Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34141
Docket No. MW-32460
00-3-95-3-359

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly advertised seven (7) Track Subdepartment positions as Pittsburgh Production Zone Gang positions and on March 14, 1994 awarded said positions to employes who hold no seniority in the Pittsburgh Seniority District, instead of properly advertising the positions as Pittsburgh Seniority District positions and awarding them to employes holding seniority therein (System Docket MW-3405).

(2) The Agreement was violated when the Carrier improperly advertised a position of Machine Operator Class 1, Mark IV Tamper as a Pittsburgh Production Zone Gang position and on March 21, 1994 awarded said position to Mr. C. E. Cherry, who holds no seniority in the Pittsburgh Seniority District, instead of properly advertising the position as a Pittsburgh Seniority District position and awarding it to an employe holding seniority therein (System Docket MW-3406).

(3) As a consequence of the violation referred to in Part (1) above, Messrs. R. Mosser, W. Russell, A. E. Long, R. R. Deitz, J. B. Cypher, H. Mullen and D. J. Domin shall be compensated at their appropriate rates of 'pay for ten (10) hours per day plus all overtime with proper credit for benefits and vacation purposes beginning March 14, 1994 and continuing until the violation ceased.

(4) As a consequence of the violation referred to in Part (2) above, Mr. L. L. Lafferty or junior employe on the frozen roster furloughed on Monongahela Railway Roster or Pittsburgh Seniority District Roster shall be compensated at the appropriate rate of pay for ten (10) hours per day plus all overtime with proper credit for benefits and vacation purposes beginning March 21, 1994 and continuing until the violation ceased."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This entire dispute reduced to its basic denominator is asking the Board to determine if two production gangs that the Carrier established pursuant to Presidential Emergency Board (PEB) 221 and implemented in Article X of the July 28, 1992 Agreement were in violation of the intent of the parties in Article X.

Under Article X, the Carrier created two types of production gangs, a regional gang that would work either in the Eastern or Western portion of the system, and zone gangs with six defined zones each of which encompassed more than one seniority district, but Article X does not define a production gang.

Had it not been for the Organization's last letter in each case, written July 6, 1995, the Board would have dismissed this dispute as being without sufficient data upon which to base a decision. Up until the July 6, 1995 letters, all the dispute had been is the Organization contending the Carrier violated the intent of Article X when it bulletined a one man gang with one machine to work in the Pittsburgh Zone (which by Agreement

encompassed three seniority districts including the district in which the Claimant retained his seniority) and likewise when the Carrier bulletined a seven-man gang to work in the Pittsburgh Zone.

But the Organization in its July 6, 1995 letter, set forth its objections to the forming of these gangs, and set forth the reasons for their objections. The Carrier should have rebutted the Organization's latest letter, but for whatever reason, it chose not to.

In reviewing all the material furnished this Board, it was first necessary to review the proceedings before PEB 221.

Interestingly enough, in the proceedings before PEB 221, the Carrier stated it was ready to accept the findings of PEB 219, whereas the Organization protested being forced into accepting pattern settlements such as imposed on other carriers by PEB 219.

Now in this dispute, the Carrier stresses that PEB 219 and whatever has occurred following has no bearing on this property, whereas the Organization relies heavily upon PEB 219 and particularly the three Arbitration Awards flowing from Public Law Board 102-29.

Wisely, PEB 221 was reluctant to afford the parties anything "better" for either side than was called for in PEB 219.

PEB 221 wrote in its "Introduction" as follows:

> ". . . Conrail's position is that the findings and recommendations of PEB 219 constitute a pattern; it offered to settle on that basis with the BMWE.
>
> * * *
>
> The BMWE views this proceeding differently. It rejects the pattern theory and asserts that it is entitled to a de novo inquiry and a new set of recommendations by this Board on the merits of each of the issues in dispute. It emphasizes its lawful right to sever its bargaining from other rail labor organizations. It disagrees with the view that it is bound by the

recommendations of PEB 219, in whose proceedings it did not participate. . . .

* * *

We consider it critical to the public interest that labor relations and collective bargaining on the nation's railroads be fair, stable, and reasonably consistent. Conversely, we believe that political competition between and among unions for supremacy of benefits, with its ineluctably destabilizing consequences, is damaging to the public interest.

Therefore, because the recommendations of PEB 219 are now in effect for most of the unionized employees in the railroad industry, we conclude that significant variations for the BMWE-represented employees on Conrail that change previously linked or stabilized economic and work relationships with other rail employees would produce the de stabilization that we think must be avoided. We recognize, however, that exceptions may be made in special, compelling circumstances. . . ."

When it came to a discussion of Regional and System-wide Gangs, following is the testimony of the parties and the recommendations of the Board.

"Conrail Position

Conrail asserts its need for relief on regional gangs to permit it fully to utilize expensive and specialized rail production machinery over an extended production season. It argues that continuity of gang consists would enhance gang productivity. It states that artificial territorial barriers slow work and increase cost by reducing employee productivity, create manpower shortages and duplications and disrupt employment and program continuity.

BMWE Position

The BMWE claims that the carrier proposal would require employees to work the entire length of the Eastern and Western halves of the Conrail territory in order to hold a production job, and that the need to travel such

great distances would curtail the employees' ability to return home on a rest day. It would, it continues, also reduce the likelihood of successful bids on positions near home. In the absence of any persuasive showing of operational need, the BMWE urges that the proposal be denied.

Recommendation

Regional and system-wide gangs are justified on highly technical and expensive equipment being operated by a large number of skilled employees. We therefore recommend that these gangs be used regionally and system-wide. We expect the carrier to share the work among all qualified employees. . . ."

The Carrier's argument that they were not a party to PEB 219 is correct, but that does not mean that the Board is precluded from reviewing PEB 219 recommendations, and more specifically, the three Arbitration Awards flowing therefrom. Of particular interest is the Meyers Award which did lay out a blueprint for the parties to follow when establishing a production gang.

In reaching a decision about whether the five gangs that the Norfolk Southern Railroad desired to establish, Referee Meyers stated:

"The first issue that must be confronted, and it is a crucial one, is how to define 'production gang.' For very cogent reasons, none of the decision-makers who previously have addressed the production-gang issue promulgated a specific definition of the term. This makes sense, in part, because a precise definition would severely limit the parties' flexibility and ability to effectively respond to changes in, for example, technology and financial conditions. The lack of a precise definition of 'production gangs,' of course, means that determining whether certain proposed gangs qualify as Section 11 gangs must be decided virtually on a case-by-case basis, with all of the associated difficulties of proof and evidence."

The Board agrees with the afore quoted. None of us have a crystal ball to see in the future as to the type and sophistication of the machines that could be developed.

Meyers went on and actually laid out a blueprint for the parties that, if followed, would perhaps lead to an acceptance of a production gang. Note the language:

> "The Union correctly lists the primary factors, based on Arbitrator Fletcher's adoption of general concepts that apply to production gangs, that must be considered in determining whether any or all of the proposed gangs qualify as production gangs: number of employees assigned to the gang; number and sophistication of machinery used by the gang to perform its work; the nature and type of work to be performed by the gang; and the extent of the operational impact, or hardship, if the Carrier is required to rebulletin the gang when and if it crosses seniority lines. These factors together incorporate a number of secondary factors, such as the amount of training necessary to qualify to operate the machinery used by the gang, whether already-qualified machine operators are present in some or all of the seniority districts in which the gang will operate, and the number of times the gang will cross seniority lines. All of these factors go toward establishing whether proposed gangs meet Arbitrator Fletcher's general concepts relating to significant operational hardships and specific advance programming of gangs. . . ."

The Carrier was fully cognizant of PEB 219 and the three arbitration decisions following PEB 219 that did to some degree define production gangs.

The Organization said the machinery assigned to each gang was not "sophisticated equipment or technology as contemplated by PEB 221." The Organization also argued that neither a seven man, nor a one man gang conforms with PEB 221's findings that such gangs "are justified on highly technical and expensive equipment being operated by a large number of skilled employees. . . ."

In fact, the Organization, before PEB 221 stated in its opposition to production gangs, "In the absence of any persusive showing of operation needs. . . ." The Carrier, by not responding to the Organization's last letter, by not raising to the challenge to explain what they intended the gangs to accomplish, what type of equipment was being used, what difficulty they would have in bulletining jobs every time a seniority district line was crossed, has not presented a defense that can lead to definitive decisions from the Board.

The Board does not define production gangs by the sheer number of employees and/or machinery assigned thereto, but with the Carrier not responding to the Organization's arguments, the Board has no choice but to sustain the claim as presented. Any monetary award, however, is based solely upon the hours each gang worked on the Pittsburgh Seniority District wherein each Claimant retains his seniority.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of June, 2000.

Carrier Members Dissent
to Award 34141 (Docket No. MW-32460)
Referee Hicks

Dissent are for the purpose of pointing out the errors of the decision so that those who come after us will understand what was wrong. That is the purpose here.

Presidential Emergency Board 219 (PEB219) did not apply to this Carrier. In the introduction portion of Presidential Emergency Board 221 (PEB221) we find:

> "The BMWE Federations representing maintenance of way employees of Conrail, however, elected not to participate in the national bargaining and were not party to the proceedings before PEB 219."

Subsequent to the issuance of PEB 221, the parties entered into an Agreement dated July 28, 1992 encompassing and disposing of the matters handled in PEB 221. Article X of that Agreement provided for the establishment of gangs as noted on page 2 of this Award. However, there was no discussion of size. In March, 1994 Carrier bulletined a 7 man zone gang and a machine operator position to work with gang SM402. The Organization filed claims on March 26, 1994 on the basis that:

> ". . . the employees awarded the{i}r(sic) position to work on the Pittsburgh seniority district have no seniority on the district."

As is noted at the bottom of page 2 and the top of page 3 of this Award, the Pittsburgh zone, ". . . encompassed three seniority districts including the district in which the Claimants retained seniority. . ." Carrier denied the claims on that basis. The Organization continued to progress these claims. In the Senior Director-Labor Relations' denial of October 14, 1994, it was again noted that:

> "Our investigation has determined that the positions in question were advertised as a Zone Gang, to work in conjunction with Zone Surfacing Gang SM-402, and thus the award was proper. Contrary to you position, Article 10 of the July 1992 Agreement does not discuss the minimum size of production gangs or support gangs, nor does it place any limitations whatsoever on such.
>
> Your position is based on the provision of PEB 219. However, as you know, PEB 219 has no application to BMWE employees on this property since PEB 221 applies instead." (Emphasis added)

In the more than six months of on-property handling the Organization had produced no evidence of a contract violation. And this decision notes that it would have "dismissed this

dispute as being without sufficient data. . ." but for the Organization's July 6, 1995 letter. Several points need to be made concerning this hand delivered letter. First, this letter come substantially AFTER the on-property handling had been concluded. The opening sentence states:

> "Reference is made to . . . . your letter of declination dated October 14, 1994."

If one were to consider that the Organization actively sought to advance their claim in the six months of claim handling prior to October 14, 1994 then what could be added six months later that would entirely change the outcome. Either the Organization had come up with factual material to substantiate their basic claim or there was new after-the-fact argument that was persuasive. Obviously, here the latter must have been persuasive since there was no new evidence contained in the July 6, 1995 letter.

Second, the July 6th letter was submitted only SEVEN days before the Organization filed Notice with this Board on July 13, 1995. This Board has often found that the late submission of correspondence so that the responding party does not have sufficient time to respond is suspect, Third Division Awards 20025, 20773, 22762. While, in retrospect, the Carrier probably should have immediately accepted the Organization's offer of a time extension to respond to the substance of this letter, such presumes that the letter contained substantial material pertinent to the claim. Which brings us to the third matter concerning this letter.

The Organization's four page letter restates, in abbreviated form the history of PEB 219 and PEB 221, the July 28, 1992 Agreement and cites the provisions of Article X. <u>There is nothing new in this letter</u>. The Organization continues to argue:

> "When management unilaterally rearranges the work so that a seven man support gang is reclassified as a production gang and permitted to work over an entire Production Zone they are in effect merging the seniority districts of the three seniority districts which compromise the Production Zone"

Wasn't that the idea of production zones?? Further, that sounds very much like what the Organization argued in its INITIAL claim. The Organization was asserting a seniority claim then and it is the same here.

We fail to see what is contained in the Organization's July 6, 1995 letter that was so different from the preceding claim handling to warrant a different conclusion. There is no new factual material, no new argument, no new material at all! The OBJECTIONS, referred to by the Majority at page 3 of the Award, is not anything new and therefore contains nothing that should change the disposition of this matter from, ". . .dismissed. . . .being without sufficient data. . . ."

Carrier Members' Dissent
to Award 34141

The majority then cites and quotes from the decision of Referee Meyers at pages 5 and 6 of this Award, in a dispute involving the Norfolk Southern pursuant to PEB 219. The Majority then states that the Carrier, ". . . . was fully cognizant of PEB 219 and the three arbitration decisions. . ." The Meyers arbitration decision was rendered on December 4, 1992, SEVERAL MONTHS AFTER THE PARTIES RESOLVED THEIR DISPUTE IN THE JULY 28, 1992 AGREEMENT. Obviously, the Meyers decision had NO bearing upon the language the parties themselves agreed to in the July 28, 1992 Agreement. Also it must again be noted that PEB 219 and all of its progeny has no CONTRACTUAL bearing on this dispute which is governed by the recommendations of PEB 221 and the July 28, 1992 agreement made pursuant thereto.

From all of the foregoing, it is clear that there was NOTHING in the Organization's BELATED July 6, 1995 letter that could substantially alter the disposition from ". . .dismissed. . . . as being without sufficient data. . ." To conclude so here is without any foundation and is wrong.

Finally, it must be pointed out that this decision has no precedential value because the matter is now moot. As of the June 1, 1999 dissolution of Conrail by CSX and NS the July 28, 1992 contract ceased as each acquiring property took its apportioned MW employees under its own Collective Bargaining Agreement. Except for the Shared Asset portion of Conrail, which does not have production gangs, Article X of the July 28, 1992 Agreement is no longer applicable.

We Vigorously Dissent,

P V Varga

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik

Michael C. Lesnik

7/17/00