelerating, decelerating, or stopping the train. The BLE points to this fact and says that “the ground person’s manipulation of the switches on the remote control device are what engages the throttle and brake,” meaning that the RCO is operating the locomotive, just as an engineer would do. BLE Litigation Brief (Exhibit 86) at 11.

The union’s argument is founded on a fundamental misconception of how this technology works. In remote operations, it is the computer, not the RCO, that controls the throttle and brakes. See Statement of Fred Horst (Exhibit 45) at ¶ 10; Canac Patent No. 5511749 (Exhibit 46) at 1, 19. The computer is directly wired into the locomotive’s power and braking systems and makes all the decisions about throttle and brake settings that engineers make in conventional operations. Canac Patent at 6, 22-24. More importantly, it is programmed with a variety of algorithms that allow the computer to replicate the train handling skills of a locomotive engineer. Id. at 21-24. The computer, not the RCO, takes into account train mass, inertia, track grade, track condition, wheel slippage, available electrical power, and so on when accelerating or
The computer, not the RCO, makes the decision whether to reduce the throttle or to engage the brakes when slowing down. Id. at 23. When braking is called for, the computer, not the RCO, decides whether to use the independent brake or the automatic brake. Id. at 24. Thus, contrary to the BLE’s contentions, it is the computer, not the remote transmitter, that is the key component of the new system. By any definition, it is the computer that is “operating the controls of the locomotive.” Id. at 1, 20-24.

Because the computer is making all the decisions necessary to operate the controls of the locomotive, the RCO using a remote transmitter is merely issuing commands, just as a conductor or foreman would issue commands to the engineer with a hand or radio signal in conventional operations. As noted above, ground service personnel are in charge of locomotive movements and are responsible for giving the directions to the engineer. See Rule 1.47, GCOR (Exhibit 14). Sending signals to direct the movement of the locomotive is, therefore, purely ground service work, not the work of a locomotive engineer.28 Using a remote transmitter is no more doing the job of the engineer than using a hand signal or radio to tell the engineer to push a block of rail cars over a hump or onto a siding or a classification yard track. Nothing has changed, except that the employee sends the command using a knob instead of his hand or voice.

A comparison of the skills and knowledge required for each task confirms that operating locomotive controls is not the same as operating a remote transmitter. To use the transmitter, an

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28 The U.S. Bureau of Labor Statistics’ description of the job of “locomotive engineer” confirms that engineers do not send signals, they receive and interpret signals. It describes the job as follows: “Drive electric, diesel-electric, steam, or gas-turbine-electric locomotives to transport passengers or freight. Interpret train orders, electronic or manual signals, and railroad rules and regulations.” Bureau of Labor Statistics, 53-4011 Locomotive Engineers (Exhibit 87) (emphasis added).
RCO does not have to have the skills of a locomotive engineer. He does not, for example, have to know how to combine the throttle and the brakes to achieve and maintain certain speeds. He does not have to know how to account for the addition or subtraction of cars from the train, or a wet track, or a steep grade. He does not have to know the difference between the independent brake and the automatic brakes. He does not have to understand or comply with many of the carriers’ voluminous air brake and train handling rules for controlling the speed of, slowing, and stopping trains. He does not have to know how to read the informational inputs that an engineer takes into account, and does not need to know what an “ammeter” is, much less how to read it. Nor does he need to have an intangible “feel” for the train. Statement of John Quilty (Exhibit 8) at ¶ 15.

Using the transmitter is, in short, an infinitely simpler and inherently different task than operating the throttle and brakes on a locomotive.

Nor does the location of the RCO during his assignment make any difference in this regard. Whether the RCO is working on the ground, or on the running board of the locomotive, or in the locomotive cab, the on-board computer continues to make all the judgments about throttle and brake applications. See Statement of John Quilty (Exhibit 8) at ¶ 18; Declaration of John Smith (Exhibit 68) at ¶ 8. Thus, the BLE’s contention that RCOs look more like engineers if they enter the cab is a red herring – the computer is always doing the engineer’s job, regardless of where the RCO stands or sits.

The difference in the training provided to engineers vis-a-vis RCOs highlights the innate variance in the two jobs. See IBEW v. Kansas City Southern Ry., NRAB Second Div., Award No. 12980 (Feb. 2, 1996) (Exhibit 88) at 3 (fact that operation of remote control crane does not require “special training” is relevant to determination of whether assignment to crafts other than
electricians is permissible). Engineers train for at least 20 weeks (and sometimes up to twelve months or more). RCO training, by contrast, is currently only two weeks. Engineers are trained in a variety of subjects that RCOs learn nothing about, such as the different uses and combinations of the various brake mechanisms, fuel conservation, dealing with slack, and operations on steep grades. See Statement of John Quilty (Exhibit 8) at ¶ 10. Likewise, RCOs are taught an array of topics foreign to engineers, such as the various remote transmitter settings, how to turn off and store the remote transmitter, safety features (such as the “tilt” mechanism that shuts down the locomotive if the RCO falls over), and how to “pitch and catch” command between two different RCOs. See, e.g., CSXT Remote Control Manual (Exhibit 47) at 4-45.

The training programs for RCOs are enormously different than the training for engineers because the jobs are different. Indeed, when the FRA required the carriers to establish new training programs for RCOs, it specifically stated that existing engineer programs would not be appropriate, because “introduction of remote control operations is a significant departure from traditional on-board locomotive operations.” FRA Safety Advisory, 66 Fed. Reg. (Exhibit 59) at 10342.

Equally telling is the fact that the certificate an engineer holds to operate the conventional controls of a locomotive does not allow him to use a remote control transmitter. The FRA requires not only separate training, but also an entirely separate certification to be an RCO. Statement of John Quilty (Exhibit 8) at ¶ 11.

In the CN case, Mr. Picher agreed that the use of a remote transmitter simply cannot be equated with the traditional operation of locomotive controls. His award states:
“The evidence raises substantial doubt with respect to the assertion of the Brotherhood that the yard operations employee is ‘handling’ a locomotive in the sense that a locomotive might be handled in manual operations by a locomotive engineer. The manual operation of a locomotive requires a high degree of skill and training, including the ability to read gauges and manipulate throttle and braking functions as required by changing circumstances and conditions. Under the automated process, locomotive handling is not performed in any meaningful sense by the operator of the belt pack. . . . It is the microprocessor which automatically makes the necessary adjustments to ensure the proper operation of the locomotive. While it is true that the yard operations employee can determine the speed and direction of the train by means of the belt pack, much as she or he previously did by radio communication with the locomotive engineer, it cannot be said that the yard operations employee is handling or operating the locomotive with anything approaching the degree of control and refinement previously exercised by a locomotive engineer. In my view, it is more accurate to say that the locomotive engineer’s position has been abolished and that that employee has been replaced by a microprocessor and interface system which automatically performs the functions previously assigned to the locomotive engineer. At most the job of moving the locomotive has . . . been de-skilled to the point where the locomotive engineer’s function has been eliminated.”

CN Award (Exhibit 4) at 10.

The CN Award also cites a Kennecott Copper Corporation award, in which the arbitrator held that “[t]he new job of operating the ‘black box’ [i.e. computerized remote control] is not a similar job to the job previously performed by the engineer,” and therefore that the employer was free to assign it to ground service employees. Id. The CN Award agreed, emphasizing that:

“...The yard operations employee does not, in my view, truly operate or handle the locomotive. He or she does not perform the functions traditionally assigned to a locomotive engineer. Those functions are automated and are now performed by the microprocessor unit upon commands initiated by the yard operations employee through the belt pack. While the analogy may not be perfect, it seems to the Arbitrator that the yard operations employee using the belt pack is no more responsible for the work of a locomotive engineer than a person who now makes a directly dialed long distance call on a digital telephone can be said to be performing the tasks of a long distance telephone operator. It is in fact an automated system which has taken over the core functions of the job which was abolished.”

Id. at 10-11. Thus, the arbitration decisions that have addressed the precise question pending
before this Board agree that using a remote control transmitter is *not* the same as the engineer’s operation of a locomotive’s controls.

**B. Engineers Do Not Perform the Duties of a Remote Control Operator**

In fact, the overall job of an RCO is like the job traditionally performed by ground service employees. The BLE focuses on *one specific part* of the RCO job – the operation of the remote transmitter. But in doing so, the BLE simply ignores the bulk of what RCOs actually do. RCOs spend ninety percent or more of their time working on the ground. This ground work involves tasks such as identifying cars to be switched, pulling pins to uncouple cars, throwing switches, aligning couplers, setting handbrakes, coupling air hoses, and so on. Statement of John Quilty (Exhibit 8) at ¶ 12. All of this work falls within the traditional job description of ground service personnel, not engineers. Declaration of John Hennecke (Exhibit 26) at ¶ 5. Consider the following:

<table>
<thead>
<tr>
<th>RCO TASK</th>
<th>GROUND SERVICE</th>
<th>ENGINEER</th>
</tr>
</thead>
<tbody>
<tr>
<td>IDENTIFY RAIL CARS</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>PULL PINS</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>UNCOUPLE/COUPLE AIR HOSES</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>ALIGN COUPLERS</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>APPLY/RELEASE HAND BRAKES</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>THROW SWITCHES</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>SEND SIGNALS TO CAB</td>
<td>YES</td>
<td>NO</td>
</tr>
</tbody>
</table>

In short, none of the standard tasks of an RCO are performed by locomotive engineers on
Under the so-called “Incidental Work” rule, Section 3(a), Article VIII of the 1986 BLE National Agreement, the carriers have the right to assign tasks such as handling switches and inspecting rail cars to “qualified engine service employees” when such tasks are “incidental” to the employee’s assignment. See BLE 1986 Agreement (Exhibit 84) at 16. However, as the BLE itself has forcefully argued, engineers perform such duties infrequently, meaning that such tasks are not within the standard job description of a locomotive engineer. As BLE has said, “[C]ommon sense tells us that any such throwing of switches pales in comparison with the time, effort, and energy an engineer[] dedicates to his core duties of operating and handling the locomotive.” BLE Reply Brief to NMB (Exhibit 22) at 29.

Thus, if we view the RCO position as a whole, rather than singling out one piece of it, there is no question that the job of an RCO is like the job of a traditional conductor or foreman position, not the job of a locomotive engineer. The CN arbitration confirms that this holistic perspective is the correct one. In that case, Mr. Picher emphasized the fact that the bulk of the RCO’s job is the same as the traditional job of ground service:

“Firstly, the Arbitrator is impressed with the degree to which the newly established position of yard operations employee [the CN term for RCO] encompasses the duties and responsibilities previously assigned to the yard foreman and yard helper [trainmen and conductors]. The basic function of identifying and marshaling cars, applying and releasing hand brakes, manipulating air hoses, aligning drawbars and pulling pins remains substantially unchanged and can fairly be said to occupy the preponderance of the working time of the yard operations employee. By any account, in my view, the core functions of the yard operations employee’s job are those which were traditionally performed by the yard foreman and yard helper prior to the introduction of the automated humping process.”

CN Award (Exhibit 4) at 9.

This is not to say, of course, that the RCO’s job is necessarily identical to what ground service employees do in conventional operations. To be sure, the RCO is using a device that has never been used before on these carriers by any craft or class of employees. But the threshold question presented by the BLE’s invocation of its agreements and alleged past practices of

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29 Under the so-called “Incidental Work” rule, Section 3(a), Article VIII of the 1986 BLE National Agreement, the carriers have the right to assign tasks such as handling switches and inspecting rail cars to “qualified engine service employees” when such tasks are “incidental” to the employee’s assignment. See BLE 1986 Agreement (Exhibit 84) at 16. However, as the BLE itself has forcefully argued, engineers perform such duties infrequently, meaning that such tasks are not within the standard job description of a locomotive engineer. As BLE has said, “[C]ommon sense tells us that any such throwing of switches pales in comparison with the time, effort, and energy an engineer[] dedicates to his core duties of operating and handling the locomotive.” BLE Reply Brief to NMB (Exhibit 22) at 29.
locomotive operation is not whether the RCO job is the same as the work of ground service, but rather whether the RCO is doing the same job as a locomotive engineer. Because it is relying on generic rules rather than any specific right to remote control positions, the BLE has the burden to show that an RCO is working as a locomotive engineer, operating a locomotive just as an engineer would.

On that score, there cannot be any serious debate. For all the reasons outlined above, it is absolutely clear that whatever this new job is, it is not the job of a locomotive engineer. Rather, the RCO duties are like the traditional job of a conductor or foreman. We now assess the consequences of that fact when considering the various collective bargaining agreement provisions and past practices that bear on this case.

II. NEITHER PAST PRACTICE NOR THE APPLICABLE AGREEMENTS REQUIRE THE CARRIERS TO ASSIGN REMOTE CONTROL OPERATOR POSITIONS TO ENGINEERS.

During the litigation in Chicago, the BLE pointed to two sources of supposed contractual entitlement to RCO jobs: (1) the past practice of assigning engineers to operate locomotives, and (2) rules that reserve the job of locomotive engineer – the job of operating the controls of the locomotive – to engineers represented by the BLE. Of the two, the BLE focused primarily on past practice. It conceded that “BLE and the carriers rarely have included specific written provisions in their agreements” on the issue of engineer work, but maintained that this has been so because “[t]he right of locomotive engineers exclusively to perform the work of operating locomotives has been so widely accepted.” BLE Litigation Brief (Exhibit 86) at 7.

In fact, as we demonstrate in this Part, there is nothing in either the past practice or the parties’ agreements that requires RCO positions be assigned to engineers. Because the RCO is not “operating the controls of the locomotive,” any rules and past practices that supposedly reserve
such work to the BLE are irrelevant and inapplicable. Rather, because RCO work is substantially the same as the traditional work of ground service, both past practice and the applicable collective bargaining agreements support the carriers’ decision to assign these jobs to ground service employees.

A. Past Practices Concerning the Work Performed by RCOs

1. The Carriers’ Uniform Past Practice is to Assign the Kind of Duties Performed by RCOs to Ground Service Employees

As we explained above in Part I, the work of the new RCO position may include throwing switches, pulling pins to uncouple cars, disconnecting and reconnecting air hoses, setting hand brakes, and/or sending signals that control when and where the locomotive moves. See Statement of John Quilty (Exhibit 8) at ¶ 12. It can hardly be disputed that the uniform past practice of the carriers has been to assign such tasks to ground service employees. A multitude of sources confirm this past practice:

• Carrier descriptions of train service jobs invariably include the kind of tasks performed by RCOs, such as throwing switches, coupling cars, and “using hand and lantern signals and radio communications to control train movement.” E.g. UP Human Resources Department: Train Service Employee Job Description (Exhibit 89).

• Arbitration awards always accept as fact that the work of operating switches and coupling and uncoupling cars is ground service work. 30

30 See, e.g., Chicago & North Western R.R v. UTU, PLB No. 5263, Award No. 8 (Exhibit 90) at 2-3; UTU v. Chicago & North Western R.R., PLB No. 5089, Award No. 10 (Exhibit 91) at 2; BLE v. Chicago & North Western R.R., NRAB First Division, Award No. 24288 (Exhibit 92) at 2; BLE v. Chicago & North Western R.R., NRAB First Div., Award No. 24295 (Exhibit 93) at 2.
• During the Canadian remote control arbitration, the arbitrator concluded that “by any account . . . the core functions of the [RCO] employee’s job are those which were traditionally performed by the yard foreman and yard helper prior to the introduction of the [computerized remote control technology].” See CN Award (Exhibit 4) at 9.

• The UTU claims that various rules in its collective bargaining agreements specify that the kinds of work performed by RCOs are ground service work within the jurisdiction of the UTU. See, e.g., Article 44, Norfolk Southern Rules and Rates of Pay For Conductors, Trainmen and Yardmen (Exhibit 95) at 218; see also UTU Submission to PEB 213 (Exhibit 16) (UTU’s statement of duties of ground service personnel).

• Finally, the BLE itself has argued that tasks such as throwing switches are the “traditional job of the brakeman/trainman” and not engineer work. See BLE Opening Brief to NMB (Exhibit 21) at 36-37; see also BLE Brief to NRAB (Exhibit 94) at 3-4. Indeed, engineers regularly file claims for penalty pay if they are asked to perform such tasks.31

In fact, the only task of an RCO that is even arguably new is the use of a remote transmitter to direct the movement of the locomotive. But even there, the past practice overwhelmingly supports assignment of such work to ground service. As we have shown in Part I above, use of the remote transmitter is most akin to the task of passing signals to the engineer to control the locomotive’s movement, the only difference being that the RCO uses a button instead of a voice or hand signal. See supra pp. 40-48. Throughout modern railroad history, employees that have

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31E.g., Chicago & North Western R.R. v. UTU, PLB No. 5263, Award No. 8 (Exhibit 90) at 2-3; BLE v. Chicago & North Western R.R., NRAB First Div., Award No. 24288 (Exhibit 92); Union Pacific R.R. v. BLE, PLB No. 4450, Award No. 72 (Exhibit 96); CSXT v. UTU, PLB No. 5471, Award No. 19 (Exhibit 97); BLE v. Chicago & North Western R.R., NRAB First Div., Award No. 24577 (Exhibit 98) at 4.
passed signals to the locomotive to direct movement have been ground service employees. 

See Declaration of John Hennecke (Exhibit 26) at ¶ 11-12; Statement of John Quilty (Exhibit 8) at ¶ 13. The past practice on all of the carriers has been that ground service employees – not locomotive engineers – issue orders about when and where the locomotive should move. Id. Indeed, the right and authority of conductors to direct locomotive movements in this fashion is enshrined in the carriers’ operating rules and recognized throughout the industry. See, e.g., Rule 1.47, GCOR (Exhibit 14); Rule 941, NORAC Operating Rules (Exhibit 19); In Re United Transportation Union, 27 NMB No. 45, Case No. R-6735 (Exhibit 99) (Feb. 29, 2000).

With remote control technology, the ground service employee continues to be responsible for directing the movement of the train, and continues to give the same kind of directional and speed commands as in the past. Thus, past practice strongly supports assignment of ground service personnel to the RCO position.

Indeed, because ground service employees, not locomotive engineers, have previously performed the work now performed by RCOs, assignment of RCO positions to engineers would necessarily take away work from ground service employees. That in itself is reason enough to reject the BLE’s claim. See TCIU v. Alton & Southern Ry., NRAB Third Div., Award No. 35513 (Exhibit 100) at 7.

2. There is No Past Practice of Assigning Engineers to Remote Operations

By contrast to the vast body of past practice supporting assignment of RCO positions to ground service, there is no past practice supporting assignment of operation of remote control to engineers represented by the BLE. When the carriers have used other kinds of remote control locomotion devices in the past, engineers have never worked such assignments. For example, the
Moreover, as discussed above, engineers historically have simply not done most of the other duties that RCOs are called upon to perform, such as coupling cars, throwing switches, lacing airhoses, and so on. See Declaration of John Hennecke (Exhibit 26) at ¶ 5. In short, the BLE has no past practice support with respect to any aspect of the RCO job.

The experience of the Canadian railroads on this point is significant as well. In all remote control operations conducted by the major Canadian railroads, it is ground service employees, not engineers, who use the remote transmitter to send signals to the computer. See CN Award (Exhibit 4) at 3; Statement of John Quilty (Exhibit 8) at ¶ 13.

The BLE insists, of course, that past practice supports assignment of remote control to locomotive engineers. But that argument is a Potemkin village – a false front with no substance behind it. The “past practice” to which BLE points is the history of engineers operating the fixed controls of the locomotive, i.e., the throttle and brake. Because the RCO is not operating the “controls of the locomotive,” but rather a wholly different device that sends signals to a computer, the past practice invoked by BLE is simply not relevant, let alone dispositive. With respect to the relevant practices of passing signals to the locomotive or operating computerized remote control systems, the BLE lacks any historical support whatsoever.32


1. The Incidental Work Rules Support the Carriers’ Assignment of RCO Work to Ground Service Employees

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32Moreover, as discussed above, engineers historically have simply not done most of the other duties that RCOs are called upon to perform, such as coupling cars, throwing switches, lacing airhoses, and so on. See Declaration of John Hennecke (Exhibit 26) at ¶ 5. In short, the BLE has no past practice support with respect to any aspect of the RCO job.
As noted above, the “Incidental Work” rule in the 1986 BLE National Agreement preserves the carriers’ flexibility to assign certain kinds of work to locomotive engineers. However, it also expressly recognizes the right of the carriers to assign certain categories of work to “qualified ground service employees,” notwithstanding any claims by engineers to such work. The rule states as follows:

“(b) Road and yard employees in engine service and qualified ground service employees may perform the following items of work in connection with their own assignments without additional compensation:

(1) Handle switches
(2) Move, turn, spot and fuel locomotives
(3) Supply locomotives except for heavy equipment and supplies generally placed on locomotives by employees of other crafts
(4) Inspect locomotives
(5) Start or shutdown locomotives
(6) Make head-end air tests
(7) Prepare reports while under pay
(8) Use communication devices; copy and handle train orders, clearances and/or other messages
(9) Any duties formerly performed by firemen.”

Article VIII, Section 3(b), 1986 BLE National Agreement (Exhibit 84) at 16 (emphasis added).

The carriers’ 1985 National Agreement with UTU also contains an identical “Incidental Work” rule, containing the same provisions concerning assignments to engineers and assignments to ground service. See Article VIII, Section 3(a) & (b), 1985 UTU National Agreement (Exhibit 37) at 18.
The “Incidental Work” rule in the BLE and UTU agreements supports the carriers’ right to assign remote control positions to ground service employees in at least three different respects.

a. “Communication Devices”

First, under this rule, both the UTU and the BLE have expressly recognized the carriers’ right to assign use of “communication devices” to ground service employees. Id. at Article VIII, Section 3(b)(8). While the term “communication device” is not defined by the Agreement, the concept clearly includes a remote transmitter that is used to send signals to a computerized locomotive. Several points support this notion.

First, the transmitter “communicat[es]” information back and forth between the operator and the on-board computer over a radio link on the 450 MHZ frequency band. Indeed, on some models, the system is equipped with a speaker that allows the computer to “talk” back to the RCO. Statement of Fred Horst (Exhibit 45) at ¶ 8; CSXT Remote Control Manual (Exhibit 47) at 18-22 (detailing “two-way digital data communication” between transmitter and on-board computer). As a matter of common sense, therefore, the transmitter is a “communication device,” for the same reasons that a telephone, fax machine, or walkie-talkie used by a conductor in conventional operations is a communication device. See Letter Agreement between UP and UTU (Feb. 27, 1989) (recognizing that telephones and fax machines are “communication devices” under Incidental Work rule).

Second, because a remote transmitter uses a channel or frequency in the radio spectrum, it is subject to regulation by the Federal Communications Commission (“FCC”). See 47 C.F.R. 90. The FCC requires any railroad using remote control to apply for a license, which allows the railroad to use the transmitter in a particular area at a particular frequency. In this respect, the
remote transmitter is no different from the portable two-way radios used by railroad employees. See Statement of John Quilty (Exhibit 8) at ¶ 21. Thus, the fact that the FCC regulates and licenses use of remote transmitters confirms that they are indeed “communication devices.”

Third, the bargaining history of the Incidental Work rule shows that the parties intended “communication device” to be interpreted broadly, to account for developing technology. According to carrier officers who participated in the drafting of that language, it was purposely drafted as broadly as possible to avoid the need to revisit the issue if technology changed over time. It was intended, therefore, to capture any tool that might be considered as a “communication device,” whether at that time or in the future. See Declaration of Ken Peifer (Exhibit 102).

Moreover, past arbitration awards confirm that “communication device” should be interpreted broadly. One such case involved the question whether a computer terminal was a “communication device” with the meaning of the Incidental Work rule. See UTU v. Chesapeake & Ohio Ry., PLB. No. 3510, Award No. 116 (1990) (Exhibit 103). The arbitrator, Herbert L. Marx, Jr., concluded that a computer terminal was indeed a communication device subject to the Incidental Work rule, “even if such were not contemplated specifically at an earlier time.” Id. at 2. If a computer terminal qualifies as a “communication device,” then a remote transmitter used to send a radio signal surely does as well.

The BLE disputes the railroads’ position that the RCO’s transmitter is a “communication device,” arguing that the remote control unit “is far more than a tool for communication.” BLE Litigation Brief (Exhibit 86) at 19. It characterizes the ground service unit as more of a control panel than a communication device because it “will initiate the stopping and starting of a locomotive.” Id.
Once again, the BLE’s argument depends on (1) a flawed understanding of the technology and (2) an overly broad view of the role of locomotive engineers in conventional operations. It is the on-board computer which actually operates the locomotive and makes all the necessary judgments about how much throttle and brake to apply – the transmitter merely communicates the operator’s directions. Canac Patent No. 5511749 (Exhibit 46). In no way can the modern remote control system’s transmitter be analogized to the control stand of a locomotive. Furthermore, to the extent that the RCO “initiates the stopping and starting” of the locomotive by sending a signal with the transmitter, that is no different than what a ground service employee did in the past. Conductors, not engineers, are the employees who direct locomotive movements. The BLE might like to believe that engineers are the ones who make such decisions – and has demanded such powers in the past, without success – but in fact it has always been the conductor that is in charge of a conventional operation. See Rule 1.47, GCOR (Exhibit 14). As such, use of a remote transmitter is indeed exactly like the use of a radio or similar appliance as a “communication device.”

b. Starting or Shutting Down Locomotives and Other Incidental Work

On some remote control assignments, the RCO may be required to start up the locomotive engine, shut it down, conduct an inspection of the locomotive or a test of the air brake system, or handle track orders. See Statement of John Quilty (Exhibit 8) at ¶ 16; CSXT Remote Control Manual (Exhibit 47) at 36-37, 42, 45. The BLE claims that such duties are engineer work, which only members of the BLE are permitted to perform. See Declaration of Richard Radek (Exhibit 85) at 7 (arguing that RCOs must “know how to properly align switches and controls in the locomotive cab”).

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As it happens, the RCO’s performance of these tasks is often \textit{not} the same as the engineer’s performance of similar functions in the past, simply because the equipment is quite different in a computerized locomotive. \textit{See, e.g.} Statement of John Quilty (Exhibit 8) at ¶ 16; CSXT Remote Control Manual (Exhibit 47) at 37, 45 (showing that process for starting and shutting down locomotive require operation of new remote functions). But even if it were true that RCOs did exactly what engineers did in the past when starting or shutting down a locomotive’s engine, or testing the brakes, or conducting daily inspections, or handling track orders, the Incidental Work rule specifically permits the carriers to assign such responsibilities to “qualified ground service” employees. \textit{See} BLE 1986 National Agreement (Exhibit 84) at 16. In particular, the BLE agreed that ground service employees would be permitted to “[s]tart and shutdown locomotives,” perform “head-end air tests,” and engage in similar incidental work of this nature.\textsuperscript{33}

As a result, the fact that RCOs may perform a few minor tasks performed by an engineer – such as starting the engine at the beginning of the assignment, or shutting it down at the end – does \textit{not} mean that such positions are reserved to the BLE. The RCO’s principal tasks will, of course, be the same kind of work regularly performed by ground service (coupling cars, throwing switches, etc.). But even if an RCO has to perform some work previously done by engineers, the Incidental Work rule allows the carriers the flexibility to assign the position to qualified ground service employees.

c. \textbf{Carrier Rights to Assign Residual Work}

Finally, the Incidental Work rule demonstrates that, as a general matter, the carriers have

\textsuperscript{33}All ground service employees who are assigned RCO work are properly “qualified” to perform such tasks. In particular, as noted above, the FRA has approved carrier RCO training programs for ground service personnel. \textit{See} Statement of A. Kenneth Gradia (Exhibit 9) at ¶ 6.
broad discretion to assign residual work left over after implementation of new technology. As noted above, the general rule is that, when new technology results in the elimination of the core responsibilities of a particular job, management retains the flexibility to assign any residual tasks as it sees fit, absent some explicit contractual promise to the contrary. See, e.g., Kessler, Inc., 84 Labor Arb. Rep. at 1188 (Exhibit 76); Peoria Water Co., 80 Labor Arb. Rep. at 487 (Exhibit 77).

In this case, not only does the BLE lack an explicit contractual entitlement to the work remaining after remote control (because such work is not engineer work), but it has expressly recognized the right of the carriers to assign work under the Incidental Work rule. Beyond their inherent management discretion to assign residual work, in other words, the carriers have the even broader rights provided by the Incidental Work rule to decide how best to assign tasks that fall into any gray areas between the crafts. Finding any restriction on the carriers’ rights to assign remote control work in the most efficient manner would, therefore, be wholly inconsistent with the terms of the Incidental Work rule.34

2. BLE Work Rules Do Not Require Carriers to Assign RCO Positions to Engineers

a. The BLE’s Rules Reserve Only Engineer Work to BLE, Not Other Work

In support of its claim to RCO jobs, the BLE has also invoked what it calls “scope rules” that generally establish the right of BLE members to jobs as locomotive engineers. A number of

34Side Letter No. 7 in the 1986 BLE National Agreement notes that the rights provided to the carriers under the Incidental Work rule were “not intended to infringe upon the work rights of another craft as established by any railroad.” See 1986 BLE National Agreement (Exhibit 84) (emphasis added). At most, that provision limits the carriers’ ability to assign to BLE members the core duties of a different craft under the guise of the Incidental Work rule, and so has no relevance in this case. See, e.g., BLE v. Burlington Northern R.R., PLB No. 5220, Award No. 1 (Exhibit 104) (denying BLE claims for extra pay because of alleged assignment of work of other craft to engineers).
carrier agreements, however, contain no such clause at all. For example, nothing resembling a rule
reserving work to engineers appears in BLE schedule agreements for the former Chesapeake &
Ohio, Louisville & Nashville, or Seaboard Coast Line properties, now all part of CSXT, or on the
former Southern Railway, now part of NS.35

In the dozens of other BLE agreements currently in effect, the exact language of the so-
called “scope rules” varies from carrier to carrier. As the BLE has noted, the genesis of all of
these rules was General Order No. 27, an order issued by the Director General of the Railroads
during World War I. See BLE Litigation Brief (Exhibit 86) at 6. In particular, Article VI of
General Order No. 27 provided that “[w]henever electric or other power is installed as a substitute
for steam . . . the locomotive engineer shall have preference for positions as engineers.” See
General Order No. 27 (Exhibit 109) at 124 (emphasis added). The BLE notes that when the
railroads were returned to private hands, General Order No. 27 “was preserved in collective
bargaining agreements between the various carriers and the BLE by reproducing its terms verbatim
or near-verbatim in those agreements.”36 See BLE Litigation Brief (Exhibit 86) at 6.

As such, while there is variation in the language of the BLE local agreements, the essence
of these rules is that they reserve positions as engineers to members of the BLE. In other words, a
job must require one to work as an engineer – i.e., to operate the fixed controls of the locomotive
– in order for the rule to apply. Thus, this is the same protection that BLE claims under the rubric

35 See BLE- Chesapeake & Ohio Agreement (Exhibit 105); BLE-Louisville & Nashville
Agreement (Exhibit 106); BLE-Seaboard Coast Line Agreement (Exhibit 107); BLE-Southern
Agreement (Exhibit 108).

36 See, e.g., BLE-Great Northern Agreement (Exhibit 110) at 75; BLE-Chicago
Burlington & Quincy Agreement (Exhibit 111) at 37; BLE-NS Agreement (Exhibit 112) at 124.
of past practice. Whether phrased as a matter of historical practice or as a matter of “scope rules,” all the BLE can claim is that engineer “positions” and/or engineer “work” must be assigned to its members.

Because it is relying on generic rules about engineer positions rather than any specific contractual rights to remote control or rules requiring the carriers to maintain a minimum crew consist, the BLE faces a particularly difficult burden. It is not sufficient for the BLE to show merely that engineer positions or work have vanished as a result of the carriers’ implementation of new technology. Arbitration awards have uniformly held that “the installation of a labor-saving device does not result in a violation of a Scope Rule.”

Rather, BLE must prove that the job that is left over after implementation of the new technology is in fact a “position as an engineer.” In this case, that means that the BLE must demonstrate that the RCO – and not the new technology – has taken over the engineer’s job of

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37 TCIU v. CSXT, Oct. 2, 1990 Mem. Agreement Special Arb. Board (Exhibit 113) at 4 (denying claim by clerks union to prevent introduction of computerized data system which tracked train delays, crew reports, and related information). See also UTU v. Norfolk Southern Ry Co., PLB No 5252, Award No. 1 (Exhibit 40) at 4 (“[w]ork eliminated by technological advances loses its contract protection”); UTU v. Norfolk Southern Ry. Co., PLB 964, Award No. 855 (Exhibit 80) at 2 (“[n]umerous awards have ruled that technological changes do not automatically constitute contract violations”); BRAC v. Cincinnati N.O. & T. Pacific Ry., PLB No. 3312 (Exhibit 114) (denying a claim by the clerks union regarding the implementation of computerized billing system, finding that “[w]ork eliminated by technological advances loses its contract protection”); TCIU v. BN, PLB No. 5555, Award No. 21 (Exhibit 83) at 4 (when work previously performed by claimant is eliminated by use of computer, there is no violation of agreement); TCIU v. CSX, PLB No. 5782, Case No. 14 (Exhibit 115) at 2-3 (when work previously done by clerk is lost to computer rather than transferred to other craft, there is no rule violation); e.g., TCIU v. BNSF, NRAB Third Div., Award No. 34025 (Exhibit 116) at 3 (“The elimination of work by computer technology is not a transfer of work to strangers to the Agreement.”)

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“operating the controls of the locomotive.”38

An example of the proper analysis of this sort of question is found in the case of UTU v. Norfolk Southern Ry., PLB No. 964, Award No. 855 (Exhibit 80). In that case, the dispute involved the carrier’s introduction of a new computerized remote control system for track switches at a hump operation in Macon, Georgia. Prior to the implementation of the new technology, a yardmaster would issue work orders, which were received by a hump foreman. The foreman would then carry out the tasks of “blocking out tracks and lining switches.” Id. at 1. With the new system in place, the yardmaster could enter his work order into a computer, which then automatically performed the tasks previously performed by the hump foreman. Id. The hump foremen claimed that the yardmasters were performing work reserved to the foremen under their scope rule. The Board disagreed and denied the claim. It found that

“The various duties previously performed by the hump foremen have either been eliminated entirely or are now being done by the computer. Numerous awards have ruled that technological changes do not automatically constitute contract violations, and the yardmasters in the claims before us are doing essentially the same thing in inputting work orders as they did before installation of the new system.”

Id. at 1-2.39

The same reasoning applies in this case. As demonstrated in Part I above, remote control transfers the traditional duties and responsibilities of engineers to the on-board computer, not to a different craft or class of employees. See supra pp. 40–48. Operation of the transmitter is not the

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38See, e.g., TCIU v. CSXT, Oct. 2, 1990 Mem. Agreement Special Arb. Board (Exhibit 113) at 7 (union must show that it “historically, traditionally and customarily performed the claimed work on a system-wide basis.”).

39See also UTU v. Norfolk Southern Ry. Co., PLB No 5252, Award No. 1 (Exhibit 40) at 4 (rejecting yardmasters’ claim that they were performing hump foreman duties).
same as an engineer’s operation of the controls of the locomotive, and the engineer’s certification
does not permit him to use a remote transmitter. Different training and a separate certification are
required. Thus, the ground service personnel working as RCOs are not doing the work of
engineers; if anything, they are doing the traditional work of ground service employees.40 Because
the RCO job is not a position as an engineer, and RCOs are not performing engineer work, RCO
positions are not subject to the BLE’s so-called “scope rules.” Thus, these rules simply do not
prevent the carriers from assigning RCO positions to members of the UTU.

b. BLE Lacks “Crew Consist” Protections

The weakness of BLE’s contractual claim to RCO positions is especially apparent if we
contrast the so-called “scope rules” on which it relies to job protection provisions in the manning
agreements of other crafts. The “crew consist” rules that apply under the UTU’s collective
bargaining agreements generally provide that “[t]he basic crew consist for all crews operated on
the [carrier territory] will be one (1) conductor/foreman and one (1) brakeman/helper, except as
provided herein,” see, e.g., UP-UTU Crew Consist Agreement (Feb. 1, 1992) (Exhibit 118) at 1, or
that “[t]he consist of all road freight and yard crews, except as provided in this Article, will be not
less than one conductor/foreman and one trainman/yardman.” NS-UTU Agreement (Dec. 1, 1998)
(Exhibit 119) at Article 37.

Hence, it is clear that when unions and railroads want to prescribe a manning rule that
requires assignment of a member of a particular craft to a crew, regardless of the nature of the
work to be done and/or possible technological or operational changes, they know how to do so.

40See BRAC v. Norfolk & Western Ry., PLB No. 3849. Award No. 20 (Exhibit 117) (if at
least some of work at issue was previously performed by other crafts, then there can be no
violation of scope rule).
The BLE has not obtained these sort of job protection rules for engineers employed by the carriers in this case. The “scope rules” to which the BLE points in this case are clearly not crew consist rules. Unlike crew consist rules, the BLE’s rules merely provide, at most, that locomotive engineers represented by BLE will perform engineer work. As such, they only require the carriers to assign BLE-represented engineers if engineer work is to be performed. If the engineer’s job either disappears or changes into something different, the BLE’s rules necessarily have no application.

c. BLE Has Acknowledged That Its Rules Do Not Give It Rights to Remote Control Work

In its Section 6 notices in previous rounds of bargaining, the BLE has repeatedly asked for rights to remote control assignments, thereby conceding that it does not have such rights under its existing rules. As early as 1988, BLE was asking the railroads to change its agreements to add a guarantee that engineers would not be displaced by remote control technology. For example, on The Atchison, Topeka & Santa Fe Railway (“ATSF”), now part of BNSF, the BLE had a rule based on the General Order No. 27 language, providing that the engineers represented by the BLE “shall have preference for positions as engineers.” See BLE-ATSF Agreement (Oct. 1, 1986) (Exhibit 120). On June 27, 1988, the BLE served a Section 6 notice on ATSF, which asked the carrier to adopt a new rule providing that:

“A. Only qualified engineers will man and operate trains regardless of propulsion or control

B. [Engineers] [w]ill not be required or requested to relinquish the controls.”

41The only properties on which BLE has an arguable manning rule are the MidSouth and Gateway Western, which are small portions of the KCS system.
During bargaining over this Section 6 proposal with ATSF, the BLE changed its proposal to ask that the carrier guarantee that “[l]ocomotive engineers . . . will be used on, and will operate, remote or otherwise, all locomotives operating on the tracks of the carrier outside engine service facility trackage.” BLE Proposal to ATSF (Jan. 10, 1989) (Exhibit 122) at 10 (emphasis added). The carrier did not agree to this proposal.

The union served substantially the same proposal on “the majority” of railroads at around the same time. See Letter from Larry McFather to Charles Hopkins (June 8, 1988) (enclosing BLE Section 6 Notice) (Exhibit 123) at 2.

When the BLE did not obtain these protections in the 1988 round, it renewed and augmented its requests in the 1994 round of bargaining. Thus, for example, the BLE’s Section 6 notice to ATSF sought a rule providing that

“No carrier supervisor, official, non-engine craft employe, radio transmitting device or other device will be used to supplant or substitute in the exclusive work of any employe working under BLE agreements.”

BLE Section 6 Notice to ATSF (Nov. 2, 1994) (Exhibit 124) at 9 (emphasis added). Likewise, on CSXT, NS, and other railroads, the BLE sought a new “Scope Rule” that repeated the terms it sought from the railroads in 1988. See, e.g., BLE Section 6 Notice to CSXT (Oct. 31, 1994) (Exhibit 125) at § 2, p.1; BLE Section 6 Notice to Chicago & North Western (Nov. 15, 1994) (Exhibit 126) at 11; BLE Section 6 Notice to Norfolk Southern (Nov. 1, 1994) (Exhibit 127) at § 2, p. 1; see also, e.g., BLE Section 6 Notice to UP (Dec. 20, 1994) (Exhibit 128) at 12 (proposing to assign locomotive engineers to “train operations . . . [that] are controlled from a remote location”). Once again, the carriers rejected the organization’s demands for these protections against adoption of remote control.

Consequently, the BLE has once again repeated its proposals in the current round. For

42During bargaining over this Section 6 proposal with ATSF, the BLE changed its proposal to ask that the carrier guarantee that “[l]ocomotive engineers . . . will be used on, and will operate, remote or otherwise, all locomotives operating on the tracks of the carrier outside engine service facility trackage.” BLE Proposal to ATSF (Jan. 10, 1989) (Exhibit 122) at 10 (emphasis added). The carrier did not agree to this proposal.
example, in the notice it served on CSX Transportation, the BLE proposes that “[t]echnologically advanced locomotives or motive power equipped for remote control will be operated and/or controlled by a Locomotive Engineer.” See BLE Section 6 Notice to CSXT (Exhibit 125) at 3 (emphasis added). Similarly, on UP, the BLE proposed as follows:

“Should technology advance in the industry to the point where the traditional job of controlling and operating locomotives from an on board location change so that the actual train operations (movements) are controlled from a remote location it is understood that the craft of Locomotive Engineers shall be considered as the fundamental affected craft to flow to such new assignments.”

BLE Section 6 Notice to UP (Dec. 11, 2000) (Exhibit 129). The BLE served similar proposals on some of the other carriers as well. E.g. BLE Section 6 Notice to Conrail (Dec. 30, 1999) (Exhibit 130) at 2-3.

When a union asks for but does not receive exclusive rights through the Section 6 process, it demonstrates conclusively that the union does not have such rights in its existing agreements. For example, in UTU v. Southern Railway Co., PLB No. 4357, Award No. 8 (Mar. 31, 1992) (Exhibit 131), the carrier abolished a yardmaster position and assigned the task of giving instructions to yard engine crews to other yard office personnel. The UTU claimed that under its agreement, yardmasters had the exclusive right to supervise yard crews. The Board disagreed. First, it noted that the union had not met its obligation to provide “convincing and detailed evidence which establishes that the work in controversy exclusively belonged to Yardmasters.” Id. at 1 (citing Fourth Division NRAB No. 2522). It then held:

“Even if one assumes that the factual basis for the claim had been established, there is a more serious deficiency with respect to rule support. The Organization attempted to secure the exclusive right to supervise yard employees. That right, after Section 6 notices were filed with the proposal by Petitioner, [was] not successfully obtained by the Organization. The 1978 Agreement amended the existing rules, but did not provide exclusivity of supervision over yard employees,
nor control of all train movements in yards. Therefore, there is no exclusivity with respect to the functions complained of by Petitioner in this case.” Id. at 1-2.

See also TCU v. Norfolk & Western Ry. Co., PLB 4702, Award No. 12 (Sept. 24, 1992) (Exhibit 132) at 6 (rejecting claim of exclusive rights to work because “the Organization, in its Section 6 notices, attempted to secure the exclusive use of the CRT device for itself, and was unsuccessful. It is obvious that such an attempt implies, without question, that such a right does not exist unless the contract is changed.”)

The same is true here. By asking the carriers to agree to new rules for assignment of remote control to locomotive engineers, the BLE has plainly acknowledged that it does not have such protections under existing rules. The rules BLE has proposed (but not received) stand in stark contrast to the sort of generic rules in current agreements. Unlike existing rules, the BLE proposals speak specifically of “remote” operations and “radio-controlled devices.” Whereas existing rules provide only that BLE-represented engineers shall have rights to engineer positions, the BLE’s proposals would have ensured that engineers would not have to “relinquish the controls” regardless of technological innovations. If the BLE already had the right to block assignment of remote control work to ground service personnel under existing rules or “implied agreements,” it would not have needed to make such proposals. In other words, the BLE has understood and admitted for years that its existing agreements do not require the carriers to assign the use of remote control to locomotive engineers.

III. ALL PRESUMPTIONS REGARDING INTERPRETATION OF THE APPLICABLE COLLECTIVE BARGAINING AGREEMENTS FAVOR THE CARRIERS’ INTERPRETATION

Because neither the applicable collective bargaining agreements nor past practice require the carriers to assign RCO positions to engineers, the carriers are free to assign such jobs to ground
As explained above, the carriers have a “reserved and inherent authority” over their methods of operation that includes “the elimination of a job, and any reassignment of remaining duties” “reasonably related” to “appropriate changes.” Beam Distilling Co., 96 Labor Arb. Rep. at 848 (Exhibit 78); see also pp. 37–38, supra, and cases cited in notes 22-24. Arbitrators have consistently held that the authority employers have over operations is “limited only by [their] obligation not to discriminate among employees and to honor [their] obligations imposed by the collective agreement and by law which might specify other limitations.” New York Air Brake Co., 36 Labor Arb. Rep. 621, 626 (1960) (Exhibit 133).

However, even if there could be any doubts about the meaning or relevance of the rules and practices cited by the BLE, such doubts must be resolved in favor of the carriers. Arbitration precedent evinces a strong presumption favoring management discretion when it comes to implementation of technology and the assignment of residual work. In cases like this one – without evidence of bad faith or clear and unequivocal language – arbitrators have repeatedly held that employers must be allowed to implement new technology and assign the newly-created work as they see fit. The surrender of the employer’s control over operations, thus, can never be unwitting or passive. Employers are allowed to innovate, adapt, and change their operations – to “make [their] operations more efficient and more productive by whatever means are available” –

43 As explained above, the carriers have a “reserved and inherent authority” over their methods of operation that includes “the elimination of a job, and any reassignment of remaining duties” “reasonably related” to “appropriate changes.” Beam Distilling Co., 96 Labor Arb. Rep. at 848 (Exhibit 78); see also pp. 37–38, supra, and cases cited in notes 22-24. Arbitrators have consistently held that the authority employers have over operations is “limited only by [their] obligation not to discriminate among employees and to honor [their] obligations imposed by the collective agreement and by law which might specify other limitations.” New York Air Brake Co., 36 Labor Arb. Rep. 621, 626 (1960) (Exhibit 133).

44 See CSXT v. UTU, SBA No. 955, Award No. 351 (Exhibit 44) at 1-2 (Partial remote control system); UTU v. NSR, PLB 5252, Award No. 1 (Exhibit 40) at 1-2, 4 (Computerized remote control switching system for hump operations). See also BRT v. Union Pac. R.R., SBA No. 331, Award No. 54 (Exhibit 134) (Automatic waybill delivery systems, replacing manual delivery of waybills); CSXT v. UTU, NRAB Award No. 24121 (Exhibit 135) at 1 (Computerized trip data systems that track train delays, crew reports, and related information); BRAC v. Cincinnati, NO&T Pac. Ry., PLB No. 3312, Award 52 (Exhibit 114) at 2-3 (Computerized billing systems); TCU v. Norfolk Southern Ry., PLB No. 3751, Award No. 9 (Exhibit 136) at 1 (Computerized billing systems); TCU v. Norfolk & Western Ry., PLB No. 4454, Award No. 25 (Exhibit 137) at 1 (Automated inventory and material management systems); TCU v. CSXT, PLB No. 5709, Award No. 1 (Exhibit 138) at 1 (Automatic scales for weighing and classifying coal cars).
unless and until they affirmatively give up their right to do so. Dresser Industries, 96 Labor Arb. Rep. at 1068.


The BLE’s argument that it should have an exclusive right to all remote control work runs counter to this body of precedent and the underlying policy concerns that motivate those decisions. Neither express agreement provisions nor implied agreements based on past practice of the BLE’s collective bargaining agreements evidence the type of clear and unequivocal language that

45 See, e.g., International Paper, 108 Labor Arb. Rep. 1207, 1210 (Exhibit 139) (“The need to change processes and procedures has always been present, but the economic pressure of today, along with the rapidly changing technology available, has resulted in more frequent and extensive changes than has been the practice in the past.”); Dresser Industries, 96 Labor Arb. Rep. 1063, 1068 (Exhibit 74) (“In a highly competitive industry, this discretion is essential to the survival of the firm.”)

46 Frito-Lay, Inc., 93 Labor Arb. Rep. at 57 (“Chaos would result if any modification of the duties and manner in which employees work necessitates bargaining.”); Associated Shoe Industries of Southeastern Mass., 10 Labor Arb. Rep. at 743 (A general policy of not allowing employers to implement new technology “would end in nothing short of disaster” and “would call a halt to technological progress, doom employer, employee, and consumer alike to economic stagnation, and deny to the worker the fruits of increased productivity.”).
arbitrators require before they will interfere with an employer’s decisions regarding methods of operation. Absent such specific restrictions, forcing the carriers to assign remote control work to engineers would violate the carriers’ fundamental managerial discretion. It would limit the carriers’ right to improve their operations with no clear sign that they ever surrendered control over this aspect of their operations.

Because the carriers have never agreed – let alone clearly and unequivocally agreed – to give up their inherent authority to use technology or assign remote control work, they must remain free to make such assignments as they deem appropriate. The carriers, after extensive research and investment, have decided to implement remote control technology and assign the resulting work to ground service employees. They did so not out of bad faith or malice to engineers, but because it promises to improve their ability to serve customers and compete in a changing marketplace. Absent compelling proof of contractual restrictions, those decisions should not – indeed may not – be second-guessed.

CONCLUSION

For all the reasons stated above, the Board should rule that the answer to the carriers’ Question and the UTU’s Question is “Yes,” and that the answer to the BLE’s Question is “No.”

Respectfully submitted,
Attorneys for the Carriers