NATIONAL MEDIATION BOARD, ADMINISTRATOR
SPECIAL BOARD OF ADJUSTMENT NO. 1087

In the Matter of the Arbitration -between- Brotherhood of Maintenance of Way Employes -and- National Carriers' Conference Committee	*OPINION AND AWARD* Case No. 11

In accordance with the October 25, 1996 Agreement in effect between the above-named parties, the Undersigned was designated as the Chairman and Neutral Member of the referenced Board to hear and decide a dispute concerning these parties.

A hearing was held at the offices of the Carriers in Washington, District of Columbia on October 5, 2002 at which time the representatives of the parties appeared. All concerned were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses consistent with the Agreement that created the Board. The Arbitrator's Oath was waived.

THE QUESTION AT ISSUE

The parties failed to stipulate an issue to be resolved by the Board. The parties authorized the Board to formulate an appropriate issue. The Organization proposed the following issue:

> Does a "prior right" former Spokane International Railroad Company ("SIRR") employee forfeit his/her protected status under the Agreement in Mediation Case No. A-

7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996, ("the Feb 7th Agreement") if he refuses to transfer to a position pursuant to an implementing agreement made under Article III of that Agreement if that position assembles or works outside of his prior right territory as defined in the implementing agreement dated September 8, 1998 between SIRR, BMWE and UP?

The Carriers proposed the following issues:

1. Do the provisions of Section 2(F) of the implementing agreement dated September 8, 1998, prohibit the carrier from transferring an employee pursuant to the provisions of Article III Section 3 of the February 7, 1965, Agreement (Feb 7th Agreement)?

2. If Section 2(F) of the implementing agreement does not contain such a prohibition, what shall be the appropriate provisions of an implementing agreement providing for such transfer?

On the basis of the arguments of the parties and a careful review of the entire record, the Board deems a fair statement of the issue to be:

Does the Carrier have a right to transfer a prior right former Spokane International Railroad Company employee (who has protected status under the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996) to a position that assembles or works outside of the employee's prior right territory pursuant to Section 2(F) of the Implementing Agreement, dated September 8, 1998 between the Spokane International Railroad Company, the Union Pacific Railroad Company, and the Brotherhood of Maintenance of Way Employes, and to treat a refusal to transfer by such an employee as a forfeiture of such protected status? If

so, what shall be the appropriate provisions of an implementing agreement to provide for such a transfer?

BACKGROUND

The Spokane International Railroad began as an independent entity. During all material times, the Organization represented certain employees on the territory of the former Spokane International Railroad.

The Carrier (Union Pacific) purchased and continued to operate the Spokane International Railroad. The Spokane International Railroad appeared as a separate railroad in Exhibit B of the Mediation Agreement in Case No. A-7128 dated February 7, 1965 and again as a separate railroad in Exhibit A of the Mediation Agreement in Case A-12718 (Sub-Nos. 1-8) dated September 26, 1996. The Carrier (Union Pacific) subsequently transferred the territory of the former Spokane International Railroad onto the Oregon Division and the Northwestern Division seniority territories of the Union Pacific Railroad. The parties therefore canceled the separate collective bargaining agreement for the employees on the territory of the former Spokane International Railroad and extended the collective bargaining agreement between the Carrier (Union Pacific) and the Organization to the employees on the territory of the former Spokane International Railroad.

As a result of the change, the Carrier (Union Pacific) and the Organization executed an Implementing Agreement, dated September 8, 1998 that became effective on September 15, 1998 to

cover the 12 remaining employees represented by the Organization on the territory of the former Spokane International Railroad. (Organization Exhibit 4, Organization Exhibit 6, and Carrier Exhibit B.)

The General Director of Labor Relations for the Carrier (Union Pacific) sent a letter, dated June 19, 2001, to the General Chairman of the Organization that provided:

> Please accept this as Union Pacific's (UP) notice to transfer certain employees as set forth below pursuant to the applicable terms of Section 2 of Article III of the Mediation Agreement, Case No. A-7128, dated February 7, 1965 (Feb 7th Agreement).
>
> It is UP's intent to transfer employees whom you represent and who are protected under the provisions of the Feb. 7th agreement to track laborers positions located at Boone, Iowa. UP intends to transfer two (2) protected employees from Roster 9400, Spokane International.
>
> I propose that we meet in my office on Thursday July 19, 2001 at 9:00 a.m. to enter into an implementing agreement as required by Article III of the Feb. 7th agreement.

(Organization Exhibit 7 and Carrier Exhibit C.) After one of the two potentially affected Bridge and Building employees established seniority in another classification and no longer became subject to the proposed transfer, the Carrier proposed an implementing agreement to cover the one remaining employee, D. R. Friesen, who was on furlough at the time. (Carrier Exhibit D.)

The parties disagree about the right of the Carrier (Union Pacific) to require the remaining employee, D. R. Friesen, to transfer or else to forfeit the employee's protected status under the February 7th Agreement. The parties failed to resolve the

dispute. The matter proceeded to the Special Board of Adjustment for a final and binding determination.

PERTINENT PROVISIONS

MEDIATION AGREEMENT
FEBRUARY 7, 1965

ARTICLE III - IMPLEMENTING AGREEMENTS

Section 1 -

The organizations recognize the right of the carriers to make technological, operational and organizational changes, and in consideration of the protective benefits provided by this Agreement the carrier shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines. The organizations signatory hereto shall enter into such implementing agreements with the carrier as may be necessary to provide for the transfer and use of employees and the allocation or rearrangement of forces made necessary by the contemplated change. One of the purposes of such implementing agreements shall be to provide a force adequate to meet the carrier's requirements.

Section 2 -

Except as provided in Section 3 hereof, the carrier shall give at least 60 days' (90 days in cases that will require a change of any employee's residence) written notice to the organization involved of any intended change or changes referred to in Section 1 of this Article whenever such intended change or changes are of such a nature as to require an implementing agreement as provided in said Section 1. Such notice shall contain a full and adequate statement of the proposed change or changes, including an estimate of the number of employees that will be affected by the intended change or changes. Any change covered by such notice which is not made within a reasonable time following the service of the notice, when all of the relevant circumstances are considered, shall not be made by the carrier except after again complying with the requirements of this Section 2.

Section 3 -

The carrier shall give at least 30 days' notice where it proposes to transfer no more than 5 employees across seniority lines within the same craft and the transfer of such employees will not require a change in the place of residence of such employee or employees, such notice otherwise to comply with Section 2 hereof.

Section 4 -

In the event the representatives of the carrier and organizations fail to make an implementing agreement within 60 days after notice is given to the general chairman or general chairmen representing the employees to be affected by the contemplated change, or within 30 days after notice where a 30-day notice is required pursuant to Section 3 hereof, the matter may be referred by either party to the Disputes Committee as hereinafter provided. The issues submitted for determination shall not include any question as to the right of the carrier to make the change but shall be confined to the manner of implementing the contemplated change with respect to the transfer and use of employees, and the allocation or rearrangement of forces made necessary by the contemplated change.

ARTICLE VI - APPLICATION TO MERGERS, CONSOLIDATIONS AND OTHER AGREEMENTS

Section 2 -

In the event of merger or consolidation of two or more carriers, parties to this Agreement on which this agreement is applicable, or parts thereof, into a single system subsequent to the date of this agreement, the merged, surviving or consolidated carrier will constitute a single system for purposes of this agreement, and the provisions hereof shall apply accordingly, and the protections and benefits granted to employees under this agreement shall continue in effect.

INTERPRETATION

ARTICLE III - IMPLEMENTING AGREEMENTS

The parties to the Agreement of February 7, 1965, being not in accord as to the meaning and intent of Article III, Section 1, of that Agreement, have agreed on the following compromise interpretation to govern its application:

1. Implementing agreements will be required in the following situations:
   (a) Whenever the proposed change involves the transfer of employes from one seniority district or roster to another, as such seniority districts or rosters existed on February 7, 1965.
   (b) Whenever the proposed change, under the agreement in effect prior to February 7, 1965, would not have been permissible without conference and agreement with representatives of the Organizations.

That part of Item I (a) hereof which reads -

"***as such seniority districts or rosters existed on February 7, 1965"

applies particularly to situations such as those that frequently obtain in collective agreements to which the Brotherhood of Maintenance of Way Employes is a party which provide that seniority is co-extensive with the territorial jurisdiction of a supervisory officer. Under these conditions, if the territory of the designated officer is expanded or contracted it does not have any effect on the seniority of the involved employes. The language above quoted is intended to mean that seniority districts or rosters existing on the effective date of the February 7, 1965 Agreement are not to be changed insofar as the application of the aforesaid agreement is concerned, except as the result of an implementing agreement or other agreement mutually acceptable to the interested parties.

2. In all instances in which the carrier makes a change such as described in Article III, Section 1, of the February 7, 1965 Agreement which does not require an implementing agreement under Item 1 hereof, but which requires an employe to change his place of residence in order to retain his protected status, such employee shall be accorded the benefits contained in Section 10 of the Washington Agreement notwithstanding anything to the contrary contained in said provisions and shall have five working days instead of the "two working days" provided by Section 10 (a) of said Agreement.

When a carrier makes a technological, operational or organizational change which does not require an implementing agreement, employes affected by such change will be permitted to exercise their seniority in conformity with existing seniority rules.

3. When changes are made under Items 1 or 2 above which do not result in an employe being required to work in excess of 30 normal travel route miles from the residence he occupies on the effective date of the change, such employe will not be considered as being required to change his place of residence unless otherwise agreed.

IMPLEMENTING AGREEMENT
September 8, 1998

Section 2.

(A) Employees who possess a seniority date, prior to the effective date of this Agreement, in the classifications of Section/Extra Gang Foreman, Rail (Track) Inspector, Sectionman - Truck Driver, Sectionmen, Extra Gang Laborer, Power Tool Machine Operator, Roadway Power Tool Operator, Motor Car Operator, Welder, Welder Helper, Roadway Equipment Operator, Special Power Tool Machine Operator, Bridge and Building Foreman, Bridge and Building Carpenter or Painter, Bridge and Building Helper, Steel

Erection Foreman, Steel Erection Mechanic, and Steel Erection Helper on the SIRR seniority rosters will have their seniority dates dovetailed into the applicable Oregon Seniority Division or the Northwestern Seniority District seniority rosters. The designation "SI" will be placed next to their names. Except as provided elsewhere in this agreement, these employees will have prior rights to all positions and work associated with their existing seniority which is performed on the former SIRR, north of M. P. 13.00 on the Spokane Subdivision.

(B) Employees holding seniority on the former Oregon Seniority Division or the former Northwestern Seniority District, prior to the effective date of this Agreement, will have the designation "UO" placed next to their names. Except as provided elsewhere in this Agreement, these employees will have prior rights to all positions and work associated with their existing seniority which is performed on the Oregon Seniority Division or Northwestern Seniority District territories and on the territory of the former SIRR between M.P. 1.49 and M.P. 13.00 on the Spokane Subdivision.

. . . .

(F) Employees referred to in (a) of this Section 2 will not be obligated to accept positions that assemble or work outside of their respective prior right territory or to positions established (mobile or headquartered) south of Mile Post 13.00 on the former SIRR in order to receive any benefits pursuant to the Mediation Agreement of February 7, 1965 and failure to do so will not be used to assert forfeiture of benefits nor serve to offset any benefits due. Employees referred to in (b) of this Section 2 will not be obligated to accept positions that assemble or work outside of their prior right territory or to positions established (mobile or headquartered) north of Mile Post 13.00 on the former SIRR in order to receive any benefits pursuant to the Mediation Agreement of February 7, 1965 and failure to do so will not be used to assert forfeiture of benefits nor serve to offset any benefits due. However, they may apply for and accept bulletined positions outside their respective prior right territories without forfeiture of any prior rights or protective benefits outlined in this agreement.

SIDE LETTER "A"
September 8, 1998

This has reference to the agreement providing for the transfer of the Spokane International BMWE employees to the Collective Bargaining Agreement between the Union Pacific Railroad Company and the Brotherhood of Maintenance of Way Employes. This transfer is to become effective September 15, 1998.

In our discussions in reaching this agreement, it was agreed

that employees with an "SI" prior right designation will not be obligated to accept any position that assembles or works outside their prior rights territory or to positions established (mobile or headquartered) south of Mile Post 13.00 on the former SIRR in order to receive any benefits pursuant to the Mediation Agreement of February 7, 1965, as amended, and failure to do so will not be used to assert forfeiture of benefits nor serve to offset any benefits due. A position "outside their prior rights territory" would include a position which is established on the "SI" prior rights territory but the preponderance of the assignment involves working south of Mile Post 354.71.

It was also agreed that employees with a "UO" prior right designation will not be obligated to accept any position that assembles or works outside their prior rights territory on the former SIRR in order to receive any benefits pursuant to the Mediation Agreement of February 7, 1965, as amended, and failure to do so will not be used to assert forfeiture of benefits nor serve to offset any benefits due. A position "outside their prior rights territory" would include a position which is established on the "UO" prior rights territory but the preponderance of the assignment involves working north of Mile Post 13.00 on the former SIRR.

If you are in agreement, please so indicate by signing below. This letter of agreement is made with the understanding that it is not to be considered precedent nor will it be cited in the future except for situations surrounding the above mentioned work.

POSITION OF THE ORGANIZATION

The Organization relates that an amendment in September 1996 to the February 7, 1965 Agreement extended the coverage of the February 7, 1965 Agreement to employees who had or subsequently would obtain ten or more years of employment with a signatory carrier. The Organization observes that the former Spokane International Railroad Company and the Union Pacific were such signatory carriers.

The Organization acknowledges that Article III of the February 7, 1965 Agreement provides a mechanism for implementing agreements to be developed to enable the transfer and integration

of protected employees into new seniority rosters. The Organization recognizes that Article III, Section 2 requires a carrier to provide at least 90 days of notice to employees about the carrier's intent to transfer such protected employees to a location that will require the employees to change their place of residence. The Organization concedes that employees, who fail to accept employment in their craft in any seniority district or on any seniority roster throughout the carrier's system pursuant to an implementing agreement, forfeit their protected status.

Although Union Pacific obtained control of the Spokane International Railroad Company from the Canadian Pacific Railway on October 6, 1958, the Organization recounts that the Organization and the Carrier (Union Pacific) continued to apply and to negotiate a separate collective bargaining agreement for the former territory of the Spokane International Railroad Company as reflected in the 1965 and 1996 national negotiations. According to the Organization, Article VI, Section 2 of the February 7, 1965 Agreement considers carriers that merge after February 7, 1965 to be a single system. Although the Carrier (Union Pacific) and the Spokane International Railroad Company had merged in 1958, the Organization explains that the bargaining history between the parties established the Carrier (Union Pacific) and the former Spokane International Railroad Company as separate systems with respect to the February 7, 1965 Agreement.

The Organization points out that the Carrier proposed to cancel the collective bargaining agreement that covered the

former Spokane International Railroad Company and the 12 employees represented by the Organization and to integrate the relevant territory and employees into the Carrier's (Union Pacific) Oregon Division and Northwestern Seniority District, which the collective bargaining agreement between the Carrier (Union Pacific) and the Organization covered. The Organization highlights that the Organization sought to protect the interests of the 12 employees in the context of such integration.

The Organization indicates that on September 8, 1998 the Carrier and the Organization executed an Implementing Agreement that canceled the separate collective bargaining agreement that had covered the employees represented by the Organization and the former Spokane International Railroad Company and incorporated the covered employees into the territory within the collective bargaining agreement between the Organization and the Carrier (Union Pacific). The Organization underscores that the September 8, 1998 Implementing Agreement contained prior rights provisions for the covered employees and restricted the Carrier from being able to require the covered employees to accept employment off of the prior rights territory.

The Organization comments that Section 2(A) of the Implementing Agreement dovetailed the seniority of the covered employees from the former Spokane International Railroad Company territory into the Carrier's (Union Pacific) Oregon Division and onto the Northwestern Seniority District rosters. The Organization adds that the covered employees retained an "SI"

entry next to their names. The Organization clarifies that the Implementing Agreement provided for the covered employees to have prior rights to all of the positions and work associated with their seniority to be performed north of Mile Post 13.00 on the Spokane Subdivision of the former Spokane International Railroad Company. The Organization identifies Section 2(F) of the Implementing Agreement as not requiring the covered employees to accept future employment south of Mile Post 13.00 to retain their protected status. The Organization refers to Side Letter "A" of the Implementing Agreement as providing that the covered employees do not have to accept a position that the Carrier (Union Pacific) establishes within the prior rights territory and that requires the performance of most of the assignment south of Mile Post 354.71 to retain their protected status.

The Organization asserts that the Carrier lacks a right pursuant to Section 2(F) of the Implementing Agreement to cause a prior rights employee to forfeit his February 7, 1965 benefits or to offset the February 7, 1965 benefits of a prior rights employee who refuses to transfer to a position that assembles or works mostly off of the prior rights territory. The Organization rejects the Carrier's position that Section 2(F) of the Implementing Agreement only applies to assignments within the Oregon Division and the Northwestern Seniority District. The Organization relies on the plain meaning of Section 2(F) of the Implementing Agreement and of Side Letter "A" as support for employees who refuse to transfer to a location south of Mile Post

13.00.

The Organization emphasizes that the present dispute involves a position south of Mile Post 13.00 in Boone, Iowa. The Organization stresses that the Carrier therefore lacks a right under the clear and unconditional language in Section 2(F) of the Implementing Agreement to effect a forfeiture or to offset the February 7, 1965 benefits of a prior rights employee who refuses to accept such a position south of Mile Post 13.00.

The Organization maintains that Article VI, Section 2 of the February 7, 1965 Agreement permitted the integration of the 12 covered employees from the former Spokane International Railroad Company into the system of the Carrier (Union Pacific) only by a voluntary agreement. The Organization insists that the 1998 voluntary agreement barred the Carrier from taking the disputed action in the present matter. The Organization criticizes the Carrier for pursuing a frivolous argument.

The Organization dismisses the Carrier's proposal of another implementing agreement for the present situation to be a useless exercise because no covered prior right employee will accept such a position. The Organization elaborates that the present Board should not issue the equivalency of a declaratory order in the absence of a case or controversy.

The Organization submits that the Carrier's position lacks merit. The Organization urges that the Organization's position should be sustained.

POSITION OF THE CARRIER

The Carrier argues that Section 2(F) of the Implementing Agreement does not prohibit the Carrier from making the disputed transfer pursuant to Article III of the February 7, 1965 Agreement. The Carrier reads Section 2(F) to involve bidding, displacement, and recall rather than transfers. In the absence of a reference by the drafters of Section 2(F) to transfers, the Carrier finds that the plain language of Section 2(F) does not prohibit the Carrier from making the disputed transfer.

The Carrier contends that Article III of the February 7, 1965 Agreement authorizes transfers throughout the system. As a result, the Carrier reasons that a right to transfer employees existed before the creation of the Implementing Agreement and the Implementing Agreement did not eliminate such a right. The Carrier considers Section 2 of the Implementing Agreement only to involve the consolidation of two seniority districts and the impact of such consolidation on the employees. The Carrier analyzes each of the provisions of the Implementing Agreement and concludes that the Implementing Agreement is silent about transfers.

The Carrier views the Implementing Agreement as eliminating the Spokane International Railroad Company collective bargaining agreement and as merging the seniority rosters into seniority rosters of the Carrier's (Union Pacific's) collective bargaining agreement. The Carrier discerns that Section 2(F) of the Implementing Agreement provides that prior right employees need

not protect their positions on the expanded seniority territories to preserve their prior rights or benefits pursuant to the February 7, 1965 Agreement. The Carrier declares that Section 2(F) fails to limit the Carrier's pre-existing right under Article III of the February 7, 1965 Agreement to transfer employees.

The Carrier regards Section 2(F) as prohibiting the Carrier from establishing positions outside of the former territory of the Spokane International Railroad Company and working the covered employees off of their prior rights territory. The Carrier perceives that the reference to Mile Post 13.00 confirms that the prior rights employees have seniority on the Oregon Division south of Mile Post 13.0, but need not bid on positions south of Mile Post 13.0. The Carrier points out that the prior rights employees have a right to accept positions outside the prior rights territory. The Carrier therefore proclaims that the Carrier retains the right to transfer such employees pursuant to Article III of the February 7, 1965 Agreement.

The Carrier adds that Side Letter "A" to the Implementing Agreement indicates that Section 2(F) of the Implementing Agreement only involved bidding and assignments to positions and protection of positions on the prior rights territory. The Carrier depicts these provisions as not disturbing the Carrier's rights under Article III of the February 7, 1965 Agreement to transfer employees.

The Carrier interprets the reference to Mile Post 13.0 as a

line of demarcation between prior rights territories. The Carrier notes that part of the territory of the former Spokane International Railroad Company became an area for employees who were not former employees of the Spokane International Railroad Company to establish prior rights. The Carrier reasons that the parties did not intend to create an island for the former employees of the Spokane International Railroad Company on which such employees would be able to remain.

As a consequence, the Carrier requests that the Board provide an implementing agreement to transfer an employee pursuant to the June 19, 2001 notice. The Carrier cites Article III, Section 4 of the February 7, 1965 Agreement as authorizing the Board to impose such an appropriate implementing agreement. The Carrier proposes certain terms for such an implementing agreement. The Carrier urges that such terms be adopted.

OPINION

I. Introduction

This case involves language interpretation. The parties stipulated that the Organization--as the moving party--has the burden to prove its case by a fair preponderance of the credible evidence.

In analyzing the record, the Special Board of Adjustment underscores that Section II(A) of the October 25, 1996 agreement between the parties that led to the creation of this Special Board of Adjustment indicates that:

> The Board shall not have the authority to add contractual terms or to change existing

agreements governing rates of pay, rules and working conditions.

The following analysis reflects these limitations on the authority of the Board.

II. The Meaning of Section 2(F) and Related Provisions

Article III of the February 7, 1965 Agreement, as amended, provides for the transfer of employees under certain conditions. A careful review of the record, however, indicates that Section 2(F) of the Implementing Agreement, dated September 8, 1998, between the Carrier (Union Pacific) and the Organization contains specific provisions to address the special interests and circumstances that evolved over many decades for the employees on the territory of the former Spokane International Railroad. The first sentence of Section 2(F) provides that the employees "will not be obligated to accept positions that assemble or work outside of their prior right territory . . . ." The clause "will not be obligated" clearly and unmistakably insulates, protects, and shields such employees from being compelled to accept certain positions. The second part of the first sentence of Section 2(F) sets forth the method for determining the positions that Section 2(F) permits the employees to reject.

Section 2(F) differentiates between the prior right territory of the employees and areas outside of the prior right territory. The Implementing Agreement identifies Mile Post 13.00 on the former Spokane International Railroad as the line of demarcation. The last portion of the first sentence of Section 2(F) indicates that Section 2(F) enables the employees to retain

their protected status if they elect to refuse to accept positions outside of the prior right territory. The last sentence of Section 2(F) confirms this arrangement by specifying that the employees may accept bulletined positions outside of the prior right territory without forfeiting their prior rights or protective benefits.

Section 2(F) fails to differentiate bidding, displacement, recall, and transfer. As a consequence, no basis exists in the record to create a special right under the Implementing Agreement, dated September 9, 1998, for the Carrier (Union Pacific) to avoid the requirements of Section 2(F) with respect to transfers of employees covered by the Implementing Agreement. This determination is consistent with the broad language contained in Section 2(F) to address the unusual situation of the employees on the territory of the former Spokane International Railroad and the absence of any language that narrows Section 2(F) to exclude transfers from the reach of Section 2(F). Any other interpretation of Section 2(F) would nullify the critical prior right benefit of Section 2(F) to the employees on the territory of the former Spokane International Railroad. If the Carrier (Union Pacific) had intended to retain the Article III right to transfer the designated employees despite the especially broad language contained in Section 2(F) of the Implementing Agreement, the Carrier (Union Pacific) should have so specified.

Section 2(F) therefore constitutes a special effort by the parties to recognize that the affected employees on the territory

of the former Spokane International Railroad have a unique connection to the territory served by the former Spokane International Railroad as defined by the parties. At the same time, Section 2(F) reflects a special effort by the parties to acknowledge that the affected employees on the territory of the former Spokane International Railroad lack a more traditional relationship to the territory defined by the parties to be outside of the prior right territory. Section 2(F) of the Implementing Agreement therefore supersedes Article III of the February 7, 1965 Agreement, as amended, for the limited purpose of recognizing the special interests that the parties agreed to safeguard for the employees on the territory of the former Spokane International Railroad.

Side Letter "A" of the Implementing Agreement, dated September 8, 1998, clarifies the meaning of the clause "outside their prior rights territory" that appears in the Implementing Agreement. The clarification, which the parties described based on the location of the preponderance of the assignment, also fails to differentiate bidding, displacement, recall, and transfer. If the Carrier (Union Pacific) had intended to retain the Article III right to transfer the designated employees despite the especially broad language contained in Section 2(F) of the Implementing Agreement, the Carrier (Union Pacific) should have so specified in Side Letter "A".

The record omits any persuasive evidence to determine the reasons why the parties decided to include references to certain

mile posts in the Implementing Agreement and in Side Letter "A". In the absence of such persuasive evidence, the System Board of Adjustment lacks the authority under Section II(A) of the October 25, 1996 agreement between the parties that led to the creation of this Special Board of Adjustment to speculate and to draw further inferences about such references.

In reaching these conclusions, the Special Board of Adjustment also lacks the authority to substitute its judgment for the judgment of the parties who drafted the Implementing Agreement, dated September 8, 1998. Thus the decision of the parties to differentiate between the territory north of Mile Post 13.00 and south of Mile Post 13.00 must receive proper deference by the Special Board of Adjustment.

III. The Application of Section 2(F) and Related Provisions

The record indicates that the Carrier seeks to compel a transfer of an employee covered by Section 2(F) of the Implementing Agreement dated September 8, 1998. The location of the proposed transfer to Boone, Iowa falls outside of the prior right territory as defined by the parties in Section 2(F) and as clarified in Side Letter "A" also dated September 8, 1998. As set forth above, Section 2(F) precludes the Carrier from obligating an employee to accept such a position. The record is uncontroverted that the remaining employee did not indicate an interest in accepting the relevant position. The Carrier therefore lacks a right to compel the employee to do so. As a result, no basis exists to develop an implementing agreement as

requested by the Carrier. Any change to this arrangement is a matter for collective bargaining, not arbitration.

IV. Conclusion

Under these special circumstances and based on a thorough analysis of the entire record, the Organization proved by a fair preponderance of the credible evidence that the Carrier does not have a right to transfer a prior right former Spokane International Railroad Company employee (who has protected status under the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996) to a position that assembles or works outside of the employee's prior right territory pursuant to Section 2(F) of the Implementing Agreement, dated September 8, 1998 between the Spokane International Railroad Company, the Union Pacific Railroad Company, and the Brotherhood of Maintenance of Way Employes, and to treat a refusal to transfer by such an employee as a forfeiture of such protected status. The Award shall so indicate.

Accordingly, the Undersigned, duly designated as the referenced Board and having heard the proofs and allegations of the above-named parties, make the following AWARD:

> The Carrier does not have a right to transfer a prior right former Spokane International Railroad Company employee (who has protected status under the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended by Article XII of the Agreement in Mediation Case No. A-12718 (Sub-Nos. 1-8), dated September 26, 1996) to a position that

assembles or works outside of the employee's prior right territory pursuant to Section 2(F) of the Implementing Agreement, dated September 8, 1998 between the Spokane International Railroad Company, the Union Pacific Railroad Company, and the Brotherhood of Maintenance of Way Employes, and to treat a refusal to transfer by such an employee as a forfeiture of such protected status.

Robert L. Douglas
Chairman and Neutral Member

Donald F. Griffin
Union Member
Concurring/Dissenting

A. K. Gradia
Carrier Member
Concurring/Dissenting

R. B. Wehrli/DFG
~~Ernest L. Torske~~ R. B. WEHRLI
Union Member
Concurring/Dissenting

John F. Hennecke
Carrier Member
Concurring/Dissenting

DATED: September 29, 2002
STATE of New York)ss:
COUNTY of Nassau

I, Robert L. Douglas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.