

In the Matter of Arbitration

Issue: Starting Time Dispute - Local Gangs

**Brotherhood of Maintenance of Way Employees'
Division of the International Brotherhood
of Teamsters (BMWET)**

vs

**Burlington Northern Santa Fe
Railway Company (BNSF)**

Award Issued: October 10, 2005

**Edward L. Suntrup
Arbitration Services**

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Way Employees' Division of the
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Background

On May 24, 2004 Dennis J. Merrell, general director of labor relations of the BNSF, sent a letter to David Joynt, general chairman of the BMWET advising the latter of starting time changes to be implemented by the Carrier for work to be done by gangs TP-06 and SC-06 and "...associated support gangs..." on the Powder River Division on its property for the months of July and August of 2004. The Carrier stated that the proposed changes would be implemented under Article IX of the 1991 Imposed Agreement. In this May, 2004 letter Mr. Merrell advised Mr. Joynt as follows:

"Please consider this letter notice pursuant to Article IX, Section 2 of the 1991 National Agreement of the Carrier's need and intent to change the starting time of TP-06 and its surfacing gang SC-06 from their regular time to a new starting time of 1400 hours (2:00 pm) beginning approximately June 23, 2004 through approximately July 27, 2004 while working on the Powder River Division, Akron Subdivision, on the single main line between Eckley CO, mile post 396, and Platner CO, mile post 423.

"This notice will also affect any local supporting forces for these gangs (anticipating at this time to be TRWX0266, District Mobile Welding Gang; TRWZ0295, Trenton Headquartered Welders; TMOX0218, Ft. Collins Headquartered Front End Loader; TMGX0178, District Maintenance Gang MG03; TSCX0499, District Mobile Surfacing Gang; and TSEC0414, the Wray Section."

The Carrier advised the BMW's general chairman that it was necessary to make these shift time changes on the single track line for the gangs in question in order to avoid unnecessary traffic interruptions to trains moving over this track. The time changes would also help avoid conflicts, according to the Carrier, between work done by the track gangs and some of the Carrier's "...very high priority traffic..." which could result in loss of right-of-way for those trains. Along these lines the Carrier officer continued in that same May, 2004 letter:

"I have attached copies of track charts for the...work areas (in question). (They show) that priority train operations are heavy during the daytime hours and substantial loss of right-of-way access time would result unless the (starting time) changes are implemented...

"I have tried to give you as much detail as possible in advance of these required changes under Article IX of the 1991 National Agreement. But considering how far in advance this information is being conveyed to you, the attached schedules or windows may be subject to some changes for various reasons. However, irrespective of any such changes to the work schedule or available window time that may or may not occur, the fundamental conflict between work gang schedules and train operations depicted on the enclosed information will not change."¹

The general chairman was advised that if he had questions about the proposed changes he should contact BNSF's labor relations' department. On the other hand, if he concurred with the proposals he was asked to affix his signature to this letter and return a signed copy to the Carrier.

In its arguments before the arbitrator in this case the Carrier states that it had

¹BNSF Exhibit 1 with supporting documents. All quotes from the May 24, 2004 letter are taken from this exhibit.

invoked Article IX of the 1991 National Agreement only a handful of times over the years in order to change starting times of track workers. According to the Carrier, documents in its archives show that Article IX was invoked for the first time, in this respect, in 1996.²

Article IX states the following which is cited here for the record.

Article IX of the 1991 Imposed Agreement

Section 1 - Production Crews

The starting time for production crews shall be between 4:00 a.m. and 11:00 a.m. and shall not be changed without thirty-six hours' notice, except that forty-eight hours notice shall be given for a change which is greater than four hours. Starting times shall remain in effect for at least five consecutive days. The BMWF may contest the creation of new starting times through the arbitration procedure set forth in Article XVI. If a carrier wishes to start a crew so early that a convenient restaurant is not open, and end work so late that a meal cannot be obtained, it will be the responsibility of the carrier to provide a meal to those employees at the work site or other place appropriate, convenient and safe to its employees.

Section 2 - Alternative Flexible Starting Times

Other starting times may be agreed upon by the parties for production crews* or for regular assignments involving service which is affected by environmental conditions or governmental requirements or for work that must be coordinated with other operations in order to avoid substantial loss of right of way access time; however, no production crew* or regular assignment shall have a starting time between midnight and 4:00 a.m. If the parties fail to agree on such other starting times, the matter may be referred to arbitration in the manner described in Article XVI. Similar notice requirements regarding starting times, as described above, shall apply.

—*/ Production crews shall include supporting BMWF forces who are directly involved. However, "directly involved" should be given the narrowest

²BNSF Exhibit 23. This exhibit contains 10 different notices that had been sent to the BMWF to change starting times under Article IX from 1996 going forward. The specific time-frame of these notices extended from August 6, 1996 up through June 18, 2004. A review of these notices, however, show that some are not applicable to the dispute raised in this case.

possible construction consistent with the efficient operation of the production crew.

On June 9, 2004 general chairman Joynt responded to the May 24, 2004 letter. He advised the Carrier that he did not "...concur with...the proposed starting time changes for TP-06, SC-06 and certainly not for the six (6) additional crews that (were) identified..." in the notice sent to him.³ The BMW's general chairman stated that the string charts provided by the Carrier show that there are only several trains a day on the single line in question and that there would be no more work interruptions if gang TP-06/SC-06's work schedule was changed or not. According to the general chairman the Carrier's own data "...proves (that) there is no advantage to changing the start time outside the 4-11 AM window...". Further, according to the BMW, there would be no "...substantial loss of right-of-way access..." if the proposed changes were not introduced.

The general chairman underlined that TP-06 is a gang that installs ties. SC-06 is a gang that surfaces the track. The two gangs work together and travel from location to location installing ties and surfacing track.

Further, which will be the main bone of contention in this case, the support gangs identified in the May 24, 2004 letter do not work with TP-06 and have "...absolutely no effect on the efficient operation of production gang TP-06...". According to the BMW, two of the gangs identified by the Carrier are mobile welding gangs which have no involvement with a tie gang such as TP-06, and the other four gangs are involved in work

³BMW Exhibit B. All quotes from the June 9, 2004 letter are taken from this exhibit.

on crossings one way or another. In fact, according to the union, if any of these gangs were to work near the tie and surfacing gangs they would just get in their way and interfere with their work. The BMWWE requested that the Carrier rescind its May 24, 2004 letter and that TP-06/SC-06 remain on scheduled starting times no later than 11:00 AM, and that those working on the other six gangs start no later than 10:00 AM.

The general chairman argues that, in his estimation, the Carrier's motive behind the proposed changes is not related to production, but rather to economics. The argument by the general chairman is that the proposed work schedule changes amount to a maneuver by the Carrier to avoid paying overtime to track workers who would be required to work outside the time-frames of their bulletined assignments.

The BMWWE argues that Article IX of the 1991 Imposed Agreement, cited by the Carrier in its May 24, 2004 letter, is "...actually (the same as) Rule 27(D) of the September 1, 1982 Agreement (updated 2002) between the BNSF and the BMWWE...".

A review of Rule 27(D) by the arbitrator shows that it contains the same language as Article IX, Sections 1 & 2 of the 1991 Agreement, in pertinent part, and the latter has been quoted earlier in this Award and is cited here again by reference.⁴

According to the general chairman, gangs supporting production crews are to be

⁴BMWWE Exhibit A-1. The exception is that the language of Rule 27(D) of the 1982/2002 Agreement adds to Section 1 of Article IX of the 1991 Imposed Agreement the following: "It is understood that local supporting forces and interrelated crews supporting the operation of these crews may also be covered by Article IX...". As far as can be determined, this is the "local modification" referred to by the BMWWE in its Brief to the arbitrator. See BMWWE's Brief @ p. 27. The same language is found in the 1999 Seniority Roster Agreement as will be noted later.

understood as forces directly involved in the work of such crews. The language of the Agreements (1991 or 1982/2002) state that the phrase: "directly involved", should be given the narrowest "...possible construction consistent with the efficient operation of the production crew...". The BMW's argument is that the Carrier is giving too wide of an interpretation to this language. Further, the Carrier's interpretation is incorrect because it is not supported by fact: the local supporting forces cited by the Carrier's officer in his May, 2004 letter are not directly involved in the work done by gang TP-06/SC-06.

On June 14, 2004 the BNSF's general director rejected the proposal that the May 24, 2004 letter be rescinded. In his response this carrier officer included some updated string charts in view of the objection that the changes in work schedules were not needed in order to avoid conflicts between the work crews and priority freight trains. The Carrier officer then advised the general chairman that certain trains known as "Z" trains have stringent on-time delivery commitments to customers and if these trains do not arrive on time, or are delayed, the Carrier can be assessed penalties. Without the proposed changes in work schedules there would be a substantial loss in right-of-way with potential penalties assessed.

With respect to the local supporting forces in question, the Carrier's officer responds that the BMW is incorrect in its assessment of this matter. According to the Carrier, the local gangs cited in his May, 2004 letter are directly involved in the work of production gang TP-06/SC-06.

Absent resolution of the parties' differences over the issues outlined in the

foregoing the general chairman advised the Carrier on September 22, 2004 that the BMWWE continued to "...vigorously oppose...the changing of the starting times of gangs and positions...listed as 'local supporting forces' to TP-06/SC-06 to hours outside their starting times in accordance with Rule 27A of (the) September 1, 1982 Agreement (December 31, 2002 update). In accordance with Rule 27D (of the same Agreement), the BMWWE (advised the Carrier that it was)... referring (the) dispute to arbitration".⁵

After additional correspondence and conferencing of this matter between the BMWWE and the BNSF the parties proceeded to arbitration. Preliminary attempts to draw up an arbitration agreement were not successful. The parties selected the instant arbitrator in accordance with Article XVI/Rule 27 without such agreement.⁶

The language of Article XVI outlines procedures for the selection of an arbitrator, hearings, and related matters. The parties waived the time lines between themselves and with the arbitrator for the hearing of the instant dispute and the issuance of an Award. Of pertinence here, for the record, is the language from Article XVI, Section 3, under title of Hearings, which states the following:

Article XVI, Section 3

...Each party shall deliver all statements of fact, supporting evidence and other relevant information in writing to the arbitrator and to the other party no later than

⁵BMWWE Exhibit B-5.

⁶Correspondence between the parties dealing with these matters is found in BMWWE Exhibit B-8. The BMWWE generally refers to this arbitration as a Rule 27 case in accordance with the language of the BMWWE-BNSF Agreement of 1982/2002 and the Carrier refers to this arbitration as an Article IX/XVI case under the 1991 Imposed Agreement.

five (5) working days prior to the date of the hearing. The arbitrator shall not accept oral testimony at the hearing, and no transcript of the hearing shall be made. Each party, however, may present oral arguments at the hearing through its counsel or other designated representative...

These procedures were followed by the parties.⁷

The Issue Before the Arbitrator

On September 22, 2004 the BMW's general chairman of the Burlington System Division advised the general director of the Carrier who had sent him the notice about the change in schedule of the gangs on May 24, 2004 that the union continued to "...vigorously oppose..the changing of the starting times of the gangs and positions listed as 'local supporting forces' to (gang TP-06/SC-06) to hours outside of their starting times listed in Rule 27A of...(the)...September 1, 1982 Agreement...". Therefore, according to the general chairman, the matter was being referred to arbitration. According to the claim letter, the BMW was submitting the following questions to be ruled on by an arbitrator:

"1. Did the BNSF violate its updated September 1, 1982 Agreement with the BMW when it changed the starting time of District Mobile Welding Gang TRWX0266 outside of the 5:00 a.m. to 10:00 am window as outlined in Rule 27A?

"2. Did the BNSF violate its updated September 1, 1982 Agreement with the BMW when it changed the starting time of the Granton, Nebraska Headquartered Welding Gang TRWX0295 outside of the 5:00 a.m. to 10:00 a.m. window as outlined in Rule 27A?

⁷The 1991 Imposed Agreement also provides at Article XVIII an alternative set of procedures for resolving differences over the "application and interpretation" of that Agreement. This is by means of an interpretation committee whose jurisdiction, however, cannot overlap those areas "...where other recommendations have provided for a specific dispute resolution mechanism...". Article XVI supersedes XVIII with respect to the specific issue of starting times which is why the former, and not the latter, was invoked when taking the issues at bar in this case to arbitration.

"3. Did the BNSF violate its updated September 1, 1982 Agreement with the BMWE when it changed the starting time of District Maintenance Gang TMGX0178 outside of the 5:00 a.m. to 10:00 a.m. window as outlined in Rule 27A?

"4. Did the BNSF violated its updated September 1, 1982 Agreement with the BMWE when it changed the starting time of District Mobile Surfacing Gang TSCX0499 outside of the 5:00 a.m. to 10:00 a.m. window as outlined in Rule 27A?

"5. 4. Did the BNSF violate its updated September 1, 1982 Agreement with the BMWE when it changed the starting time of the Wray, Colorado Headquartered Section Gang TSCC0414 outside of the 5:00 a.m. to 10:00 a.m. window as outlined in Rule 27A?

"6. Did the BNSF violate its updated September 1, 1982 Agreement with the BMWE when it changed the starting time of the Ft. Collins' Headquartered Front End Loader Gang MOX0218 outside of the 5:00 a.m. to 10:00 a.m. window as outlined in Rule 27A?

". If the answer to any of the above questions is "Yes", what shall the remedy be?"⁸

Arguments

Position of the BMWE

Despite preliminary disagreements between the Carrier and the BMWE over the change in starting times for gang TP-06/ SC-06 which was a regional/ system production

⁸BMWE Exhibit B-4. A parallel claim was filed by one of the vice general chairmen of BMWE's Burlington System Division, same dates, for just three of the local gangs in question. See BMWE Exhibit J all entries. The claim cited in this case subsumes that other claim and the ruling in this case will apply accordingly. On a different note, the Carrier frames the issue before this tribunal in its own way, as follows: "Was the work of certain local forces supporting the work of region/system gang TP-06/SC-06 so that the Carrier's changing of the local forces' starting time was authorized under Article XI of the 1991 Imposed Agreement?" See BNSF Brief @ p. 2. This latter formulation is not an incorrect statement of the issue before the arbitrator. It is just lacks reference to detail that must be addressed in this case and it subsumes the issue before the arbitrator, as the Carrier sees it, under Article IX of the 1991 Agreement rather than Rule 27 of the 1982 Agreement with amendments.

gang that matter was resolved for the July 2, 2004 - August 18, 2004 time-frame by the parties. According to the union, referring to Rule 27 of the 1982 Agreement, as it habitually does throughout these proceedings, "...TP-06 was subject to the 'other starting time' provisions of the third paragraph of Rule 27D and BNSF was at liberty to start (the trackmen on both of these gangs) outside the 4:00 to 11:00 AM time period as it did in this case..." in July-August, 2004.

Nor, according to the union, was there disagreement between the parties over the fact that the six local gangs named in the claim were not regional/system production gangs under the Sickles' arbitration Award of 1992.⁹

The dispute put before the arbitrator centers on the contention by the Carrier that the six local gangs represent "supporting forces", as outlined in the Note to Rule 27D, which are "directly involved" in the work being done by the production gang.

This Note under Rule 27D uses parallel language to that found in Section 2 of Article IX of the 1991 Imposed Agreement as noted. Although this language has been cited earlier under Article IX it is worthwhile to cite it again here under title of Rule 27D of the 1982 amended Agreement since the narrow issue before the arbitrator in this case centers on the meaning and application of this language.

Rule 27D

.....

⁹This Award is found in BMW Exhibit D. There is no need here to elaborate on what has become the standard, because of that Award, for what the parties understand as production gangs on this property. There is no dispute here that gang TP-06 was a production gang working district 400 in the summer of 2004 and the six local gangs were not.

*Note: Production crews include supporting BMW forces who are directly involved. However, 'directly involved' should be given the narrowest possible construction consistent with the efficient operation of the production crew.

According to the union the Carrier is unable to show that the support gangs in question here, with but one limited exception involving one of them, were ever directly involved in the work of TP-06/SC-06. In fact, according to the union, when the local gangs worked too close to the production gang they "...actually hindered the operation of the production crew rather than promoting its efficiency...".

TP-06 is a production gang that lays ties. But it is not equipped to replace ties at switches or at grade crossings. This is done by local gangs. Nor does TP-06 do what is known as rail distressing work. The latter, which consists in cutting pieces out of rail, and then reattaching the rail, is done by welders and none were assigned to TP-06. The six local gangs involved in this case did switch work, grade work and rail distressing work. They did not, according to the BMW, get involved with the laying of ties and the fixing of main roadbeds which was the function of TP-06/SC-06.

The BMW cites a written statement in the record provided by the foreman of tie gang TP-06. That statement addresses the foreman's perspective on the work done by TP-06 from July 6, 2004 through August 18, 2004 as well as information on the relationship between that gang and the local gangs in question.¹⁰ This statement, complemented by

¹⁰BMW Exhibit K. This foreman was on vacation the first week of the period and limits his direct observations to the time from July 12, 2004 going forward. All quotes in this section are taken from this written statement.

other statements by employees working on the local gangs, provide much if not all of the basis for the union's arguments in this case dealing with the meaning and application of Rule 27D. This information provided by employees working the Yuma-Wray, Colorado area in July and August of 2004 is discussed here.

According to the foreman of TP-06, the work done by the local crews, whose starting times were changed to accommodate the changed starting times of TP-06, was not "...in direct support of (his) gang...". He states that members of the local gangs did not "...work directly with (his) crew in most cases...". Maintenance gang MG-03 installed ties at switches and did other such work. That gang was assigned by supervision to work in the middle of TP-03 and, according to the latter's foreman, sometimes got in the way of the work of the production gang. The work by MG-03 was done before TP-03 arrived on the scene and after TP-03 left the area in the middle of August of 2004. According to the TP-06 foreman, had this maintenance gang worked its regular hours both it and his production gang could have gotten more done.

According to the foreman of MG-03 itself, who also wrote a statement which is part of the record of this case, his local gang did the same thing before TP-03 arrived on the scene in July of 2004 as it did after TP-03 left. The MG-03 gang was replacing switch ties and doing other switch work. According to the MG-03 foreman his gang was not a support "...crew for TP-06..." during the time frame in question.¹¹

¹¹BMWE Exhibit N.

According to the TP-03 foreman local surfacing gang TSCX0499 mostly tamped surfaces in and around crossings where sections were taken out so the surfacing crew could raise them. TP-03 did not put ties in "...most of these crossings...". Work by this local gang, which also tamped track behind the TP-03 gang in conjunction with SC-06 "...had nothing to do with (TP-06's) tie gang production..." All of the work done by that local gang could have been done during regular working hours, according to the TP-06 foreman. This conclusion is corroborated by the foreman of that local gang who submitted a written statement for the record. According to this latter foreman "...during the time from July 6 to August 18 (2004) we surfaced track, some days behind the tie gang and on other days in other areas as needed where the tie gang did not work. All of this track surfacing could have been done during our regular shift ...(and)...the surfacing we did behind the tie gang which did not in any way effect the amount of ties they put in per day...".¹²

The foreman of TP-06 does admit that the local welding gangs did work on distressed rail by cutting out pieces of rail and then angle barring the rail together. According to him local gangs TRWX0266 and TRWX0295 really did little welding per se while his production gang was working the Yuma-Wray, Colorado area installing ties

¹²BMWE Exhibit O. As can best be determined this statement is by the foreman of local gang TSCX0499. There are a number of written statements of record by members of local gangs without specific information on which gang they belonged to during the July-August, 2004 time period. In one case the writer states that he was with mobile welding gang W-712 albeit this gang is not listed in the claim and the evidentiary value of this statement is unclear. Another writer identifies himself as foreman of surface gang sc243 with the same problem.

during the time-frame under scrutiny in this case. According to the production gang foreman, the welding was actually done after TP-06 finished its work and was later done on regular shift by these local welding gangs. These gangs were also not in direct support of production gang TP-06/SC-06.

The foreman admits that local gang TSEC0414 which is called the Wray Section gang did help with some of the laying of ties done by TP-06. But according to the foreman, TP-06 could have gotten along okay without this help.

According to the foreman of TP-06: "It didn't help our crew to have these gangs working the afternoon-night shift. Any help they gave us could have just been done in their regular work hours, which I understand they went back to after we left...If these crews were really support crews for my tie gang then they would have been bid out with my gang and (would have) worked with us on the entire seniority district...".

Argument by the union is that since production gang TP-06 was not "...programmed nor equipped..." to do work such as replacing ties at switches or grade crossings, nor to do rail distressing work this was normal work assigned to the local gangs who did what they were equipped to do and subsequently did not contribute to the efficiency of TP-06. The latter lays ties across seniority districts, and SC-06 helps finish the job by doing the surfacing work. As the foreman of TP-06 put it: these gangs did not work directly with his gang and they were not directly involved with the work of TP-06.

According to the BMW:

"...(the) BNSF must bear an extremely heavy burden in order to validly invoke the

'other starting time' provisions of Rule 27D..." In order to rely on Rule 27D in this case, BNSF must not only show that each of the local forces was supporting TP-06, but that they were 'directly involved' with those terms being given not just a narrow construction, but the 'narrowest possible' construction consistent with the efficient operation of the production crew. TP-06 is programmed and equipped to perform production tie installation work and, save for the Wray Section Gang on one day, BNSF has not and cannot show that any of the six local gangs was involved in production tie installation.¹³ To the extent that any of the six local gangs (were) involved with the work of TP-06, they were tangentially involved, not directly involved, and there is no showing that changing the starting times of the local gangs promoted the efficient operation of the production crew..."¹⁴

The union argues that the incumbents of the six local gangs in question all had regular assignments and that the latter were excluded from coverage of the third paragraph of Rule 27D and its Note which states that production crews subject to other starting times "...include supporting BMW forces who are directly involved...with the efficient operation of the production crew...". But this must be understood, according to the union, in its "...narrowest possible construction..." which burden, the union argues, BNSF has not borne in this case.

The six local gangs cited in the claim had various bulletined starting times between 5:00 and 10:00 AM. Their starting times could be changed within the 5:00-10:00 AM period with 36 hours' notice in accordance with Rule 27C with 36 or 48 hours' notice depending on whether the schedule change was more or less than four hours. Changing

¹³There is admission that the Wray Section Gang TSCC0414 did assist with the installation of ties by TP-06 at one point during the July 6-August 18, 2004 period. Additionally, there is some dispute whether the Front End Loader gang MOX0218 did, in fact, start work outside the 5:00 - 10:00 AM period on the dates in question.

¹⁴BMW Brief @ p. 48.

starting times outside the 5:00-10:00 AM perimeters would require abolishment and re-bulletining of positions to accommodate seniority rights of gang members to bid on positions, according to the BMWWE. This is the accepted interpretation of Rule 27 under Appendix GG of the Seniority Districts Consolidated Agreement of 1999.

Since the six local gangs were inappropriately scheduled to work during the July-August, 2004 time frame, according to the BMWWE, they fall under the overtime provisions of Rule 29 and the remedy to be applied in this case ought to follow arbitral precedent stemming from violations of this latter type of rule. The BMWWE cites Awards, in this respect, with remedies fashioned by arbitrators for violations of union agreements by Carriers involving scheduling of work outside regularly assigned hours in order to avoid payment of overtime.¹⁵

Position of the BNSF

The Carrier argues that Article XI of the 1991 Imposed Agreement was designed by PEB 219 to "...assure Carriers the ability to coordinate use of local maintenance forces alongside large production gangs...". Notwithstanding subsequent PEBs after 1991 Article XI of the 1991 Agreement remained intact up to the present time. The test here, therefore, is not whether the Carrier had the right to reschedule local forces' work days to coincide with the schedule of a production gang, but whether that action was reasonably

¹⁵With respect to avoidance of payment at overtime rate the BMWWE cites a number of NRAB Third Division Awards including 20065, 26519, 27848, 28307, 29542 and 34181. These Awards are found in BMWWE Exhibits S & T.

done in accordance with the language of the Note to Article XI, Section 2 of the 1991 Agreement.

There is a Districts Consolidation Agreement on this property going back to 1999 which which all parties to this arbitration, including the arbitrator, are familiar. According to the Carrier that Agreement, negotiated between the the BNSF and the BMW, acknowledges that both regional system gangs and local supporting crews can be covered by Article IX of the 1991 Agreement. To this effect, the Carrier argues, the 1999 seniority agreement states the following which is applicable to the starting time issue raised in this case.

Article C-1

The starting time of district mobile gangs meeting the Sickles definition, and Regional and System gangs established under Article XIII of the 1991 BMW Imposed Agreement, as amended by Article XVI of the 1996 National Agreement, will be covered by Article IX - Starting Times of the July 29, 1991 BMW Imposed Agreement. It is understood that local supporting forces and interrelated crews supporting the operation of these crews may also be covered by Article IX.¹⁶

Further, according to the Carrier, it may implement changes in starting times of production gangs and local forces under Article IX and if the Organization does not agree it may bring the matter to arbitration. That is what happened in this case.

The Carrier argues that what happened in July-August of 2004 on the Akron Division of the Carrier Powder River Division was basically idiosyncratic and the Carrier's supervision resorted to implementation of Article XI of the 1991 Agreement

¹⁶BNSF Exhibit 18.

only because of this. Production work done by gangs such as TP-06 is usually done during normal working hours but on occasions it is necessary to get longer window periods of track and time in order for a gang such as TP-06/SC-06 to operate efficiently and in order for the Carrier to keep its trains running on schedule. That is what happened at the time and at the location in question in 2004. And, the Carrier argues, that is why the language of Article XI was framed the way it was in the first place in order to accommodate such circumstances. The documentation provided by the Carrier which includes string charts, explanations by managers, and so on justify the actions taken by the Carrier in rescheduling TP-06/SC-06 in July and August of 2004, as well as the local gangs to support that gang's activity.

The position of the Carrier, therefore, is that the issues before the arbitrator in this case are narrow and are limited to "...whether the facts of this case support the Carrier's temporarily changing certain local forces' starting time, so that they could work alongside TP-06/SC-06...".

The Carrier states that it provides an "...abundance of facts..." for the record to support the decision made by supervision to change the work schedules of the local gangs to coincide with the work schedule of TP-06/Sc-06. But, the Carrier concurrently argues, even if it had remained silent the BMW would still bear the burden of proof in this contract interpretation case. Notwithstanding, the Carrier argues that the "...evidence is abundant that these local forces did, in fact, contribute to the efficient operation of TP-06/SC-06 on the dates at bar in this case.

There is a statement in the record submitted by the general director of maintenance schedules. Since 2001 his job has been the "...scheduling of the yearly Capital Maintenance Work Program and the assignment of track windows for all maintenance activities across the BNSF system...".¹⁷ Referencing data¹⁸ gathered by the Carrier this manager states that the work of TP-06 was scheduled at the time it was so that the system production gang working district 400 could avoid the heavy traffic on this one line during the early part of the day and have longer window periods in which to work later in the day. The trains running this line included not only Carrier's freight trains but also Amtrak. The project required the installation of 40,000+ ties on a single track from July 6, 2004 to August 18, 2004 which are the dates stated in the claim. According to this manager, scheduling the work of TP-06 at hours different than those determined by management could have added up to 3 weeks work on the project because the tie gang would have had to clear the track, go to the nearest siding, allow the trains to pass and stop production. Then the crew would have had to travel back to the work site and so on. Finding the longest window period for the production gang to work was directly co-variant to its productivity. There were also some high priority, time sensitive trains on the stretch of track in question which included not only Amtrak but freight trains that carried on-time delivery penalties if schedules were not kept. This manager states the following:

¹⁷BNSF Exhibit 24. All quotes in this section of the Award by the general director of maintenance schedules is taken from this exhibit.

¹⁸Data sheets, including what are called "string charts" are attached to BNSF Exhibits 24 and 25.

"I understand that the BMW...believes the work performed by the local supporting forces in association with the tie gang in this instance could have been performed during their regular hours instead of working with the gang. I do not believe this would be possible, for the same reason that TP-06 gang was moved to the afternoon window. And operating separately from the main TP-06 gang, there would be no available work window for the local supporting forces to do this work at the required pace because they would also be continually clearing for trains as well, presuming they received any practical access at all --- which is doubtful considering the traffic density in this area."

Discussing the priority trains, as well as other trains in the territory also on this single track such as grain trains that may not show up on the string charts at all, this manager observes that all of these trains "...physically occupy space, with the potential to block other trains. BNSF cannot...decide not to move trains for the duration of a project, because there is not enough capacity to do so. This is exacerbated on single-track territory such as was encountered in this case..."

There is a second statement in the record by the assistant director of maintenance production for the Carrier's Powder River Division. This manager discusses why the Carrier changed the hours of the six local gangs during the July-August, 2004 time-frame. This supervisor states that his responsibility is "...production gang planning, coordination of support crews, cost control, safety and quality of scheduled work...". He has been doing this since 1991 and prior to that time had worked as a trackman, machine operator, foreman, road master and assistant project manager.¹⁹ This manager states that he was familiar with the work done by region/system gang TP-06/SC-06 on the dates in question

¹⁹All quotes in this section are taken from BNSF Exhibit 25.

in this case. The work involved scheduled improvements on the Akron Subdivision, Powder River Division in order to "...maintain a class of track for Amtrak, coal and high-priority freight trains to travel safely...". The rationale behind coordinating the work times of the production gang and the local gangs is provided by this manager and is cited here for the record.

"The project (under scrutiny in this case) consisted in placing 34,973 wood ties on mainline and siding tracks. These tracks include road crossings, bridges and curves. In addition, 1,457 switch ties, 200 each 10 ft. ties for bridge approaches and crossings, 725 second hand ties, 29 track panels and associated crossing surfaces were included in this project.

"The local supporting crews that worked with tie gang TP-06 to complete this project are (those cited in the claim filed by the BMW general chairman of the Burlington System Division on September 22, 2004). These support crews were required to assist TP-06 in its work, and so were also given the same start time as the production gang. The crews needed to work hand-in-hand with the tie gang to support the tie placement process. Contrary to the BMW's claim, these support crews are not 'in the way' of the tie gang; they need to be in, ahead and behind the tie gang to prepare and assist with material, crossings, switches and compressed rail conditions so the production gang can complete the project.

"The process for any tie replacement program is to bulletin the production gang on a schedule that may include several projects spread across various seniority districts or divisions for the entire work season. The crews needed to support the tie gang are scheduled from local maintenance forces assigned to the road master's territory or operating divisions. This is done due to the situational needs of each project.

"The situational needs are the requirements that vary considerably from work location to work location during the project. Some locations may need to replace ties in road crossings, bridges, switches and some may not. Likewise, there may be major differences at work locations with respect to tie density per mile, traffic sensitivity for length of slow track, number of curves to surface and the size of the work window given to perform this work. This means that manpower and equipment needs for each location may vary. In order to achieve efficiency in responding to those differing requirements, the Carrier may use local forces to

supplement the production gang, as may be necessary or desirable.

"The support crews' starting times are changed to match the tie gang's due to the section and maintenance gangs taking out crossings and placing them back in service after ties are placed through them and surfacing is done through them. The two crews also prepare switches by removing fastenings ahead of the tie gang placing switch ties and replacing the same fastenings after switch ties have been installed, help surface the point and frog areas of the turnouts where the surfacing machines are not able to fit, place angle bars to hold the rail together where it has been cut for decompression of the rail and haul material for the tie gang to support the gang with missing tie plates and anchors lost in the time placement process."

This Carrier official then goes through a somewhat detailed analysis of the work that each of the local gangs did in assisting the production gangs in their work on the dates in question. For example, the welding gangs performed "de-stressing" of track by cutting it and pulling it back together "...thereby releasing compressive forces ahead of the gang to prevent 'track buckles' which are misalignments of the track structure."

According to this supervisor, welders "...need to be present with the production gang in order to remove track buckles (or bulges in the track) due to compressive forces that occur during the time placement process." On this project there was approximately "...220 cuts made in the rail..." which included cutting the rail and placing a rail joint. This amounted to about "...eight joints per mile...". According to the supervisor "...even if the welders had been able to de-stress the rail during their normal work hours --- which was not feasible in this case, because of train traffic --- their presence during the working hours of TP-06/SC-06 would still have been necessary because the production gangs's tie insertion process itself could have caused track buckling." There are no welders assigned

to production gangs.²⁰

Further, the local maintenance gang had to work along side the production gang on this project in order to "...get the much longer work windows in order to efficiently perform the work..." and in order to handle work at the crossings. The Wray section crew assisted in the removal and replacement of decks at crossings, and did work on switches. They "...help(ed) surface the point and drop areas of turnouts where the surfacing machines (were) not able to fit...". This local gang does other tasks also along side the production gang such as haul materials to it (missing anchors and tie plates lost in the tie placement process) and so on. Local surfacing gangs "...complement the production gang surfacing crew by surfacing a switch, crossing or curve while the other surfacing crew continues to work towards the production gang". The two gangs needed to work the same hours because they "...help each other do pieces of the project to keep the completed track as close to the production gang's schedule..." as possible in order to reduce slow orders. On the project under scrutiny in this case there were "...about 27 crossings...".

According to Powder River assistant director of maintenance production:

"...region/system gangs like TP-06 are sized in anticipation that they will be supplemented by local support crews. That enables the Carrier to efficiently meet

²⁰Information provided on welders is corroborated by a statement in the record by the Carrier's chief engineer of North Operations. According to this manager elevated temperatures during the time of this project in July-August, 2004 could result in rail "...kicking out of alignment..." or buckling which could cause serious accidents. Thus the rails have to be de-stressed. He states: "Tie production gang TP-06 required the support of various crews working in and around the limits of their project to ensure that the rail was properly 'de-stressed' at the end of the work day...It was necessary that these support crews worked in conjunction with TP-06 in order to allow the production gang to maintain maximum productivity and efficiency related to the tie renewal process..." (BNSF Ex. 26).

the varying needs of the different projects as these large production gangs move across several seniority districts during the work season. All of the crews (working with TP-06 in July and August of 2004) had to be working at the same time as the production gang in order to efficiently perform this project.

According to this Carrier supervisor "...local support gangs like all those involved in the current dispute --- district maintenance gangs, section gangs, welders, loaders and surface gangs --- have always served as support for production gangs like TP-06. These support crews perform many functions that are integral to the safe and efficient work of the production gang...". "Changing the starting time of local support forces is necessary to the efficient and effective operation of the production gang, in such situations." This supervisor states that what happened in July and August of 2004 on the Powder River Division may be rare but is not without precedent and changing the hours of support gangs to match those of production gangs involved in projects had been done before.

There is a statement in the record by the road master involved in the project under scrutiny in this case. In answer to questions posed to him by the division engineer the road master states that the production gang could not skip the 27 crossings while laying ties and let the local gang do the crossings during their normal working hours because this would have led to 25+ slow orders during the time-frame of the project.²¹

Additional corroborating statements in the record are found also by the director of maintenance performance and support who points out that priority trains passing through

²¹BNSF Ex. 29. The road master states that it is common for production gangs to have local gangs work with them.

during the morning hours would have disrupted the work of local forces had the latter worked their bulletined hours, and that local forces have tools with them to deal with crossing planks and so on that the production gang does not carry. Carrier's managers confirm that the close interaction between production gangs such as TP-06 and local gangs, irrespective of schedule changes, is a common occurrence.

The Carrier argues that it is aware that the BMWWE will provide information to the arbitrator which attempts to support its position that the Carrier acted improperly when it changed the schedule of the six support gangs and that these gangs could have accomplished all of their work during bulletined work hours. At the most, the Carrier asks that the arbitrator put more credibility in the information it provides in this case. At the least, the Carrier argues that the claim should be denied, in accordance with arbitral precedent, on basis of an irreconcilable conflict of facts.

Lastly, with respect to the merits of this case, the Carrier argues that the claim should be denied in accordance with the rule of laches. The Carrier had invoked Article IX of the 1991 Agreement in the past without complaint by the BMWWE and both sides recognize that the use of local forces "...is a routine part of production gang work...".

With respect to remedy, the Carrier argues that should the claim be sustained the unnamed Claimants as members of the six local gangs are only eligible for the difference between the overtime rate and straight-time rate since they had already been paid the latter.

Discussion

Prior to framing a ruling on the merits of the case the arbitrator will underline the following prolegomena.

First of all, the original concerns about the change in work schedule of members of production gang TP-06 and SC-06 on the dates in question were abandoned by the union in favor of allegations of contract violations centering only on the changes in work schedules of the six local gangs involved in this case. This case deals with the scheduling of work of "...supporting BMW forces who (may or may not be) directly involved..." in the work of system gang TP-06.SC-06 from July 2, 2004 through August 18, 2004.

Secondly, it is clear from studying both the arguments by the BMW and the written statements submitted for the record by those working on the support gangs that a consistent and underlying concern related to the filing of the claim in the first place centered not only on a possible violation by the Carrier of the language in the Note of Rule 27D of the 1982 Agreement, but also Rule 29 which deals with overtime. This is a concern articulated in a number of different ways in the record of this case. The BMW, as well as the gang members providing statements for the record, underline that the Carrier was trying to avoid paying overtime to incumbents of the local gangs for work done outside of their bulletined schedules under guise of the local gangs having to be scheduled at the same time as the production gang in order that the latter could efficiently accomplish its work.

Thirdly, the company's position, however, is that the work schedule changes implemented for the local gangs were not made capriciously or willy-nilly. According to the company, the schedule changes were made under Article IX of the 1991 Imposed Agreement only for reasons directly related to the way it had to do business and in view of the requirements of some of its customers. While not using exactly this language in its arguments the Carrier's representative, with support by statements from operating personnel, contend that the changes in schedule of the support gangs had to do with logistics. If that is so, and the arbitrator is persuaded on the contrary that there is considerable support in the record to warrant such conclusion, then the decision to change the schedules of the local gangs was nothing other than an information-based management decision. Which observation points to the other side of the coin: it is unclear to the arbitrator if any of the authors of the statements penned by members of the local gangs in question, or the foreman of TP-06, had sufficient information to rebut the basis for management's strategic decision-making in the first place.²²

Fourthly, the union states that the local gangs may have indeed been involved in the work of the production gang but, to quote the union directly on this matter "...to the extent that any of the six local gangs (were) involved with the work of TP-06, they were

²²This leads to several asides that need to be disposed of at this point and which can be done so in a Footnote. There is too much information in the record to persuade the arbitrator that there are reconcilable conflicts of fact in this case. By the same token there is insufficient information to warrant conclusion that the laches rule should be applied in this case. The specific action taken by the Carrier in July and August of 2004, specifically with respect to schedule changes of local gangs, is fairly idiosyncratic on this property. And the information provided by the Carrier with respect to the prior history of Article IX based notices to the BMW are not too convincing since most of the notices cited are not on point with this case.

tangentially involved, not directly involved...". The task here is to figure out whether "tangentially" and "directly" overlap, or whether they are simply orthogonal concepts. This may not be as tricky as it seems on first impression because the parties also have a Seniority District Agreement that addresses the issue of the relationship between system gangs and local forces. There is nothing in Rule 27D of the 1982 Agreement which states that arbitrators may not use standard principles in resolving disputes such as the instant one by addressing all potentially applicable contract language between parties when ruling on a grievance related to starting times. Obviously, this case deals not only with the involvement of the local gangs in the work product of TP-06 in July and August of 2004, but also with whether the gangs had to be scheduled to work at the same time in order for TP-06 to have accomplished its objective "...consistent with the efficient operation of..." that gang. A close scrutiny of the rather extensive record on this case shows that the Carrier has been dealt a strong hand on this latter point.

Lastly, albeit this case deals with whether management's decisions about the change in work schedule for the support gangs in question were violative of these workers' contractual protections, it is also about the balance of economic interests which is always an issue central to union-management relations. When the specific details of the arguments presented by both sides to this case are set aside, it is clear that this case revolves around the union's contentions that some of its members lost overtime

opportunities because of management's decisions,²³ and on the company's contention that if the scheduling decisions had not been made the way they were it would have suffered economic duress in view of on-time delivery commitments to certain customers, possible construction cost overruns, and so on.²⁴ The on-time delivery commitments involved the transportation of commodities that had to be delivered in a timely manner. They also involved keeping the track open for Amtrak while track work was being done so that this passenger service could keep to its schedule.

Findings

The BMWWE argues that the "...BNSF must bear an extremely heavy burden in order to validly invoke the 'other starting time' provisions of Rule 27D...". This is incorrect. This is a contract interpretation dispute and the burden of proof lies with the union, and not the Carrier, as moving party.

There is no doubt that the Carrier had the right to invoke Article IX of the 1991 Agreement when changing the work schedules of the six support gangs. There is also no doubt that the BMWWE had the right to grieve that action. The function of this forum is to ascertain if the actions by the Carrier were sufficiently reasonable to have avoided a violation of the language of the Note of Rule 27D of the 1982 Agreement. The Carrier's representative is correct when he states in his Brief that it becomes a question of

²³As well as certain social benefits such as time with their families in accordance with the social schedules of the rest of society as the BMWWE representative argues in his Brief, and so on.

²⁴As well as potential safety hazards particularly relative to the role that the welders played in the project of TP-06 during the time frame in question.

scrutinizing the facts and of interpreting them in the light of the contractual language at bar.

Rulings in this case center on the union's evidentiary burden that the Carrier could have continued to run an efficient operation, and could have reasonably met its contractual requirements to its customers, had the six support gangs' work schedules not been changed to parallel that of the production gang working on seniority district 400 on the Carrier's Powder River Division between the dates of July 6, 2004 and August 18, 2004.

A review of the statements by the foreman of production gang PT-06 and the foremen and incumbents of various positions on the six support gangs, to the extent that it can be ascertained that they worked for any of the gangs in question, warrants the following conclusions.

First of all, all of the statements imply that the work of the specialized, local gangs who worked on crossings, who did the welding and so on during the time-frame in question could have been accomplished equally well had the local gangs just worked their bulletined hours. But how would that have been factually possible? The Carrier provides abundant evidence, none of which is disputed in this case, to show that the time frame that PT-06/SC-06 was assigned to work from July 2 to August 18, 2004 was chosen expressly because of the low traffic volume on the one track in question, and because the scheduled time-frame for work provided a longer window period for PT-06/SC-06, and a fortiori the local gangs, in which to work. All other things being equal, it is illogical to

argue that local gangs could accomplish as much when they are being interrupted more often. As stated earlier, it is not clear that any of the authors of the statements solicited by the BMWWE were in a position to appreciate why their schedules were changed by the Carrier on the dates in question in the first place. They are not paid to engage in exercises in logistics. They are paid to do specialized and often highly technical work related to the building, maintenance and upkeep of railroad tracks, roadbeds, crossings, bridges and so on so that moving stock can run in a timely and safe manner. Thus if the work schedules of the six local gangs had not been changed, and if information provided by the Carrier in this case is credible, and the arbitrator can find no reason to second-guess it, then the schedules of the rolling stock passing on the single track would have been affected during the July-August, 2004 time-frame. Something had to give. Either the train schedules would have had to have been amended, which would have practically amounted to delays, or the work done by the local gangs would have been interrupted more often than during the schedule they were asked to work. This is an indisputable conclusion supported by the information in the record of this case albeit not one single author of the statements provided by the BMWWE deals with this issue.

So if the schedules of the six gangs had not been changed this would logically have had an effect during the time-frame in question on the schedules of the rolling stock. But if the work schedules of the six gangs had not been changed would that have had an effect on the "...efficient operation of the production crew (TP-06)..."? A written statement by one of the Carrier's engineers states that a continuing problem with

installing new track, and particularly so when temperatures are elevated as they undoubtedly were in July and August of the summer of 2004, is that the tracks could buckle and they need to be de-stressed. In other words, they need to be cut, a piece taken out, and then put back together. TP-06 had no welders assigned to it. From information of record the close collaboration of local gang welders and a production gang such as TP-06 appears to be so self-evident, particularly in view of the circumstances outlined in this case, that it requires no further comment. The assistant director of maintenance production states that the tie insertion process in and of itself can make track buckle. This statement is not disputed in the record. And what exactly was TP-06 to have done if that had happened, absent the local welders? The foreman of TP-06 states that few of the cuts were welded back together while the production gang was on site during July and August of 2004, implying apparently that the welders were not needed. But the track did not have to be rewelded immediately since there were other ways to hold the track together after the cuts were made. But the welders had to make the cuts in the first place. The foreman of TP-06 intimates that the Carrier could have assigned extra men to his gang, implying also apparently that this could have welders. That could be. But the arbitrator has not been apprised of any contractual requirement for Carrier's supervision to have done that. And as a matter of logic, why do that anyway? There were two local welding gangs available with employees with precisely the kind of expertise that was needed to do the de-stressing of the track while it was being laid by TP-06. Further, TP-06 did not repair or renew crossings. That was done by other specialized local gangs. Theoretically, it may

also have been possible for the production gang to have laid new track from MP396 to MP 423 on the single track in question in the weather conditions at stake without a local gang concurrently helping it by renewing crossings. But as a logical matter that probably makes little sense. As an exercise in logistics, it probably makes even less sense. And particularly so in view of the train scheduling issues outlined earlier and the extended window period for working which came with the re-scheduling of the local gangs.

Lastly, there is information that the local surfacing gang and the end loader gang assisted production gang TP-06 in various other ways by helping with surfacing, by helping by bring materials to the work location, by coordinating the work of renewing crossings and so on. Whether any of this could have been done had the six local gangs worked their bulletined hours is never made clear by the BMWWE.²⁵ There are some assertions to that effect. But there is no evidence.

Does this mean that all of the local gangs were directly involved in the work of the system gang in accordance with the meaning and intent of the language found in the Note of Rule 27D or of Article IX of the 1991 Agreement? In its arguments before this forum the BMWWE does not state that the local gangs were not involved with the work done by TP-06/SC-06. It argues that they were not "directly" involved. According to the BMWWE, the six local gangs were only "...tangentially..." involved, as noted earlier. Unfortunately

²⁵ There is some information in the record that one of the six gangs may not have been assigned a new schedule during the July-August time-frame. If so, then this case is about the other five. The BMWWE suggests that the schedule status of this one gang could be ascertained if the arbitrator ordered a check of the records. That would be a reasonable suggestion in the event of a sustaining Award in this case. In the event of a denial Award the status of that one gang becomes moot.

the arguments provided to the arbitrator with respect to this distinction are not developed. What is clear is that the local gangs were involved in the work done by TP-06 to some degree. According to the Carrier they were irreconcilably involved. According to the BMWWE they were tangentially involved. But they were involved.

The language of the Note of Rule 27D states that the "...narrowest possible construction..." should be given to the phrase: "...directly involved...", which is consistent with the efficient operation of a production crew. Exactly what the phrase: "...narrowest possible construction..." means is anybody's guess. It is general language enunciated at a rather high level of abstraction. It provides little constructive guidance for those charged with interpreting the language of contract. It is another curious invention of a PEB.

But the parties to this case themselves apparently spent some time thinking about this issue when they negotiated both the amendments to the 1982 Agreement and their 1999 Seniority District Agreement. Both contain the same language. Article C-1 of the 1999 Agreement will be cited here only by means of exemplification. This provision deals with starting times, district and regional gangs and local gangs. Whether the latter are directly or tangentially involved with the work of a system gang is addressed, to some extent, by Article C-1 which tells us that:

"...It is understood that local supporting forces and interrelated crews supporting the operation of (a system gang) may also be covered by Article IX..." of the 1991 Agreement. (Emphasis added)

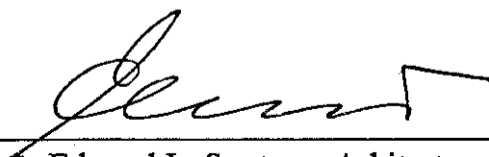
The facts outlined in this case persuade the arbitrator that the six local gangs were supporting the operation of TP-06 in July and August of 2004. As such they could have

been properly ("...may also be...") covered by Article IX of the 1991 Agreement.

The ruling is that the BNSF did not act improperly by changing the work schedules of the six local gangs when it did so in July and August of 2004 in accordance with Article IX of the 1991 Imposed Agreement. The grievance before the arbitrator will be denied on its merits.

Award

The six (6) questions cited in the grievance filed by the BMW on September 22, 2004 are answered in the negative.

A handwritten signature in black ink, appearing to read "Suntrup", is written over a horizontal line.

Edward L. Suntrup, Arbitrator

Dated: October 10, 2005