SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:	)	Case No. 18
	)	Award No. 18
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,	)	
	)	
Organization,	)	
	)	
and	)	
	)	
UNION PACIFIC RAILROAD COMPANY,	)	**OPINION AND AWARD**
	)	
Carrier.	)	
	)	

Hearing Date: April 14, 2005
Hearing Location: Sacramento, California
Date of Award: June 17, 2005

BOARD MEMBERS

Organization Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

STIPULATED ISSUES IN DISPUTE

1. Is the change proposed in the Carrier's notice of December 5, 2003, an "operational and organizational change" as defined in Article III Section 1 of the Agreement in Mediation Case No. A-7128, as amended?

2. If the answer to No.1 above is yes, has the Organization established any basis on which to negate the Carrier's explicit right to make such a change under Article III Section 1?

3. If the answer to question No. 1 is yes and No. 2 is no, may the Carrier implement the proposed operational or organizational change without negotiating an implementing agreement with the BMWE under Article III of the Agreement in Mediation Case No. A-7128, dated February 7, 1965, as amended?

OPINION OF THE BOARD

I. BACKGROUND AND SUMMARY OF THE FACTS

Declaring that it was invoking the provisions of Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement (Agreement), the Union Pacific Railroad Company (Carrier) notified the Brotherhood of Maintenance of Way Employes (Organization), on December 5, 2003, of the Carrier's plan to assign work customarily performed by employees on district tie gangs to system rail gang employees on the former Missouri Pacific (MP) property. More specifically, the Carrier wrote that, ". . . effective January 5, 2004, Union Pacific will implement an operational and organizational change whereby work that is customarily performed by employees assigned to district tie gang seniority rosters will also be performed by employees assigned to system rail gang rosters." The Carrier informed the Organization that, after it implemented its plan, employees assigned to either the district tie gang seniority roster or the system rail gang seniority roster may perform the work previously and customarily performed by employees on the district tie gang seniority roster. The Carrier further notified the Organization that, inasmuch as its proposed action did not involve the transfer of employees, an implementing agreement was not required. The Carrier characterized its plan as an operational and organizational change.

On December 12, 2003, the Organization vigorously protested the Carrier's proposed action for several reasons which will be related later in this Opinion. On December 19, 2003, the Carrier responded to the Organization's objections and gave reasons in support of its contemplated action. This exchange of correspondence led the parties to submit their dispute to Special Board of Adjustment No. 1087 (Board). They stipulated to three issues quoted on the title page. Thereafter,

the Carrier and the Organization properly progressed their dispute to this Board for a decision on its merits.

This controversy centers on the proper interpretation and application of Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement which provides:

> 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.

Three tiers of seniority currently exist on the MP: division seniority; district tie gang seniority; and, system rail gang seniority. According to the Carrier, simultaneous with the 1996 Southern Pacific Transportation Company merger, all incoming Southern Pacific employees were assigned a system seniority number and placed on the applicable district seniority roster. In addition, former MP employees, who had not previously established system seniority, also received a slot on the system rail gang seniority roster. While the record is not entirely clear, most employees apparently hold seniority on all three rosters albeit, agreement provisions may limit how an employee exercises a particular level of seniority under certain circumstances.

Both the Organization and the Carrier rely on the historical evolution of system rail gangs and district tie gangs to support their respective positions in this dispute.

The MP and the Organization entered into an Agreement, dated December 17, 1951, permitting the Carrier to establish system rail gangs to perform large rail renewal projects.[1] The December 17, 1951 Agreement specified that system rail gangs could perform other than rail laying work by mutual agreement between the Organization's General Chairman and the MP's Assistant Chief Engineer. The MP system rail gangs were divided into two territories. The system rail gangs worked across division seniority boundaries.

In an agreement dated March 19, 1981, the Organization and the MP created the middle tier of seniority, that is, the district tie gangs. The March 19, 1981 Agreement (the District Tie Gang Agreement) formed three districts of tie gangs on the MP. Section 4 of the District Tie Gang Agreement established a separate seniority roster for each district.[2] The district tie gangs performed tie renewal projects that division workers could not adequately handle.

On May 31, 1984, the MP and the Organization entered into a supplemental agreement dividing one tie gang district into the Texas and Southern districts consistent with MP engineering departmentalization. As a result, the MP had four separate district tie gang territories.

On August 26, 1983, the MP and the Organization agreed to remove seniority limitations for employees on system rail gangs. Section 2 of the August 26, 1983 Agreement (the System Rail Gang Agreement) provided that system rail gangs can work on the entire MP. Section 5(a) of the System Rail Gang Agreement granted a division seniority date to those system rail gang members who did not hold seniority on a division roster. Section 10 of the System Rail Gang Agreement reads:

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[1] The Carrier submits that these early system rail gangs were labor intensive populated by track laborers. When a system rail gang needed machinery and equipment, they borrowed the equipment (and presumably the machine operators) from division forces.

[2] Section 3 of the District Tie Gang Agreement provided for tie gang members to hold division seniority as well as district seniority.

> This Agreement shall become effective September 1, 1983 and supersedes all rules, practices and working conditions in conflict therewith; and shall continue in effect until changed as provided for in the Railway Labor Act, as amended.

In a letter dated May 14, 1984, the MP informed the Organization that, effective June 1, 1984, the MP would use district tie gangs to perform rehabilitation of road crossings and the replacement of ties, switches and surfacing, within the limits of tie renewal projects. The Organization did not challenge the transfer of this surfacing work from division forces to district tie gangs.

The Carrier and the Organization completely revised and recodified their property agreement effective July 1, 2000. They incorporated the System Rail Gang Agreement and the District Tie Gang Agreement into the July 1, 2000 Agreement.[3] [See Rules 3(a) and 4(a) of the July 1, 2000 Agreement.]

On August 15, 2001, the Carrier notified the Organization of its intent to combine the four district tie gangs into a single system-wide tie gang district. In its response dated September 21, 2001, the Organization vigorously contested the Carrier's planned action. The Organization contended that the Carrier's notice involved, not just combining seniority rosters, but also the establishment of regional and system-wide gangs. The Organization argued that the Carrier's action was impermissible because it had foregone the regional and system-wide gang rules emanating from Presidential Emergency Board No. 219 and the 1991 Imposed National Agreement in favor of existing rules. The Organization elaborated that the Carrier's preservation of the pre-1991 rules

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[3] While the record is not entirely clear, Rule 2 of the July 1, 2000 Agreement evidently loosened seniority restrictions so that employees could move between the system seniority and the district seniority rosters without forfeiting their seniority.

meant that it could not establish a system-wide tie gang. According to the Organization, the Carrier abandoned its contemplated action to convert the district tie gangs into system tie gangs.

A little over two years later, the Carrier served its December 5, 2003 notice, which led to the instant controversy.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Organization initially argues that the Carrier's proposed action does not constitute an operational or organizational change under Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement. The Organization raises two alternative arguments. Even if the Carrier's proposed action is an operational and organizational change, the Carrier waived its right to invoke Article III, Section 1 in the District Tie Gang and System Rail Gang Agreements and/or its past bargaining positions equitably estop the Carrier from implementing its proposal.

The Carrier's proposed action is not an operational and organizational change on its face. More importantly, the Carrier attempts to achieve through Article III, Section 1 something that is has never before asserted that it has the authority to do. The negotiating history, the Carrier's past admissions before Presidential Emergency Boards, and a past practice evince that the Carrier cannot implement its proposed action as an operational or organizational change under the auspices of the February 7, 1965 Job Stabilization Agreement.

The Carrier cannot reassign work in derogation of the District Tie Gang and System Rail Gang Agreements by using the subterfuge of an operational or organizational change. The Carrier wants employees who perform rail renewal work on a system basis to perform tie and surfacing work whenever the Carrier deems fit. The System Rail Gang and District Tie Gang Agreements explicitly

provide that rail laying work is performed by system-wide gang members holding seniority on the system rail gang seniority roster while tie replacement work is performed by members of the district tie gangs holding seniority on the applicable district seniority roster. In the extreme, the Carrier could move all tie and surfacing work being performed by the district tie gangs to system-wide gangs, something it unsuccessfully tried to accomplish in 2001. In essence, the Carrier is attempting to combine the district and system seniority rosters. The Carrier lacks the authority to consolidate seniority districts pursuant to Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement. *Special Board of Adjustment No. 605, Award No. 5.* Other decisions of Special Board of Adjustment No. 605 hold that the mere reassignment of work is not an operational change. *Special Board of Adjustment No. 605, Award Nos. 503(b) and 504.* In this case, the Carrier is simply reassigning some unknown amount of tie work from one group of employees (district tie gangs) to another group of employees (system rail gangs).

Under the Carrier's proposed action, the location of the tie work does not change and so, it is not transferring work. The absence of any work transfer is another indication that the Carrier is not engaging in an operational or organizational change.

During the previous four decades, the Carrier never sought to accomplish that which it seeks to do in its December 5, 2003 notice. The negotiating history of the February 7, 1965 Job Stabilization Agreement and subsequent national agreements manifest that the Carrier does not have the right, under Article III, Section 1, that it asserts here. The Carrier has, over many years, consistently taken the position in national bargaining that it needs the flexibility to unconditionally establish system-wide gangs. This position obviously shows that it currently lacks such flexibility.

Back in 1964 before Presidential Emergency Board No. 163, the nation's carriers advanced a proposal to consolidate seniority districts. A member of the presidential panel observed that the carriers' proposal would involve a revolutionary change in employment. In a 1969 Section 6 notice, the carriers proposed eliminating the 1965 Job Stabilization Agreement. One wonders why, if the Job Stabilization Agreement provided the flexibility the Carrier asserts in this case, that the railroads wanted to escape from the 1965 Job Stabilization Agreement.

In a July 12, 1984 Section 6 notice proposing a litany of work rule changes, the carriers wanted to eliminate restrictions on which class of employees could perform work and to obtain the unilateral power to realign and combine seniority districts. The 1986 report issued by Presidential Emergency Board No. 211 did not grant the carriers the authority that they sought but warned that a future Presidential Board might consider a national rule if local negotiations over combining seniority districts were unproductive.

In their submission to Presidential Emergency Board No. 219, the carriers specifically complained that the 1965 Job Stabilization Agreement had halted self-correcting features that appeared in earlier contracts and so, the carriers needed the unfettered discretion to consolidate seniority districts. The Carrier's Vice President of Engineering testified before Presidential Emergency Board No. 219, that while gangs on the former Union Pacific territory can be utilized for any type of system work, MP gangs were restricted to tie gangs and nothing else. The Carrier official's representation is an admission that the Carrier cannot create system and regional gangs. The statements of a Carrier official before a Presidential Emergency Board are admissions because they are not exaggerated arguments, but rather declarations of fact. *Special Board of Adjustment No. 1087, Award No. 5.* Thus, as of 1990, existing rules on the MP, including Article III of the February

7, 1965 Job Stabilization Agreement, did not permit the establishment of system-wide tie gangs which is exactly what the Carrier seeks to accomplish herein. Although Presidential Emergency Board No. 219 recommended the establishment of regional and system-wide gangs and the 1991 Imposed National Agreement provided for the establishment of such gangs, this Carrier elected to save current practices and rules in lieu of the rules recommended by Presidential Emergency Board No. 219. As a result of its election, the Carrier withdrew a September 25, 1991 notice to establish regional tie gangs. A month and a half later, on November 19, 1991, the Carrier sought to combine the four tie gangs but it did not follow through on its proposal after the Organization objected to the notice because the Carrier had opted for the savings clause.

In its 1996 presentation to Presidential Emergency Board No. 229, the carriers sought the flexibility to apply the pre-Presidential Emergency Board No. 219 rules as well as the post-Presidential Emergency Board No. 219 rules. However, the 1996 National Agreement provided, in Article XVI, that the Presidential Emergency Board No. 219 rules only applied to those carriers who timely elected to implement the Presidential Emergency Board No. 219 rules.

Thus, since 1965, the bargaining history shows that the Carrier does not have the right that it seeks today. The Carrier simply cannot reassign work from one group of employees to another under either existing agreements or Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement.

Since the Carrier did not attain what it wanted through national bargaining, the Carrier is bound by the terms of the District Tie Gang and System Rail Gang Agreements. Those Agreements provide for separate seniority rosters to govern different types of gangs and the work that those gangs perform. Moreover, if Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement

permitted the Carrier to engage in the action described in the December 5, 2003 notice, the Carrier waived those rights in the District Tie Gang and System Rail Gang Agreements. Indeed, Section 10 of the latter agreement expressly announces that the System Rail Gang Agreement supersedes all prior rules, which includes Article III, Section 1 of the Job Stabilization Agreement. The System Rail Gang Agreement therefore, trumps any vested rights that the Carrier had under Article III, Section 1.

The Carrier's reliance on Award No. 7 of Special Board of Adjustment No. 1087 is misplaced. In that decision, the Board did not interpret Article III, Section 1 because the Organization never challenged the Carrier's right to transform a gang with mobile headquarters into a completely new gang with a fixed headquarters. The Board found that the Carrier rearranged the manner of organizing bridge and building gangs. This activity cannot be extrapolated to mean that the Carrier is making an organizational change in this case.

Even if the Carrier's proposed action is an operational or organizational change under Article III, Section 1, the Carrier is equitably estopped from implementing its proposed action for the same reasons discussed above. To reiterate, the District Tie Gang and System Rail Gang Agreements control who performs rail and tie work on the MP. Also, the Carrier disingenuously claims that since it believes that there is not any reservation of work between the two types of gangs, it is unnecessary to amend either the District Tie Gang or the System Rail Gang Agreements. If the Carrier is correct, then it could take its proposed action whether Article III, Section 1 exists or not.

Last, if the Carrier's proposed action is an Article III, Section 1 operational or organizational change, an implementing agreement is necessary. The Carrier's action will shift tie gang work from district tie gangs to system rail gangs. Inasmuch as there are separate rosters for each type of gang,

the reassignment of work will impact workers' seniority. Moreover, in conjunction with the Southern Pacific merger, the parties entered into New York Dock implementing agreements granting prior rights to some employees. An implementing agreement must equitably address how to apply these prior rights in view of the overall seniority impacts.

In summary, the Carrier is trying to obtain through arbitration that which it could not obtain through collective bargaining. If the Carrier prevails herein, the result will undermine the national agreement provisions governing regional and system production gangs as well as negate the District Tie Gang and System Rail Gang Agreements. The Carrier simply wants to fill tie gang positions from a different seniority roster. The creation of such extra gangs is not an operational or organizational change.

B. The Carrier's Position

In recent years, major track maintenance and rehabilitation is being performed by highly mechanized maintenance of way gangs. These gangs work on huge projects across many miles of track. Traffic volume has increased substantially so that the Carrier experiences great difficulty in scheduling track maintenance and rehabilitation. On busy rail corridors, track rehabilitation must be scheduled during off peak seasons (customers will not tolerate shipment delays during peak seasons) and be completed as quickly as feasible. The district tie gangs cannot possibly satisfy these operational requirements.

By its December 5, 2003 notice, the Carrier seeks to establish a limited number of system rail gangs to supplement the existing district tie gangs. Having the supplemental, system gangs participate in the work performed by the district tie gangs will accelerate the time needed to complete major rail and tie renewal projects on busy rail corridors. Stated differently, instead of assigning tie

work to one group of employees, the Carrier will reap efficiencies by assigning the work to two groups of employees. Changing the method of performing the work is much more than an *ad hoc* transfer of a finite portion of work such as occurred in *Special Board of Adjustment No. 605, Award No. 503(b)*. Rather, the Carrier will engage in a material rearrangement in the method of accomplishing recurring tie and surfacing work. The change is similar to the type of employee rearrangement addressed in *Award No. 7* of *Special Board of Adjustment No. 1087*. If changing the headquarters of a three-member bridge and building gang constitutes an Article III, Section 1 operational or organizational change, then certainly, a massive reorganization of major rail and tie maintenance programs also meets the criteria for an Article III, Section 1 change. Furthermore, other awards issued by Special Board of Adjustment No. 605 show that transferring work from one seniority district to another (but staying within craft boundaries) constitutes a transfer of work under Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement. *Special Board of Adjustment No. 605, Award Nos. 206, 276 and 417*.

The Carrier's intended change does not violate the System Rail Gang or the District Tie Gang Agreements. In 1984, the Carrier demonstrated that it has the right to transfer the work under these agreements. It transferred division work to the district tie gangs without any protest from the Organization. So, the Organization conceded that the Carrier has the authority to transfer work among the groups of maintenance of way forces. In addition, the Carrier is not consolidating seniority districts. All employees will maintain their status on the current seniority rosters. The three tiers of seniority will remain and endure.

The District Tie Gang and System Rail Gang Agreements do not reserve any work exclusively to any particular group of employees. In the past, the Organization has unsuccessfully

challenged the Carrier's prerogative to assign system rail gangs to perform routine track maintenance which, the Organization asserted, belongs exclusively to division forces. *NRAB Third Division. Award No. 29977.* Thus, rail laying and tie work is not reserved to any kind of gang.

The Carrier did not waive or bargain away its rights to take the proposed action in the System Rail Gang or District Tie Gang Agreements. Neither of those contracts mentions the February 7, 1965 Job Stabilization Agreement. Section 10 of the System Rail Gang Agreement only operates to supersede prior rules pertaining to system gangs. The section does not denigrate rules covering other matters including operational and organizational changes.

The Organization suggests that the Carrier's notice of December 5, 2003 is an attempt to implement a new management prerogative never before invoked by the Carrier. However, the Carrier utilized other contracts and conditions in the past and so, it did not need Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement. Prior to 2003, and due to a series of railroad mergers, the Carrier used New York Dock implementing agreements to accomplish operational and organizational efficiencies in lieu of the Job Stabilization Agreement. Also, the fact that the Carrier did not use the February 7, 1965 Job Stabilization Agreement does not mean that it surrendered its right to make operational and organizational changes. *Brotherhood of Maintenance of Way Employes and Burlington Northern-Santa Fe Railroad Company (Mittenthal, 1999).*

Nothing in the negotiating history demonstrates that the Carrier either waived its rights under Article III, Section 1 or admitted that it lacks authority to engage in the proposed operational and organizational change. The member of Presidential Emergency Board No. 163 who skeptically referred to a proposal as revolutionary was addressing a proposal that would have allowed the

transfer of work across craft lines.[4] Here, as required by the February 7, 1965 Job Stabilization Agreement, the Carrier will keep tie renewal work within the class and craft of maintenance of way employees. In any event, what is more important is the language that the parties agreed to following Presidential Emergency Board No. 163. In Article III, Section 1, the Organization "recognizes," as opposed to "gives," the carriers the right to make operational and organizational changes.[5] When the carriers sought to eliminate the 1965 Job Stabilization Agreement in 1969, the carriers were concerned with the burdensome cost of lifetime protective benefits as opposed to eradicating Article III, Section 1. Also, when the carriers serve Section 6 notices in national bargaining, the proposals represent many railroads. The proposals do not apply to each and every carrier. Thus, work rule relief specified in a Section 6 notice does not mean that every railroad needs such relief.

The testimony of the Carrier's Vice President of Engineering before Presidential Emergency Board No. 219 concerned the consolidation of seniority districts and not transferring work or making changes pursuant to the Job Stabilization Agreement. Moreover, the statement of Carrier officials before Presidential Emergency Boards cannot be construed as admissions and are not proper evidence for interpreting agreement language. *Transportation Communications International Union and Norfolk Southern Corporation, (Mittenthal, 2003).* Arbitrator Mittenthal overruled the decision in *Special Board of Adjustment No. 1087, Award No. 5.*

Special Board of Adjustment No. 1087, Award No. 7 clearly delineated that a broad interpretation must be given to the operational and organizational change language found in Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement. The Organization is now

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[4] Similarly, *Special Board of Adjustment No. 605, Award No. 504* is distinguishable from the case herein because of the alleged transfer of work from one craft to another.

[5] The carriers already had a plethora of rights to make these changes. Article III, Section 1 solidified and expanded those rights.

equitably estopped from arguing a limited construction of those terms since, in *Award No. 7*, it vigorously argued that the Carrier possesses wide discretion to make changes under the Job Stabilization Agreement.

An implementing agreement is not required where such an agreement would be unnecessary on a particular property prior to the Job Stabilization Agreement. *Special Board of Adjustment No. 605, Award No. 43*. Since the Carrier is not transferring employees, no logical reason exists for negotiating an implementing agreement.

In conclusion, the Carrier's proposed action is an operational and organizational change permissible under Article III, Section 1 of the 1965 Job Stabilization Agreement and, in exchange, employees receive ample and lucrative protection.

III. DISCUSSION

Both the Organization and the Carrier proffered extensive extrinsic evidence to support their respective positions. The Organization relies not only on the negotiating history of various national agreements but also on an alleged admission that a Carrier official made before a Presidential Emergency Board. The Organization also submits that the provisions of the District Tie Gang and System Rail Gang Agreements demonstrate that the Carrier waived its right to put into effect the action described in its December 5, 2003 notice.[6] For its part, the Carrier contends that its movement of work from division forces to district tie gangs in 1984 exemplifies a past practice of making changes similar to the change contemplated in its December 5, 2003 notice. The Carrier avers that statements made before Presidential Emergency Boards can hardly be construed as admissions and certainly cannot be utilized to interpret solemnly negotiated agreements. The Organization replies

[6] More specifically, the Organization argues that Section 10 of the System Rail Gang Agreement operates akin to a zipper clause so that the Carrier relinquished any rights it had in pre-1983 agreements unless expressly enunciated in the System Rail Gang Agreement.

that the Carrier's unsuccessful attempts to consolidate seniority on the former MP in 1991 and 2001 show that it lacks the authority to implement the action set forth in the December 5, 2003 notice. Finally, both parties assert that the other is equitably estopped. The Carrier claims that the Organization's position herein is contrary to the position on which it prevailed in *Special Board of Adjustment No. 1087, Award No. 7.* The Organization counters that the Carrier is improvidently attempting to unilaterally amend the District Tie Gang and System Rail Gang Agreements in violation of the Railway Labor Act.

The Board carefully evaluated the totality of the extrinsic evidence. We conclude that, within the peculiar circumstances of this particular dispute, the extrinsic evidence does not have sufficient probative value on which to predicate a considerate and reasonable decision. Rather, the Board finds that the language in Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement, along with prior arbitrable decisions, is the most reliable evidence and the most persuasive precedents for adjudicating this controversy.[7]

While Article III expansively recognizes the Carrier's right to engage in technological, operational and organizational changes, the drafters of the Job Stabilization Agreement did not precisely define those three types of changes. However, the express enumeration of three changes implies that all other types of changes are outside the ambit of Article III, Section 1. Moreover, it is abundantly clear that the Carrier is vested with the right to transfer work or employees throughout its system, without abridging craft lines, in conjunction with a technological, operational or organizational change. As the parties stipulated, the threshold issue before this Board is whether the action described in the Carrier's December 5, 2003 notice constitutes a technological, operational

[7] This Board emphasizes that extrinsic evidence is not the best evidence to resolve this particular dispute. Extrinsic evidence is probative and reliable when an agreement provision is unclear and when the record lacks any past arbitral authority on an issue in controversy.

or organizational change within the meaning of Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement.

Special Board of Adjustment Nos. 1087 and 605, have issued several decisions interpreting and applying Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement.

In *Award Nos. 503(b) and 504, Special Board of Adjustment No. 605* adjudged that an operational or organizational change must involve an integral alteration to how work is accomplished as opposed to the mere transfer of a finite and modicum amount of work from one shop to another. The Board observed that not every assignment of work is tantamount to a transfer of work emanating from an operational and organizational change. In *Award No. 504*, the Board found insufficient evidence of an operational or organizational change when a railroad engages in an action that does not involve ". . . revamping systems or a change in work flow or some other alteration in the method of accomplishing . . . work . . . .." Finally, the Board held that an organizational change entails something more than the mere assignment of work to a particular group of employees. Although *Award Nos. 503(b) and 504* attempted to lay down standards for applying the language in Article III, Section 1, the enunciation of concepts and principles in those two decisions was confined to the specific facts in those cases.

On the other hand, *Award No. 7* of *Special Board of Adjustment No. 1087* broadly ruled that the Carrier has wide latitude to make operational and organizational changes without defining the three adjectives which modify the term "change" in Article III, Section 1. In *Award No. 7*, the Carrier abolished a three-member bridge and building gang headquartered on line. The Carrier simultaneously established a three-member bridge and building gang with a fixed headquarters. Besides the change from mobile to a fixed headquarters, the Carrier revised the hours of assignment

and rest days for the bridge and building gang. The Board wrote that a critical inquiry into each case is necessary to ". . . pinpoint the proper standard to use to determine whether an operational and organizational change occurred." Without articulating any standard, the Board went on to declare that, "Insofar as the carriers have obtained wide discretion to make operational and organizational changes, an objective analysis requires that wide latitude must exist to protect the right of the carriers to make such operational or organizational changes." The Board's analysis was self-confirming. In essence, the Board stated the definition of an operational or organizational change is an operational or organizational change. The Board held that since the Carrier has substantial discretion to make operational and organizational changes, the same wide latitude must protect that discretion. It is evident that the Board was more concerned about the *quid pro quo* in the Job Stabilization Agreement rather than framing a reasonable standard or principle for determining what activity constituted an operational or organizational change. Stated differently, the Board presumptively concluded that, inasmuch as the employees receive protective benefits as a result of an operational or organizational change, the Carrier must be making a change that triggers those benefits. While *Award No. 7* failed to articulate a definition of an operational or organizational change, the decision is distinguishable from the case before us. In *Award No. 7*, the Carrier abolished a gang and established a new gang with revisions to the gang's hours of assignment, rest days and headquarters. In this case, the Carrier acknowledges that it is not abolishing any district tie gangs or tampering with the seniority governed by either the District Tie Gang or the System Rail Gang Agreements. Therefore, this Board concludes that the relevant standards (albeit, not necessarily the complete criteria) for determining whether the Carrier's proposed action constituted an operational or

organizational change are found in *Award Nos. 503(b) and 504* of *Special Board of Adjustment No. 605*.

In this case, the Carrier proposes utilizing existing or additional system rail gangs to participate in tie gang work. The Carrier envisions that these extra or supplemental system gangs will work in concert with the district tie gangs. The work in question is tie renewal and ancillary grade crossing and surfacing work. The work remains in discrete locations. The Carrier also acknowledges that it is not engaging in a transfer of work or a transfer of employees. The record is void of any evidence that the flow of work will change. The work will be performed in the same manner that district tie gangs have performed the work in the past except that the Carrier hopes to complete the work more quickly to minimize traffic congestion in busy rail corridors. The Carrier did not present any evidence that it is introducing new technology or revamping its method of accomplishing the work. A close examination of the Carrier's proposal leads to the inescapable conclusion that it merely wants to reassign work from one group of employees to another (as it did in *Award No. 503(b)*), as opposed to engaging in an Article III, Section 1 operational or organizational change. The evidence proving any change is minuscule.

Therefore, the record before us does not contain sufficient evidence that the Carrier's proposed action constitutes an operational or organizational change according to the criteria set forth in *Award Nos. 503(b)* and *504*. As *Special Board of Adjustment No. 605* stated in those two awards, the decision must be restricted to the particular facts of each case. This Board cannot foresee all of the potential changes that could fall within the parameters of Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement.

Inasmuch as the Board's answer to the first issue in dispute is "No," we need not address or consider Issue Nos. 2 or 3.

This Board emphasizes that it did not reach any decision on work exclusivity among district tie gangs and system rail gangs on the MP. We stress that we are not overruling *NRAB Third Division, Award Nos. 29977, 30086, 30087* or *Public Law Board No. 6375, Award No. 4*. Rather, our jurisdiction is relegated to interpreting and applying the February 7, 1965 Job Stabilization Agreement.

The Board notes that the Carrier raises a strong equitable argument. The Carrier submits that the action described in its December 5, 2003 notice is necessary to satisfy customers by minimizing the time track is out of service on busy rail lines. Nevertheless, this Board does not sit to dispense equity between the parties. Equity is best left to the bargaining table.

AWARD AND ORDER

1. The answer to the first stipulated issue in dispute is "No."

2. The second stipulated issue in dispute is moot.

3. The third stipulated issue in dispute is moot.

Dated: June 17, 2005

Rick Wehrli
Union Member

Ken Gradia
Carrier Member

Donald F. Griffin
Union Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD NO. 18 OF SPECIAL BOARD OF ADJUSTMENT 1087

This case turned on the proper interpretation of Article III, Section 1, of the February 7, 1965 Job Stabilization Agreement [JSA]. Previous awards presented two lines of authority—one construing that provision narrowly (SBA 605, Awards 503B and 504) and the other more broadly (SBA 1087, Award 7). The Brotherhood of Maintenance of Way Employes [BMWE] successfully argued for the broad interpretation set forth in Award 7 of SBA 1087, which expands the ability of employees to claim entitlement to certain protective benefits (moving expense) provided for employees who are affected by a technological, operational or organizational change. Having secured those benefits, the BMWE reversed course in this case and urged the Board to adopt the narrow interpretation adopted in the SBA 605 awards and rule that the carrier's proposal could not be implemented under Article III. Unfortunately, the Board has endorsed those tactics. For the reasons that follow, we respectfully dissent to the Board's ultimate conclusions but concur with certain aspects of the decision.

There is nothing more crucial to the arbitration process than consistency. Consistency in arbitral decisions produces predictability, which in turn brings stability to the employer-employee relationship. This concept was articulated well by Referee Rodney E. Dennis in Award No. 23031 rendered by the Third Division of the National Railroad Adjustment Board:

> *The success of arbitration as a dispute resolution forum in any industry is based on accepted principles of contract construction, intelligent interpretation of the facts presented, and fairness in the decisions rendered. If the parties have confidence in the system it will work. Lack of confidence by either side will generally serve to frustrate the system and complicate the parties' day-to-day relationship.*
>
> *The parties that use arbitration must be able to predict what may happen to their case if it goes to arbitration. There must be some degree of consistency in decisions in order for this predictability to be present. This Board is mindful of the need for consistency and predictability and has diligently worked over the years to maintain it in the decisions it has rendered. In an effort to maintain a degree of consistency, the Board has developed and utilized many principles that are applied in every case. While the letter of some of our decisions may not appear to the uninitiated to be consistent with our previous decisions, the principles that we have used to arrive at these decisions are generally unanimously accepted by the members.*

Part A

This case involves the proper interpretation of Article III, Section 1, which reads, in pertinent part, as follows:

> *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. . . .*

As noted above, there are two lines of relevant authority that take inconsistent views of this provision. The inconsistent awards were the product of inconsistent positions taken by the Brotherhood of Railroad Signalmen [BRS] in Awards 503B and 504 of SBA 605 and the BMWE in Award 7 of SBA 1087. The BRS had argued before SBA 605 that the language of Article III, Section 1, should be given a very narrow construction—arguing that the transfers of work proposed by the carrier in those cases should not be construed as being the result of a technological, operational or organizational change—in order to prevent the carrier from transferring certain work from one location to another or from one group of employees to another group of employees. The BRS prevailed with their argument for a narrow construction of Article III, Section 1.

The BMWE on the other hand argued before SBA 1087 that the phrase technological, operational or organizational change should be construed broadly in order to expand the ability of employees to claim entitlement to certain protective benefits (moving expense) provided for employees who are affected by a technological, operational or organizational change. The organization prevailed again, even though their argument for a broad construction of Article III, Section 1, was inconsistent with the earlier BRS argument for a narrow construction.

In Case 18 before SBA 1087, this Board was confronted with the BMWE taking the position that Article III, Section 1, should now be construed narrowly, to try to limit the carrier's ability to exercise the rights, which the signatory labor organizations explicitly recognized in Article III, Section 1, to transfer work throughout the carrier's system. The BMWE was taking the same position that the BRS had taken earlier before SBA 605, even though it was clearly inconsistent with the position BMWE had previously taken before this Board.

We believe it was incumbent upon the Board to reject the inconsistency of the BMWE's arguments before SBA 1087. By allowing the organization to prevail by advancing inconsistent positions, resulting in two awards detrimental to the carriers, the

Board has itself become a party to the inconsistency, which in turn has created an atmosphere of unpredictability.

Part B

We do, however, give the Board credit for having swept aside the efforts of the organization to obscure the real issue before the Board by attempting to fill the record with irrelevant and immaterial extrinsic arguments rather than addressing the clear and unambiguous language of Article III, Section 1, in a straightforward manner. On page 15, the Board held:

> *The Board carefully evaluated the totality of the extrinsic evidence. We conclude that, within the peculiar circumstances of this particular dispute, the extrinsic evidence does not have sufficient probative value on which to predicate a considerate and reasonable decision. Rather, the Board finds that the language in Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement, along with prior arbitrable decisions, is the most reliable evidence and the most persuasive precedents for adjudicating this controversy.*[7]
>
> [7] *This Board emphasizes that extrinsic evidence is not the best evidence to resolve this particular dispute. Extrinsic evidence is probative and reliable when an agreement provision is unclear and when the record lacks any past arbitral authority on an issue in controversy.*

The Board clearly has concluded that Article III, Section 1, does not warrant using extrinsic evidence because it does not meet the test of being unclear or lacking in past arbitral authority.

Part C

A close reading of Award 18 also reveals that the Board has reached certain conclusions on the proper construction of Article III, Section 1, and in particular, what does or does not constitute a technological, operational or organizational change:

- Article III, Section 1, expansively recognizes the Carrier's right to engage in technological, operational and organization changes, although those terms are not precisely defined within the agreement itself. (page 15)

- It is abundantly clear that Carrier is vested with the right to transfer work throughout its system, without abridging craft lines, in conjunction with a technological, operational or organizational change. (page 15)

- There are changes that do not constitute a technological, operational or organizational change, such as:

- the mere transfer of a finite and modicum of work from one shop to another. (page 16)

- the mere assignment of work to a particular group of employees (page 16) or the mere reassignment of work from one group of employees to another. (page 18)

- instances where the work is performed in the same manner as performed in the past (page 18)

- There are also changes that do constitute technological, operational or organizational change, such as:

  - an integral alteration to how work is accomplished. (page 15)

  - the revamping of systems or a change in work flow or some other alteration in the method of accomplishing work. (page 15)

  - the abolishment of a gang and the establishment of a new gang with revisions in the gang's hours of assignment, rest days and headquarters. (page 17)

  - a change in the flow of work. (page 18)

  - the introduction of new technology. (page 18)

We believe these findings now constitute settled issues which this Board must observe and apply in deciding future cases involving Article III, Section 1.

Part D

While we concur with the Board's findings that the language of Article III, Section 1, is not unclear and thus not subject to the consideration of extrinsic evidence, its recognition of the expansive rights of carriers to transfer work anywhere throughout its merged system, provided such transfer of work is the result of a technological, operational or organizational change, and the principles set forth in Part C, we believe that the Board reached the wrong conclusion when attempting to apply those principles to the circumstances present in this case. Most notably, the Board based its decision, in part, on the following findings, which are not consistent with the facts presented to the Board in the Carrier's submission and in the oral argument before the Board:

- "The Carrier also acknowledges that it is not engaging in a transfer of work or a transfer of employees" (page 18)

- "In this case, the Carrier acknowledges that it is not abolishing any district tie gangs or tampering with the seniority governed by either the District Tie Gang or the System Rail Gang Agreements." (page 17)

The Board's finding that the Carrier acknowledged that it was not engaging in a transfer of work is not supported by the record before the Board. The Carriers, particularly at the bottom of page 5 and the top of page 6 of their submission, clearly stated:

> *By letter dated December 5, 2003, Carrier served notice pursuant to Article III of Mediation Agreement A-7128 dated February 7, 1965, as amended (Feb 7th Agreement) of its intent to transfer the performance of tie gang work to system rail rosters. Since the transfer of this work would not require the transfer of any employees, it was the Carrier's position that no agreement was required and the change could be implemented immediately. . . . [emphasis added]*

The Board's finding that the Carrier acknowledged that it was not abolishing any district tie gangs is likewise not based upon the record before the Board, particularly the oral arguments made at the hearing wherein it was noted that certain district tie gangs would no longer be able to continue to exist because the system gangs would be using the automated equipment that these district gangs had previously used.

Because the Board did not fully consider certain material facts involved in this case, it reached an erroneous conclusion. For the foregoing reasons, the carrier members must respectfully dissent to the Award in Case 18 of Special Board of Adjustment No. 1087.

A. Kenneth Gradia, Carrier Member

John F. Hennecke, Carrier Member

July 12, 2005