

**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 BMW.**

**\* \* \***

**The BMW 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 BMWWE-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.

**BMWWE Position**

The BMWWE 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 BMWWE 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 persuasive 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.