In the Matter of Arbitration

Issue: Scheduling the Work Week

Union Pacific Railroad Company

vs

Brotherhood of Maintenance of Way Employees
AFL-CIO

Award Issued: September 10, 1999

Edward L. Suntrup
Arbitrator

In the Matter of Arbitration

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Claim 920313/S-686/PLB 6206-1**
	)	
Union Pacific Railroad Company	)	

Appearances

For the Union

R. B. Wehrli	-	Vice President
D. D. Tanner	-	General Chairman
S. Powers	-	Assistant to the President
M. Schappaugh	-	Staff Assistant

For the Company

W. E. Naro	-	General Director
D. Ring	-	Director

Introduction

The instant case deals with one grievance, herein designated as claim 92033/S-686, which will serve as lead case for resolution of other grievances which have been filed by the union which deal with comparable matters. The parties mutually framed an arbitration Agreement in which they state the following, in pertinent part:

> "The Award rendered (on) claim 920313 (S-686) will be applied by the parties (to) the partial or complete disposal and resolution as applicable (to) the following

list of (43 separate) claims".[1]

The parties also state inter alia in their arbitration Agreement, which is dated February 4, 1999 that a hearing on this matter would be held "...within...120...days from the appointment of the arbitrator..." at a location mutually agreeable to the parties. A hearing was held on May 12, 1999 in Chicago, Illinois. At the hearing the parties presented arguments based on Briefs and Exhibits which had been sent to the arbitrator before the hearing itself.[2] The arbitration Agreement also states that the arbitrator "...shall make findings and render an Award in writing on the cases within...30...days after the close of the hearing". By any standard, the record on these disputes which is before the arbitrator is voluminous. In view of this the arbitrator requested an extension

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[1]The company's file number of the case is 920313 and the union's file number is S-686. The arbitrator will not list here the parties' file numbers of each of the other claims. The file numbers of those claims are found listed in correspondence dated February 4, 1999 from the company's General Director of Labor Relations to the General Chairman of the Union. The parties, it appears, may also have decided to privately include some additional cases. The company states in its Brief that "since the (arbitration) agreement of February 4, 1999 there have been additional cases added to the outcome of the decision of this Board with the total number of cases tied to the lead case approaching fifty (50)". (Company Brief @ p. 15). The union neither denies nor confirms this. It should be noted for the record that 8 of the claims subsumed under the instant case had been docketed earlier before the National Railroad Adjustment Board (NRAB) and have been withdrawn The lead case being ruled on here by the arbitrator had also been docketed before the NRAB under file No. 93-3-465 and has also been withdrawn. The general subject-matter of the instant case was stated as follows when it was docketed before the NRAB: "Carrier changed the work week of Production and Support Gangs from a Monday to Friday work week to Sunday through Thursday work week". Copies of earlier submissions to the NRAB with accompanying Exhibits are found in Company Exhibits L & M. The 44 claims are limited to the gangs stated in the statement of the grievance. Apparently, a claim was filed also somewhere along the line for a Gang 9049. The Carrier states that it has no record of such Gang (Union Exhibit F-5). Whether such is so or not is moot with respect to this arbitration. The lead case under scrutiny in the instant arbitration is also one of the cases found in the "Attachment 'A'" to the Contract Interpretation Committee (CIC) ruling of December 26, 1994 on Issue No. 25 (Union Exhibit E).

[2]Both sides presented Briefs (Submissions) which they exchanged, which were followed by Rebuttal Briefs to the arbitrator. The record includes 7 volumes of materials which are of varying length.

in framing and issuing an Award. Such was kindly granted by the parties.

Statement of the Grievance

The grievance before the arbitrator is the following:

Were there labor Agreement violations when the Company changed the work week of System Gangs 9063, 9073 and 9083 and B&B Gangs 6821 and 6841,[3] beginning March 15, 1992, from a Monday through Friday work week, to a Sunday through Thursday work week?

If there were violations the union requests that the arbitrator grant the following relief to members of the above captioned System Gangs as of March 15, 1992 and continuing thereafter:

1. Each employee assigned to these gangs shall be allowed eight (8) hours' pay at his or her respective straight time rate for each Friday the employer denied the employee the right to work.

2. Each employee assigned to these gangs shall be paid at his or her respective overtime rate for all services rendered on each Sunday that the employer required the employee to work.[4]

Background to the Filing of the Claims

The company issued Maintenance of Way bulletins on the property in January of

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[3]At one point in its brief to the arbitrator the company refers to Bridge & Building Support Gangs 6821 and 6824 as being involved in this case (Submission @ p. 15). The arbitrator will assume that the latter is in error since the number of such gang does not surface at any other point in the record.

[4]This is a re-formulation by the arbitrator of the Statement of Claim found in both the Union's and the Company's Submissions. The Company states, in its Submission, that its version of the Statement of Claim is "...copied from the Organization's notification of intent to file an "ex parte" to the National Railroad Adjustment Board, and is used in (its) Submission (to the arbitrator here) solely for identification purposes and its quotation does not constitute an adoption thereof by the Union Pacific Railroad Company..." (Submission @ p. 2). The original claim which was filed on March 26, 1992 which inaugurated, so to speak, the stream of grievances at bar here, of which claim 920313/S-686 has been chosen as lead claim, contains references to rules of the on property agreement between the parties, as well as the Imposed Agreement of February 6, 1992 (Public Law 102-29) as having been allegedly violated by the Carrier's actions beginning March 15, 1992 (Employees' Exhibit F @ pp. 1-3).

1992.[5] These bulletins advertised positions open for bid on the gangs involved in this case. The bulletins stated classifications involved, headquarters' location, rates of pay, meal periods, hours of service and rest days. These bulletins for System Gangs 9063, 9073 and 9083 and B&B Gangs 6821 and 6841 were for 8 hour shifts, Saturday and Sunday as rest days. Each of the Claimants to this case successfully applied for positions on these various gangs in accordance with their seniority.

But a problem surfaced immediately when the bulletins were issued because they contained on them the following statement: "All gangs are subject to alternate work week conditions under PEB 219"[6]. The union found this language objectionable.

The General Chairman of the Union Pacific System, at that time,[7] forthwith called the company's Labor Relations' Department after the bulletins had been issued and discussed with the Assistant Director[8] the inclusion of the (by then) controversial statement in the bulletins. This discussion was followed by a letter to the Labor

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[5]Using telephonic advertisement recording procedures in place on this property in 1992.

[6] Curiously enough, a search of the voluminous record before the arbitrator on this case fails to produce copies of those January, 1992 bulletins. The record does contain copies of bulletins issued in 1989 (Union Exhibit I: 5 different bulletins); a copy of a bulletin issued in 1993 (Union Exhibit F-1, Attachment 2); copies of 1997 abolishment notices and bulletins for various gangs other than those under scrutiny in this case (Union Exhibit J); and copies of 1999 bulletins for various gangs other than those involved in this case (Union Exhibit). The 1989 bulletins do not contain the controversial statement because they were pre-PEB 219. The 1997 and 1999 bulletins also do not contain the statement which was found on the 1992 and the 1993 bulletins. A copy of the full text of well-known PEB 219 in this industry is found at Company Exhibit B. The full title of PEB 219 is: "Report to the President by the Emergency Board No. 219 Submitted Pursuant to Executive Order No. 12714, Dated May 3, 1990 and Section 10 of the Railway Labor Act, as Amended".

[7]Who is now Vice President of the Union.

[8]Who is now a Director.

Relations' Department in early February of 1992 wherein the General Chairman stated his reasons for objecting to the inclusion of the statement on the bulletins. Among other things, the General Chairman intimated that the statement could lead to misunderstandings with respect to the latitude of management's right to unilaterally change scheduled work weeks without re-bulletining positions.[9] The General Chairman asked the company's supervision to "...discontinue including the remark in question on all advertisement and assignment bulletins". The General Chairman then argued as follows which is cited here for the record:

> "Aside from the fact that this Organization feels the inference of the message is inaccurate, there is no valid basis under Rule 20, or any other provision of our Agreement or PEB 219 to include such information on bulletins advertising and assigning positions...
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> .....
>
> "(I)t is our position that the alternative work weeks and rest days' provision of Presidential Emergency Board (PEB) 219 does not apply to 'all gangs'. Instead it may only apply to 'production crews' as clarified by the Interpretation Committee (of PEB 219)...
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> "Secondly, while the statement, as it applies to production crews, is technically correct, it should be recognized that the Carrier does not have the unrestricted right to change work weeks and rest days at will or based merely on a manager's desire. The PEB intended that production crews will be given both weekend days as rest days and only where there is a real need may the Carrier establish alternative work

[9]A copy of the February 3, 1992 letter was also sent to the company's Manager of Maintenance Services, and to the Director of Non-Operating Personnel Services. See Union Exhibit F-1, Attachment 1 which is the source of quotes also immediately following. When a same document appears in both parties' Exhibits accompanying Briefs on this case the arbitrator will cite only one parties' Exhibit with other included by reference. There are duplicates of many of some documents found in Exhibits to this arbitrator since the original Exhibits accompanying written arguments on this case submitted to the NRAB (Company Exhibits L & M) are also part of the record.

> weeks and rest days for a production crew. Contrary to the remark's possible inference otherwise, the Carrier does not have the right to change an existing production gang's work week and rest days bulletined Monday through Friday, and Saturday and Sunday, respectively, to alternative work weeks and rest days. Again, if the Carrier has a legitimate need to establish a production crew with an other than Monday-Friday work week with Saturday-Sunday rest days, it must establish that gang through the normal bulletining procedures..."

These early concerns by the General Chairman became premonition of things to come. Because about a month later, on March 2, 1992, the Carrier's Assistant Director responded to the General Chairman as follows:

> "The inclusion of the language on the bulletin(s) is not outside the intent of Rule 20 or the Collective Bargaining Agreement, nor in violation of the spirit of PEB 219. Rather, it is only an informative statement defining the rights accorded to the Carrier under the PEB...and is not inaccurate.
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> "It also remains the Carrier's intent to apply Rule 40 and the Memorandum Agreement of October 29, 1990 when applicable and practicable and our supervisors have been conveyed this information that these agreements are still valid.
>
> "Therefore, the (company) is not agreeable to removing the informational statement from the bulletins...".[10]

Cutting to the quick of a developing dispute which would end up in this arbitration, the company's representative also stated the following in this correspondence:

> "Additionally, as stated to you in our conversation of January 17, 1992, I do not concur that the Carrier can only utilize the benefits provided by the Board through the bulletining process. If I were to accept your argument, then this would place a significant restriction on the Carrier not intended. It would preclude us from being able to realize the full benefits of the work relief rule. Due to the time periods of the bulletining rule and the disruption to the stability of the gang, I do not concur that this was the Board's intent when providing relief granting the Carrier's

[10]Union Exhibit F-2, Attachment 1. Additional quotes which follow are taken from this Exhibit..

flexibility and productivity.

> "Obviously, if we cannot as a carrier take advantage of the benefits of the work relief rule and are faced with the restrictions you imply are associated with the relief rule, then the Carrier's ability to meet customer commitments and remain competitive is reduced. I do not believe this is either parties' intent...".

The die was cast. Several days after this letter was written the Assistant Director of Labor Relations then advised the General Chairman that the work weeks of System Gangs 9063-73-83 were, in fact, being changed from a Monday-Friday schedule, to a Sunday-Thursday schedule.

When this happened, the General Chairman immediately wrote the following to the company on March 10, 1992 which is cited here in pertinent part:

> "This is in reference to your advice Thursday, March 5, 1992 that the work week for System Gangs 9063, 9073 and 9083 was being changed...effective Sunday, March 15, 1992...
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> "(First of all)...PEB (219) intended that production crews will be given both weekend days as rest days and only when there is a real need may the Carrier establish alternate work weeks and rest days for a production crew. I do not believe the Carrier has satisfied its burden of proof in this regard. That is, the Carrier has not provided evidence indicating there is a real need to establish an other than Monday through Friday work week with Saturday-Sunday rest days.
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> "(Secondly) without waiving the foregoing, even if there was a real need to change the composition of the work week as desired, you indicated the Carrier was not agreeable to establishing these gangs with other than Monday through Friday work week through the normal bulletining procedures. Under the provisions of Rule 20 BULLETINING POSITIONS - VACANCIES arrangements could have been made to bulletin these positions accordingly on Thursday's (March 5, 1992) telephonic advertisement recording. The advertisement bulletin would have closed Monday, March 9, 1992 and the telephonic assignment recording could have been issued as scheduled on Thursday, March 12, 1992. In other words the bulletining process could have been completed in time to have all assignees report by Sunday, March 15, 1992 the first day the Carrier desired to have these gangs commence working a

Sunday through Thursday work week with Friday-Saturday rest days.

"Had you made arrangements for the Carrier to have advertisement and assignment bulletins distributed in this connection, the Carrier would have at least complied with the bulletining requirements of the Agreement...

"In conclusion, since the Carrier has failed to establish a real need to have these gangs work a Sunday through Thursday work week...and failed to bulletin these assignment as required...(it is the union's)...position that the Carrier is in violation of the Agreement..."[11]

Not surprisingly, a grievance was filed shortly thereafter on March 26, 1992 by the union with the company's Manager of Maintenance Services which outlined, in substance, what was stated above. The General Chairman re-interated in that grievance that it was being filed because company's supervision had not shown a need to change the work schedules, and because the company had failed to re-bulletin the positions in accordance with Rule 20 of the Agreement. The grievance also referenced Article X of the February 6, 1992 Agreement which "...intended that production crews (would) be given both week-end days as rest days..."[12] absent showing of a real need on the part of the employer to the contrary. According to the grievance, such need had not been shown.

The claim was denied on grounds that it was vague, that the imposed Agreement and the subsequent Interpretation Committee permitted the company some accommodations with respect to schedule changes in view of its needs. The Carrier argued that those needs existed. To support this the Manager of Maintenance Services

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[11]Union Exhibit F-1, Attachment No. 1, Sheets 3-4.

[12] Union Exhibit F-1. This grievance is the same one which became subject of NRAB Case 93-3-465 (formerly Union Exhibit A-5 now found in Company Exhibit M).

argued inter alia, that the actions by the Carrier in this respect were not arbitrary since "...traffic patterns on the LaGrande subdivision for scheduled trains..." showed that:

> "Allowing for unscheduled trains (i.e. work trains, etc.) it was the determination that the Carrier was justified in scheduling to take advantage of the optimum track time for this large complement of employees thus necessitating the Sunday through Thursday work week. A Sunday-Thursday work week is in compliance with Article X of the Imposed Agreement..."[13]

With this denial of the claim the Manager included copies of computer-mapped traffic patterns for a 7 day period which outlined density of trains running during this period at different locations.[14] Further, the Carrier argued that its actions "...were not arbitrary in that the System Gangs were bulletined with the language that they were subject to the Alternative Work Week Rules...".[15]

Agreement Provisions & Rulings by the Contract Interpretation Committee

The following are the Agreement provisions and Contract Interpretation Committee's (CIC) rulings cited by the parties in the handling of this case.

Imposed Agreement of February 6, 1992[16]

Article X

(a) Production crews* may be established consisting of five (5) eight (8) hour days

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[13]Union Exhibit F-2.

[14] Union Exhibit F-2, Attachment 2, Sheets 1-7.

[15] Union Exhibit F-2

[16] Article VI, Section 5 - Alternative Work Week and Rest Days of PEB 219, which became effective July 29, 1991, subsequently became what the parties to this arbitration designated as Article X of the February 6, 1992 Imposed Agreement (Company Exhibit G).

followed by two (2) consecutive rest days. One of those rest days shall either be a Saturday or a Sunday, and both week-end days shall be designated as rest days where there is no need for week-end work.

(b) Production crews may be established consisting of four (4) ten (10) hour days, followed by three (3) consecutive rest days, in lieu of five (5) eight (8) hour days. The rest days of such compressed work week will include either Saturday or Sunday. However, where there is no carrier need for week-end work, production crews will be given both week-end days as rest days.

Note: * - Production crews include locally based supporting BMWE forces whose assignment is associated with that of a production crew to the extent that a different work week or rest days for such crews, on the one hand, and such supporting forces, on the other, would delay the work or otherwise interfere with its orderly progress.

Contract Interpretation Committee Ruling (October 7, 1992)[17]

Issue No. 16

Existing rules and practices require carriers to bulletin and maintain fixed work weeks and rest days. Was it the intention of PEB No. 219 in Article VI-J-Section 5, Alternative Work Weeks and Rest Days, to abrogate such existing rules and practices and allow Carriers to change work weeks and rest days after bulletining and assignment positions. Or, was it the intention of PEB No. 219 that existing rules and practices requiring Carrier to bulletin and maintain fixed work weeks would remain in effect?

Answer to Issue No. 16

PEB No. 219's Recommendation regarding Alternative Work Weeks and Rest Days did not address, directly or by implication, the question of existing bulletin and assignment rules and procedures. It is the finding and opinion of the Neutral Member of the Committee that the Recommendation of PEB No. 219 regarding Alternative Work Weeks and Rest Day, and Article X of the Imposed Agreement,

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[17]Pursuant to Recommendations by Presidential Emergency Board No. 219 Involving the National Railway Labor Conference (NRLC) & the Brotherhood of Maintenance of Way Employees (BMWE). Interpretation of Unresolved Questions Concerning the 1991 National Agreement Between the Carriers Represented by the NRLC & the BMWE (Union Exhibit C).

which granted flexibility requested by the Carrier in establishing work week schedules, do not relieve a Carrier from complying with the existing rules and procedures regarding the bulletining and assigning of employees to Alternative Work Week Schedules.[18]

Contract Interpretation Committee Ruling (July 27, 1994)[19]

Issue No. 21: Article X -Alternative Work Weeks and Rest Days

Sub-Question No. 1

Did Article X - Alternative Work Weeks and Rest Days abrogate or change existing rules and practices which required carriers to bulletin and maintain fixed work weeks?

Answer to Sub-Question No. 1

This Neutral Member agrees with the answer to Issue No. 16. PEB 219 did not reference existing local rules and/or practices applicable to the bulletining and assignment of work weeks for production gangs. Nor does Article X of the Imposed Agreement address local rules and/or practices governing the bulletining and assignment of work weeks for production gangs. Both PEB 219 and Article X of the Imposed Agreement are silent on this subject. Accordingly, those local rules and/or practices were not abrogated by Article X and remain in effect on those carriers where they currently exist.

Sub-Question No. 2

If there is a "minor" dispute between a Carrier and the BMWE concerning the changing of bulletined work weeks and rest days, in what forum should that dispute be resolved?

Answer to Sub-Question No. 2

Article XVIII of the Imposed Agreement provides that disputes arising over the

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[18]Neutral Member: Richard R. Kasher, Contract Interpretation Committee (CIC).

[19] Cited in pertinent part. Neutral Kasher served on the CIC from August of 1991 to February of 1993 when Neutral Robert M. O'Brien was the chosen by the parties to serve on the Committee. The July 27, 1994 ruling is by Mr. O'Brien (Union Exhibit D).

application or interpretation of this Agreement will be referred to the Interpretation Committee except that the Committee's jurisdiction shall not overlap those areas where other recommendations of PEB 219 have provided for a specific dispute resolution mechanism. PEB 219 did not recommend another dispute resolution mechanism to resolve disputes over alternative work weeks and rest days. Thus, this Committee has jurisdiction to resolve disputes over the application or interpretation of Article X of the Imposed Agreement.

Article XVIII clearly states that this Committee only has jurisdiction to address disputes involving the application or interpretation of the Imposed Agreement. Therefore, disputes that exclusively involve the application or interpretation of local rules and/or practices applicable to the bulletining and assignment of work weeks and rest days for production gangs must be resolved in accordance with Section 3 of the Railway Labor Act. Where there is a dispute as to whether the Interpretation Committee or another forum has jurisdiction over an issue involving the Imposed Agreement, the Interpretation Committee will make this initial jurisdictional determination.

Contract Interpretation Committee Ruling (December 26, 1994)

Issue No. 25

Sub-Question No. 1: Article X - Alternative Work Weekw and Rest Days

Did Article X - Alternative Work Weeks and Rest Days grant the Carriers the right to change bulletined work week assignments of positons on production gangs without re-bulletining the positions where such changes in work weeks were not permitted by pre-PEB 219 rules or practices?

Answer to Sub-Question No. 1

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The central question to be answered by this Committee is whether local rules and/or practices that require carriers to re-bulletin positions on a production gang when the production gang's work week is changed were abrogated by Article X of the Imposed Agreement? Or whether they remained in effect subsequent to the Imposed Agreement?

In the Neutral Member's opinion, this precise question has already been answered

by the CIC in Issue No. 16 and Issue No. 21. In Issue No. 16, Neutral Member Richard Kasher found that PEB 219 did not address, directly or by implication, the question of existing bulletin and assignment rules and procedures and that a carrier was not relieved of complying with existing rules and procedures regarding the bulletining and assigning of employees to Alternative work Week schedules. The present Neutral Member of the CIC embraced the Answer to Issue No. 16 in his Answer to Issue No. 21... The Neutral Member recognizes that this Answer to Issue No. 16 and Issue No. 21 imposes a limit on some of the flexibility granted carriers by PEB 219 in scheduling maintenance work. Nevertheless, since PEB 219 did not reference existing local rules and/or practices governing the bulletining and assignment of work weeks for maintenance employees when it considered the carriers' proposals for alternative work weeks and rest days, there is no reason to believe that they intended their recommendation to abrogate such local rules and/or practices on those carriers where they existed. Since neither PEB 219 nor Article X of the imposed Agreement referred to existing local rules and/or practices governing the bulletining and assignment of work weeks and/or rest days those rules and/or practices were not affected by the Imposed Agreement. Accordingly, they must still be adhered to until changed by mutual agreement.

Sub-Question No. 2

In what forum should the claims identified in Attachment "A" concerning the changing of bulletined work weeks and rest days be resolved?[20]

Answer to Sub-Question No. 2

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This Committee is not empowered to determine whether Rule 20 and/or Rule 40 on the Union Pacific Railroad were violated but we do have the right to decide if Article X of the Imposed Agreement guaranteed the production gangs in question Saturday and Sunday as rest days. The Neutral Member would direct that the claims pending on the Union Pacific Railroad be resolved pursuant to Section 3 of the Railway Labor Act inasmuch as they involve the interpretation and application of local rules and/or practices.

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[20]Attachment "A" to Issue No. 25 ruled on by the Contract Interpretation Committee (CIC) includes 3 claims filed by the BMWE on the Union Pacific property, and 4 filed on the CSX property. One of the UP cases is the lead case here (Carrier File 920313/BMWE File S-686). See earlier: Footnote No. 1 supra. One of the listed CSX cases (Carrier File 12(93-1127) was subject of an arbitration Award issued on September 9, 1996 (Meyers, Neutral) (Company Exhibit K).

Rule 20: Bulletining Positions - Vacancies[21]

(a) All new positions or vacancies that are to be filled...including temporary vacancies of thirty (30) calendar days or more duration, created by the absence of the regular occupant of the position for such reasons as assigned to a temporary assignment, sickness, leave of absence, etc., shall be bulletined to all employees holding seniority on the district in the class in which the new position is created or vacancy occurs.

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Bulletins will show location, descriptive title and rate of pay, and will be prepared in the format set forth in Appendix I.

(h) Positions will not be bulletined in connection with changing of payroll classifications, rates of pay, gang numbers, or changes involving section headquarters within the established section limits.

Discussion

The union outlines a number of arguments in its Submission all of which center, one way or another, on the premise that the grievance before the arbitrator in this case should be sustained on basis of local agreement protections. Those arguments inter alia state the following.[22] According to the union, the key question for the arbitrator here is whether the UP can "...unilaterally change bulletined work weeks without first abolishing and re-bulletining positions"? In answering that question in the negative the union further argues that the "...schedule agreement does not permit work weeks of positions to be unilaterally changed by the Carrier once those positions have been bulletined and

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[21] Agreement effective January 1, 1973, revised April 1, 1992.

[22] Although the parties' Briefs, including the Rebuttals, are fairly extensive, some of the arguments found therein have already been laid out in this Award by the arbitrator in the foregoing "Background to the Filing of the Claims" section and will not be repeated.

assigned in accordance with Rule 20". The instant claim before the arbitrator should be sustained, according to the union, on basis of the "...clear contract language of Rule 20...", as well as on basis of past practice.

The union argues that the company mistakenly believes that it obtained the right to make unilateral changes in work weeks, including assigning trackmen to work on a Saturday or Sunday as part of their work week without paying overtime, on basis of intent found in Article X of the Imposed Agreement of 1992. First of all, the union argues, it has always resisted such changes in the past since a predictable work week "...is essential to allow employees an opportunity to organize and plan their personal lives...". It has further resisted such changes because predictable, bulletined work weeks are essential for the intelligent "...exercise of seniority rights...". Secondly, according to the union, any gains which the company believes it may have obtained from Article X of the Imposed Agreement has been qualified on three different occasions by the Contract Interpretation Committee which held that in the area of work week schedules Article X did not abrogate local contract provisions.

The union acknowledges that Rule 20(h) does state that positions do not need to be bulletined under certain circumstances. Those exceptions include changes in payroll classifications, rates of pay, gang numbers and changes involving section headquarters within established section limits. But this Rule does require bulletining on basis of changes in the work week, according to the union. If Rule 20 did not require this, the language of the Rule would state that as an exception also. But such is not the case. The

union cites the contract construction principle which states that to exclude one or more of a class in a written instrument means to include all others.

The union states that prior to PEB 219 the company did not have the unilateral right to change work weeks without issuing new bulletins. Nor did it obtain the right to do so from PEB 219.

The company, on the other hand, argues that the issue to be resolved here is the following:

> "Does Article X - Alternative Work Weeks and Rest Days of the Imposed Agreement of February 6, 1992 require the Carrier to abolish and re-establish a New Production Crew (Gangs) including Support Gangs each and every time the Carrier changes the work week of the Crew or Gangs in order to achieve the operational flexibility accorded by Presidential Emergency Board 219"?

After discussing the history of PEB 219 inter alia. including the rulings by the CIC, the company goes on to state that the CIC "...specifically retained jurisdiction over... Article X disputes and advised that the BMWE and the Union Pacific were to pursue resolution (in another forum) of whether Rules 20 or 40 were indeed violated". This, according to the company, is the purpose of this arbitration..

In arguing that Rule 20 was not violated by the company's unilateral actions when it changed the gangs' work weeks in March of 1992 the company states that it does not have to abolish and re-bulletin positions when making certain changes, but that it only has to give "...adequate notice..." of such changes to members of track gangs. In so

arguing in its Brief the company appear to lean heavily on the Meyers' Award[23] which, according to the company, dealt with "...similar claims..." at CSX. The company then states:

> "The crucial test for the Organization is to point to the specific language of the Collective Bargaining Agreement which would prohibit this Carrier from making (such changes as are complained of in the claim)...after giving adequate notice".

The company then addresses the issue of past practice. According to it, the company does have a "...substantial practice..." on this property of making work week changes outside the exceptions permitted in Rule 20(h) without abolishing and re-bulletining positions. Such has happened, according to the company, when work week changes have been made in the past due to "...elections made pursuant to Article 40...", or when employees have opted for "make-up time". Further, according to the Carrier, when work weeks were changed prior to PEB 219 "...in conformity with the (Van Wart) decision",[24] System Production Gangs had not been abolished and re-bulletined.

Jurisdiction

In establishing the jurisdiction of this forum to rule on instant claim 920313/S-686 before it the arbitrator can do no better than to defer to the CIC itself which addressed this very topic in its discussion and rulings on Issue No. 25 of December 26, 1994. Not

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[23]Supra. Footnote 20 and Company Exhibit K. It should be kept in mind, however, that the issues at bar in this case occurred in 1992. The Meyers' Award off CSX was issued in 1996.

[24]The Van Wart Award was issued June 8, 1989 (Company Exhibit N).

only is such reference applicable here as a matter of arbitral precedent[25] but it is also pertinent because the CIC's ruling on Issue No. 25 specifically refers to the lead claim under scrutiny here as one of the claims appended in its own Attachment "A". Reference to the CIC in this instance is squarely on point. The CIC states the following in its ruling on Issue No. 25:

> "Several claims have been filed on behalf of maintenance of way employees on the Union Pacific Railroad and on CSX Transportation, Inc. protesting the unilateral change in the work week of production gangs or system production gangs without re-bulletining those positions. The BMWE contends that those claims (appended hereto as Attachment "A") involve local rules and/or practices and should be resolved in accordance with Section 3 of the Railway Labor Act. However, the Carriers argue that they should be decided by the CIC since they involve the proper interpretation and application of Article X of the Imposed Agreement over which this Committee has jurisdiction.
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> Article XVIII of the Imposed Agreement expressly limits the jurisdiction of this Committee to disputes involving the application and interpretation of the Imposed Agreement.[26] This Committee has no authority to interpret or apply local rules and/or practices indigenous to individual carriers. Those disputes must be resolved pursuant to Section 3 of the Railway Labor Act.

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[25]The arbitration precedent emanating from CIC No. 25 (as well as any of the other CIC rulings) is one which takes place in an idiosyncratic context. But it represents arbitral precedent nevertheless.

[26]**Article XVIII** of the Imposed Agreement of July 29, 1991, which has been cited in this Award a number of times in references to CIC rulings, states the following, in pertinent part, which is cited here for the record (Company Exhibit G).

> Disputes arising over the application or interpretation of this Agreement will be referred to a joint Interpretation Committee consisting of an equal number of representatives of both parties. The Committee's jurisdiction shall not overlap those areas where other recommendations have provided for a specific dispute resolution mechanism.
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> Within ninety days of the effective date of the Agreement, the parties shall select a neutral person to serve with the committee, as needed. If the parties fail to agree upon such a neutral person, either party may request of list from the NMB of five potential arbitrators from which the parties should choose the arbitrator by alternatively striking names from the list.

The Contract Interpretation Committee then goes on to say, however, which goes to the heart of the matter involved in the instant claim, the following:

> Having merely reiterated the findings of this Committee in Issue No. 21, how are the claims on Attachment "A" (including Claim 920313/S-686) to be resolved? The Organization's General Chairman on the Union Pacific alleged that Rule 20 and Rule 40 on that property were violated when the work weeks were changed without bulletining. However, he further alleged that Article X of the Imposed Agreement was also violated when production gangs were not given both Saturday and Sunday as rest days.
>
> This Committee is not empowered to determine whether Rule 20 and/or Rule 40 on the Union Pacific Railroad were violated **but we do have the right to decide if Article X of the Imposed Agreement guaranteed the production gangs in question Saturday and Sunday as rest days. The Neutral Member would direct that the claims pending on the Union Pacific be resolved pursuant to Section 3 of the Railway Labor Act inasmuch as they involve the interpretation and application of local rules and/or practices. However, this Committee will retain jurisdiction should it become necessary to decide whether Article X of the Imposed Agreement was violated on the Union Pacific as claimed by the BMWE on that property** (Emphasis ours).

The CIC ruled on three different occasions that since the Imposed Agreement is silent on the subject of local rules and practices, it interprets this to mean that they were not abrogated by Article X of the Imposed Agreement of July 29, 1991. Since this is so, this Board is competent to rule on Rules 20 and 40 of the Agreement between the parties just as it would be competent to rule on any other contract interpretation matter under the normal procedures outlined by Section 3 of the Railway Labor Act, Circular No. 1 and any pertinent contract provisions as controlling.[27]

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[27] On this issue, see First Division Award 21459 as well as Third Division Awards 21459, 21697 & 23135. Also Fourth Division 4645.

But there are two very different issues involved here which need to be sorted out in order to determine what the arbitrator will be ruling on in this case. To fully appreciate these two issues it is necessary to go back to the specifics of the original claim filed in March of 1992, rather than rely on the more general terms used by both parties in their statement of the claim in the instant case. In the original claim the Organization was explicit in stating that the company had allegedly acted improperly when it unilaterally changed the gangs' work weeks, effective March 15, 1992, and that it had thus violated both Rule 20 dealing with bulletining positions, as well as Article X of the Imposed Agreement because the gang members were required to work on Sunday.

This forum has jurisdiction to issue a ruling in the instant case on the issue of whether the company was in violation of Rule 20 when it made the work week changes it did in 1992 which are challenged by claim 920313/S-686. Although they go about their business in arguing their positions in quite different ways, neither party to the instant case really denies this.

On the other hand, the Imposed Agreement at Article X contains directives on the issue of rest days which is not addressed in Rule 20. The CIC's ruling on Issue No. 25 emphatically states that the CIC should "...retain jurisdiction...to decide whether Article X of the Imposed Agreement was violated on the Union Pacific as claimed by the BMWE on that property..." with respect to Saturday and/or Sunday work when the UP made the work week changes it did in 1992 which, likewise, were challenged by claim 920313/S-686. This arbitrator can find no grounds to do other than honor that ruling by the CIC

with respect to the Imposed Agreement of 1992.

Rulings on Procedural Objections

Before framing an Award on merits on the issue before him the arbitrator will rule on a number of procedural issues raised by the parties during the handling of the claim on property.

In denying the claim the company's officer raises objection that the claim as originally filed was "...vague..."[28] since it did not list individuals but only gang members as Claimants. A review of the original grievance filed by the union fails to persuade the arbitrator that the claim was in procedural default for this reason. While arbitral precedent in this industry tells us that claims may be dismissed when there is vagueness with respect to when, what, where and who were involved in alleged violations,[29] such is not the case here. In the instant claim it was known who the Claimants were without them specifically being named.[30] As Third Division 25101 instructs us, which applies to the instant case: "...(a) simple review of the records...would reveal the identity of

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[28] Union Exhibit F-2.

[29] See, for example, First Division Award 24039; Second Division Awards 11197 & 12542; and Third Division Awards 19960, 23859, 28285 & 28492.

[30] The union argues that the company knew, in either case, who the Claimants were by their identifying number on the Gangs. If such were not the case, according to the union, the company would not know "...who to pay, who is absent, who is responsible for getting work done, etc.". The union goes on: "...In fact, it is the Carrier who developed the idea of identifying groups of employees by using gang numbers, as it was felt it was a much easier way of referring to employees than identifying them by name each and every time...". (Union Exhibit F-4).

the...Claimants".[31]

In subsequent handling of the claim on property the General Chairman, on the other hand, raised a procedural objection about the timeliness of an evidentiary showing by the Carrier. The General Chairman stated that he "...finds it to be procedurally defective..." that company data which consisted in computer-mapped traffic patterns, used by the Manager of Maintenance Services to substantiate the March 15, 1992 work week changes of the gangs in question, were not presented to the union until the first level denial of the claim. According to the General Chairman, presentation of these materials at the first level of denial was "...untimely...".[32] This objection is dismissed by the arbitrator. In denying the original grievance which was filed by the union on March 26, 1992 the company appended to its denial letter some data to the union justifying its actions. By doing so the company was not in violation of any time-line requirements --- which is the only objection here --- under any agreement provisions cited in this case. Whether the company was justified in actually making the changes or not is, of course, a different matter.[33]

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[31]On this point see also Third Division Awards 5078, 9248, 10871, 11987 & 25183 as well as Fourth Division Award 3719. The latter states: "The Carrier's defense that a named Claimant does not appear in the Statement of Claim is...without merit. The Awards supporting the Organization on this point are legion".

[32] Union Exhibit F-4.

[33] The subject-matter of this procedural objection by the union verges on issues of interest to the CIC in any rulings it might subsequently make on Saturday or Sunday work as they would relate to the claim at bar. Should the CIC itself, at some subsequent time, also deem it appropriate to rule on this procedural objection, that would obviously be its prerogative. Instant ruling, by definition, can only refer to any time-line violations based on local agreement provisions. No such provisions were cited in the record.

Findings on Merits

The Carrier argues that it had the right to unilaterally change the schedule of the work weeks of the gangs, effective on March 15, 1992, because it had advised the members of the gangs that it might do this by including a statement on the advertised bulletins which read: "Gang subject to alternate work week conditions under PEB 219". For this forum to rule on this argument by the company is not to coopt the authority of the CIC. The statement in question is not found in the language Article X of the Imposed Agreement. A search of the extensive record on this case fails to show that this statement is a provision in any agreement between the parties. Nor has it been sanctioned by any CIC ruling or by any other arbitral precedent.[34] The sentence apparently embodied the alleged understanding by company's supervision of its rights under PEB 219. In view of the full record on this case the arbitrator must conclude that this sentence represents what arbitral forums would call a mere assertion. The inclusion of the sentence on the January, 1992 job advertisements was vigorously contested by the union from almost the moment

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[34]Some 5 years after the grievance here under scrutiny was filed , the following is stated in an arbitration Award issued by Meyers in September of 1996 which involved a dispute between BMWE and CSX (Company Exhibit K & Appendix A of CIC ruling on Issue No. 25): "...neither PEB 219 nor the Imposed Agreement necessary to implement PEB 219 contain any prohibition against the Carrier's changing the scheduled rest days so long as it gives adequate notice of any such change, and it complies with the National Forty Hour Work Week Rule, the Imposed Agreement, and all other applicable statutes, agreements, and policies". The controversial statement attached to the January, 1992 bulletins by the company appears to have been a sort of early version of an "adequate notice" procedure which it attempted to use on this property. The Meyers' Award could not serve as precedent for the company's actions since it was issued 5 years after the action took place.

it saw the light of day. The Manager of Maintenance Services uses this sentence as one of his reasons for denying the original, March 26, 1992 claim. The arbitrator has no alternative but to conclude that such reasoning had no basis in contract, arbitral precedent, or any past practice of which he has been apprised. The common arbitral principle to be applied here is that inference is no substitute for evidence in either denying or asserting a claim. The argument used by the company here in denying the claim is dismissed by the arbitrator.[35]

Secondly, the Carrier denies the claim by asserting that it changed the work week of the gang members, effective March 15, 1992, because of operational need. A close review of the record on this case shows that the arguments by the company on this point, and response to them by the union, are inextricably intertwined with the company's position on the alleged operational need to work gangs on either a Saturday or Sunday. This is an Article X issue. It is not a Rule 20 issue. This arbitrator will defer to the authority of the CIC to deal with the issue of operational need in accordance with the CIC's ruling on Issue No. 25.

There can be no doubt that PEB 219 gave the nation's freight carriers, and this company as one of them, greater flexibility to schedule work weeks and rest days for

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[35]As far as the arbitrator can determine the Carrier appears to have stopped the practice of attaching this particular statement to advertised bulletins for track workers, which the Assistant Director of Labor Relations calls, in correspondence with the union (Union Exhibit F-2, Attachment 1) "...an informative statement defining the rights accorded to the Carrier under PEB...". This specific language does not appear on bulletins cited by the union which were issued by the company in 1997 and 1999. A different phrase does surface which is found on some of the later bulletins, however, which states: "changing days off". Whether that is a new, amended version of the old statement is not addressed by the parties.

crews in what ultimately resulted in Article X of the Imposed Agreement between the UP and the BMWE on this property. The CIC confirmed the existence of this new flexibility 3 different times when ruling on Issue Nos. 16, 21 and 25. Article X states inter alia, that a company does not have to designate both Saturday and Sunday as rest days when there is a "...carrier need..." to act otherwise. Resolution of disputes arising over exercise of such alleged need is reserved to the CIC, as noted earlier, and is beyond the purview of this tribunal.

But the new flexibility which the UP gained from Article X of the Imposed Agreement of 1992 created problems which the parties to this arbitration have been grappling with ever since. This stems from the fact that there is an existing agreement on this property, mutually negotiated by the parties, which contains provisions which regulate the bulletining of positions. The Findings of PEB 219, and the Agreement which resulted from them on this property, created the problem of interpreting the relationship between the Imposed Agreement of 1992 and the existent, local collective bargaining agreement. The question became: which one --- the Imposed Agreement or the negotiated, local agreement --- had priority in given circumstances? More specifically, and to the point, did the intent of Article X of the Imposed Agreement, and the "flexibility" which the company derived from this, simply supersede the bulletining requirements of Rule 20 of the negotiated agreement between the parties with respect to scheduling work weeks for track crews? Did Article X of the Imposed Agreement mean that the company gained that much flexibility from PEB 219? The parties sought answers

to this and other issues in the Contract Interpretation Committee's rulings. The issue dealing with the relationship between managerial flexibility derived from Article X of the Imposed Agreement, and bulletining requirements found in Rule 20 of the negotiated agreement on this property, was posed to the CIC on three different occasions. And three times, in issuing rulings on Issue Nos. 16, 21 and 25 the CIC answered that **local provisions dealing with scheduling production crews remained inviolate**. The CIC ruled that "...a carrier was not relieved from complying with existing rules and procedures regarding the bulletining and assigning of employees to alternative work week schedules...". There can simply be no misunderstanding of the language used by the CIC in these rulings. Rule 20 remained in full force. The narrow question in this arbitration is whether that Rule was violated when the company unilaterally changed work week schedules of the gangs, effective March 15, 1992, without abolishing and then re-bulletining the positions.

The company argues, in effect, that it had made changes in work weeks in the past without re-bulletining positions and in view of this it should have been permitted to have made the changes it did in March of 1992 u... e meaning and intent of Rule 20. In fact, the company states that it had a "substantial practice" of making unilateral changes of the type it made in March of 1992. As moving party, the union contests, disregards as immaterial, or agrees with each of the examples given by the company with respect to past practice on this property. For example, according to the company, changes in work

weeks were made without re-bulletining positions when "...elections (had been) made (by gangs in the past) pursuant to Rule 40...".[36]. The union observes that there is nothing wrong with this, if and when such happened, but that Rule 40 was not applied when the March, 1992 work weeks were changed. This is not rebutted by the company. Secondly, the company states that it had made changes in the past without re-bulletining when employees opted for "make-up" time. Such is neither affirmed nor denied by the union. Nor can the arbitrator find any evidence of record that any of the gang members opted to, or in fact were, making-up any time when the company unilaterally changed the March, 1992 work weeks. Such may have happened in the past, but it is not on point with the fact pattern before the arbitrator in this case. Thirdly, the company intimates that changes had been made in the past without abolishment and re-bulletining in accordance with the provisions of Rule 20(h). The union states that it has no problem with that but that the March, 1992 changes by the company were not covered by any of the bulletining exclusions found in Rule 20(h). After studying the record, the arbitrator must agree. A review of the affirmative defense by the company on basis of past practice fails to show that the company was not in violation of Rule 20 when it made the unilateral changes in

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[36]Because of the limited application of Rule 40 to the instant case it was not cited in the foregoing. The language the company is referencing is the following, cited here in pertinent part.

Rule 40

(a) With the election in writing from the majority of the employees working on a project and with the concurrence of the appropriate Manager, a consecutive compressed half work period may be established where operations permit...

work week schedules in March of 1992 without re-bulletining the positions.

Nextly the Carrier argues that unilateral changes in the work week existed as a practice prior to PEB 219 and that such changes were made in conformity with "....the Van Wart..." arbitration Award issued on June 8, 1989. A review of that Award fails to show that it is on point with respect to the instant grievance.[37] Issues dealt with in the Van Wart Award pre-date the set of issues involved here.

Lastly, and of seminal importance to this case, the union argues that there were no factual reason why bulletins could not have been issued, in accordance with Rule 20(a) provisions, prior to the March 15, 1992 unilateral rescheduling of the gangs by the company. The union states that there was sufficient time to issue bulletins in accordance with Rule 20. In his correspondence to the company on March 10, 1992, after he had been advised on March 5, 1992 that the work weeks of gangs 9063, 9073 and 9083 were to be unilaterally changed without abolishment and re-bulletining of the positions the General Chairman wrote to the Assistant Director of Labor Relations of the company that there was sufficient time to have applied the provisions of Rule 20. The early version of the union's position on this matter has been cited in the Background Section of this Award. [38] A more developed version of the union's argument on this point is found in the

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[37]This Award (Company Exhibit N) deals with the application of Rule 26 and whether the company had the right to schedule work weeks which included a Sunday in a single track corridor territory. The dispute in that Award "...arose out of a hotly contested application of the Forty Hour Work Week..." and not out of bulletining issues associated with Rule 20 and its relationship to Article X of the Imposed Agreement of 1992.

[38] @ p. 7.

rationale accompanying the March 26, 1992 grievance. This version of the argument states the following:

> "In reviewing my notes...(the company's officer) notified me of the Carrier's intention to establish the Sunday through Thursday work week for these gangs on March 5, 1992. As such, it is obvious the Carrier could have, as well as should have, made arrangements to bulletin the positions on these gangs accordingly on the telephonic advertisement bulletining recording issued that same Thursday, March 5, 1992 as provided under Rule 20... The advertisement bulletin would have closed Monday, March 9, 1992 and the telephonic assignment recording could have been issued as scheduled on Thursday, March 12, 1992. As you can see, *this normal bulletining process could have been completed in time to have all* assignees report by Sunday, March 15, 1992 the first day the Carrier desired to have these gangs commence working a Sunday through Thursday work week with Friday-Saturday rest days...
>
> "Had the Carrier made arrangements to have advertisement and assignment bulletins distributed in this manner, the Carrier would have at least complied with the bulletining requirements of the Agreement....However, the Carrier chose not to follow the required procedures and unilaterally imposed the referred to work week conditions on the gangs involved..."[39]

A review of the full record fails to produce a company rebuttal to this argument of the union. Instead of rebutting this argument the company's denial of the grievance sidesteps the argument by using rationale which centers on accommodations gained by the company under Article X. This type of response to the union is put forth both by the

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[39] Union Exhibit F-1.

Manager of Maintenance Services[40] and by the Assistant Director of Labor Relations. The latter states:

> "...I do not concur that the Carrier can only utilize the benefits provided by the Board (i.e. PEB 219) through the bulletining process. If I were to accept your argument, then this would place a significant restriction on the Carrier not intended. If would preclude us from being able to realize the full benefits of the work relief rule. Due to the time periods in the bulletining rule, and the disruption to the stability of the gang, I do not concur that this was the (PEB's) intent when providing relief granting the Carriers' flexibility and productivity...".[41]

Clearly, the company does not respond to the union's argument with respect to the application of Rule 20 under the circumstances at bar. Rather than rebut the specific reasons why it did not re-bulletin the positions in view of the union's argument that Rule 20 could have been, and should have been, reasonably applied in March of 1992 the company relies on generalities dealing with disruptions of the "...stability of the gang..." without providing any rationale why this was the case, and by resorting to scheduling flexibility which the company claims was now its right under Article X of the Imposed Agreement.

The company's arguments on Rule 20 are succinctly encapsulated in the position it continued to hold on this matter up to 1999 which is stated in its Submission on this case.

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[40] The denial of the grievance by the Manager of Maintenance Services states: "...As you are aware, neither the Presidential Emergency Board, the Special Board, nor the Imposed Agreement support your contention that any restrictions were placed in order for the Carrier to utilize Article X" (Emphasis ours). (Union Exhibit F-2). This May 22, 1992 statement was made by the company's supervisor prior to the rulings by the CIC in October of 1992, and in July and December of 1994, on Issue Nos. 16, 21 & 25. In his ruling on Issue No. 25, Sub-Question No. 1 the arbitrator of the CIC states that he "...recognizes that this Answer...**imposes a limit on some of the flexibility granted carriers by PEB 219** in scheduling maintenance work..." (Emphasis ours).

[41] Union Exhibit F-2, Attachment 1.

Therein the company states:

> "There is no restriction in the collective bargaining agreement precluding the Carrier from changing the work week of an existing gang to accommodate the Carrier's operation without abolishing and re-bulletining positions".[42]

Until and unless the parties re-negotiate Rule 20 to accommodate what the company mistakenly believes are its current rights under Article X of the Imposed Agreement with respect to bulletining of positions this statement, as it stands, is simply incorrect.

The arbitrator must conclude that the union has sufficiently borne its burden of proof with respect to why Rule 20 was violated by the company in March of 1992 when it unilaterally changed the work weeks of the gangs without abolishing and re-bulletining positions. Rebuttal arguments related to past practice raised by the company either are not on point, or they are covered by the exceptions found in Rule 20(f). Nor has the company rebutted the argument by the union that there was sufficient time to have applied Rule 20 in March of 1992 to the gangs in question in order to have fulfilled the bulletining requirements of that Rule. On merits the grievance is sustained.[43]

While we conclude here, on basis of substantial evidence,[44] that the company

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[42]Company's Brief @ p. 22.

[43]The company cites arbitral precedent for the instant case in the Meyers Award which was issued in September of 1996. That Award has been closely studied by the arbitrator. The fact pattern in that Award is not on point with the instant case, nor is it clear whether the local Agreement provisions which are designated therein as the System Production Gang (SPG) Agreement, Sections 5 and 6, parallel Rule 20 off the UP. Sections 5 and 6 of the SPG are not cited in that Award.

[44]Substantial evidence in arbitral forums has been defined as "...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. Vs Labor Board 305 U.S. 197, 229). On substantial evidence see also First Division 12952, Second Division 6419, Public Law Board No. 5712, Award 4 inter alia.

20(a), and 20(h), cited here for interpretation, do not address week-end work. That is a matter to be taken up by the CIC as an Article X issue in accordance with its own Ruling on Issue No. 25, if such is pursued by the parties above and beyond this forum.

Relief is a complicated matter in this case. Relief requested is directly predicated on an answer to the question of whether the company acted correctly or not in scheduling week-end work on a Sunday. That question is not answered here. This arbitrator is not of the view that a labor agreement can be violated with impunity without a sanction being levied. Upon review of the full record in this case, however, there is evidence of a violation, but the arbitrator would be hard pressed to conclude such was done with impunity when the company did not abolish and then re-bulletin the positions of the gangs in question. The cause of the violation appears to have been a mistaken understanding by the company of the amount of scheduling flexibility it had gained from PEB 219 and from Article X of the Imposed Agreement. To levy a sanction for the violation, at this point, would amount to pure damages which is an issue the arbitrator would prefer to avoid in this case.

Relief, therefore, shall be the following. First of all, ruling on specific relief requested when the grievance was filed is deferred, in this sustaining Award, until and when the CIC rules on the question of Sunday work as an Article X issue. The arbitrator retains jurisdiction over this case until such time. Secondly, the company is ordered here to treat Rule 20(a) as a rule which continues to be applicable on this property and which has not been annulled by Article X of the Imposed Agreement. The company is also

retains jurisdiction over this case until such time. Secondly, the company is ordered here to treat Rule 20(a) as a rule which continues to be applicable on this property and which has not been annulled by Article X of the Imposed Agreement. The company is also ordered to bulletin positions in the future when fact patterns parallelling those of March of 1992, which are under scrutiny in this case, exist.

Award

The grievance is sustained in accordance with the Findings on Merits. This Award shall be implemented within thirty (30) days of its date.

Edward L. Suntrup, Arbitrator

Concurring:

W. E. Naro, Employer Member

R. B. Wehrli, Union Member

Date: August 10, 1999

In the Matter of Arbitration

Ruling & Award on Relief

Claim 920313/S-686/PLB 6206-1

Union Pacific Railroad Company

vs

Brotherhood of Maintenance of Way Employees

Award Issued: May 24, 2000

Edward L. Suntrup
Arbitrator

In the Matter of Arbitration

Brotherhood of Maintenance of Way Employees	)	
	)	
	)	
vs	)	**Claim 920313/S-686/PLB 6206-1**
	)	**Ruling & Award on Relief**
	)	
Union Pacific Railroad Company	)	

Appearances

For the Union

Steven V. Powers - Assistant to the President

For the Company

Wayne E. Naro - General Director

Introduction

On September 10, 1999 the majority of PLB 6206 issued a sustaining Award on claim 920313 (S-686) which had been filed by the union.

In an arbitration Agreement establishing PLB 6206 the parties mutually agreed that:

> "The Award rendered (on) claim 920313 (S-686) will be applied by the parties (to) the partial or complete disposal and resolution as applicable (to) the list of (43 separate) claims...".

According to the Brief filed by the Carrier in its arguments on merits the parties added additional claims to this case after the signing of their arbitration Agreement establishing

PLB 6206. In its Brief the Carrier states that the "...the total number of cases tied to the lead case (actually) approach(ed) fifty (50)".[1] Later, in a statement before this forum by the Organization in a memorandum on relief, after the Award on merits had been issued, the union states that the violation under scrutiny involved an incorrect interpretation by the Carrier of Rule 20 of the Collective Bargaining Agreement "...not just once, but some fifty (50) times...". The use of imprecise language by the parties relative the number of claims to be disposed of by a ruling on claim 920313 (S-686) leads the arbitrator to conclude, on basis of the record before him, that the exact number of claims involved in the instant case may never have been firmly established by the parties. As a factual matter that may or may not be true. There is no way of telling from the record before the arbitrator.

A ruling on relief in the instant case must cover violations of the parties' Collective Bargaining Agreement by Carrier's supervision for time-frames worked by specific individuals. In view of this the arbitrator will rule, first of all, that conclusions on relief by PLB 6206 on lead case 920313 (S-686) apply to the fifty (50) claims referenced by the parties in this case. Secondly, if in fact there are other claims out there besides these fifty (50), which had been filed by the Organization and which might be "...tied to the lead claim..." which is subject-matter of PLB 6206, the parties are instructed to return to the arbitrator for a final and binding ruling on whether such claims are to be covered

[1]See Footnote 1 of the merits Award on PLB 6206 (claim 920313 (S-686)).

by the instant ruling and Award on relief.

The merits Award issued by PLB 6206 ruled that the Carrier's supervision had violated Rule 20 of the parties' Collective Bargaining Agreement. For reasons stated in that Award, ruling on relief requested by the union in lead claim 920313 (S-686) was deferred until the Contract Interpretation Committee (CIC), which had been established by the parties under PEB 219's Imposed Mediation Agreement, ruled on PLB 6202's authority to issue such ruling. Ruling on relief by PLB No. 6202 was deferred to the CIC in view of the language used by that forum in its own earlier ruling on Issue No. 25, Sub-Question No. 2, to wit:

> "...(The CIC) is not empowered to determine whether Rule 20 and/or Rule 40 (of the parties' Collective Bargaining Agreement) on the Union Pacific Railroad (could be) violated but we do have the right to decide if Article X of the Imposed Agreement guaranteed the production gangs in question (represented by the BMWE union) Saturday and Sunday as rest days. The Neutral Member would direct that the claims pending on the Union Pacific Railroad (by the BMWE) be resolved pursuant to Section 3 of the Railway Labor Act inasmuch as they involve the interpretation and application of local rules and/or practices".[2]

On February 14, 2000 the CIC issued its Ruling on whether PLB No. 6206 had authority to rule on relief in claim 920313 (S-686) which was before it. In view of that

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[2]In an attempt to resolve the issue of whether supervision on the Union Pacific Railroad was improperly changing the work schedules of bulletined positions which had been bid on by members of the BMWE craft the parties asked the CIC, at one point, whether claims filed to this effect should be resolved by the CIC or by some other forum? When this issue was brought before the CIC three claims on this property dealing with the changing of bulletined work weeks were cited in an Attachment"A" presented to the CIC. The question asked of the CIC in Sub-Question No. 2 of Issue No. 25 was the following: "In what forum should the claims identified in Attachment 'A' concerning the changing of bulletined work weeks and rest days be resolved"? Footnote 20 (@ p. 13) of the instant arbitrator's September 10, 1999 Award on merits contains details on this matter.

ruling it is now clear that PEB No. 6206 has full authority to resolve both the merits of the claim presented to it in 920313 (S-686), as well as the issue of relief associated with that claim, albeit some of the violations at bar involve work on "...Saturday and Sunday as rest days...".

For the record, the CIC stated the following in its February 14, 2000 ruling, which is cited here in pertinent part.

> "On September 10, 1999 PLB No. 6206 found that Rule 20 of the BMWE-UP labor agreement was violated when the work week of (System Gangs 9063, 9073 and 9083 and B&B Gangs 6821 and 6841) was changed without the positions in the gangs being abolished and re-bulletined. However, PLB No. 6206 deferred rendering a ruling on the remedy requested by the BMWE until this Committee rules on the question of Sunday work as an Article X issue.
>
> .....
>
> "When this Committee rendered its Answer to Issue No. 25 we expected a Section 3 tribunal to fashion whatever remedy it deemed appropriate if it concluded that local rules and/or practices on the UP were violated when the work week of a production gang was changed without re-bulletining the positions. In as much as PLB No. 6206 concluded that Rule 20 of the BMWE-UP agreement was violated when the work week of (the System and B&B gangs) was changed without re-bulletining the position in these gangs PLB No. 6206 must now fashion whatever remedy it deems appropriate for those violations".[3]

Discussion & Findings

A review of the full record of this case warrants the following conclusions with respect to remedy.

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[3]Ruling, dated February 14, 2000 (O'Brien), of the Contract Interpretation Committee (CIC) Established Pursuant to Recommendations by Presidential Emergency Board No. 219 Involving the National Railway Labor Conference and the Brotherhood of Maintenance of Way Employees - Interpretation Committee Issue No. 27: Article X - Alternative Work Weeks and Rest Days.

Since the Carrier's supervision was in violation of Rule 20 of the parties' Collective Bargaining Agreement when the work weeks of System Gangs 9063, 9073 and 9083 and B&B Gangs 6821 and 6841 were changed, without the positions in the gangs being abolished and re-bulletined, the arbitrator concludes, and as the Organization correctly argues, that there were concurrent violations by the Carrier of provisions of Rule 35 of the labor contract. These provisions deal with overtime. The violations involve the following provisions of Rule 35.

Rule 35 (a) Overtime Service

Time worked preceding or following and continuous with the regular eight (8) hours assignment shall be computed on an actual minute basis and paid for at the time and one-half rate with double time applying after sixteen (16) hours of continuous service, until relieved from service and afforded an opportunity for eight (8) or more hours off duty.

.....

Rule 35 (c) Calls

Employees notified or called to perform services not continuous with regular work assignment, on rest days, or on one of the designated holidays, will be paid a minimum of three (3) hours at the time and one-half rate for three (3) hours of service or less. If the service for which called extends beyond the minimum of three (3) hours, employees will be paid at the over time rates, as specified in subsection (a) of this rule until relieved from service and afforded an opportunity for eight (8) or more hours off duty.

.....

Rule 35 (f) Suspending Work

Employees shall not be required to suspend work during the regular hours of assignment of a work day for the purpose of absorbing overtime. In the case of employees required to work continuously from one regular work period to another,

> relief from work during the second regular work period will not be considered as suspension of work during regular assigned work period for the purpose of absorbing overtime.....[4]

In view of the language found in Rule 35 the arbitrator concludes that each affected employee in the Gangs in question should be paid, because of the violations of Rule 20, the difference between pro rata rate, and time and one half rate, for each regularly bulletined rest day they were required to work at straight-time rate.

Likewise, under Rule 20 each affected employee in the Gangs in question should be paid at pro rata rate for each Monday they were supposed to have worked had there not been a violation of this Rule of the Collective Bargaining Agreement.

In the merits Award on claim 920313 (S-686) the arbitrator expressed uncertainty about his jurisdiction to grant remedy for week-end work under conditions of a violation of Rule 20 because week-end work is not specifically addressed by Rule 20 of the parties' Collective Bargaining Agreement, but it is specifically addressed by Article X of the Imposed Agreement. Such uncertainty was also founded on the arbitrator's reading of earlier language used by the CIC in its interpretations of the Imposed Agreement.

In this respect the instant arbitrator stated the following in the earlier merits Award on claim 920313 (S-686):

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[4]Agreement between the Union Pacific Railroad and the Brotherhood of Maintenance of Way Employees Governing the Wages and Working Conditions of employees of the classes listed herein in the Maintenance of Way Structures Department. Effective January 1, 1973 (Including Revisions to April 1, 1992). Full copy of agreement provided to the arbitrator on April 26, 2000. These provisions from this Agreement are also cited by the Organization in its Memorandum on Relief provided to the arbitrator on April 26, 2000.

> "Relief requested (here by the Organization) is directly predicated on an answer to the question of whether the company acted correctly or not in scheduling week-end work on a Sunday. That question is not answered here".

In deferring to the CIC for an answer on the propriety of the company scheduling week-end work on a Sunday, since Rule 20 does not address this matter --- to which the issue of relief is inextricably bound in this case because of the Carrier's argument that Article X of the Imposed Agreement gave it such Sunday scheduling rights --- the arbitrator of PLB 6206 was unequivocally instructed by the CIC that he did have authority to rule on this question. In view of this, and in view of the full record of this case which the arbitrator has reviewed in issuing this ruling and Award on relief, he concludes that when the Carrier's supervision violated Rule 20 it also improperly scheduled the Claimants, who are party to this case, to work on Sundays.

Prior to receipt of the CIC's ruling on the jurisdiction of PLB 6206, over relief on violations of Rule 20 which involve Sunday work, the instant arbitrator also stated in his merits Award on claim 920313 (S-686) that:

> "...To levy a sanction for the violation (of Rule 20), at this point, would amount to pure damages which is an issue the arbitrator would prefer to avoid in this case...".

Since it is now clear that Sunday work is a Rule 20 issue, and not only an Article X issue, any reference to pure damages, relative to this case, is no longer appropriate. It is now clear that relief in this case has nothing to do with damages.[5] What is at stake is a make whole remedy in view of continuous violations by the Carrier, over an extended period of

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[5]Or with a ruling by a Section 3 arbitrator over an issue which might be reserved only to the CIC.

time, of Rule 20 of the parties' Collective Bargaining Agreement which also involved inter alia improper work assignments to the Claimants on Sundays.

There is ample arbitral precedent in this industry to warrant conclusion that make whole remedies are appropriate for labor contract violations by Carriers.[6] This is not a case of first impression.

At issue then is the right of each of the Claimants to this case, under Rules 20 and 35 of the Collective Bargaining Agreement, to be made whole for overtime pay when they were assigned to work on Sundays. Concurrent with this is each of the Claimant's right to be made whole for the work to which they should have been assigned, but were not, on Mondays in accordance with their bulletin bids.

The arbitrator rules that all Claimants to this case shall be made whole for the difference between pro rata, and the time and one half, rate of pay for all Sunday work to which they were improperly assigned. This amounts to four (4) hours of compensation per Claimant at pro rata rate for each Sunday in question. All Claimants to this case shall also be made whole for eight (8) hours at pro rata rate for all Mondays they were not allowed to work under their bid bulletins.

The violations of Rule 20 of the parties' Collective Bargaining Agreement

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[6]See Third Division Awards 20065 (Blackwell), 26519 (Suntrup), 27848 (Suntrup), 28307 (Lieberman), and 29542 (DiLauro). These Awards all involve this one craft, but they have been issued off of four different properties by, as noted, four different arbitrators. The Carrier members of the NRAB issued dissents to Awards 26519 & 27848 but the dissents did not address the propriety of make-whole remedies. Rather, the dissents addressed technicalities related to the specific cases in question and the fact that in one case (Third Division 27848) the relief granted was in excess of "...a 'make whole penalty'..." which the minority did not find, however, to be per se objectionable.

surfaced in early 1992. The history of those violations is outlined in the instant arbitrator's Award on merits which was issued on September 10, 1999. For reasons which both parties appreciate better than the arbitrator it took them until 1999 to bring the claims involved in this dispute to arbitration under the umbrella of 920313 (S-686) as lead claim. The arbitrator has been informed that the Carrier immediately complied with the merits Award issued on September 10, 1999 and that violations of Rule 20 have ceased. The make-whole remedy requested here by the union spans, therefore, the time frame from the filing of the first claim in 1992 until the Award issued by this arbitrator on the date cited in the foregoing. In the Award on merits, the arbitrator stated the following:

> "...there is evidence of a violation (of Rule 20), but the arbitrator would be hard pressed to conclude (that) such was done with impunity when the company did not abolish and then re-bulletin the positions of the Gangs in question...".

A review of the record fails to persuade the arbitrator that the above statement is incorrect. At the same time the arbitrator also observed, in the Award on merits which was issued on September 10, 1999, the following:

> The cause of the violation(s) appear...to have been a mistaken understanding by the company of the amount of scheduling flexibility it had gained from PEB 219 and from Article X of the Imposed Agreement...".

A review of the history of this case shows that the Carrier held fast to its view of the scheduling flexibility it had gained under PEB 219 throughout the processing of claim 920313 (S-686) and associated claims. This view, however, did not pass muster in the earlier merits Award issued by the instant arbitrator. Irrespective, the Carrier not only held fast to such view, but it did so for an extended period of time. Such tactic in itself is

insufficient grounds to warrant show of impunity on the part of the Carrier. Nevertheless by extending the time-frame of the dispute, which included refusal to arbitrate these matters earlier before the National Railroad Adjustment Board even though the lead claim in this case had been docketed before that forum, the Carrier was effectively party to the creation of a zero-sum arrangement wherein what it had to gain, and what it had to lose, was incrementally increasing over time. A final search of the record fails to warrant conclusion that the risk involved by the Carrier in this case, while obviously calculated, was not fully appreciated by that party. There is neither evidence of record, nor reference to any extenuating circumstances, which would reasonably or logically permit any other conclusion. In view of these considerations the arbitrator has no reasonable grounds for amending the claim for full relief requested by the Organization. The arbitrator will sustain claim 920313 (S-686) in full and thereby "...dispose...", in accordance with the parties' arbitration Agreement governing PLB 6206, of all other claims falling under PLB 6206.

Ruling on Relief and Award

Claim 920313 (S-686) and all other claims covered by PLB 6206 are sustained in full in accordance with the Findings. Representatives from the Carrier and the Organization are instructed to meet within thirty (30) days of the date of this Award, examine the records involved in the payment of relief as outlined in this Ruling, and agree on the amount to be paid to each Claimant. Compensation due to each of the Claimants to this case shall be paid to them by the Carrier within one hundred and twenty (120) days of the date of this Ruling. Any disputes between the parties over the amount of relief to be paid to given Claimants involved in this case shall be referred to the arbitrator for final and binding ruling. Any disputes between the parties over payment of relief to alleged Claimants involved in any claims exceeding fifty (50) claims shall be referred to the arbitrator in accordance with instructions outlined in the Introduction to this Ruling. The arbitrator holds jurisdiction over this case until the instant Ruling has been fully implemented.

Edward L. Suntrup, Arbitrator

Concurring

Wayne E. Naro, Employer Member

Steven V. Powers

Steven V. Powers, Union Member

Date: May 24, 2000

In the Matter of Arbitration

Ruling & Award on Relief
Executive Session/Interpretation

Claim 920313/S-686/PLB 6206-1

Union Pacific Railroad Company

vs

Brotherhood of Maintenance of Way Employees

Interpretation Issued: June 24, 2000

Edward L. Suntrup
Arbitrator

In the Matter of Arbitration

Brotherhood of Maintenance of Way Employees	)	
	)	
	)	
vs	)	**Claim 920313/S-686/PLB 6206-1**
	)	**Ruling & Award on Relief**
	)	**Executive Session/Interpretation**
Union Pacific Railroad Company	)	

Appearances

For the Union

Steven V. Powers - Assistant to the President

For the Company

Wayne E. Naro - General Director

Introductory Comments

On September 10, 1999 the majority of PLB 6206 issued a sustaining Award on claim 920313 (S-686) which had been filed by the union. The merits Award issued by PLB 6206 ruled that the Carrier's supervision had violated Rule 20 of the parties' Collective Bargaining Agreement. For reasons stated in that Award, ruling on relief requested by the union in lead claim 920313 (S-686) was deferred until the Contract Interpretation Committee (CIC), which had been established by the parties under PEB 219's Imposed Mediation Agreement, ruled on PLB 6202's authority to issue such ruling. Ruling on relief by PLB No. 6202 was deferred to the CIC in view of the language used by that forum in its own earlier ruling on Issue No.

25, Sub-Question No. 2, to wit:

> "...(The CIC) is not empowered to determine whether Rule 20 and/or Rule 40 (of the parties' Collective Bargaining Agreement) on the Union Pacific Railroad (could be) violated but we do have the right to decide if Article X of the Imposed Agreement guaranteed the production gangs in question (represented by the BMWE union) Saturday and Sunday as rest days. The Neutral Member would direct that the claims pending on the Union Pacific Railroad (by the BMWE) be resolved pursuant to Section 3 of the Railway Labor Act inasmuch as they involve the interpretation and application of local rules and/or practices".[1]

On February 14, 2000 the CIC issued its Ruling on whether PLB No. 6206 had authority to rule on relief in claim 920313 (S-686) which was before it. In view of that ruling it is now clear that PEB No. 6206 has full authority to resolve both the merits of the claim presented to it in 920313 (S-686), as well as all aspects of the issue of relief associated with that claim, albeit some of the violations at bar involved work on "...Saturday and Sunday as rest days...". On May 24, 2000 the arbitrator issued a Ruling on Relief on PLB 6206, Case 1.

In the Discussion & Findings on Ruling & Award on Relief the instant arbitrator stated the following, in pertinent part:

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[1]In an attempt to resolve the issue of whether supervision on the Union Pacific Railroad was improperly changing the work schedules of bulletined positions which had been bid on by members of the BMWE craft the parties asked the CIC, at one point, whether claims filed to this effect should be resolved by the CIC or by some other forum? When this issue was brought before the CIC three claims on this property dealing with the changing of bulletined work weeks were cited in an Attachment"A" presented to the CIC. The question asked of the CIC in Sub-Question No. 2 of Issue No. 25 was the following: "In what forum should the claims identified in Attachment 'A' concerning the changing of bulletined work weeks and rest days be resolved"? See Footnote 20 (@ p. 13) of the instant arbitrator's September 10, 1999 Award on merits which contains details on this matter.

"In deferring to the CIC for an answer on the propriety of the company scheduling week-end work on a Sunday, since Rule 20 does not address this matter --- to which the issue of relief is inextricably bound in this case because of the Carrier's argument that Article X of the Imposed Agreement gave it such Sunday scheduling rights --- the arbitrator of PLB 6206 was unequivocally instructed by the CIC that he did have authority to rule on this question. In view of this, and in view of the full record of this case which the arbitrator has reviewed in issuing this ruling and Award on relief, he concludes that when the Carrier's supervision violated Rule 20 it also improperly scheduled the Claimants, who are party to this case, to work on Sundays.

"Prior to receipt of the CIC's ruling on the jurisdiction of PLB 6206, over relief on violations of Rule 20 which involve Sunday work, the instant arbitrator also stated in his merits Award on claim 920313 (S-686) that:

> '...To levy a sanction for the violation (of Rule 20), at this point, would amount to pure damages which is an issue the arbitrator would prefer to avoid in this case...'.

"Since it is now clear that Sunday work is a Rule 20 issue, and not only an Article X issue, any reference to...damages, relative to this case, is no longer appropriate. It is now clear that relief in this case has nothing to do with damages.[2] What is at stake is a make whole remedy in view of continuous violations by the Carrier, over an extended period of time, of Rule 20 of the parties' Collective Bargaining Agreement which also involved inter alia improper work assignments to the Claimants on Sundays.

"There is ample arbitral precedent in this industry to warrant conclusion that make whole remedies are appropriate for labor contract violations by Carriers.[3] This is not a case of first impression.

"At issue then is the right of each of the Claimants to this case, under Rules 20 and

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[2]Or with a ruling by a Section 3 arbitrator over an issue which might be reserved only to the CIC.

[3]See Third Division Awards 20065 (Blackwell), 26519 (Suntrup), 27848 (Suntrup), 28307 (Lieberman), and 29542 (DiLauro). These Awards all involve this one craft, but they have been issued off of four different properties by, as noted, four different arbitrators. The Carrier members of the NRAB issued dissents to Awards 26519 & 27848 but the dissents did not address the propriety of make-whole remedies. Rather, the dissents addressed technicalities related to the specific cases in question and the fact that in one case (Third Division 27848) the relief granted was in excess of "...a 'make whole penalty'..." although the minority did not find, however, the make whole remedy to be per se objectionable. (The last sentence of this footnote, cited in this quote, has been slightly edited for clarification purposes.)

35 of the Collective Bargaining Agreement, to be made whole for overtime pay when they were assigned to work on Sundays. Concurrent with this is each of the Claimant's right to be made whole for the work to which they should have been assigned, but were not, on Mondays in accordance with their bulletin bids (Emphasis added here).

"The arbitrator rules that all Claimants to this case shall be made whole for the difference between pro rata, and the time and one half, rate of pay for all Sunday work to which they were improperly assigned. This amounts to four (4) hours of compensation per Claimant at pro rata rate for each Sunday in question. All Claimants to this case shall also be made whole for eight (8) hours at pro rata rate for all Mondays they were not allowed to work under their bid bulletins.

"The violations of Rule 20 of the parties' Collective Bargaining Agreement surfaced in early 1992. The history of those violations is outlined in the instant arbitrator's Award on merits which was issued on September 10, 1999. For reasons which both parties appreciate better than the arbitrator it took them until 1999 to bring the claims involved in this dispute to arbitration under the umbrella of 920313 (S-686) as lead claim. The arbitrator has been informed that the Carrier immediately complied with the merits Award issued on September 10, 1999 and that violations of Rule 20 have ceased. The make-whole remedy requested here by the union spans, therefore, the time frame from the filing of the first claim in 1992 until the Award issued by this arbitrator on the date cited in the foregoing. In the Award on merits, the arbitrator stated the following:

> '...there is evidence of a violation (of Rule 20), but the arbitrator would be hard pressed to conclude (that) such was done with impunity when the company did not abolish and then re-bulletin the positions of the Gangs in question...'.

"A review of the record fails to persuade the arbitrator that the above statement is incorrect. At the same time the arbitrator also observed, in the Award on merits which was issued on September 10, 1999, the following:

> 'The cause of the violation(s) appear...to have been a mistaken understanding by the company of the amount of scheduling flexibility it had gained from PEB 219 and from Article X of the Imposed Agreement...'.

"A review of the history of this case shows that the Carrier held fast to its view of the scheduling flexibility it had gained under PEB 219 throughout the processing of claim 920313 (S-686) and associated claims. This view, however, did not pass muster in the

earlier merits Award issued by the instant arbitrator. Irrespective, the Carrier not only held fast to such view, but it did so for an extended period of time. Such tactic in itself is insufficient grounds to warrant show of impunity on the part of the Carrier. Nevertheless by extending the time-frame of the dispute, which included refusal to arbitrate these matters earlier before the National Railroad Adjustment Board even though the lead claim in this case had been docketed before that forum, the Carrier was effectively party to the creation of a zero-sum arrangement wherein what it had to gain, and what it had to lose, was incrementally increasing over time. A final search of the record fails to warrant conclusion that the risk involved by the Carrier in this case, while obviously calculated, was not fully appreciated by that party. There is neither evidence of record, nor reference to any extenuating circumstances, which would reasonably or logically permit any other conclusion. In view of these considerations the arbitrator has no reasonable grounds for amending the claim for full relief requested by the Organization. The arbitrator will sustain claim 920313 (S-686) in full and thereby '...dispose...', in accordance with the parties' arbitration Agreement governing PLB 6206, of all other claims falling under PLB 6206".

In the Ruling on Relief and Award of PLB 6206, the instant arbitrator stated:

"Claim 920313 (S-686) and all other claims covered by PLB 6206 are sustained in full in accordance with the Findings. Representatives from the Carrier and the Organization are instructed to meet within thirty (30) days of the date of this Award, examine the records involved in the payment of relief as outlined in this Ruling, and agree on the amount to be paid to each Claimant. Compensation due to each of the Claimants to this case shall be paid to them by the Carrier within one hundred and twenty (120) days of the date of this Ruling. Any disputes between the parties over the amount of relief to be paid to given Claimants involved in this case shall be referred to the arbitrator for final and binding ruling. Any disputes between the parties over payment of relief to alleged Claimants involved in any claims exceeding fifty (50) claims shall be referred to the arbitrator in accordance with instructions outlined in the Introduction to this Ruling.[4] The arbitrator holds jurisdiction over this case until the instant Ruling has been fully implemented".

[4]Which is not cited here. For instructions outlined in that Introduction, see Ruling & Award on Relief (PLB 6206-1), issued on May 24, 2000 @ p. 1 seq.

Request for Executive Session by the Carrier

After the Ruling & Award on Relief was issued on May 24, 2000 the Carrier Member of PLB 6206 sent correspondence to the arbitrator under date of June 5, 2000 requesting an Executive Session. This session was scheduled for and took place on June 19, 2000. Prior to the session the Carrier Member faxed to the arbitrator's office, with subsequent response by the Organization member, at the request of the arbitrator, a written synopsis of the Carrier's objection to the Ruling & Award on Relief. The arbitrator would like to go on record and thank both of the interested Members of the Board for their courtesies in these matters.

Issues Raised in Executive Session

The Carrier did not voice an objection in Executive Session, nor at any other time since September 10, 1999, on the merits of the Award issued by PLB 6206. In fact, the Carrier is on record before the arbitrator to the effect that it has stopped violation of Rule 20 of the Collective Bargaining Agreement, between it and the BMWE, as of the date of issuance of the merits Award by PLB 6202 on September 10, 1999. The sole issue raised by the Carrier in the Executive Session which was held on June 19, 2000 deals with the Ruling & Award on Relief issued by PLB 6206 on May 24, 2000.

The Carrier's Arguments & Briefs on Relief Prior to Request for the Executive Session Which Was Held on June 19, 2000

Prior to the Executive Session requested by the Carrier which was held on June 19, 2000 it had a number of occasions, both directly and indirectly, to present its position on

relief, for the record, before the arbitrator of PLB 6206. The Carrier had the occasion to do so orally before PLB 6206 when the May 12, 1999 hearing was held on the full record of the case. There was occasion to do so in the written Submission to that hearing, and in its written Rebuttal Submission to that hearing. Earlier, which is part of the voluminous record before PLB 6206, the Carrier had the occasion to address the issue of relief in the exchange on property with the Organization after the claim used as lead claim in PLB 6206 was filed. The Carrier also had occasion to deal with this issue when the original Submission to the NRAB on Case No. 93-3-465 (Docket MW-31469) was proffered to the NRAB which is part of the record before PLB 6206. Lastly, the Carrier had the occasion to explicitly address the issue of relief when PLB 6206's hearing on relief was held on April 26, 2000. All of this information, as it exists, is available to the arbitrator of PLB 6206. It was available and had been studied by the arbitrator prior to the issuance of the Ruling and Award on Relief on May 24, 2000. In view of objections raised by the Carrier in the Executive Session on June 19, 2000 on PLB 6206's Ruling and Award on Relief a further review of the Carrier's position on relief on Case No. 93-3-465 (Docket MW-31469) is instructive.

In its original Submission to the NRAB on Case No. 93-3-465 the Carrier limits its arguments on relief, referring to the grievance chain on this case while it was being conferenced on property after the original claim was filed by the Organization on March 26, 1992, to the following. According to the Carrier none of the Claimants involved in the claim

were deprived of their forty hours of work in the work weeks involved in the claim.[5] Since this was so the implication here by the Carrier was that no relief was appropriate even if arguendo there had been a violation of Rule 20 of the Collective Bargaining Agreement by the Carrier.[6] This argument is repeated in the Carrier's Submission to PLB 6206 although here the Carrier intermingles its position on relief with what it argues are its rights under Article X of the Imposed Agreement, as well as the operational needs of the Carrier. In this respect the following is cited:

> "...Putting all the rhetoric aside of both parties, it is clear that the Carrier proceeded (in unilaterally reassigning track employees who were on bid positions) on the basis of the explicit rule language contained in Article X. The Carrier was reasonable in its actions by basing its decision on the train traffic (both scheduled and unscheduled) as a result of the QSP process and met with the other departments in the Railroad to determine when the work windows could be had. As the Petitioner was advised, he was not being reasonable and his claims were contrary to the Special Board's ruling that the intent was to accommodate Carrier's needs. Petitioner was advised that he was playing havoc with the Carrier's operation if he succeeded and the Board is reminded of the same. Finally, the Petitioner was advised that no one was deprived of their forty hours in the work week and, further, (the) claim was fatal inasmuch as

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[5]See Exhibit L (Volume 2) of Carrier's Submission to PLB 6206. In the original correspondence the Carrier had raised the issue of unnamed Claimants. Logically, this issue should not have surfaced again before PLB 6206 (although it did) since the parties agreed to a lead claim for PLB 6206 to handle all Rule 20 claims filed by the union. Obviously all of these claims had real Claimants associated with them. There is abundant arbitral precedent in the railroad industry to have guided the parties on this matter. See Third Division 10871, 11372, 11667 & 25183 as well as Fourth Division 3184 & 3719 inter alia. Fourth Division 3719 states, for example, that a "...Carrier's (procedural) defense that a named Claimant does not appear in the Statement of Claim is...without merit. The Awards supporting the Organization (in that case) on this point are legion". For reasons which are not clear the issue of unnamed Claimants is, nevertheless, raised by the Carrier in its Submission to PLB 6206 @ p. 18. The issue of unnamed Claimants was not raised by the Carrier in the Executive Session of June 19, 2000.

[6]Which the Carrier's officer denies. In this respect, he informs the union representative that the latter is to be reminded that "...not everyone is as enamored of the frequency of bulletins (under Rule 20) as you apparently are..." See Carrier's Exhibit J of original Submission to the NRAB on Case 93-3-465.

(it) did not name Claimants.[7] For these reasons also the Board should find in favor of the Carrier and deny the claim".

In the Rebuttal Submission to PLB 6206 the Carrier states the following with respect to Relief:

"Clearly then, there is no basis for this Referee to award any sort of remedy. (The) ...employees were not deprived of their forty hour work week(s)...".

At the PLB 6205 hearing on relief which was held on April 26, 2000 the position of the Carrier on this issue did not change from any of the above cited arguments but the Carrier did add a number of considerations at that hearing. The Carrier member argued orally at that hearing that the Carrier was not responsible for the extended time-frame involved in ultimately bringing the issues involved in PLB 6206 to arbitration. Secondly, the Carrier member implied that he construed PLB 6206's merits Award to mean that damages in this case were not appropriate.

Arguments by the Carrier in Executive Session and Response

The arbitrator will now outline the arguments raised by the Carrier in Executive Session on June 19, 2000. This will be followed by PLB 6206's response to, and interpretation of, those arguments.

Argument No. 1

The Carrier argues in its written correspondence to the arbitrator prior to the June 19, 2000 Executive Session, and in oral argument at the Executive Session that "...the sanctions

[7]See Footnote 5 for comments on unnamed Claimants.

imposed (by PLB 6206 in its Ruling and Award on Relief) are grossly excessive...". To emphasize this point the Carrier proffers various arbitration Awards as precedent in this Executive Session to PLB 6202.

Response to Argument No. 1

The argument by the Carrier dealing with excess is a variant of the argument on relief used by the Carrier throughout the handling of this case from the time that claim 920313/S-686 was filed until the hearing on relief before PLB 6206. In its most elementary form the Carrier's argument states that any monetary relief granted by PLB 6206 could be interpreted as excessive since no "...employee (who is Claimant to this case was) deprived of their forty hour work week...". The Carrier has argued in all prior handling of this case that it did not believe that any monetary relief was proper arguendo the issuance of a sustaining Award on merits.

The arbitrator responds to this by underlining that the relief granted in the Ruling and Award on Relief by PLB 6206 was a make whole remedy. As a result of the violations of the BMWE-UP Agreement by the Carrier the Claimants who are party to this case were required to work on week-end days and were not paid overtime for doing so. They were further not paid on days which they should have been allowed to work in view of the same violations at bar. To receive overtime pay, and to receive pay for days they should have been able to have worked under the Agreement protecting the job bidding process, is a contractual right accruing to the Claimants which was mutually agreed upon by the employer and the union when they negotiated Rule 20. The arbitrator to this case cannot make that right disappear.

The authority of Section 3 arbitrators is to interpret labor Agreements "as written".[8] Nor can the arbitrator make disappear the economic benefits contractually accruing to the Claimants to this case who possessed rights under Rule 20. The Carrier unilaterally worked these Claimants on week-ends without paying them overtime. The Carrier unilaterally changed work schedules, in violation of the labor agreement, and did not work the Claimants on days on which they had properly bid. By doing this the Carrier, at its risk, both underpaid the Claimants when they did work, and it did not allow them to work on days they had a contractual right to work. There were some operational benefits, as the Carrier freely admits,[9] which accrued to the Carrier because of its unilateral actions in violating Rule 20, which reasonable minds would conclude translated themselves into economic gains for the Carrier over the period of time in question. The arbitrator has no control over that. What PLB 6206 does have control over, however, is the make whole remedy which should accrue to the Claimants whose contractual rights were violated. The Claimants were not allowed to work on a day which they had bid on in the exercise of their contractual rights, and they were paid only straight time, and not overtime rate, on a week-end day which they had not bid on. The Ruling and Award on Relief by PLB 6206 wherein the Claimants are to be paid what is

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[8]This jurisdiction of arbitrators in the railroad industry is so fundamental that it need not be belabored here. See Third Division Awards 21459, 21697, 23135 & Fourth Division 4645 inter alia. The latter states, in pertinent part, that "...the sole function (of an arbitration Board) under Section 3 of the Act is to interpret labor agreements 'as written'...".

[9]"...The Carrier...bas(ed) its decision (to make unilateral changes in the Claimants' work schedules) on...train traffic (both scheduled and unscheduled) as a result of the QSP process and (consulted)...other departments in the Railroad to determine when the work windows could be had...". See p. 8 of this Interpretation.

contractually theirs is not excessive. Nor can the Carrier reasonably argue that the Claimants were paid forty hours anyway so that no relief is appropriate. The Claimants did not work the schedules they bid on which was their contractual right. There can be no doubt that many of the Claimants ended up working the Carrier's schedule which was imposed on them at considerable personal inconvenience. Concurrently the Carrier was reaping, over the period of time involved in this case, operational and economic gains because of violations of Rule 20 of the BMWE-UP labor Agreement.

Secondly, the arbitrator will observe that prior to the Executive Session which was held on June 19, 2000 no arbitral precedent with respect to the issue of relief was cited by the Carrier, at any point, in the voluminous record of this case. Whether citation of such precedent by the Carrier could or would have changed the final outcome of PLB 6206's Ruling and Award on Relief is moot. The arbitrator has no alternative, in view of the abundant precedent dealing with the finality of records before a forum such as this in this industry[10] but to conclude that the attempt to introduce such materials in Executive Session after both an Award on merits, and an Award on relief has been rendered represents an

[10]For precedent on this point see Third Division 20841, 21463, 22054; Fourth Division 4132, 4136, 4137 inter alia. In this respect, Fourth Division 4137 states: "...it must be underlined that it is well established that the NRAB (and PLBs and SBAs) will not consider..." new materials and arguments after the docketing of a case. "This firmly entrenched doctrine, which is codified by Circular No. 1, has been articulated in many Awards...".

improper attempt to insert new materials and new argument into the record of PLB 6206.[11]

Argument No. 2

The time-frame of the set of violations dealt with by PLB 6206 extended from 1992 until 1999. According to the Carrier, it should not be held accountable for the delays associated with the final resolution of the instant case before PLB 6206 which, in turn, affects the quantity of relief. In this respect the Carrier states the following in written correspondence to the arbitrator which was elaborated upon in oral discussion at the Executive Session:

> "Contrary to language and implications contained in the Award (on relief by PLB 6206), the Carrier did not delay in seeking resolution of the issue decided by this Board. The Carrier did not unilaterally extend the time frame of the dispute and the Carrier did not refuse to arbitrate these matters before the National Railroad Adjustment Board. In fact, the Carrier approached the BMWE to establish a PLB and further agreed to party pay arbitration to expedite the process. If there were any delays, they should be attributed to the National Railroad Adjustment Board and not the Carrier. The time line of events pertaining to arbitration of this matter before both the Adjustment Board and this Board (PLB 6206) belies any notion that the Carrier undertook a calculated risk that would justify the sanctions imposed here..."

Response to Argument No. 2

The arbitrator has been careful to observe that the record in this case does not support the conclusion that the violations of Rule 20 of the UP-BMWE Agreement were committed

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[11]The Carrier proffered a number of Awards dealing with relief to the arbitrator in Executive Session (over objection by the union) which the arbitrator accepted "under advisement" and as a courtesy with proviso that the appropriateness of accepting them as part of the Carrier's argument on relief would be ruled on accordingly. In and of themselves the Awards had a neutral status since they were part of the public record accessible to the arbitrator under any circumstance. They are rejected here, as part of the record in PLB 6206, on grounds that they represent both addition to the record, and because arguments presented in the Awards in question represent arguments not raised earlier by the Carrier.

by the Carrier with impunity. Rather the violations stemmed from a "...mistaken understanding by the company of the amount of scheduling flexibility it had gained from PEB 219 and from Article X of the Imposed Agreement...". What cannot be denied, however, is that the Carrier held fast to this position over a long period of time. This is simply indisputable. A review of the history of the differences between the parties dealing with the scheduling issue is that the Carrier believed that its authority to engage in the unilateral scheduling that it did stemmed from Article X of the Imposed Agreement as well as the company's operational needs, and the union's contention was that the Claimants' contractual rights to work the schedules of their bid bulletins stemmed from Rule 20 of the mutually negotiated BMWE-UP labor Agreement. That the union prevailed on the merits of this dispute is not the issue under consideration here. At issue here is why the parties did not resolve this dispute more expeditiously. The arbitrator has closely studied the record of this case in order to be able to come to a reasonable conclusion on this important matter. The road leading to that conclusion is circuitous. Nor can it reasonably be concluded from available evidence that the Carrier "...delayed seeking resolution..." of the problem. But there is also no evidence that the Carrier hurried matters along.[12] The Carrier must bear its

[12]There is simply no evidence to warrant conclusion that the real culprit of the long time-frame of this case is the NRAB. There is no evidence that this case would have stayed a longer or shorter period of time at the Board after being docketed than any other case. Certainly, it is unreasonable to conclude that the NRAB was responsible for a 7 year delay in arbitrating this case. In the Ruling and Award on Relief PLB 6206 stated that: "Nevertheless, by extending the time-frame of the dispute, which included refusal to arbitrate these matters earlier before the National Railroad Adjustment Board even though the lead claim in this case has been docketed before that forum, the Carrier was effectively party..." to delays in the process. For the record, the Carrier's refusal consisted in arguing that the NRAB had no jurisdiction over claim 920313/S-686 and that the case should be dismissed because it was improperly before the NRAB.

share of the burden of delay in resolving the issues dealt with by PLB 6206. In view of the record before PLB 6206 such is indisputably a reasonable conclusion. From the mutual participation by the parties in extending the time-frame of the claims at bar stemmed the creation of the zero-sum game which the parties engaged in and which all conflict resolution tacticians are aware of: it got to the point where one or the other had much to gain or much to lose. The arbitrator to this case did not create that situation. It was presented to him as a fait accompli. The arbitrator to this Board possesses no arbitrary authority, which he might exercise according to his own whim, to reconstruct the facts of a labor dispute which he is asked to resolve. Subsequently the arbitrator has no authority to conclude, in the instant case, absent any extenuating circumstances whatsoever, that the losing party should pay only part of a remedy when the winning party suffered duress for the full 100% of the time the violations continued. The May 24, 2000 Ruling and Award on Relief fashioned by the arbitrator in PLB 6206 stems inevitably, logically and reasonably from the circumstances to which both the employer and the Claimants were party to from the time the Rule 20 violations started in 1992 until they were stopped when the merits Award on PLB 6206 was issued on September 10, 1999.

Argument No. 3

The Carrier argues that there was a dramatic change between the merits Award issued by PLB 6206 on September 10, 1999 and the Ruling and Award on Relief by PLB 6206 on May 24, 2000. According to Carrier:

"There is no basis for the dramatic change between the first award and the

> second award with respect to the issue of damages. The evidence fully supports the Board's initial conclusions (a) that the Carrier was acting in good faith belief that it was entitled to take the actions it did and (b) that a sanction of pure damages should be avoided".

Response to Argument No. 3

As cited earlier in this Interpretation, in quoting PLB 6206's Ruling and Award on Relief, the arbitrator's concern with damages in the case before this Board was that this Section 3 forum might improperly coopt authority from the CIC with respect to a ruling on relief as this related to week-end work. This was not an undue concern in view of the language used by the CIC in its ruling on Issue No. 25, Sub-Question No. 2 wherein it stated: "...but (the CIC does) have the right to decide if Article X of the Imposed Agreement guaranteed the production gangs in question Saturday and Sunday as rest days...". When PLB 6206 ruled, in its merits Award of September 10, 1999, that Rule 20 had been violated by the Carrier, that ruling logically and factually implied that the violations encompassed week-end work. This could not be avoided in view of the nature of the claims. The question was whether PLB 6206, or the CIC, had authority to fashion a remedy if the Rule 20 violations included week-end work. This was a particular concern to the arbitrator since Rule 20 makes no mention of week-end work. But Article X of the Imposed Agreement does. What was needed was a final clearing of the air on this "jurisdictional ping pong" issue, to use a fortuitous phrase employed by the union member of PLB 6206 when writing his response

to the Carrier when the instant Executive Session was called.[13] On February 14, 2000 the CIC provided a response to PLB 6206, and subsequently closure on the issue of jurisdiction, when it wrote, in what is now known as CIC Issue No. 27, the following which is cited here in pertinent part:

> "When this (CIC) Committee rendered its Answer to Issue No. 25 we expected a Section 3 tribunal to fashion whatever remedy it deemed appropriate if it concluded that local rules and/or practices on the UP were violated when the work week of a production gang were changed without re-bulletining the positions. In as much as PLB No. 6206 concluded that Rule 20 of the BMWE-UP Agreement was violated when the work week of the gangs were changed without re-bulletining the positions in these gangs PLB No. 6202 must now fashion whatever remedy it deems appropriate for these violations".

The arbitrator may not have expressed himself as clearly as was necessary on this point in the September 10, 1999 merits Award, but the issue of damages was raised as this related only with respect to PLB 6206's potential remedy for Rule 20 violations involving week-end work. The same relief problem did not exist for PLB 6206 for the work lost on the week-days by the Claimants to this case because of the Rule 20 violations by the Carrier. What PLB

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[13]Indeed, the origins and history of the dispute ruled on by PLB 6206 stems from contested rights by the parties which involve Article X of the Imposed Agreement versus Rule 20 of the UP-BMWE Agreement, the relationship between those two Agreements, and the forums which exist to interpret these Agreements. PLB 6206's concern with pure damages, as so stated in the merits Award issued on September 10, 1999, was a potential ruling it might make on remedy which dealt with week-end work which ruling could have been contested at a later point as being outside its jurisdiction since week-end work is an issue found in the language of Article X but not Rule 20. Language used by the CIC in its ruling on Issue No. 25 but reinforced that concern. "Damages" as used by PLB 6206 in its merits Award was a term used to mean an Award on remedy on an issue over which PLB 6206 might not have jurisdiction. Once it was clear by means of the CIC ruling that PLB 6206 possessed the authority to make a ruling on remedy which dealt with week-end work, as a result of its finding of a violation of Rule 20 of the UP-BMWE Agreement by the Carrier, PLB 6206 then issued an Award on relief. It did so on basis of the Claimants' violated contractual rights and the remedy became a make whole remedy. It is incumbent upon an arbitral forum to seek finality in issuing Awards. It can do so only if its jurisdiction over all facets of a dispute is established.

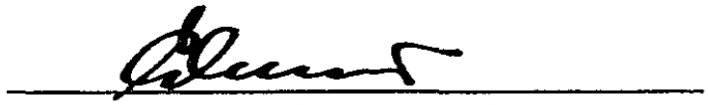
6206 sought, when issuing its merits Award, and what it obtained from the CIC by means of the latter's subsequent ruling on CIC Issue No. 27, was full authority to rule on remedy for all violations of Rule 20 in accordance with PLB 6206's ruling on merits. When this was obtained PLB 6206 issued its Ruling on Relief and Award. In so doing PLB 6206 stated the following:

> "...(s)ince it is now clear that Sunday work is a Rule 20 issue, and not only an Article X issue, any reference to pure damages, relative to this case, is no longer appropriate. It is now clear that relief in this case has nothing to do with damages. What is at stake is a make whole remedy in view of continuous violations by the Carrier, over an extended period of time, of Rule 20 of the parties' Collective Bargaining Agreement which also involved inter alia. improper work assignments to the Claimants on Sundays".

In this respect the arbitrator reference his responses in the foregoing to argument Nos. 1 and 2 raised by the Carrier in this Executive Session which need not be repeated here.

Conclusion and Interpretation

> In view of the considerations outlined in the forgoing the arbitrator affirms in full the Ruling on Relief and Award issued by PLB 6206 on May 24, 2000. That Ruling and Award stated time-lines to be followed by the parties when implementing the Award. Those time-lines, which could not have been met heretofore in view of the Carrier's request for an Executive Session, shall now be implemented as of the date of this Interpretation. All other instructions to the parties in the May 24, 2000 Ruling on Relief and Award remain unchanged.



Edward L. Suntrup, Arbitrator

Date: June 24, 2000

In the Matter of Arbitration

Ruling & Award on Relief
Interpretation/Implementation

Claim 920313/S-686/PLB 6206-1

Union Pacific Railroad Company

vs

Brotherhood of Maintenance of Way Employees

Interpretation Issued: November 14, 2000

Edward L. Suntrup
Arbitrator

In the Matter of Arbitration

Brotherhood of Maintenance of Way Employees	)	
	)	
	)	
vs	)	**Claim 920313/S-686/PLB 6206-1**
	)	**Ruling & Award on Relief**
	)	**Interpretation/Implementation**
Union Pacific Railroad Company	)	

Appearances

For the Union

Steven V. Powers - Assistant to the President

For the Company

Wayne E. Naro - General Director

Introductory Comments

There is a Public Law Board (PLB), known as PLB 6206, which was established by mutual agreement between the Union Pacific Railroad Company (UP) and the Brotherhood of Maintenance of Way Employees (BMWE). This Board was established to resolve the parties' differing interpretations of their rights and obligations under their labor agreements dealing with the issue of scheduling work. The parties have docketed only one case before PLB 6206. This is Case No. 1.

On September 10, 1999 the majority of PLB 6206 issued a sustaining Award on merits of Case No. 1. That Award specifically dealt with claim 920313 (S-686) which

had been filed by the BMWE.

For reasons stated in the Award on merits, which will not be repeated here and which are already part of the record, PLB 6206 held in abeyance an Award on relief on Case No. 1 until the parties had solicited a ruling by their Contract Interpretation Committee (CIC) on matters found in their Presidential Emergency Board (PEB) 219's Imposed Mediation Agreement. After the CIC issued its ruling that PLB 6206 did have jurisdiction to issue an Award on relief which also dealt with week-end work, PLB 6206 then issued a supplementary Award on relief. The latter is dated May 24, 2000. After an Executive Session was called and held on the Award on relief PLB 6206 then issued its June 24, 2000 Interpretation of the May 24, 2000 Award. All of these rulings issued by PLB 6202, and the parties' various briefs, and the voluminous exhibits presented to PLB 6206 throughout history of the handling of this case, are part of the record. The full record has been reviewed, as necessary, by the arbitrator in issuing this fourth set of rulings on Case No. 1 of PLB 6206. The instant rulings, which logically follow from rulings which preceded it, deal with questions related to the implementation of PLB 6206's Award on relief.

Implementation Issues: Background

The Award on merits issued by PLB 6206 dealt with an unresolved dispute between the parties over one lead claim. This claim had been filed by the Organization on March 26, 1992. There was a mutual understanding and agreement between the parties

that the Award on this claim would dispose of all other similar claims, names and dates different. It was never made clear to the arbitrator exactly how many claims in toto were associated with PLB 6206. Nor was the arbitrator ever apprised of the number of claimants associated with the total number of claims. Given the manner in which Case No. 1 was structured by the parties they apparently never thought that it was necessary to burden the record with this additional information. The arbitrator fashioned, therefore, his Ruling and Award on Relief, which was issued on May 24, 2000 to handle the lead claim with understanding that the Award would cover all claims and all claimants who were party to PLB 6206 whatever and whomever they were.

The total number of claims associated with Case No. 1 of PLB 6206 had been filed over an extended period of time. Therefore, assembling the data on each one of the claims, in order to implement the Award issued by this Board, presented a challenge.

The parties were instructed by the arbitrator to do two things in order to facilitate implementation of PLB 6206's Award. First, the parties were asked to meet and examine the records in order to come to an agreement on the number of claims and the number of claimants who were party to the Award. As it turned out the number of claims involved was a moving target. The General Chairman of the BMWE came to the Carrier after the Award on relief had been issued, with information on additional claims which had surfaced in the records which the General Chairman claimed should be included under the Award. As far as can be determined from information provided to the arbitrator, the Carrier simply added those cases to the data-set in its good faith efforts to implement the

Award.

It can be reasonably concluded, from available information, that the Carrier exercised due diligence with respect to the information gathering phase of implementing PLB 6206's Award. The Carrier instructed its Information Technologies' Department (IT) to write software which was used to capture information on each of the claimants involved in the known claims which comprised the record of PLB 6206, including those added at request of the BMWE's General Chairman. This was not, it appears, a particularly easy task. Nor was it something which, according to the Carrier, could have been accomplished "...overnight...". The addition of claims by the General Chairman to the repertoire of claims under PLB 6206 only further "...delayed the process..."

During the course of sorting out the information on the number of claims and claimants under PLB 6206, which was done by the Carrier using the program written by its IT Department, the General Chairman of the BMWE raised the issue of the "...criteria the Carrier (was proposing to use to pay relief) to eligible employees..." under the Award. This issue did not address the process of information gathering. Rather, it addressed the issue of how the information which had been gathered was to be interpreted.

Suspecting that such problems might surface, given the history of this case, the arbitrator did two things when he issued the May 24, 2000 Award on Relief. The arbitrator asked the parties to: (1) "...agree on the amount to be paid to each claimant..." covered by PLB 6206's Award, and (2) absent such agreement, the arbitrator held jurisdiction over the Award in order to issue rulings on given claims/claimants.

Implementation Issues: Rulings

The parties apprised the arbitrator of problems related to the interpretation of the data dealing with compliance of Award No. 1 of PLB 6206 after, it appears, the full data-set on claims and claimants had been gathered. In order to resolve these problems the arbitrator advised the parties that he would meet with them in Executive Session in order to examine the claims in detail and make rulings when required. The arbitrator thought that this was a reasonable approach. But the parties proposed an alternative one. They informed the arbitrator that they would make mutual attempts to resolve the Award compliance problems themselves. In their good faith efforts to do this the parties had meetings and exchanged communications. As far as can be determined, the parties did resolve certain problems related to the data-set on claims filed. However, from these also surfaced certain questions which the parties could not resolve. After the Carrier officer unilaterally advised the arbitrator, by correspondence, of what he thought the outstanding issues in dispute were, the arbitrator then advised the parties to jointly stipulate the questions to be resolved and they were informed that the arbitrator would issue rulings on these questions. The parties did this, with supporting briefs and exhibits, after which they both also filed rebuttal briefs. The arbitrator would like to thank the parties for their courteous and professional approach to the difficult and vexing questions related to this phase of the instant case.

Issue 1[1]

Based on the language of the Award is the Carrier correct in its interpretation that the days to be considered are Sundays and Mondays?

Discussion & Findings

The first issue can be dealt with briefly since it is based on a simple error of fact which found its way in the Ruling and Award on Relief by PLB 6206. Since the parties have effectively acted heretofore, as a matter of common sense, as if the error did not exist in their attempts to implement Award No. 1 of PLB 6206 the ruling on this issue here is only pro forma for the record.

The lead claim of PLB 6206 states that the Carrier violated Rule 20 of the parties' labor Agreement when it unilaterally changed certain gangs' bulletined work weeks from Monday through Friday, to Sunday through Thursday.[2] In view of the language of the claim the days in dispute are not Sundays and Mondays, but Sundays and Fridays. When the May 24, 2000 Award on Relief cited Monday instead of Friday, in its ruling, this was a factual error. The Carrier is incorrect in its interpretation that the days to be considered

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[1]The list of issues or questions at bar here was first formulated for the arbitrator in correspondence dated October 2, 2000 to him by the Carrier officer. These questions are numbered: 1 & 2a-d. In his Brief on these questions the BMWE representative states that the parties have "...jointly agreed that, at this point, the questions that we are submitting...(to the arbitrator)...for resolution are..." those found in the October 2, 2000 letter.

[2]Claim filed March 26, 1992 which was later designated as claim 920313 or S-686 (See Employees' Exhibit F of original exhibits presented to the arbitrator at the hearing on merits). The gangs in question in this claim are System Gangs 9063, 9073, 9083, 6821 and 6841.

in PLB 2606's Award on Relief are Sundays and Mondays.[3] The days at bar are Sundays and Fridays. The error found in PLB 6206's Ruling on Relief, as this related only to claim 920313 (S-686) involves one word. It substituted, incorrectly, the day: Monday, for the day: Friday.

Ruling

The Carrier is incorrect in its interpretation that the days at bar are Sundays and Mondays.

Additional Ruling on Issue 1

The parties know that the arbitrator was not provided specific information on other claims, besides claim 920313 (S-686), under PLB 6206. The arbitrator is generally aware from information submitted to him throughout the handling of this case that there are other variations of violations of Rule 20 which fall under PLB 6206 which encompass work weeks besides a Sunday-Thursday week. Those other days involved in those other claims are covered by the language of PLB 6206's Ruling and Award on Relief which states:

> The arbitrator will sustain claim 920313 (S-686) in full and thereby "...dispose...", in accordance with the parties' arbitration Agreement governing PLB 6206, all

[3]Actually the parties recognized from the beginning the factual error of the May 24, 2000 Award on Relief and to their credit they treated the Monday/Friday substitution accordingly. The Carrier's representative to this case states that the parties used a "...common sense approach and (did) not appl(y) the Monday language...(and then) calculated (claims for all employees) based on a Sunday and Friday payment schedule..." (Carrier's October 13, 2000 Brief @ p. 20). The union member agrees with this in his Brief to the arbitrator (BMWE's October 13, 2000 Brief @ pp. 3-7). The subsequent questions raised by the parties which deal with the interpretation of the data related to the claims all assume that the relief issues center on Sundays and Fridays. This is consistent with the substance of the lead claim which deals with a Sunday/Friday problem.

other claims falling under PLB 6206.

Whether all of work week variations associated with the other claims which fall under PLB 6206's Award will be resolved by the arbitrator's instant rulings on the set of questions mutually posed by the parties in 2a-d cannot be stated at this point. The Carrier has concentrated, heretofore, on relief involving the Sunday-Thursday week which is found in claim 920313 (S-686). The union has concurred in posing this mutually agreed upon list of questions to the arbitrator which stem from that single claim. Whether rulings issued here will settle all other outstanding problems related to the other claims is not clear. The arbitrator can only rule, at this point, on the questions posed to him by the parties.

Issue 2a

If the days to be considered are Sundays and Fridays and if a holiday, vacation day, personal leave day, travel time day or any other day not worked but paid for was taken on the Thursday before the contested Friday, is the Carrier obligated to make payment for that Friday?

Discussion of Issue 2a

The Carrier argues that payment on Fridays should not be made under the Award if any of the claimants were paid on a Thursday of a Sunday-Thursday work week when the Thursday was a paid holiday, a paid vacation day, a paid personal leave day, a paid travel time day or any other day not worked but paid. The Carrier argues that this is proper because the Award on Relief issued by PLB 6206 was a make-whole remedy. It was not an Award which required the payment of damages. According to the Carrier

arbitral precedent in this industry recognizes that make-whole remedies address losses actually incurred by a grieving party. Further, according to argument by the Carrier, arbitral precedent outside of this industry also normally only awards monetary losses actually suffered by a grieving party unless the parties' labor agreement states otherwise. In view of this, according to the Carrier, it should not be obligated to pay for the Fridays outlined in 2a since such would amount to turning the make-whole Award issued by PLB 6206 into a penalty Award.

The argument by the union is that the company is here attempting to "...escape liability for violating the Agreement...". The position of the union is also that the new arguments which are being raised here by the Carrier for the first time under guise of questions to be answered by the arbitrator are procedurally barred because they represent new issues not found in any of the prior record on Case No. 1 of PLB 6206. The union representative raises the question of when the "...stream of new issues in this case" will ever stop.

Ruling on Procedural Issue Applicable to 2a-d

First of all, the procedural issue raised by the union with respect to new argument will be dealt with by the arbitrator. This is not the first time this issue has been raised in these deliberations. Ruling here is applicable to all four questions raised in 2a-d.

There is a dilemma here with respect to the Organization's procedural objection to the questions listed for ruling by the arbitrator at this point in the handling of this case. The arbitrator has already ruled that Circular No. 1 and abundant arbitral precedent in this

industry, none of which needs to be repeated again here, made it improper for the Carrier to raise new arguments on relief which were not raised earlier in the handling of this case on property. The reason for this is that arbitration cases such as Case No. 1 of PLB 6206 are considered to be appellate forums in which new information or new arguments are not permitted to be introduced into the record after a case has been docketed.

The instant case, however, because it was structured around a lead claim, and because that claim was sustained, cannot reasonably be dealt with at the stage of implementation of relief without involving some discovery. There is simply no other way to view Case No. 1 of PLB 6206 at this point except to conclude that it now has mixed status: part appellate and part discovery. The instant case eschews pure appellate status at this point as a matter of logic because of discovery required with respect to facts associated with all of the other claims besides claim 920313 (S-686). There are a number of observations which can be made which makes such conclusion reasonable. First of all, despite its arguments to the contrary about questions 2a-d being inappropriately placed before this forum, the union itself did mutually agree to place them before the arbitrator for ruling. Further, the union has also argued a position on these questions. As far as can be determined, the union's position was not argued under an arguendo format. There was a good reason for that. The relief stage of this case cannot be either reasonably nor practically resolved without finding an answer to questions of the type raised here by the Carrier. In recognizing this, and by agreeing to be a mutual party in posing these questions to the arbitrator, the union must logically recognize that there are discovery

issues, at this point, which must be resolved in order to implement the Award issued by PLB 6206.[4] The arbitrator was cognizant of this eventuality when he issued the May 24, 2000 Award on Relief. This is why he held jurisdiction over the Award. The procedural objection raised by the Organization relative to new information is dismissed at this point in this case.

A further objection intimated, more than formally raised, by the Organization relative to alleged delays by the Carrier in implementing the Award, which in itself is also a new argument, and as such falls under the line of reasoning in the immediate foregoing, will be dealt with by the arbitrator upon evidence of such. To date, there is no evidence to support any undue delays in implementing the Award. What we have, heretofore, are the parties' attempts to understand exactly how to implement the Award issued by PLB 6206 on Case No. 1. Such efforts are taking longer than the time-lines for implementation originally set by the arbitrator. To date, however, the arbitrator has not been apprised of any substantial evidence of bad faith on the part of either side in implementing PLB 6206's Award.

Further, the arbitrator will observe that the parties' labor Agreement does not

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[4]The Organization raises in its Rebuttal brief certain issues surrounding the new information question as it relates to Third Division Award 32565. For reasons outlined further on in these Rulings the arbitrator would suggest some caution when using such sources to shed light on the instant case. First of all that case involved a disciplinary matter, and one claimant, and it did not address a contract interpretation matter. Secondly, the Carrier to that case never raised the back pay issue at all in its arguments before the NRAB although it had commonly done so in other cases on the property in the not so recent past. For these and other reasons which we need not delve into here the issues raised by Third Division Award 32565 are not on point with the problems inherent to Case No. 1 of PLB 6202.

provide direction on how PLB 6206 should rule on relief in its sustaining Award on Case No. 1. This is why the arbitrator has before him the questions outlined in 2a-d.

The Intent of PLB 6206's Ruling & Award on Relief

Prior to ruling on the issues raised in 2a (and 2b-d) the arbitrator reiterates here the intent of the Award on Relief in Case No. 1 of PLB 6206 in order that the rationale for the arbitrator's rulings is clear. This appears to be required at this point in order to foreclose additional arguments on relief which continue to be presented to PLB 6206 from a body of precedent which is unapplicable.

There is a guiding principle in the Award. The Award is a make-whole Award. It is not a damages' Award. The arbitrator was assiduous to make this point clear to the parties. The arbitrator stated in the Award on Merits which he issued on September 10, 1999 that it was his intent to avoid awarding damages when he sustained claim 920313 (S-686). Damages involve punitive payment for alleged or proven duress.

There is a strong tendency here, which is clear from the Carrier's latest briefs to the arbitrator, to view the make-whole issue from the point of view of the forum in which it most frequently manifests itself which is the arena of sustaining arbitration awards dealing with discipline cases. In sustaining awards involving discipline arbitrators generally do not award windfalls and if they would do so the awards would usually be

viewed, although this is starting to change somewhat, as idiosyncratic.[5] For example, arbitrators tend not to grant overtime which might potentially have been earned by a discharged employee when making whole such employee in the event a claim is sustained. Such is viewed as a windfall. So is the granting of interest on earnings when an arbitrator rules that earnings have been improperly withheld.[6]

Less commonly, however, do arbitrators have to deal with the make-whole issue in the arena of sustaining awards for violation of provisions of a labor agreement involving working conditions. Under such circumstances analogies dealing with arbitral precedent involving make-whole arbitral remedies from discipline cases are wonting. The guiding principle for a make-whole remedy involving what this industry calls a "rules'" case is that a claimant (or claimants) should be made whole for what they would have earned had the labor Agreement not been violated. The issue here is not windfall. The issue here is labor contract rights as mutually agreed upon by the parties.

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[5]Such as, for example, the case involving Third Division Award 32565 which is cited by the Organization in its Rebuttal brief to this phase of PLB 6206. The Award in that case did involve a windfall which was full back pay plus outside earnings because of a curious quirk which developed in that case. After the Award was issued the Organization refused to provide information to the Carrier on the Claimant's outside earnings because the Award did not address this issue. The Award did not address this issue because it had not been raised by the Carrier during handling on property nor before the NRAB. When the Carrier asked for an interpretation the position of the Carrier was denied on grounds that raising the issue of outside earnings at that stage broke the principle outlined in Circular No. 1 and arbitral precedent dealing with new information under the appellate forum of Section 3 cases. Albeit precedent set by Award 32565 would be viewed as idiosyncratic by many arbitrators in this industry, including the instant one who was author of Third Division Award 32565, this was not the first time that such windfall issues in discipline cases surfaced in this industry and there is, in fact, considerable arbitral precedent dealing with such matters related to outside earnings (Third Division 19623, 20676 inter alia.).

[6]The Organization's Rebuttal Submission contains an informed discussion of changing arbitral mores with respect to granting interest "...most often for a back-pay award...", citing arbitrator Snow inter alia., but this too is in the context of discipline cases which has no application to PLB 6206.

As a corollary there is the issue of sanction for violation of a labor Agreement. An employer cannot violate a labor Agreement dealing with unambiguously stated rights of employees represented by a labor Organization and seek to minimize sanction for such violation on grounds that the sanction amounts to a windfall for the parties whose rights have been violated. Such arguments against the full exercise of employees' rights logically lead to the conclusion that employers could violate labor Agreements with impunity. The relief issue in PLB 6206's Award has nothing to do with windfalls. The issue is about employees' rights under a labor Agreement.

Related to this, which has been noted earlier to the parties by the arbitrator, but which merits repetition here as threshold to the rulings on 2a-d, is that the employer cannot reasonably argue, before PLB 6202, that it has not reaped operational and economic benefits after 1992 at the expense of the claimants because of the contract violations in question. Relief granted by PLB 6206, therefore, is no more than the claimants' rightful share of economic benefits stemming from their contract rights. These benefits had been siphoned off to the Carrier's side of the union-management equation since 1992. The playing field of mutual rights and obligations, embodied in the parties' labor Agreement, tilted in favor of the employer since 1992 because of the violations. Relief granted by PLB 6206's Award tilts the field back in the other direction so that the field becomes level.

With respect to the damages' issue, and absent direction from the parties' labor Agreement, the arbitrator had a number of options when issuing the Award on Relief after

the CIC ruled that PLB 6206 had jurisdiction over the week-end issue. The only option which the arbitrator found reasonable, in order to avoid even the semblance of granting damages, was to issue a full sustaining make-whole Award. The arbitrator rejected other available options, after pondering these issues longum et latum, such as ruling that a lump sum of "X" compensation should be paid to each claimant (to be identified subsequently) by the Carrier because of its violations of the labor Agreement, and have it over with. Such a ruling, not founded in any reality, would have been arbitrary and would have been subject to no more than the vagaries of the arbitrator's imagination. Such an approach would also have represented an Award of damages: it would have represented punitive payment (of whatever amount) to the claimants for violation of the labor Agreement by the Carrier rather than an Award which dealt in a straightforward manner with the actual rights of the employees which had been infringed upon as result of the Carrier's violations of the Agreement.

Findings on 2a

The Thursday addressed by the Carrier in 2a is the last day of the work week as outlined in claim 920313 (S-686). Thursday was the last day of the work week improperly substituted for the last day of the bulletined work week which was a Friday. Whether a claimant worked on a Thursday, and/or received compensation in any other way on this day, has no bearing on Friday which is a day on which a claimant should have been able to have worked, and been paid, under claim 920313 (S-686).

The Carrier argues that in order to understand their position on Issue 2a it is

necessary to understand the nature of Production Gangs which have been in existence in the BMWE craft for many years. Members of these gangs report to work at on-line locations which are sometimes long distances from their homes. Using System Tie Gang 9063 from the lead claim as an example, the Carrier argues that if the members of this gang[7] were to take off a Thursday or the last day of their incorrectly assigned work week under claim 920313 (S-686) then it is illogical to conclude, on geographical grounds, that they would have returned to work on Friday "...because they were not available...".

Argument by the Organization is that the Carrier is simply presuming that if a claimant takes off a Thursday then he would not be available to work on the Friday.

The arbitrator here concludes as follows. First of all, no one knows, had the claimants in question been able to exercise their labor Agreement rights under Rule 20 and had they worked the bulletined positions for which they had actually bid, whether any of the claimants as outlined under 2a would have taken off Thursdays in the first place. Logic would tell us, since they did live a long distance from their work point, that they would have taken off Fridays, and not Thursdays, had the labor Agreement not been violated. If the latter would hold, these employees would have been paid on Thursdays, and also on Fridays, had they used the last day of their work week to be paid for most of the eventualities outlined in 2a. What the Carrier does here, in its arguments, is to paint the worse case scenario for the employees who were ultimately put in the position of

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[7]The Carrier here uses a sample of six (6) members of the gang as its example. See Carrier's Exhibit G.

taking off Thursdays, in most of the cases described here, because of the violation of the labor Agreement. Secondly, the arbitrator does note that the Carrier uses a sample of employees from gang 9063 as basis for its arguments and that these 6 employees do live fairly long distances from where their gangs are working. But what of all the other members of this gang, and the members of other gangs who are claimants to Case No. 1 of PLB 6206 such as members of gangs 9073, 9083, 6821 and so on? For the arbitrator to designate a geographical cut-off point which would benefit one claimant and not another would be arbitrary speculation of the type which PLB 6206 precisely seeks to avoid in the make-whole remedy of its Ruling and Award on Relief. This is particularly so since it is far from clear if any of these claimants would ever have taken Thursdays off in the first place had the labor Agreement not been violated. Logic tells us that they would have taken off on Friday and would have, therefore, been paid for that day.

The arbitrator rules here, therefore, that if a claimant is off on Thursday because of a paid holiday, and they were paid on Friday as an additional holiday, they shall not be paid under PLB 6206's Award for that Friday. If they were not compensated on Friday after the Thursday holiday, they are eligible to be paid for Friday under the Award.

The claimants to PLB 6206 shall be paid at straight time rate, under the Award, for all Fridays that they have not received compensation. If, for some reason, a claimant has already been paid eight (8) hours (or more)[8] for any Friday covered under claim 920313

[8]To include a day worked at overtime.

(S-686), the claimant shall not be paid for that Friday.

Ruling on 2a

The ruling on Issue 2a is in accordance with the Findings.

Issue 2b

If the days to be considered are Sundays and Fridays and if an employee was absent from service (either with or without authority) on the Thursday before the contested Friday, is the Carrier obligated to make payment for that Friday?

Discussion of 2b

It is the position of the Carrier that if a claimant was off on disciplinary suspension "...for the week and received no pay...", then the claimant should not receive pay under PLB 6206's Award on Friday of the week the claimant is serving such suspension. The Organization's argument here is the same as is found under Issue 2a.

Findings on 2b

The arbitrator rules as follows on 2b. If an employee who is an eligible claimant under PLB 6206 was on disciplinary suspension without pay for a work week which ran from Sunday-Thursday, such claimant shall not be paid for Friday of such week if and only if his suspension continues on the first work day after the Thursday, or on the Sunday immediately following such week. Otherwise the claimant shall be paid for the Friday of the week he received suspension without pay. The arbitrator will add here the following to also cover an additional scenario. If an employee is absent from work (AWOL) for the whole week Sunday-Thursday the claimant shall not be paid for Friday

of such week if and only if his AWOL status continues on the first work day after the Thursday, or on the Sunday immediately following such week.

Rationale for ruling here is stated in Findings under Issue 2a and is incorporated herein by reference.

Ruling on 2b

The ruling on Issue 2b is in accordance with the Findings.

Issue 2c

If the days to be considered are Sundays and Fridays and if an employee was compensated at the straight time rate for Sunday and also was compensated at the overtime rate for service performed on Friday, is that employee entitled to additional compensation?

Discussion & Findings on 2c

Consistent with rationale used in the foregoing, which is incorporated herein by reference, the arbitrator rules here as follows on 2c. A claimant under PLB 6206 shall be not paid on a Friday if the claimant has already been paid for working a Friday irrespective of whether the claimant earned overtime or not. If a claimant has only received straight-time pay for Sunday, the claimant shall be paid an additional four (4) hours for Sunday. But if a claimant earned overtime on Sunday (minimum 4 hours) the claimant shall not be paid any additional compensation for that Sunday

Ruling on 2c

The ruling on Issue 2c is in accordance with the Findings.

Issue 2d

Since the arbitrator has determined that Sunday was not a valid work day, if the employee utilized a day with pay and did not work may the Carrier use that day to offset the Friday of the same work week?

Discussion & Findings on 2d

The issue here, as the arbitrator understands it, involves vacations. Consistent with earlier ruling the arbitrator concludes as follows. If an employee took their vacation for one week on a Sunday-Thursday week and the vacation did not continue to the Sunday immediately following this week then the employee shall be paid for the Friday immediately following the Thursday of his vacation week. If the vacation day with straight time pay was on a Sunday, the claimant shall be paid four (4) hours at overtime rate for this Sunday. The bulletined positions, and consequently vacation time in accordance with such bulletined positions, ran from Monday-Friday. Sunday is an overtime day in accordance with claim 920313 (S-686) irrespective of whether, as result of the violation of the labor Agreement, a claimant received straight time pay for Sunday for working or for taking a vacation day.

Ruling on 2d

The ruling on Issue 2d is in accordance with the Findings.

Time-Lines

Time-lines for implementation of Award No. 1 of PLB 6206 are extended for thirty (30) days from the date of these Rulings. The arbitrator holds jurisdiction over the Award until it is implemented.

Edward L. Suntrup, Arbitrator

Date: November 14, 2000