BEFORE PUBLIC LAW BOARD NO. 6671

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Case No. 2

STATEMENT OF CLAIM:

1. Did Amtrak violate its May 19, 1976 Agreement with BMWE (as amended) when it contracted out the welding work identified in its letter dated September 12, 2003?

2. If the answer to Question No. 1 above is "Yes," what shall the remedy be?

Introduction

By letter dated September 12, 2003, the Carrier advised the Organization of its intent, pursuant to the January 28, 1977, Equipment Rental Agreement, to lease a Holland Mobil In-Track Welder, with Holland operators, to perform track welding over the course of several months with an Amtrak rail gang replacing rail on the Harrisburg Line and New York Division. The Organization objected to the contracting out of this work. After a conference between the parties failed to result in a resolution of this dispute, the parties subsequently agreed to submit their dispute to this Board.

Position of the Organization

The Organization contends that this is a straightforward contract-interpretation case. The Organization argues that the Scope Rule does not permit the Carrier to contract out welding work. The Organization emphasizes that the Rule plainly provides that track maintenance work from four inches below the base of the tie and up may not be

contracted out without the written concurrence, except in case of emergency, of the appropriate General Chairman. The Organization maintains that there can be no question that welding rail joints in connection with installing new rail is track maintenance work that is above the base of the ties, so such work may not be contracted out without the General Chairman's written concurrence, except in emergencies. There was no emergency asserted in connection with this case, and the General Chairman did not give his written concurrence. The Organization therefore contends that Amtrak violated the Scope Rule when it contracted with Holland Company to weld rail joints in connection with the replacement of rail by Amtrak rail gangs, pursuant to Amtrak's September 12, 2003, letter.

The Organization argues that the Scope Rule's exceptions to the clear prohibitions on contracting out plainly have no application to the instant dispute. Side Letter No. 2, dated January 22, 1987, specifically provides that the Scope Rule's exceptions will not apply to work of the scope and magnitude historically performed by BMWE forces. The Organization emphasizes that there can be no question that welders represented by BMWE historically performed rail welding work, including welding rail joints in connection with the replacement of rail by Amtrak's production rail gangs. The 1983-1987 force account reports establish that Amtrak consistently maintained a large force of welders to perform rail joint welding work, including large-scale production rail installation projects. These force account reports, together with the written statement of Edward J. Romecki, who has worked as an Amtrak welder since 1978, make it

transparently clear that Amtrak welders historically performed joint rail welding work, including the high volume of welds associated with production work. The Organization therefore argues that there can be no question that BMWE forces historically performed rail welding work of the scope and magnitude involved in this case. Accordingly, the exceptions set forth in the Scope Rule do not apply to this case.

The Organization goes on to contend that even if the Scope Rule's exceptions were applicable to this case, the Carrier has not and cannot establish the factual predicate for applying those exceptions. The Carrier cannot show that a "lack of essential equipment" would have prevented timely completion of the work. The Organization asserts that Amtrak may have preferred to use the Holland equipment, but there is no question that use of Holland equipment was not essential. To the contrary, the evidence demonstrates that Amtrak forces have welded rail joints since the inception of Amtrak, using the boutet and thermite processes; there is no reason that Amtrak forces could not have welded all of the rail joints involved in this dispute if Amtrak had assigned an adequate number of welders to the task. The Organization points out that, in fact, it was not "essential" for Amtrak to weld the rail joints in question at all. Consistent with the Federal Railroad Administration Track Safety Standards, Amtrak could have initially bolted the rail ends together, then assigned a small dedicated welding gang, or even local welding forces, to weld the joints as time permitted. Alternatively, Amtrak could have assigned a larger welding gang to weld the joints as the rail was installed, using the boutet or thermite processes. The Organization then asserts that even if the Holland welding unit can be

deemed "essential," there was no "lack" of such equipment because these welding units are readily available for lease without Holland operators.

The Organization then asserts that the Carrier does not dispute that rail joint welding is an integral part of maintaining the track above the base, and it therefore is covered by the Scope Rule. The Organization points to the Carrier's reliance on the 1977 Equipment Rental Agreement to support its contention that it may contract out such work, despite the Scope Rule's mandatory command that such work "may not be contracted out" without the General Chairman's written concurrence. The Carrier's reliance on the Equipment Rental Agreement is misplaced for several reasons. This 1977 Rental Agreement was negotiated in conjunction with the Scope Rule in the May 1976 collective bargaining agreement, but it must be read in conjunction with the new Scope Rule provisions that took effect in January 1987. The Organization points out that the earlier Scope Rule was silent with respect to equipment, and the 1977 Rental Agreement filled that gap. The current Scope Rule, however, clearly limits Amtrak's right to rely on equipment exceptions as an excuse to contract out work. Under the current Scope Rule and Side Letter No. 2, Amtrak may rely on an equipment exception only when the work is of a scope and magnitude greater than that historically performed by BMWE forces, and when a lack of essential equipment would prevent timely completion of the work. The Organization maintains that the Carrier has not and cannot establish that either of these conditions exists in connection with the disputed work. The Organization contends that, pursuant to the principle that one contract provision should not be interpreted so as to

render another provision meaningless, it is evident that the 1977 Equipment Rental Agreement applies only in instances where Amtrak first has met the equipment exception tests in Side Letter No. 2 and in the Scope Rule. The 1977 Equipment Rental Agreement has no application to this case.

The Organization additionally contends that the Carrier cannot establish the factual predicate to apply the Equipment Rental Agreement, i.e., that it did not have the equipment available to perform the work or that such equipment cannot be rented or leased. Amtrak has not and cannot deny that it owns boutet and thermite welding equipment that is sufficient to perform the welding work at issue. Moreover, Amtrak employees have been assigned to use that equipment for joint elimination work day in and day out from Amtrak's inception to the present. The Organization emphasizes that there can be no question that the boutet and thermite processes continue to be safe and effective welding processes.

The Organization then points out that another problem with the Carrier's reliance on the 1977 Equipment Rental Agreement is that the Carrier has the burden of showing that the flash butt welding equipment "cannot be leased without an operator." The Organization asserts that the Carrier readily could have rented or leased additional equipment without an operator, including Holland brand welders. The Organization maintains that there is no probative value or credibility to the unsigned September 2003 letter that the Carrier holds out as evidence that Holland Company will not lease its mobile in-track welders without Holland operators. The Organization asserts that this

letter is, at best, the shilling of a Holland Company sales representative who will say whatever Amtrak wants.

The Organization argues that the utter lack of credibility of this Holland letter is best demonstrated by the prior agreements that Amtrak made with the Organization to settle disputes on the operation of Holland welding units in 1996 and 1997. The Organization points out that in the 1996 settlement agreement, the Carrier agreed to train its own welders to operate flash butt welding units, and Amtrak further stipulated that this training "is being done in anticipation of Amtrak's desire to purchase or lease an intrack flashbutt unit and staff it with BMWE employees." Similarly, in the 1997 settlement agreement, the Carrier once again agreed to train its employees at the Holland facility in Chicago, and Amtrak once again stipulated that the training "is being done in anticipation of Amtrak's desire to purchase or lease an intrack flashbutt unit and staff it with BMWE employees." The Organization emphasizes that these settlement agreements are in direct conflict with Amtrak's belated assertion that it cannot lease Holland welding units without Holland employees. Amtrak would not have paid to train its employees to operate Holland welding equipment if it could not purchase or lease that equipment for its employees to operate. The record shows that Amtrak employees operated a leased Holland welder during 1996. The Organization further points out that it has made agreements with other carriers to train and assign employees to operate Holland welding units. In fact, one of these other carriers recently notified the Organization that it planned to lease Holland welding machines for the 2004 production season and assign its own

employees to work with each of the leased machines to perform the welding and grinding work. The Organization asserts that the Carrier cannot rely on the 1977 Equipment Rental Agreement because Amtrak cannot prove that Holland welding equipment cannot be leased without an operator. Holland welding units are available for Amtrak's employees to operate.

The Organization argues that Amtrak is wrong, as a matter of fact and principle, in asserting that prior settlement of welding disputes has no precedential value in this case. The Organization emphasizes that the 1996 and 1997 disputes were resolved when Amtrak agreed to provide training to its employees on Holland welding equipment and to allow its employees to displace on Holland welding equipment working on Amtrak's Southern District after completing that training. The disputes that arose in 1995 and 2002 were resolved when Amtrak agreed to pay BMWE-represented welders between 75% and 100% of the hours Holland employees performed welding work on Amtrak. The Organization contends that it is not reasonable to believe that Amtrak would have entered into such agreements if it did not recognize that the work in question was reserved to BMWE-represented welders under the Scope of the Agreement.

The Organization additionally argues that the most compelling reason why Amtrak cannot rely on the 1977 Equipment Rental Agreement in this case is that the clear and unambiguous language of the agreement specifies that any proposal to implement that agreement shall be furnished to the General Chairman "for his approval before any contractor's equipment or employes are permitted to perform work coming within the

scope of the current M.W. Agreement." The Organization points out that the Equipment Rental Agreement makes three separate references to obtaining the General Chairman's approval before Scope-covered work may be contracted out. In this case, the General Chairman not only refused to grant his approval, but vigorously protested Amtrak's proposed contracting out of the track welding work. The Organization asserts that notwithstanding the multi-layered issues presented by the parties in this matter, this case can and should be decided in the Organization's favor based on the hornbook principle that where contract language is clear and unambiguous, it must be enforced as written. Based on the clear and unambiguous meaning of the word "approval" in the Equipment Rental Agreement, Amtrak simply cannot rely on that agreement to support its position in this case.

The Organization goes on to maintain that yet another problem with the Carrier's argument concerning the Equipment Rental Agreement is its reliance on a Third Division Award that, according to Amtrak, recognizes that Amtrak was free to contract out Scope-covered work pursuant to the Equipment Rental Agreement if it did not have equipment available to perform the work and it could not rent such equipment without an operator. The Organization maintains that the fatal problem with this argument is that this Third Division Award involved a dispute that arose in May 1986, prior to the 1987 amendments to the Scope Rule and the cancellation of the Minimum Force Agreements. The Organization acknowledges that in May 1986, Amtrak did have broad latitude to contract out Scope-covered work under the Minimum Force Agreements, as long as it maintained

the required minimum number of BMWE-represented forces. The Organization contends that all of this changed with the 1987 amendments to the Scope Rule and the abrogation of the Minimum Force Agreements. The Third Division proceeding cited by the Carrier is not a "like" case, and is irrelevant here, because it was controlled by contract terms that were substantially different than the contract terms that control the instant case.

The Organization then contends that although it is not necessary to rely on bargaining history in order to sustain its position, an analysis of the parties' bargaining history lends further support to the Organization's position in this matter. The Organization points out that the Scope Rule that controls this case was preceded by the massive federal funding associated with the NECIP, which led to the May 1980 Minimum Force Agreements. The Organization maintains that by 1987, it agreed to free the Carrier from the Minimum Force Agreements in exchange for scope language that would maintain the vitality of the bargaining unit by guaranteeing that scope-covered work could not be contracted out except under the very limited circumstances specifically included in the January 5, 1987, Scope Rule. This January 1987 Agreement relieved the Carrier from having to maintain an artificial number of Maintenance of Way employees, while it guaranteed the Organization that when the Carrier had the resources to perform maintenance of way work, that work would be performed by the bargaining unit. The Organization argues that if the Carrier can contract out fundamental track maintenance work, such as rail welding, by the simple expedient of failing to acquire new equipment as technology advanced, then the entire *quid pro quo* inherent in the January 1987

Agreement would be a sham. The Organization emphasizes that it did not surrender the May 1980 Minimum Force Agreements for such a hollow promise.

With regard to the Carrier's contention that the Amtrak Reform and Accountability Act (hereinafter "the Amtrak Reform Act") expressly gives Amtrak the right to contract out work previously denied it under its agreements with the Organization, the Organization asserts that the Carrier's arguments relies wholly on a bootstrapping of the general Congressional findings contained in the Amtrak Reform Act's preamble to amend, by implication, the plain language of Section 121 of the Act, and by further implication, amend the parties' collective bargaining agreement *sub silentio*. Although the Carrier's arguments are clever, the Organization maintains that they are specious at best and dishonest at worst.

The Organization contends that, contrary to the Carrier's assertions, the Amtrak Reform Act did not create such a fundamental rearrangement of the parties' collective bargaining relationship. The Organization emphasizes that Section 121 simply transferred a restriction on Amtrak's ability to subcontract scope work from the statute books into each labor organization's collective bargaining agreements with Amtrak. Moreover, Section 121 obligated both Amtrak and all the unions representing its employees to bargain over that term's continued inclusion in the agreements no later than five years after the Amtrak Reform Act's enactment. The Organization asserts that if Amtrak truly believed that Section 121 amended the collective bargaining agreements to remove all subcontracting provisions save the statutory language, then it would have said

so in the contemporaneous December 1997 letter from its Vice President – Labor Relations to its employees' representatives. Instead, as the Carrier well knew, Section 121 merely began a process that obligated the parties to bargain over the continued existence of the former statutory provisions in the collective bargaining agreements, nothing more.

The Organization then maintains that the utter dishonesty of the Carrier's novel position on the impact of the Amtrak Reform Act is demonstrated by the competing House and Senate versions of the Act. The Organization emphasizes that the House version of the Act proposed the outright repeal of all collectively bargained restrictions on subcontracting. The purpose of the House version was the negotiation or arbitration of entirely new provisions regarding "all issues" concerning subcontracting. The Organization contends that the Carrier wants this Board to believe that this is what Congress accomplished in enacting the Amtrak Reform Act, but this version never passed the House and never was enacted into law. The competing bill that was introduced in the Senate also initially contemplated a process that required bargaining and a negotiated or arbitrated settlement of "all issues relating to subcontracting." Various amendments to the Senate version, however, substantially changed the subcontracting provisions in Section 121. The Organization emphasizes that the amended Senate version that ultimately passed and became the Amtrak Reform Act applies, by its own terms, only to subcontracting that "results in the layoff of an Amtrak employee," and not to "all issues relating to contracting out by Amtrak of work normally performed by an employee in a

bargaining unit covered by a contract between Amtrak and a labor organization representing Amtrak employees." The Organization maintains that the version of the Act actually passed by Congress focuses only on the statutory restriction on subcontracting that leads to the layoff of an Amtrak employees. The Organization contends that in the Amtrak Reform Act, Congress did not seek to remove all restrictions on the Carrier's ability to subcontract work.

The Organization then points out that the "no inference" provision in subsection (d) of Section 121 actually supports the Organization's position. Contrary to the Carrier's assertion, the Organization argues that this term means that nothing in the Amtrak Reform Act should be read to affect the collectively bargained rights and restrictions on Amtrak's ability to subcontract work. The Organization contends that those provisions remain unchanged, and the parties were left to negotiate these provisions under the standard Railway Labor Act process. The Amtrak Reform Act was a compromise bill that offered Amtrak limited relief on the statutory restrictions on subcontracting. The Organization argues that the Carrier's specious claims, seeking to breathe life into a bill that could not pass the House or the Senate, should be summarily rejected by this Board.

The Organization goes on to assert that it is just plain frivolous for the Carrier to argue that track welding work to eliminate rail joints is not reserved to BMWE-represented forces under the Scope Rule. The Organization emphasizes that Amtrak itself has recognized that the work involved in this dispute is Scope-covered. Amtrak initiated this dispute when it sought to contract out the work in question under the Equipment

Rental Agreement; this Agreement, by its own plain terms, applies only to work within the Scope Rule. If the disputed work was not Scope-covered, then there would have been no reason for Amtrak to attempt to implement the Equipment Rental Agreement. Moreover, the work of welding rail ends to eliminate rail joints unquestionably is an element of track maintenance, construction, and repair, and the Scope Rule clearly and unambiguously reserves such work to BMWE forces.

The Organization emphasizes that the Carrier's attempt to distinguish between flash butt welding and other methods for welding rail is a distinction without a difference under the controlling contract language. The Organization asserts that the language of the Scope Rule refers to "work," demonstrating that the collective bargaining agreement preserves work, not the equipment or the method of performing it. BMWE forces have performed the work at issue, fastening rail ends, and the employees have used a number of methods, technology, and tools to perform this work over the years. The Organization points out that fastening rail ends is an integral part of the rail construction, maintenance, and repair work, and this historically has been performed on Amtrak by BMWE forces, irrespective of the method used to perform that work. Such work unquestionably falls within the Scope Rule of the Agreement.

The Organization ultimately contends that the instant claim should be sustained; the track welding work should be returned to Track Department welders covered by the May 16, 1976, Agreement, as amended; and the appropriate Track Subdepartment welders should be compensated at their applicable rates of pay for an equal and

proportionate share of the hours expended by the contractor's forces in performing the identified work. The Organization maintains that the instant claim should be paid for 100% of the hours worked because previous settlements in which pay was reduced to 75% of the hours worked obviously has not deterred the Carrier from repeatedly violating the Agreement. The Organization contends that the instant matter therefore should be remanded for a joint check of the Carrier's records to determine the number of hours worked by the contractor's employees, and the appropriate claimants from the welder seniority rosters.

Position of the Carrier

The Carrier initially contends that the January 28, 1977 Equipment Rental Agreement is controlling here. The Carrier explains that the parties negotiated this special agreement in recognition of the fact that certain work is covered by the Scope of the Agreement and to expedite the handling of situations where Amtrak does not own specific equipment necessary to perform maintenance of way work and that necessary equipment cannot be leased without operators. If these two conditions are met, the agreement provides for an automatic remedy – step-rating an equal number of employees for the duration of the use of outside operators on the leased equipment on the project.

The Carrier argues that nothing in the contract restricts Amtrak's right to lease necessary equipment, and Amtrak employees operate that equipment in the performance of their assigned functions in many cases. The Equipment Rental Agreement was simply to address those situations in which Amtrak seeks to rent equipment, but cannot obtain

equipment without outside operators. The Carrier further asserts that changes in the Scope Rule have absolutely no impact upon the application of the Equipment Rental Agreement. If the work is not Scope-covered, Amtrak is free to have the work performed in whatever manner it deems appropriate and no remedy would be due to BMWE employees. The Carrier asserts that in the absence of evidence that the parties specifically agreed to eliminate or alter the application of the Equipment Rental Agreement in connection with the 1987 Scope Rule revisions, that special agreement continues to exist and applies to the instant dispute.

The Carrier maintains that in connection with the instant matter, it met the requirements of the Equipment Rental Agreement. Amtrak provided ample notice to the Organization that it does not own the track flash-butt welding equipment and intended to lease this equipment from Holland Industries. The Carrier also provided evidence that the equipment could not be leased without operators. The Carrier emphasizes that the Organization never has argued in this case that the Carrier owns this equipment or that the equipment could be leased without operators, and the Organization has asserted, in prior cases before the Board, that the Carrier must satisfy these two conditions under the Equipment Rental Agreement. The Carrier argues that it fulfilled its obligations under the Equipment Rental Agreement, but the Organization now seeks to veto the rental of this equipment, effectively abrogating the Equipment Rental Agreement.

The Carrier points out that although it has met all of the requirements for application of the Equipment Rental Agreement, the Organization nevertheless contends

that this Agreement is not applicable here, arguing that Amtrak either should buy a Holland Welder for BMWE employees to operate or should utilize one of the welding processes performed by BMWE employees. The Carrier maintains that these arguments do not constitute a basis on which to veto Amtrak's lease of the equipment, effectively abrogating the provisions of the Equipment Rental Agreement. There is no provision that prohibits Amtrak from utilizing different technology or methods of work performance from that traditionally performed by BMWE members. In addition, there is no provision that mandates that Amtrak use a less reliable and less efficient method of joining rail lengths simply because the BMWE is capable of performing those methods. The Carrier argues that it has a responsibility to utilize the most cost effective and reliable work processes possible.

The Carrier goes on to argue that although it considered buying such equipment in the late 1990s, and trained a number of BMWE employees on the flash-butt welding process, it is not possible to purchase such equipment under Amtrak's current financial constraints. Moreover, the limited need for such equipment would not justify the expense of the equipment or the cost of employee training. The Carrier emphasizes that there is no agreement provision mandating that Amtrak purchase equipment under these circumstances.

The Carrier then asserts that the Organization cannot rely on the "approval" provision of the Equipment Rental Agreement to support the contention that it has the right to veto the lease of necessary equipment. Such a veto right would effectively

abrogate the entire agreement; this obviously was not the parties' intent. The Carrier maintains that, consistent with the Organization's position in previous disputes, the approval provision is simply to affirm that the Carrier has met the key requirements of the agreement – that Amtrak does not own the necessary piece of equipment and that the needed equipment cannot be leased without operators. If those requirements are not met, the Organization need not approve the process. The Carrier maintains, however, that if these requirements are met, the application of the agreement cannot be ignored or rejected simply by withholding approval.

The Carrier argues that the lease of the Holland Welder is the type of project that the Equipment Rental Agreement was specifically designed to address. There is limited need for the equipment, Amtrak does not own it, and it cannot be leased without operators. Because the agreement's requirements have been met, the Organization cannot simply reject its application. As for the Organization's criticism of the document provided by Amtrak to show that Holland will not lease their In-Track Welding Unit without their operator, the Carrier argues that the Organization merely made assertions about the document. If the Organization seeks to take an affirmative defense, then the Organization is obligated to demonstrate that Holland Industries or another vendor will, in fact, lease the equipment without operators. Because no such evidence has been presented, the Carrier maintains that the fact remains that the equipment cannot be leased without operators.

The Carrier goes on to assert that if the Board determines that Amtrak cannot lease the equipment in question without BMWE approval, there is nothing in the Scope Rule, as amended, that prohibits contracting out the work in dispute. The Carrier argues that in December 1997, its labor agreements were amended by the Amtrak Reform and Accountability Act of 1997 (hereinafter "the Amtrak Reform Act"), which provides that Amtrak may not contract out work normally performed by bargaining unit employees if the contracting out results in the layoff of an employee in the bargaining unit. The Act further specifies that this amendment is without prejudice to Amtrak's power to contract out work not resulting in the layoff of Amtrak employees. The Carrier maintains that this amendment was intended to afford Amtrak greater flexibility in the use of outside forces so that the Carrier could become more efficient and productive, thereby reducing the need for federal subsidies. The Carrier argues that the language inserted into the contract was not an addition to existing restrictions, but rather an overriding provision, consistent with Congress' intent to improve Amtrak's financial and operating performance.

The Carrier argues that the Amtrak Reform Act was intended to ensure that Amtrak make the most efficient use of its financial resources by eliminating restrictions on the use of the most cost-effective means of accomplishing work, including broader use of outside forces. The Carrier asserts that the only restriction that was preserved was that Amtrak could not contract out work that resulted in the furlough of bargaining unit employees. Moreover, by placing this provision in the contract, the parties had the ability to bargain over the elimination of that remaining restriction. The Carrier points out that in

printing the agreement following the contract settlement and the Amtrak Reform Act, the statutory amendment was simply inserted in the contract. The Carrier argues that this does not mean that the parties agreed that this change simply was an addition to existing provisions. In fact, the parties agreed that the reprint was a synthesis, intended as a guide, and that the terms of the actual contract provisions would govern the resolution of disputes. The Carrier asserts that the synthesis cannot now be used to support the Organization's position that the prior restrictions continue to apply. The Carrier therefore contends that the contracting out of the work at issue did not violate the Agreement, as amended by the Amtrak Reform Act, as no employees were furloughed as a result of the contracting out of this work.

The Carrier then argues that even if this Board rejects the fact that the previous Scope Rule restrictions were eliminated by the Amtrak Reform Act, the Organization has failed to establish that the disputed work, flash butt welding, is work reserved to the craft under the contract. The Carrier submits that even if the Equipment Rental Agreement did not exist, and the previous scope rule restrictions remained in effect, Amtrak would not be prohibited from contracting out the work in question. The Carrier points out that the Organization will argue that the disputed work is track maintenance, construction, or repair that cannot be contracted out without the General Chairman's written concurrence, but Amtrak maintains that this argument ignores the fact that this provision can restrict only the contracting out of work originally reserved to the craft under the Scope Rule. The Carrier points out that the Agreement's Work Classification Rule reserves only two

types of welding to the craft. Although Amtrak has trained and utilized employees to perform other welding methods, the contract language does not reserve all methods of welding to the craft. Where, as here, there is no broadening contractual language, only those methods listed are reserved to the craft.

The Carrier contends that flash butt welding is not reserved to the craft under the scope and work classification provisions of the Agreement. For this reason, as well as the fact that Amtrak employees never have performed flash butt welding, Amtrak is free to contract out the performance of this work. The Carrier points out that even if the Board determines that flash butt welding was work reserved to the BMWE, it nevertheless is true that because of the lack of essential equipment, a specific exception set forth in the Scope Rule, Amtrak can contract out the work without BMWE concurrence. The Carrier argues that because it does not own equipment capable of performing flash butt welding, there is no prohibition on contracting out the work.

The Carrier then addresses the Organization's contention that prior "agreements" resolving similar requests to lease Holland Welding equipment are somehow determinative of this dispute. The Carrier maintains, however, that such agreements do not amend the collective bargaining agreement or establish precedent for all future handling of equipment rental issues. The Carrier readily admits that the April 1997 agreements expressly provide for the training of employees on the flash butt welding process, but the Carrier emphasizes that the agreements clearly indicate that the training was being done "in anticipation of Amtrak's desire to purchase or lease an intrack

flashbutt unit." The Carrier contends that its funding constraints have precluded the purchase or long-term or lease of such equipment. More importantly, because of the impact that these financial constraints have had upon capital improvement projects, the Carrier argues that the need for such equipment has been virtually non-existent in the years since these 1997 agreements.

The Carrier maintains that an agreement to train employees on a new welding process does not automatically place the work under the Scope Rule, nor does it mandate that Amtrak repeat that training exercise on the limited occasions when the lease of the equipment is necessary. Moreover, although Amtrak trained a number of employees on the process more than six years ago, the fact remains that Amtrak does not own flash butt welding equipment; the trained employees therefore never have been able to utilize those skills, much less develop proficiency in performance of the process. The Carrier further points out that even if these employees have been able to retain those skills for all of these years, the technology has changed substantially over the past several years, making the skills learned by Amtrak employees in 1997 virtually obsolete. As for any payments made to BMWE employees in connection with certain rentals of Holland Welding Equipment, the Carrier argues that payments by subordinate officials do not establish precedent in contract interpretations.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

Findings

The instant matter is one of three separate, but related, claims that the Organization has pursued over the Carrier's decisions to contract out certain work to outside contractors. This case specifically focuses on rail welding work. As is true of any contract-interpretation matter, the analysis of the parties' respective positions must be based upon the relevant language of the parties' agreements. Here, the Scope Rule in the parties' collective bargaining agreement is the starting point, but other agreements and statutes also come into play. The Carrier has pointed to both the Amtrak Reform Act and the so-called exclusivity test, focusing on their respective impacts upon the proper interpretation of the collective bargaining agreement's provisions relating to subcontracting. The Organization has emphasized that Side Letter No. 2 must be read along with the contractual Scope Rule for a full understanding of the collective bargaining agreement's restrictions on contracting out and the exceptions thereto. The logical first step in the Board's analysis of the proper interpretation and application of the contractual Scope Rule is to determine whether and how the Amtrak Reform Act has modified the Scope Rule.

The Carrier's position in this case rests heavily upon its assertion that the Amtrak Reform Act eliminated the bargained-for restrictions on contracting out that appear in the parties' collective bargaining agreement. The Carrier argues that the single restriction on

subcontracting that appears in the Amtrak Reform Act – prohibiting Amtrak from contracting out work normally performed by bargaining unit employees if the contracting out results in the layoff of a bargaining unit employee – serves to override the express restrictions on contracting out that appear in the parties' collective bargaining agreement. The Carrier maintains that the contracting out of the rail welding work at issue did not violate the parties' collective bargaining agreement because it did not result in any layoffs of bargaining unit employees.

Collective bargaining, of course, helps to form the very foundation of the relationship between management and labor, and agreed-upon contractual provisions cannot be lightly tossed aside. The Carrier's position here, however, requires a finding that the Amtrak Reform Act operates to supercede bargained-for provisions relating to the contracting out of work, replacing any and all mutually agreed prohibitions on contracting out – in all of the collective bargaining agreements between Amtrak and the labor organizations that represent its employees – with the single restriction that such contracting out may not result in the layoff of bargaining unit employees. The Carrier's suggestion that Congress intended to work such an extreme change upon these collective bargaining agreements must, to be accepted, be supported by clear and credible evidence.

This Board, however, finds no support in the record for the Carrier's assertion about the impact of the Amtrak Reform Act on the contractual restrictions on the contracting out of bargaining unit work. If the Amtrak Reform Act actually was intended to override specific provisions of the parties' collective bargaining agreement, then this

would unequivocally be stated within the Act itself. Nothing in the language of the Reform Act itself, or in the cited legislative history, suggests that the Act was intended to override any bargained-for provision with any of the collective bargaining agreements between Amtrak and the labor organizations that represent its employees. In fact, Section 121 of the Reform Act specifically states that any Amtrak collective bargaining agreement is deemed amended "to include" the prohibition against contracting out work if it results in bargaining unit layoffs, thereby demonstrating that this limitation is to be added to whatever other limitations on contracting out already appear in the Amtrak labor agreements. Moreover, Section 121's general emphasis on party negotiations, which underlines the importance of collective bargaining, is at odds with the Carrier's assertion that the Reform Act should be read as superceding the contractual limitations on the contracting out of work.

Based on its express language, we find that the Amtrak Reform Act cannot be taken as overriding any part of the Amtrak collective bargaining agreements. Instead, this Board finds that the language of Section 121 of the Act must be read and understood as adding to, rather than superceding, the existing contractual restrictions on the contracting out of work. Applying this to the instant dispute, it must be noted there is no allegation, and no evidence in the record, that the contracting out of the rail welding work at issue resulted in any bargaining unit layoffs. The Amtrak Reform Act's single limitation on the contracting out of work therefore does not apply to this dispute, making the Reform Act and its impact on the parties' collective bargaining agreement irrelevant to the resolution

of this matter. Accordingly, this Board shall determine whether the contracting out of the rail welding work at issue constituted a contract violation based upon the Scope Rule language as written in the parties' collective bargaining agreement, without any further specific consideration of the provisions of the Amtrak Reform Act.

There can be no serious question that the welding of rail joints is covered by the contractual Scope Rule. The Scope Rule expressly includes "track inspection, maintenance, construction or repair work from four (4) inches below the base of the tie up, and undercutting." Rail joint welding is an essential component of such work, and the evidentiary record conclusively demonstrates that the Carrier's Track Department welders historically have performed welding work of the scope and magnitude of the particular work at issue here, involving large-scale rail installation and an associated high volume of welds. The record shows that the Carrier's BMWE forces have performed this type of work using a number of methods, technologies, and tools, but particularly the boutet and thermite processes.

In notifying the Organization that it planned to contract out the welding work at issue, the Carrier indicated that its decision was pursuant to the terms of the parties' 1977 Equipment Rental Agreement. The relevant portion of this special agreement essentially addresses one particular situation: when Amtrak does not have equipment available to perform maintenance of way work and that equipment cannot be rented or leased without an operator. Although the Carrier owns the equipment necessary to complete the welding work at issue if the boutet and/or thermite processes are used, the Carrier opted to have

this work completed using the flash-butt welding process, instead. The Carrier does not own flash-butt welding equipment, and it has asserted that such equipment cannot be leased without operators.

The Carrier certainly has the right to use different technologies to complete its various building and maintenance tasks. In fact, it has an obligation to perform such work in an efficient and cost-effective manner. If newer methods and technologies allow certain work to be completed more quickly and/or more cheaply, without harming the quality of the finished work, then the Carrier must have the right to utilize such newer technologies as part of its on-going operations. If the Carrier chooses to adopt new methods and technologies in connection with Scope-covered work, however, then it must make it possible for its own employees to perform that work in accordance with the Scope Rule. If the simple adoption of a new method or technology to perform work, requiring the use of equipment that the Carrier does not already own, was sufficient to allow the Carrier to contract out Scope-covered work, then the Scope Rule's protections would be completely undercut. If the Scope Rule is to have any meaning, and it must, then the Carrier must be obliged to have its own employees utilize such new methods or technologies to perform Scope-covered work, with the only exceptions being those expressly set forth in the Scope Rule.

The Carrier has pointed to one Scope Rule exception, "lack of essential equipment," as justifying its decision to contract out the work at issue. Again, there is no question that the Carrier does not own flash-butt welding equipment, but this does not

necessarily mean that the Carrier can avoid the Scope Rule and contract out covered work by choosing to have certain work done by a new method, involving equipment that it does not own, when its own employees regularly have performed the work using other methods, with equipment owned by the Carrier.

In fact, the express language of the Scope Rule and Side Letter No. 2 demonstrates the parties' intent to limit the Carrier's ability to contract out Scope-covered work under the "lack of essential equipment" exception. As specified in Side Letter No. 2, the exceptions set forth in Paragraph A.1.b. of the Scope Rule, including the "lack of essential equipment" exception, do not apply to work "of the scope and magnitude historically performed by members represented by the BMWE." This language is critical to a proper understanding of the application of the Scope Rule to the instant dispute. Quite simply, the Carrier may not rely on the "lack of essential equipment" exception to support the contracting out of covered work of the scope and magnitude historically performed by its BMWE forces. The evidentiary record clearly demonstrates that the welding work at issue definitely is of the scope and magnitude historically performed by Amtrak's BMWE forces, so we find that the Carrier cannot rely on the equipment exception as a reason to contract out this work.

As stated, if the Carrier chooses to utilize a new method to perform Scope-covered work, then it must give its own employees the opportunity to perform the work under the new method, in accordance with the terms of the Scope Rule. Moreover, if the Carrier's employees can perform the work in question, and meet the applicable quantity and quality

requirements, by using existing methods and equipment, then the Carrier must show some justification for adopting a new method that results in the contracting out of the work due to a "lack of essential equipment." If new equipment is "essential" only to the new method, but the work in question can be properly, safely, and timely completed using existing methods and equipment, then the Carrier cannot truly establish a "lack of essential equipment," as that phrase is used in the Scope Rule.

These considerations similarly apply to the question of whether the Equipment Rental Agreement justifies the contracting out of the welding work at issue, despite the fact that such work is covered by the Scope Rule. The Equipment Rental Agreement's authorization of contracting out of maintenance of way work, when the Carrier "does not have equipment available to perform [the] work and said equipment cannot be rented or leased without an operator," must be read in conjunction with the current Scope Rule. To satisfy the Scope Rule's purpose of preserving bargaining unit work, and Side Letter No. 2's limitation on the use of the equipment exception, the Carrier has the burden of showing why existing methods and equipment cannot be used to complete the work, and why it therefore is necessary to adopt a new method that involves the contracting out of work under the Equipment Rental Agreement. The fact is that in this case, the Carrier certainly does have "equipment available to perform" the welding work at issue, albeit by the boutet and thermite processes, rather than the flash-butt welding process. The record in this matter, however, does not contain any evidence that shows that the work at issue cannot be appropriately, safely, and timely completed by using the boutet and/or thermite

processes, nor is there any evidence that the flash-butt process is, in some way, materially superior to these other methods. The Carrier therefore has not met the first requirement of the Equipment Rental Agreement.

The Carrier also has failed to meet the second requirement of the Equipment Rental Agreement, which is showing that the "equipment cannot be rented or leased without an operator." Although the Carrier submitted an unsigned letter stating that Holland mobile in-track welders cannot be leased without Holland operators, this document's credibility does not hold up under scrutiny, particularly in light of the fact that the Carrier previously trained its own employees to operate such equipment, and the fact that another carrier notified the Organization that it planned to lease Holland welding machines and use its own employees to perform welding work with these leased machines. In light of this evidence, we find that the Carrier has failed to demonstrate that the Equipment Rental Agreement properly applies to the situation at issue. Accordingly, this Board finds that the Equipment Rental Agreement does not serve to justify the Carrier's decision to contract out the welding work at issue.

This Board finds that the Scope Rule governs the question of whether the welding work at issue may be contracted out. In light of the evidence in the record, the Equipment Rental Agreement does not apply to this situation and does not justify the Carrier's decision to contract out the welding work. Given the established fact that the welding work at issue could have been properly, safely, and timely performed by Amtrak employees using existing methods and existing Amtrak equipment, this Board finds that

the Scope Rule does not allow for the contracting out of this covered work under the circumstances at issue here. In accordance with the terms and intent of the Scope Rule, if the Carrier wishes to adopt the flash-butt welding method, then it must, as it has done before, train its employees in this welding method, and then either buy or lease the necessary equipment. This Board therefore finds that the instant claim must be sustained.

Award

The claim is sustained. Amtrak violated its May 19, 1976, Agreement with the BMWE (as amended) when it subcontracted out the welding work identified in its letter dated September 12, 2003. The track welding work should be returned to the Track Department welders represented by the BMWE and covered by the May 16, 1976, Agreement (as amended) and the Carrier must compensate the appropriate track sub-department welders at their applicable rates of pay for an equal proportionate share of man hours expended by the contractor's forces in performing the work identified in Amtrak's letter dated September 12, 2003. This case is remanded for a joint check of the Carrier's records to determine the number of man hours worked by the Holland employees and the appropriate claimants from the BMWE welder seniority rosters.

PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: May 11, 2004

CARRIER MEMBER

DATED: 5/11/04

Written Dissent to follow

Carrier Member's Dissent – Public Law Board No. 6671 , Award No. 2 and 3

The Majority determined in these cases that the Amtrak Reform and Accountability Act did not alter the Amtrak – BMWE Northeast Corridor Scope Rule and proceeded to decide that Amtrak has equipment that could do the work and therefore, we cannot lease other equipment without BMWE approval. The Majority not only exceeded their authority, by interpreting the Amtrak Reform and Accountability Act, and did so incorrectly, but it also effectively eliminated the Equipment Rental Agreement.

First, the Amtrak Reform and Accountability Act of 1997 amended Amtrak's collective bargaining agreements. While the parties differed in their view of that amendment, the Board exceeded its' authority by interpreting the Act.

Relative to the merits of this case, the 1977 Equipment Rental Agreement was negotiated before the Minimum Force Agreements, continued through their existence and survived their replacement. This was a special agreement and an exception to the scope rule and contracting procedures. The reason for the tenure of that agreement is because it is not affected by the scope rule or any changes to the scope rule.

The simple fact is that Amtrak has the unfettered right to lease whatever equipment it wants or needs to meet operational requirements. The Equipment Rental Agreement was negotiated in recognition that certain work is scope covered and when Amtrak elects to lease equipment, and that equipment cannot be obtained without outside operators, there is an automatic remedy – payment of the higher rate to an equal number of employees.

The decision in these cases effectively abrogates the Equipment Rental Agreement and throws everything under the basic scope rule. If that had been the intent of the parties when negotiating the 1987 scope rule changes, they would have eliminated the Equipment Rental Agreement at that time. That clearly was not done, but the majority here elected to take that action for the parties, which renders the Awards palpably erroneous and in violation of the Agreement establishing the Board and the Railway Labor Act. The Board is simply not authorized to re-write the terms of the agreement.

Further, without authority, the majority has in essence said that as long as there is a tool on the property or an alternate method that could be used to reach the end goal, Amtrak cannot utilize other technology or equipment. The Majority has determined that Amtrak is obligated to buy equipment while no other railroad in the nation has such an obligation. As the BMWE pointed out, many freight roads utilize leased equipment, including the Holland Welder and the Slot Train. While it may be that the BMWE is saying that track-welding and scrap pick up is not reserved to the BMWE on the freight railroads, in the absence of such an admission, there is no conceivable basis on which to decide that those railroads are able to lease such equipment while Amtrak cannot. The decision in these cases is utterly absurd, particularly in light of the fact that Amtrak has a specific agreement dealing with the lease of equipment with outside operators that defines the remedy for that action. By implying that the BMWE has veto rights any time there is a tool that can be used for the purpose, or an alternate way of doing the work, the Majority has gone beyond preserving the BMWE's right to work and granted them the right to determine how work will be performed.

These awards are not based on the language of the agreement and in fact change the agreement by granting BMWE veto rights over equipment rental with operators. The parties had already negotiated and reached a special agreement – the Equipment Rental Agreement – on the applicable conditions for equipment rental issues requiring outside operators and, the proper remedy in those situations. While the majority may have viewed Amtrak's BMWE scope rule as different from those in effect on freight railroads, that does not alter or undermine the application of the Equipment Rental Agreement. While the freight roads may have to negotiate special agreements to permit utilization of leased equipment with outside operators on their property, Amtrak already has an agreement in place for that type of situation. This award goes against the basic tenet of contract interpretation by ruling that the general rule supersedes the special rule.

The facts remain in these cases that Amtrak met the requirements of the Equipment Rental Agreement and there was simply no basis on which to conclude that this agreement did not apply. The employees did not prove that Amtrak has either flash butt welding equipment or slot train equipment available. While in the latter case, they pointed to the Jimbo Crane, which is similar to the Slot Train equipment, we stated in rebuttal that the one and only Jimbo Crane Amtrak owns was already assigned to material distribution on the Harrisburg Line Improvement project and was not available.

Relative to the ability to lease without operators, it was inappropriate at best for the majority to rule that Amtrak did not establish in these cases that the equipment could not be leased without operators, particularly when that issue was never contested during the conference discussions over the lease of the equipment. In neither case did the employees ever contend at the initial meeting that the equipment in question could be leased without operators.

More importantly, the employees failed to prove that the equipment could be leased without operators. Prior Amtrak agreements involving the Holland Welder simply involved training on the operation of that equipment. Amtrak employees were not actually operating the Holland Welder. Similarly, the CSX Agreement provided by the BMWE clearly states that BMWE employees will do set up and grinding of finished welds. That is not operating the equipment. The Board's ruling apparently is based solely on the organization's characterization of the "intent" of two other agreements with freight railroads, neither of which states that BMWE employees will "operate" the Holland Welder following training. Both the IHB and GTW agreements simply indicate that the employees trained will "work with" the Holland Welder. There is no commitment that they would actually operate that equipment.

As stated in Amtrak's submissions and presentation, if Holland or any other company would lease their flash butt welding equipment without their own operators, or if Georgetown Rail Equipment or any other vendor would lease a Slot Train without an operator, the BMWE would have had correspondence from the company attesting to that fact. At best, the Board should have viewed that issue as involving a dispute in facts and remanded the matter to the parties to determine if the equipment can be leased without operators.

Relative to the remedy in these cases, the Board has again exceeded its authority by directing that the work be returned to the BMWE. The Board does not have the power to direct Amtrak to, in essence, cancel a commercial contract. Similarly, it is well established that arbitration boards such as this do not have the authority to direct the establishment of positions. At most, the Board has the authority to find monetary damages for a contract violation.

The awards in these cases are palpably erroneous. The Equipment Rental Agreement applied to these disputes and the majority improperly determined that the general rule superseded the special agreement. The decisions here create rather than resolve disputes.

R. F. Palmer
Carrier Member

Labor Member's Response
To Carrier Member's Dissent
To
Awards 2 And 3 Of Public Law Board No. 6671

Corrected Copy

With the exception of his newfound position concerning the Amtrak Reform and Accountability Act, the Carrier Member's Dissent is largely an attempt to reargue points that were fully aired in the written briefs of the parties, oral argument and in an extensive Executive Session. As the Neutral Member so carefully explained in his well-reasoned award (as well as in Executive Session), these arguments simply have no merit under standard principles for interpreting contract language and evaluating evidence. I urge the Carrier Member to simply accept the plain meaning of the Scope Rule and to abide by its terms rather than engendering future disputes and the attendant monetary liability that will almost certainly redound to Amtrak if it continues to violate the Scope.

While I hesitate to be pejorative, there is no way to describe the Carrier Member's position on the Amtrak Reform and Accountability Act other than to label it as frivolous. I agree that as a general matter, Section 3 tribunals do not have the authority to interpret statutes. However, in this case, the Amtrak Reform and Accountability Act was made a part of and physically inserted into the collective bargaining agreement. In other words, it became a contract term and was therefore clearly subject to interpretation and application by the Board pursuant to Section 3 Second of the Railway Labor Act and the terms of the Agreement establishing Public Law Board No. 6671. Moreover, it was Amtrak, and not BMWE, who raised the Amtrak Reform Act in defense of its position in this case. Hence, it is more than a little disingenuous for the Carrier Member to complain that the Board exceeded its jurisdiction by interpreting the language of the Amtrak Reform Act when it was Amtrak itself that raised the Reform Act as a defense in this case.

The Carrier Member's continuing attempt to rely on the Equipment Rental Agreement seems to be nothing more than a stubborn refusal to recognize the obvious. As the Organization painstakingly documented in its submission, Amtrak's attempt to rely on the Equipment Rental Agreement in Case Nos. 2 and 3 was blatantly wrong for three reasons. First, that agreement, which was negotiated in 1977 in connection with the Scope Rule of the May 19, 1976 collective bargaining agreement, must be read in conjunction with the new Scope Rule provisions which were negotiated effective January 5, 1987. The Scope Rule of the May 19, 1976 Agreement was silent with respect to equipment and the 1977 Equipment Rental Agreement filled that gap. However, Paragraph A.1.b. of the Scope Rule in the January 5, 1987 Agreement very clearly limits Amtrak's right to rely on equipment exceptions as an excuse to contract out work. In fact, pursuant to Side Letter No. 2 dated January 22, 1987, Amtrak may not rely on equipment exceptions at all if the work in question is work of the scope and magnitude historically performed by BMWE members, as was the case in Award Nos. 2 and 3. BMWE submits that the failure to

read the 1977 Equipment Rental Agreement in the context of Paragraph A.1.b. of the January 5, 1987 Scope Rule and Side Letter No. 2 would, in essence, abrogate the entire meaning of these latter two provisions. It is axiomatic that one contract provision should not be interpreted in a manner that destroys another. When this principle is applied to the contract language in the cases decided by Award Nos. 2 and 3, it is clear that the 1977 Equipment Rental Agreement applies only in instances where Amtrak has first met the equipment exception tests in Side Letter No. 2 and Paragraph A.1.b. That is, before Amtrak may resort to the Equipment Rental Agreement, it must first show: (1) the work involved is of a scope and magnitude greater than that historically performed by BMWE-represented employes; and (2) Amtrak's lack of essential equipment to perform the work within required time limits. In these cases, Amtrak did not and could not meet those tests. Consequently, the 1977 Equipment Rental Agreement has no application in the cases decided by Award Nos. 2 and 3.

Second, even if Amtrak could show that the 1977 Equipment Rental Agreement applied in Award Nos. 2 and 3 (which it does not), Amtrak would next have to show that, "... Amtrak, Northeast Corridor does not have equipment available ***" to perform the work in question. In this case, Amtrak never even asserted, much less proved, that it did not have equipment that was sufficient to perform the disputed welding and material handling work. Indeed, Amtrak could not credibly make such an assertion because the records showed that Amtrak employes had been performing such work with Amtrak's own equipment since the inception of Amtrak.

Finally, the third and most compelling reason why Amtrak could not rely on the 1977 Equipment Rental Agreement in these cases is that the clear and unambiguous language of the agreement provides that any proposal to implement that agreement shall be furnished to the General Chairman, **"... for his approval before any contractor's equipment or employes are permitted to perform work coming within the scope of the current M.W. Agreement."** (emphasis in bold added). In this case, General Chairman Dodd not only refused to grant his approval, but vigorously protested, in writing, when Amtrak proposed to contract out the work involved in Award Nos. 2 and 3. Consequently, Amtrak could not validly rely on the 1977 Equipment Rental Agreement in these cases.

The Carrier Member is also stubbornly refusing to recognize reality when he continues to assert that the Organization failed to prove that the necessary equipment could be leased without operators. The record clearly showed that Holland Welders are leased for operation by BMWE-represented employes on the IHB, GTW and CSXT railroads. However, what makes the Carrier Member's assertion truly astonishing is that subsequent to the rendering of Award Nos. 2 and 3, Amtrak made agreements with BMWE to implement those awards and those agreements clearly show that Amtrak was able to obtain Holland Welders and the GREX Slot Machine for its BMWE-represented employes to operate. In a Letter of Agreement dated June 21, 2004 to implement Award No. 2, the parties agreed as follows with respect to Holland Welding Machines:

"This is in reference to our June 10, 2004, meeting and subsequent discussions regarding the above subject and implementation of Award No. 2 of Public Law Board No. 6671.

The parties agreed to permit the utilization of the Holland Flash Butt Welding Units currently working on the property under the following conditions:

1. **Amtrak will obtain the Holland Flash Butt Welding Units (the Holland Welder) to be operated by employees coming under the scope of the Amtrak - BMWE Northeast Corridor Agreement,** to perform field welds on the Keystone Corridor Improvement Project, support the work of the TLS Unit and, to perform field welds on the New England Division.

2. The Holland Company will supply supervision to direct the operation of the Holland Welder and to perform maintenance and repair of the equipment.

3. The Holland Company will train BMWE employees to operate the Holland Welder. Holland Company may supply those employees necessary to train BMWE members, but such employees will not operate the Holland Welder except incidentally when necessary for the instruction of BMWE employees. **All operation of the Holland Welder will be performed either by a BMWE member being trained under the direction of a Holland employee or, by a qualified BMWE employee.**

* * *

8. Following the FY 04 production season, Amtrak will again post three (3) training positions, under the 1977 MW Training Agreement, for each Holland Welder anticipated to be used in the next production season. Employees who commenced training or were awarded positions under paragraph 4 above shall have first rights in seniority order to these training opportunities on their respective districts. Successful applicants for these positions will attend formal training at Holland Facilities in Chicago, Illinois. **Upon successful completion of that training, the employees will be assigned to the Holland Welder for the FY 05 production season, with preference in seniority order to available positions.** Employees who are not assigned under this paragraph will be

subject to assignment under paragraphs 4 and 5 above." (Emphasis in bold added)

Similarly, in another Letter of Agreement dated June 21, 2004 to implement Award No. 3, the parties agreed as follows with respect to the GREX Slot Machine:

"This is in reference to our June 10, 2004, meeting and subsequent discussions regarding the above subject and implementation of Award No. 3 of Public Law Board No. 6671.

The parties agreed to permit the utilization of the GREX Slot Machines currently working on the property under the following conditions:

1. **Amtrak will obtain the GREX Slot Machines (the Slot Machines) to be operated by employees coming under the scope of the Amtrak - BMWE Northeast Corridor Agreement,** to perform material distribution and pick-up on the Keystone Corridor Improvement Project, as well as other locations on the MidAtlantic, New York and New England Divisions.

2. The GREX Company will supply supervision to direct the operation of the Slot Machines and to perform maintenance and repair of the equipment.

3. The GREX Company will train BMWE employees to operate the Slot Machines. The GREX Company may supply those employees necessary to train BMWE members, but such employees will not operate the Slot Machine except incidentally when necessary for the instruction of BMWE employees. **All operation of the Slot Machine will be performed either by a BMWE member being trained under the Direction of a GREX employee or, by a qualified BMWE employee.**

* * *

8. **Future rental of Slot Machine equipment shall include advertisement of an operator position for that equipment. Employees already qualified on such equipment shall have first rights in seniority order to these positions on their respective districts.** In the event there are no qualified applicants, the provisions of paragraph 5 of this agreement shall apply." (Emphasis in bold added)

The above-quoted Letters of Agreement make it crystal clear that, contrary to Amtrak's assertions (and the assertions of many freight carriers), Holland Welding Machines and the GREX Slot Machine are available for least without contractor operators so that BMWE-represented employes may be assigned to operate these machines. It is clear that Amtrak was less than candid during the claim handling when it falsely asserted that it could not lease the machines in question. It is even more incredible that the Carrier Member would continue to insist that the machines could not be leased without operators now that Amtrak has signed Letters of Agreement providing that it would lease the machines for BMWE-represented employes to operate.

Finally, the Carrier Member is simply wrong when he asserts that the Board exceeded its authority by directing that the work in question be returned to the BMWE. Public Law Board No. 6671 was established pursuant to Section 3 Second of the Railway Labor Act which grants the Board broad discretion to resolve disputes growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. Hence, the Board had broad discretion to resolve the instant dispute pursuant to the Railway Labor Act itself. Moreover, the Questions At Issue referred to the Board by the parties make it clear that once the Board found that Amtrak had violated the May 19, 1976 Agreement (as amended), it had broad discretion to determine "... what shall the remedy be?".

Awards 2 and 3 of PLB No. 6671 could hardly have been reasoned or written more clearly. If future readers accept the inexorable logic that the precedential value of an award is proportionate to the clarity of reasoning in the award, then Award No. 1 of this Board will indeed carry powerful precedential value.

Respectfully submitted,

Jed Dodd
Labor Member