In the Matter of Arbitration

Seniority District Consolidation Issue

Burlington Northern Santa Fe

vs

Brotherhood of Maintenance of Way Employees
AFL-CIO

Award Issued: August 29, 1999

Edward L. Suntrup
Arbitrator

In the Matter of Arbitration

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Seniority District Consolidation Issue**
	)	
Burlington Northern Santa Fe RR	)	

Background

The Burlington Northern-Santa Fe Railroad (BNSF), as it presently exists, is a company which is the result of numerous mergers of U.S. carriers of various sizes operating in the western U.S. which include the former St.Louis-San Francisco Railway Company, the former Atchison, Topeka and Santa Fe Railway Company, and the former Burlington Northern Railroad Company.[1] The instant case deals with an issue which has its genesis in the merger activity which the company has been engaged in over the years.

The BNSF currently employs system-wide some 8,000 track workers who are represented by the Brotherhood of Maintenance of Way Employees' (BMWE) union. The members of this craft do repair and maintenance work on railroad tracks, roadbeds, bridges and other structures on the BNSF property. These craftsmen maintain and repair some 34,000 miles of track and supporting structures on the BNSF. The company's track extends from the Great Lakes and Canada on the north and east, to the Pacific Ocean and

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[1]The BNSF also includes inter alia, the former C&S, the former Joint Texas Division & the FWD territories.

the Gulf of Mexico on the west and south. Because of the merger of various carriers into what is now the BNSF there also remained in effect on this property as of 1998 different labor agreements as residuals of the various merged entities and this union.

The near-term genesis of the issue at bar in this arbitration started in April of 1998. On April 6, 1998 the company advised the union that it wanted to consolidate the number of seniority districts on the property which existed because of the various mergers alluded to in the foregoing.[2] The company stated that it wanted to implement these changes system-wide "...on or about July 6, 1998...".[3] The BNSF also wanted to reduce the number of labor agreements it had on its property with the BMWE. Specifically, for our purposes here, the company proposed that the 47 seniority districts on the BNSF be reduced to 9 seniority districts. As it turned out, which has some bearing on the question before the arbitrator in this case because the labor agreements which now exist have some bearing on the "prior (seniority) rights" issue, the number of labor agreements regulating the new district structure was to be reduced to three. The company proposed that it meet with union representatives on April 28, 1998 "...to further discuss these matters...". The company offered rationale for this proposed change which need not detain us here. This

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[2]There had been some consolidation of seniority districts on the former Santa Fe in the early 1990s. This carrier merged with the Burlington Northern and its merged partners in 1995. According to information provided to the arbitrator the BN had basically the same seniority district structure in 1998 that it had in 1970 and even earlier.

[3]Copy of the April 6, 1998 letter to various officials of the union, outlining the proposed changes, is found in company Exhibit 1.

rationale has been dealt with at length in another arbitration forum.[4] Suffice it to say that from the company's point of view the proposed re-organization and reduction of seniority districts involved what it considered to be productivity, economy of scale and other issues. Obviously there were important ramifications for BMWE represented employees also because of the company's proposals. The BMWE was not in favor of re-organizing the seniority districts unless certain specific conditions were met in order, as the union saw it, to protect its membership on this property. For example, according to the union, since some 25% of its members worked on mobile gangs, one result of the proposed changes would be that members of these gangs would work larger seniority districts with potential consequence that the number of headquarters' jobs would in all probability diminish.[5] But the company argued that advantages would not only accrue to the company, result of the proposed changes. The company argued that the proposed changes would also benefit members of the craft represented by the BMWE. Such benefits could potentially include, according to the company, more work opportunities, as well as an alleged stabilization of work locations for members of the craft.

The BNSF and the BMWE attempted to negotiate some changes in the seniority district structure after the April 6, 1998 notification by the company. But these

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[4]See BNSF vs. BMWE (Arbitration Award, March 11, 1999: Mittenthal). Union Exhibit 2 & Company Exhibit 3.

[5]The company did not deny that this might happen, but observed in its original April 6, 1998 notice to the union representatives that it guesstimate of abolishments would be about 20 jobs on 8 of the districts. It noted in that correspondence that protections for incumbents of those positions adversely affected would be protected under New York Dock.

negotiations were not fruitful. Finally, the company proposed a final offer in writing which kept to the scenario of reorganizing the company's 47 seniority districts into 9 districts. [6] This was rejected by the union.

On August 4, 1998, therefore, the company advised the union that it was going to implement a different strategy in order to attempt to achieve its seniority district re-organization objectives. On that date the company submitted its proposal to re-organize 47 seniority districts into 9 districts for arbitration under Article XII of the July, 1991 Imposed Agreement (Public Law 102-29). The 1991 Imposed Agreement on this property stemmed from the recommendations by Presidential Emergency Board (PEB) 219. The union objected to this arbitration proposal on grounds that Article XII of the Imposed Agreement was being invoked by the company so that it might gain leverage in setting up regional track gangs which the union argued it was not able to do under Article XIII of this same Agreement. Such arguments by the union notwithstanding the matter still went to arbitration.[7]

The arbitrator chosen to hear the Article XII case attempted to mediate the parties' differences on the seniority district question but this was not successful. An arbitration hearing was held, therefore, on these matters in November of 1998 and an Award was

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[6]Details of this offer are found in company Exhibit 2.

[7]The issues associated with the 1998-9 arbitration, and ultimately the narrow problem to be dealt with in this arbitration, stem to a great extent from what the arbitrator of the Article XII case calls the "...absence of any true negotiating history of Articles XII and XIII..." which are found in the 1991 Imposed Agreement stemming from PEB 219 (subject to but minor modifications by subsequent PEB 229). Obviously problems associated with PEB 219's recommendations are not limited to this property.

issued the following March. Therein the arbitrator concluded that the arbitration fell under the "interest" aegis covered by Article XII of the 1991 Imposed Agreement, that the company had "...a strong case..." , that it demonstrated "...a large operational need...", and that "...the Carrier's proposed combination of seniority districts (did) not violate the moratorium provisions of the September 26, 1996 Collective Bargaining Agreement". The arbitration Award on the redistricting matter, issued on March 11, 1999, is now referred to by the parties simply as the Mittenthal Award.[8]

The New Seniority District Consolidation Agreement

On June 10, 1999 the parties signed off on a new seniority district Agreement which was subsequently ratified. In Section 1 of that Agreement they state the following:

> The purpose of this agreement is to satisfy the company's seniority consolidation Notice of April 7, 1998 and to fulfill the combination of seniority districts as authorized by Arbitrator Mittenthal's Award of March 11, 1999 under Article XII (of the 1991 Imposed Agreement).[9]

This Agreement provides for nine (9) newly consolidated seniority districts for track workers represented by the BMWE on the BNSF. No purpose is served here in laying out all of the details of these new districts, but for the record we note only generally that the consolidation of districts led to the following nine (9), new districts: 1. Galesburg; 2. Lincoln; 3. Kansas; 4. Fargo; 5. Montana; 6. Northwest; 7. Texas; 8. Southeast, and 9.

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[8]See Company Exhibit 3. A number of documents before the arbitrator in this case are found in both parties' exhibits. When this happens and one is referred to, the other is included, by reference.

[9]See Union Exhibit 1.

Southwest. Except as provided in the June 10, 1999 Agreement each of the new consolidated districts would be covered by a specific schedule agreement. The Kansas (3.), Texas (7.) and Southwest (9.) districts are now under the Santa Fe Agreement; the Southeast (8.) district is under the Frisco Agreement; and 5 other districts are under the BN Agreement.[10]

With the consolidation of the seniority districts from 47 to 9 there arose problems related to the exercise of seniority by members of the craft. Who now had prior seniority over whom and under what conditions? In the June 10, 1999 Agreement the parties granted "prior rights" for the exercise of seniority to headquartered positions to those BMWE covered employees who held seniority on their former seniority districts. But does "prior rights" mean bidding rights to a higher position in the former district? Nothing is said in the Mittenthal Award on this matter. The parties fashioned their intent on the matter of "prior rights" in Article 4.A. of the June 10, 1999 Agreement. The narrow focus of this arbitration is to interpret that provision as it applies to "prior rights" when a BMWE covered employees bids on a higher headquartered position in his or her former seniority district.

Jurisdiction of the Arbitrator

This is not an "interest" arbitration case sanctioned by Article XII of the Imposed

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[10]Copies of these three (3) Agreements have been made part of the record of this case as Union Exhibits 4-6. They are, respectively, the September 1, 1981 BN Agreement; the January 1, 1984 Santa Fe Agreement; and the August 1, 1975 Frisco Agreement.

Agreement nor any other labor agreement. This is a "rights" arbitration case which involves the interpretation of one provision of the June 10, 1999 Seniority District Consolidation Agreement. The authority of the arbitrator is limited to this narrow "rights" issue. All principles of interpretation applicable to Section 3 of the Railway Labor Act and pertinent arbitral precedent emanating therefrom are applicable here.

The Agreement Provision to be Interpreted

> **4. A.**
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> Each BMWE-represented employee who holds seniority on the effective date of this Agreement shall retain prior rights for all exercises of seniority to all headquartered positions on his/her former seniority district until the employee resigns, retires, dies or is dismissed for cause under existing agreements.[11]

Application of 4.A.

In order to clarify their understanding of the intent of the language found in this provision, the parties tested it against a number of fact patterns.[12] But there is at least one fact pattern which remained unresolved by the parties. This is the application of the language of provision 4.A. to the following hypothetical, to wit:

> "Employee A has a Section man seniority date of March 1, 1980 on former Seniority District No. 1 (and so has prior rights on former Seniority District No. 1), but does not have seniority as a Foreman. Employee B holds a Section man date of March 1, 1980 and a Foreman's date of March 1, 1995 on former Seniority

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[11] Seniority District Consolidation Agreement between The Burlington Northern and Santa Fe Railway Company and the Brotherhood of Maintenance of Way Employees, June 10, 1999. See Union Exhibit 1 @ pp. 4-5.

[12] These are outlined in a June 10, 1999 letter by the company's General Director of Labor Relations to six General Chairmen on the property which is attached to the same General Director's June 23, 1999 letter to the instant arbitrator advising that at least one fact patterns remained unresolved.

> District No. 2. A headquartered Foreman's position is advertised on former Seniority District No. 1. Both employees, A and B, make application for the position, who is assigned?

The position of the BMWE is that employee A should receive the assignment. The position of the BNSF is that employee B should receive the assignment. The narrow focus of this arbitration is to issue a ruling on which party is correct.

Discussion

According to the BMWE, Employee A should be assigned to the headquartered Foreman's position in former Seniority District No. 1 because he would have been assigned to this position anyway under the BN, SF or Frisco Agreement seniority and promotion rules in the absence of the new Seniority District Consolidation Agreement of June 10, 1999.

The BMWE argues that the clear and unambiguous language found in Article 4.A. of the June 10, 1999 Agreement supports the conclusion that an employee has prior right to bid and be assigned to a headquartered position in a higher class in his/her former seniority district. The language of this Article states that prior rights continue to exist in the former district for "all" exercises of seniority to "all" headquartered positions. According to the BMWE, this means not only prior right to exercise seniority in a class held on the effective date of the new June 10, 1999 Agreement, but prior right to exercise seniority to a position in a higher class also. Further, the BMWE argues, the source of prior rights is found in the language of the three agreements covering the new seniority

districts. An analysis of the language of Rules 4, 5, 20 and 22 of the 1982 BN Agreement; of Rules 3, 4, 5, 14, 32 and 33 of the 1975 Frisco Agreement; and Rule 2 (a)(b)(d) and 8(a) of the 1984 Santa Fe Agreement[13] all support this conclusion, according to the union. In the absence of the 1999 Seniority District Consolidation Agreement employee A in the fact pattern under scrutiny here would have been the eligible employee to have been assigned to the headquartered Foreman's position in former Seniority District No. 1. According to the union this is a "...plain language case...". We cite here the argument used by the union:

> "...Employee A (in the fact pattern) would be assigned to the headquartered Foreman's position on Seniority District No. 1 because he would have been so assigned under the BN, Frisco and Santa Fe Agreement rules in the absence of the Seniority Districts Consolidation Agreement and the seniority rights conferred by those rules are the "prior rights" that were preserved by Section 4A of the Seniority Districts Consolidation Agreement...".[14]

The BNSF argues, on the other hand, that it also reads the language which the parties used to frame Article 4.A. of the 1999 Agreement as clear and unambiguous. It states that, in its view, a "...single, obvious and reasonable meaning does appear from the reading of the language..." and 4.A. is "...not reasonably susceptible to misconstruction, and there are no latent ambiguities...".[15] Since the arbitrator has two parties stating in effect that this is a plain language case it is best to quote the company's view also on this

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[13]The provisions of all three Agreements are cited in the union's Brief @ pp. 6-17 and will not be reproduced here.

[14]Union Brief @ p. 18.

[15]Company Brief @ p. 6.

matter. According to the company's brief:

> "...the actual contract language is replete with references to *present* possessory[16] interest -- to what an employee **already has**, and *not* to what he or she may obtain later. There is a reason that the operative verb is "shall *retain*" --- "to hold or keep in possession", which necessarily deals with what one presently has and possesses. There is a reason that the object is "*prior* rights" --- rights already secured. There is a reason that the prepositional phrase is "for all *exercises* of seniority" --- one exercises what one has. Each of these elements of the sentence speaks to applying what the employee has, at any given moment, and then the exercise of those rights at that given moment. And the clause as a whole --- "shall retain prior rights for all exercises of seniority" --- likewise addresses **prior** rights, to exercising the rights that one has *at that time*, and **not** to what may be gained, somehow at some later time" (All emphases in the original).[17]

The company argues that there are problems with the union's interpretation of Article 4.A. because it would permit employees to bid up and over another employee who already has seniority in a higher class. The claim is that this will cause discontent. The company also argues that the old "...seniority districts did go away..." as a result of the Mittenthal award and that the union "...shouldn't, under the guise of interpretation here, be allowed to recreate what they couldn't keep in the seniority district consolidation arbitration...".[18] The company also argues that what the union fails to see is that there really are new seniority districts since the ratification of the June 10, 1999 Agreement and

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[16]This is not a commonly used adjective but it appears to accurately describe what the company's position is here with respect to its view of the meaning of the language of Article 4.A. Webster's International defines "possessory" in a number of different ways, but "...based upon possession..." appears to come closest to what the company is arguing here. Obviously, the company here means to say that "present possessory interest" describes prior (seniority) rights to a position in a given class and not some other higher class in the former seniority district at the time of signing of the June 10, 1999 Agreement.

[17]Company Brief @ pp. 6-7.

[18]Company Brief @ p. 8.

that "...former seniority district 1 and former district 2 are just part of a great whole, a larger, a new, a consolidated seniority district...".[19] According to the company, the union continues, throughout its analysis of the fact pattern before the arbitrator here, to treat "...Employees A and B as if they were still on separate seniority districts...(when, in reality)...both...are (now) on the **same** consolidated seniority district..." (Emphasis in original).[20]

Findings

A review of the arguments by both sides leads to the manifest conclusion that both cannot be right about the clear and unambiguous nature of the language found in Article 4.A. if they cannot agree on what this language means. This is a curious situation, not confronted too often in arbitration. The more common scenario is disagreement over the intent of language which both parties agree is ambiguous. It appears that the parties had different intents when framing the language of Article 4.A. and may not have fully appreciated that until they got to the application of the language to the fact pattern under scrutiny in this case. More to the point, given the complex of variables involved in reorganizing a company the size of BNSF from 47 to 9 seniority districts, there may have been no way to avoid the problem raised in this case.

Whatever the parties' different intents may have been the arbitrator "...is

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[19]Company Rebuttal Brief @ p. 5.

[20]Company Rebuttal Brief @ p. 6.

constrained to give effect to the thought expressed by the words used..." as the company states in quoting from Phelps Dodge.[21] The principle enumerated in this latter Award originated in an arbitration conducted under a NLRA protected union-management relationship. More pertinent to this industry is the arbitral precedent which states that the function of the "rights" arbitrator under Section 3 of the RLA is to "...interpret labor agreements..." as they are "written".[22] Arbitrators in this industry have always held that the "...terms of (a) written agreement must prevail...".[23] Arbitration Awards issued in this industry tell us that we must "...give common or normal meaning to the language used in (an) agreement..." and that "...however onerous the terms of an agreement may be, they must be enforced if such is the meaning of the language used...".[24]

A close review of the interpretation given by the company to the language of Article 4.A. shows that it goes beyond the plain meaning of the words used. The company's interpretation, while most ingenuous, finds hidden meanings which the application of common principles of contract construction would be hard pressed to detect.

For the company to prevail in this case Article 4.A. of the June 10, 1999 Seniority

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[21] See the fairly often cited older Phelps Dodge Copper Products Corporation Award (16 LA 229, 233 (1951) which only says that arbitrators are not free to give obscure and obtuse constructions to language which is readily understandable by a thoughtful reader. See Company Exhibit 6 for copy of the Phelps Dodge Award.

[22] First Division 21459. See also Third Division 21459, 21697, 23135 & Fourth Division 4645.

[23] Third Division 6856.

[24] Third Division 16489.

District Consolidation Agreement would have to read that prior rights for all exercises of seniority to all headquartered positions are limited to the exercise of such in the class in which the employee finds him/herself on the effective date of the 1999 Agreement.[25] But Article 4.A. does not say that. For the arbitrator to read that into the language of Article 4.A. would be to add to its meaning as written. The authority of "rights" arbitrators is limited to the interpretation of contracts. They have no authority to add to nor subtract from the language found therein.

The company believes that the interpretation proposed by the union here to Article 4.A. may cause some problems in the future since an employee in a lower class with prior rights in a former district can bid up and over someone who already has seniority in a higher class from a, presumably, neighboring former district if both are part of one of the new seniority districts. There is no doubt that this concern is well founded. This may be a problem. Having stated that this arbitrator has no authority to do anything about it one way or the other. This is a problem which is endemic to the language mutually negotiated by the parties when they framed Article 4.A. As Third Division 16489 would put it: this may be one of the "onerous" results of the terms of the June 10, 1999 Agreement.

The company argues that the union's interpretation is inconsistent with the

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[25]In a telling observation in its Brief, the company states the following with respect to Article 4.A.: "...There is nothing in the paragraph (Article 4.A. is the only paragraph involved here) that specifies, and precious little that connotes, **any** ("seniority" - which is the only kind we are talking about here) **rights that may or may not arise in the future**" (Emphasis added). This kind of observation opens the door to the interpretation of Article 4.A which is union is proposing in this case. There are no limits placed on the exercise of seniority to a position in a different class in the employee's former seniority district which are found in Article 4.A.

Mittenthal award which permitted the reduction of 47 seniority districts to 9 on this property. A review of the record before him fails to persuade the instant arbitrator that this is totally correct. What happened was that the BNSF and the BMWE mutually negotiated a new 9 district scenario, in accordance with the Mittenthal Award, while acknowledging the obvious which was the fact that the old districts had employees who had established seniority over the years, on those districts, and that they must be protected for the exercise of seniority. If that is not true the parties would never have negotiated Article 4.A. in the first place. Obviously there will be a transition as the company and the employees move from 47 to 9 districts. Part of that transition includes prior seniority rights as outlined in Article 4.A. of the June 10, 1999 Agreement. The company argues that both employees in the fact pattern before the arbitrator are now in the same consolidated district. Obviously, this is true. But both employees also have prior rights, which extend beyond the new consolidated district in which they are located, which allows them to bid on "all headquartered positions" in their "former seniority district" until they resign, retire, die or are dismissed for cause under either the SF, BN or Frisco Agreements, depending on which one is applicable to them.

Award

The correct interpretation of Article 4.A. of the June 10, 1999 Seniority Consolidation Agreement, applied to the fact pattern before the arbitrator in this case, is that Employee A should be assigned to the headquartered Foreman's position of his former Seniority District No. 1.

Edward L. Suntrup, Arbitrator

August 29, 1999
Winnetka, Illinois