NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6871

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

-and-

NORFOLK SOUTHERN RAILWAY COMPANY

OPINION AND AWARD

Case No. 1

STATEMENT OF CLAIM:

"Claim on behalf of "Youngstown Prior Rights employees, Alliance subdivision" requesting that they be compensated hour-for-hour for work performed by "employees of the Toledo Prior Rights Territory" and by "employees of the Pittsburgh Prior Rights Territory" while working "on the Youngstown Prior Rights Territory" on the Cleveland Line, beginning November 24, 2003, at MP 86 to MP 98 (including the Akron Industrial Track and Hugo Industrial Track) and beginning November 17, 2003, at MP 26.3 to MP 53."

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

This Claim consolidates several separate claims, all raising the question of how or whether Carrier's modifications to specific management reporting lines can be squared with its agreements establishing certain "priority rights" for particular BMWE employees as explained more fully below.

The exceptionally well developed record before the Board features extensive treatment of the background leading to those underlying agreements between the parties as well as comprehensive argument by each in support of how they should apply to the changes at issue announced by Norfolk Southern in November, 2003. Although dense with detail, both

the history and text of the Parties' prior understandings must be understood to make any sense of their arguments here. That background is our jumping off point.

As a result of its several acquisitions of and consolidations with prior independent lines, Carrier's July 1, 1986 Agreement with the Organization had set forth a separate seniority region, the Western Seniority Region, comprehending the former Wabash Railroad territory and the Eastern Seniority Region, consisting of the former Norfolk & Western and NKP territories.

After acquiring a portion of Conrail's operations and assets, Carrier then concluded a Memorandum of Agreement ("Implementing Agreement") with the Organization on May 6, 1999, amending the 1986 Agreement and addressing "the rearrangement of forces and the coordination of maintenance of way functions...and the division of the use and operation of Conrail...by Norfolk Southern..."

Itself a negotiated modification of an earlier New York Dock arbitrated settlement, the Implementing Agreement established *inter alia* in Rule 2 – (ii) a further seniority Region, the "Northern Region," consisting of the former Conrail territory. That region was intended to be staffed by existing and future Conrail employees represented by the Organization who were or would be in the future integrated with the Norfolk Southern workforce.

Pursuant to Rule 2 -- (ii), former Conrail employees were granted "prior rights" to one of twelve territories within the Northern Region. Although in a technical sense not a defined term, it is apparent from the text of Rule 2 that "prior rights" for Northern Region employees consisted of a kind of "super seniority" status for fixed headquarter positions that might open on their Prior Rights Territory. The Rule reads in pertinent as follows:

> "Rule 2 (ii). This rule 2 (ii) has no application to DPG positions. *Conrail employees allocated to NSR under Article I of Appendix A to Attachment No. 1 will be prior righted to positions on the Conrail lines allocated to and operated by NSR as detailed below.* (Emphasis supplied.)
>
> 1.) Within the Northern seniority Region and the Dearborn, Pittsburgh and Harrisburg seniority Divisions, the lines of the former Conrail seniority Districts allocated to NSR will constitute respective prior rights territories, except that for the Dearborn Division the Detroit District lines Cleveland District lines and the Southwest District lines are consolidated

with the Toledo District lines, and for the Harrisburg Division the Buffalo District lines are consolidated with the Southern Tier lines. This will result in the following prior rights territories from former Conrail BMWE seniority districts for NSR allocated territory:

Southern Tier (including NSR allocated Buffalo District line)
Philadelphia
New Jersey
Allegheny A
Allegheny B
Harrisburg
Pittsburgh
Toledo (including NSR allocated lines in Detroit, Cleveland and Southwest Districts)
Columbus
Chicago
Michigan
Youngstown

(2) *Such prior righted employees will have preference for positions established with fixed headquarters located on their prior rights territory.* (Emphasis supplied.) Such employees will have preference for Northern Region positions established without fixed headquarters located on their designated Divisions. Such employees will not be required to exercise seniority to a position without a fixed headquarters beyond their designated Division but may voluntarily do so. As a position without fixed headquarters moves off of the incumbent's designated Division, the incumbent must either continue with the position or exercise seniority per Rule 14 of the NW-WAB Agreement as if the position were abolished. Such prior righted employees who are on furlough at the time at a position without fixed headquarters moves onto their designated Division are entitled to exercise seniority onto such position within ten days of the position first moving onto their designated Division..."

The Claims arose as follows: On November 11, 2003, Division Engineer in Dearborn, James R. Stump. wrote the Organization to advise that effective November 24, 2003, the Dearborn Division would be responsible for maintenance of tracks and facilities located on several specific sections lying within the Cleveland, Akron, and Hugo Industrial territories.[1] In its subsequent exchanges with the Organization, and in its submission here,

[1] The changes in the Dearborn and Pittsburgh territories differ somewhat in detail but the substantive issues they raise are identical. For simplicity, the Board discusses only the Dearborn changes.

Carrier characterizes these changes as an "adjustment in the territorial responsibilities of some non-agreement supervisors on the Northern Region." Central to this Claim is the Carrier's insistence that those changes merely adjusted the territorial responsibilities of some non-agreement supervisors on the Northern Region to better align them with those of their counterparts in the Transportation and Dispatching groups and that they had no adverse impact on the Claimants.

More specifically, Carrier asserts that supervisory responsibility for several small track segments was moved between supervisors on the Cleveland Line, Akron Industrial and Hugo Industrial tracks. These changes, Carrier contends, were comfortably within its managerial prerogatives to make and did not in any way modify any existing geographical boundaries for the Northern Region seniority district or alter the work complements within any of the Prior Rights Territories which determined preferences for assignments to fixed headquarter positions based upon the locations of the headquarters. Thus they violated no Agreement rule.

Carrier further explains that by re-distributing responsibility for managing several short track segments among non-agreement supervisors at Cleveland, Mingo Junction and Alliance, the maintenance gang headquartered at Rockport, Ohio, on the Toledo Prior Rights Territory, began performing "occasional day-to-day maintenance" on a 12-mile segment of track previously serviced by gangs under the jurisdiction of the Alliance Track Supervisor, headquartered at Alliance and Salem.[2] Further, its changes extended the Mingo Junction Track Supervisor's responsibility from Mile Post 26.3 to Mile Post 53 on the Cleveland Line, resulting in the gang headquartered at Mingo Junction now occasionally performing day to day maintenance on this 26-mile segment. That track was

[2] As if concerned about the chord they may hear, neither party hits the nature-of-the change keys hard. Critical factual questions--"permanent" or "temporary," "total" or "partial"—are thus left in a state of some uncertainty. The stalemate on the facts is well illustrated here by Carrier's use of the wonderfully muzzy descriptor, "occasional day-to-day." ("Government of Lebanon.") In arguing permanent and total, the Organization relies on the verbiage of Mr. Stump's November 13, 2003, letter, ["...the Dearborn Division will be responsible for maintenance of tracks and facilities located in..."] but offers no independent evidence of frequency or regularity that might enlighten the Board's judgment and does not address Carrier's denial that Alliance gangs have in any respect been permanently cut off from their normal work by the administrative realignment, which in turn is unsupported by any evidence whatsoever. Thus, while the contractual arguments are thoroughly developed on both sides, their application in the abstract is hardly trouble-free, forcing the Board to the view that the Organization has failed to shoulder its evidentiary burden of showing that the changes are as sweeping as alleged..

formerly serviced routinely by gangs headquartered at Alliance and Salem under the jurisdiction of the Alliance Track Supervisor.

By letter from its Vice Chairman, Ashtabula, OH, dated December 17, 2003, to Mr. Stump, the Organization took exception to Carrier's action, asserting violation of Rule 31 and stating in part:

> "...You advise that effective start of business on November 24, 2003, the Dearborn Division will be responsible for maintenance of tracks and facilities located in the following territories gained:
>
> Cleveland Line (RD) formerly to Mile Post 98.00, change to Mile Post 86.00
> Akron Industrial (AL) form Mile Post 0.00 to Mile Post 1.44
> Hugo Industrial (OJ) from Mile Post 25.50 to Mile Post 27.40
>
> The change that you have described involves the transfer of territory from one prior rights territory to another. The involved trackage is reserved by agreement to the employees of the Youngstown prior rights territory, Pittsburgh Division.
>
> There is no agreement basis for your letter of notice...This issue was previously before the parties and decided in favor of the Union in Public Law Board No. 4362, Case No. 1..." [3]

On February 10, 2004, Carrier responded, denying that there had been any changes in the assignment of Youngstown Prior Right territory to either the Toledo Prior Rights Territory or to the Pittsburgh Prior Rights Territory. "The respective geographic limits of the employees' Prior Rights Territory and Designated Division remain the same while there simply has been some adjustment in the managerial jurisdictions with no affect on seniority rosters or employee's seniority rights to work particular positions."

Carrier additionally asserts that the Organization's objections to these changes have mutated over time. Initially, it states, on December 17, 2003 the BMWE contended that the use of the Rockport and Mingo Junction gangs was a unilateral change to the boundaries of the Youngstown Prior Rights Territory, Alliance Subdivision. Demand was made for

[3] A second, substantially identical communication was addressed to R. L. Meadows, Division Engineer in Pittsburgh, alleging wrongful transfer of "trackage reserved by agreement to the employees of the Youngstown prior rights territory, Pittsburgh Division."

payment to Claimants on a "hour-for-hour" basis for all work performed by the employees of both the Toledo and Pittsburgh Prior Rights Territories while working on the Yorktown Prior Rights Territory based upon alleged violations of Rules 3, 8, 39, 40, 41 and 42 of the July 1, 1986 NW-Wabash Agreement and the May 6, 1999 Implementing Agreement.

In its subsequent appeal, Carrier contends BMEW shifted focus, arguing that because the Alliance Track Supervisor lost territory as a result of the changes, his gangs suffered a loss of work reserved to them. Thus, by letter of May 27, 2004, Vice Chairman Tredent contended that by "transferring trackage from one prior rights territory to two others," Carrier "had made unilateral changes which resulted in losses to the Claimant's working assignments." Before the changes at issue, Tredent argued, employees in the Youngstown Prior Rights District had maintained the track and switches in the following areas on a regular basis:

- Cleveland Line to Mile Post 98.0
- Akron Industrial from Mile Post 0.00 to Mile post 1.44
- Hugo Industrial from Mile Post 25.50 to Mile Post 27.40

Following management's realignment, however, he states that each of the above segments was reassigned to the Toledo Prior Rights District whose employees are stationed at Cleveland, Ohio, the neighboring sub-division to the north. Additionally, management reassigned Cleveland Line Mile Post 26.3 to Mile Post 53, previously in the Youngstown Prior Rights District, to the Pittsburgh Prior Rights District. Those employees are stationed at Mingo Junction, Ohio, the neighboring subdivision to the south. In sum, he alleges, because the Youngstown Prior Rights District lost 42 miles of track and maintenance work related to that track, employees whose individual seniority is reserved to Youngstown suffered a significant setback in the process. They had secured regional seniority in classification and in a single seniority prior rights territory when they transferred from Contrail to the Norfolk Southern beginning on June 1, 1999. Such regional seniority dates, pursuant to Rule 2 (ii) 2 established their priority claims to "positions established with fixed headquarters located on their prior rights territory."

On October 24, 2004, the Organization then followed up its appeal by contending for the first time that since Norfolk Southern had adopted the Conrail seniority districts as

"Prior Rights districts," its changes meant that Youngstown employees now had now been deprived of preference "for work in areas that were reserved to them."

The Organization argues that from June, 1999 until these changes, management consistently respected the parameters of the Youngstown territory. The changes, however, have resulted in less work to perform for Youngstown employees than formerly because that territory has been reduced in size, leaving the same number of employees competing for less work. Employees are hired based upon operational needs. Seniority is a function of the amount of work "which occurs on and *is reserved to the district.*" (Emphasis supplied.) Thus, work opportunities are determined by a combination of seniority and the volume of work to be performed in the district. Seniority without work is meaningless, and work without seniority is a hollow right. When Carrier argues that the boundaries are unchanged and thus no violation has occurred, it overlooks the fact that Toledo Prior Rights people at Cleveland and Pittsburgh Prior Rights people at Mingo Junction are now maintaining the facilities formerly worked by the Claimants. Not only has their work been transferred out of the district, they are unable to follow it—they cannot bid or exercise their seniority since the work has gone to different Prior Rights Districts where other employees have superior seniority standing based upon their preferential rights at those locations. In short, there is little benefit being the most senior employee in the Youngstown district when there is no work being performed there.

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At the outset, this dispute concerns a charge that the permanent reassignment of work historically performed by specific fixed headquarters gangs violated the Agreement. Carrier's right to assign Youngstown forces to work with floating gangs, to perform maintenance services with or independently of fixed gangs, either within or outside of their district, or to require employees from other districts to perform maintenance work within the Youngstown boundaries is not challenged. Plainly, whether holding fixed headquarters positions or not under the Agreement, employees are not contractually limited to working within a single Prior Rights Territory. The case does not pose any questions of Carrier trying to unilaterally "move employees. Nor is it disputed that pursuant to Rule 18, the

temporary transfer of employees, fixed or not, between and within the Eastern, Western and Northern (former Conrail) seniority districts is permissible under the conditions set forth therein without regard to any question of "Prior Rights." Prior Rights, in short, are not seniority districts but simply preferences for new positions. Employees holding seniority on the Northern Region may perform service there. Preference to fixed headquarter positions in the Northern Region does not equate to reservation of work within that region.

With those considerations in mind, upon careful consideration of this record, the Board concludes that although sturdily built, the Organization's case sits on unstable sub-base. Thus, vast tracts of its argument are compelling in the abstract—e.g., for the senior employee on the Region to enjoy a preference for new work is meaningless without work opportunities within the boundaries of the territory where those rights lie; Carrier has no contractual authority to unilaterally change seniority districts. But in the main those broadly valid and common sensible observations are grounded on unproven predicates and so do not compel the conclusions the Organization demands of them. They presume both that the language of the governing Agreement reserves all work in the seniority district to Prior Rights employees, that there have been unilateral changes in the boundaries of one subset of the Northern Region seniority district and that those changes reduced work opportunities therein. None of those assertions has been established.

1. The contention that the former Conrail Agreement preserved work in former seniority districts on Conrail must be rejected. Although Prior Rights Territories under the May 6, 1999 Memorandum of Agreement were fixed by reference to the former Conrail Districts where employees established seniority, that Agreement plainly eliminated "the former Conrail District [s]," replacing them with the Northern Region seniority district. That arrangement in turn vests preferential rights to positions with fixed headquarters on the employees' Prior Rights territory, but it does not reserve to them all work that must be performed on such Prior Rights territory. Nor does it prevent employees occupying positions headquartered on one Prior Rights Territory from performing work at a location on another prior

Rights Territory. On a day-to-day basis, the Agreement sets forth no limitation on where employees may perform service.

2. In that context, the related suggestion that lost work opportunities—even if established--translate to violation of the Agreement is deprived of oxygen when laid up against the plain meaning of Rule 2: *Such prior righted employees will have preference for positions established with fixed headquarters located on their prior rights territory.* Although the Organization's case in a vacuum is a more sympathetic proposition than that offered by the Carrier, when viewed in the hard light of the bargain struck, it appears, as Carrier contends, an attempt "to build walls around a geographic subset of the Northern Region seniority district," by prohibiting a fixed headquarter gang from working on the Youngstown Prior Rights Territory unless headquartered there. Said another way, it improperly seeks an amendment of the Agreement.

   The case is complex, but one thing is clear: none of the Rules cited in support of these Claims—Rules 3, 8, 29, 30, 41, 42—is applicable to the issues presented here. In the absence of any restrictive language in the Agreement, and in the face of the obvious potential impact such limitations would have on Carrier's efficiency of operation and employee utilization, this Board would be working well beyond the margins of its authority to imply such limitations.

3. "Prior Rights" are implicated only in the context of special preferences for awards to whatever fixed headquarter positions Carrier chooses to bulletin; such rights are in actuality a form of "super seniority" for narrow, well defined purposes. They cannot be stretched into limitations on employee utilization within the Northern Region seniority district. To do so would compel Agreement changes in the form of establishing new rules, a result clearly beyond the contours of the Board's authority.

4. Unilateral modification of seniority districts would offend the Agreement. We find Carrier's managerial realignments, however, to have been ministerial or administrative in character. They did not "modify" or "redefine" seniority districts

and thus were not inconsistent with Rule 2 (ii) of the May 6, 1999 Implementing Agreement.

Obviously, Carrier may not achieve by indirection that which it is precluded from doing directly. There is, however, no evidence before this Board demonstrating that Carrier's November, 2003 announcement was anything other than a good faith attempt to improve the efficiency of its track maintenance operations. Those adjustments did not conflict with any agreement terms; they did not represent either real or constructive alteration of seniority boundaries. All the gangs employed for the work in question are Northern Region seniority gangs. There has been no reduction in either the location or the number of employees holding preferences for fixed headquarter positions as between Prior Rights Territories on account of these changes, nor any showing of lost overtime opportunities. And, for the reasons below, even if there had been, that would not mechanically equate to a violation of the applicable Rule because the Agreement does not reserve all work on the Alliance subdivision to one particular group of employees among those listed on the Northern Region rosters.

In summary, neither loss of work nor the specter of potential future loss is an infallible standard by which to measure violation. The point may be stated another way: it is undisputed that Carrier enjoys broad if not unfettered rights to eliminate fixed headquarter positions. Such actions would have a direct adverse impact on work opportunities. They would not, however, violate the Agreement. Here no losses of work have been demonstrated, and potential losses cannot be the sole gauge for assessing the merits of the dispute.

5. In one sense, the Youngstown people will continue to have Prior Rights to new positions bulletined in the district as the Agreement compels. It may be naïve to suggest that a single transfer of 40 or more miles of track to another district does not impact the number of future work opportunities within the district, and we do

not so suggest.[4] Different concerns might arise under other factual patterns--if by a simple stroke of the pen Carrier were to effect a wholesale gerrymandering of a Prior Rights district so as to replace Prior Rights holders with outlying gangs, the outcome might differ. But in general, the number of work opportunities is presumably not static, and assuredly not guaranteed. It will likely fluctuate up and down in response to the needs of the service. The appropriate criterion for determining violation is not solely future potential loss of work opportunity under the governing terms of the Agreement.

Nor is the arbitral precedent relied upon by the Organization in this connection persuasive. This Board has great respect for the Board in Public Law Board No. 4362 (Myers) (1987) and for that reason alone, the blandishments are strong here for application of *res judicata* principles. But that Board's decision is grounded on a clear-cut, conceded case of unilateral change—Carrier asserted it had within its broad managerial discretion the right to unilaterally change prior rights and seniority districts. On that basis alone, the holding is inapposite. The threshold question here is *whether* Carrier's adjustments to the territorial assignments of its supervisors were or had the effect of modifying prior rights districts.

Similarly, the findings of Public Law Board No 6339 (Malin) (2004), presumably relied upon for aspects of its language but favoring Carrier, are largely inapplicable to the issues before us. That Board explicitly interprets Rule 18, addressing the temporary transfer of employees from one seniority district to another, demarcating and circumscribing what constitutes "temporary transfers." But Rule 18 is not relied upon by the Organization in this case. Second, even if applicable, there is serious tension between Referee Malin's holding and the

[4] Once again, the analysis here is complicated by Carrier's unrebutted assertion on the factual question of how much maintenance responsibility is comprehended by the Claims. Carrier states that "employees headquartered at Mingo Junction have not assumed all maintenance responsibility on these track segments at the expense of the Claimants. [Such] work on these lines is performed by a variety of forces just as is done throughout the system Some fixed headquarter positions at Cleveland and Mingo junction may be performing more tasks now on some of the referenced lines than they were prior to November, 2003 and some of the fixed headquarter positions located on the Alliance subdivision may be performing more tasks now on some of the lines than they were prior to November 2003."

Organization's position here, which, relying on the language of Carrier's initial announcement, is based on the contention that Toledo and Pittsburgh gangs have "permanently replaced" Youngstown employees. Carrier asserts the arrangements made in November 2003 do not represent permanent transfer of work. Rather, it contends repeatedly that, "...the Youngstown people still work on the track at issue within their division." The Organization asserts that work has been permanently and entirely lost, but for all the record indicates, the work at issue it could be twice a year. In any event, no proof is offered that it is either permanent or with such frequency or regularity as to be constructively permanent. The PLB 6339 Award stands for the proposition that Rule 18, "...is an express grant of authority to transfer employees for temporary service outside seniority boundaries. On its face, it does not limit the use of such express authority to emergency situations."

6. Since neither a violation nor any losses have been shown, the Board does not consider the Organization's plentiful authority on remedies issues.

There is no issue here regarding the reasonableness of the rights the Organization seeks to have affirmed. The only question is whether those rights are established by the Agreement. We find such rights to be unexpressed and accordingly grist for the bargaining mill. Because Carrier's actions did not eliminate the employee protections agreed upon pursuant to the terms of Rule 2, the Claim must be denied.

AWARD

The Claim is denied.

James E. Conway
Chairman and Neutral Member

J. Dodd
Employee Member

D. L. Kerby
Carrier Member

Dated at Great Falls, VA
September 24, 2006