SPECIAL BOARD OF ADJUSTMENT NO. 1069
SOUTHERN PACIFIC TRANSPORTATION COMPANY
AND ATDA, ET AL.
OREGON BRANCH LINES ARBITRATION
RICHARD R. KASHER, ARBITRATOR
AUGUST 9, 1993

Case 1

In the Matter of an Arbitration Between the

SOUTHERN PACIFIC TRANSPORTATION COMPANY

and

AMERICAN TRAIN DISPATCHERS ASSOCIATION
BROTHERHOOD OF RAILROAD SIGNALMAN
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS
and
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION

Special Board of Adjustment

__Appearances:__

John O'B. Clarke, Jr., Esquire
L. Pat Wynns, Esquire
Highsaw, Mahoney & Clarke
for the Organizations

Wayne M. Bolio, Esquire
Southern Pacific Transportation Company
for the Carrier

Introduction:

As the result of a decision by the Southern Pacific Transportation Company (hereinafter the "Carrier" or the "SP") to lease various of its branch lines in the state of Oregon to the Willamette & Pacific Railroad, Inc. (hereinafter the "W&P") and to the Willamette Valley Railway Company (hereinafter the "WVRY") and to sell certain other branch lines in the state of Oregon to the Mololla Western Railway (hereinafter the "MWRY") and in view of claims by the American Train Dispatchers Association, the Brotherhood of Railroad Signalmen, the Brotherhood of Maintenance of Way Employes, the Brotherhood of Locomotive Engineers, the International Association of Machinists and Aerospace Workers, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, the International Brotherhood of Electrical Workers, the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers and the Sheet Metal Workers International Association (hereinafter the "Organizations") that those branch line transactions violated the scope provisions in the existing collective bargaining agreements and/or the implied covenant of good faith dealing, and deprived the members of the involved crafts or classes of the opportunity and right to perform the work which they are entitled to by dint of said collective bargaining agreements, the parties agreed to the establishment of this Special Board of Adjustment.

The below-signed Arbitrator was selected to serve as the "Board", and hearings were held before the Board on June 3 and 4, 1993 at the offices of the National Mediation Board in Washington, DC.

Prior to the commencement of said hearings, in accordance with arrangements between the Board and the parties' counsel, the Carrier and the Organizations filed pre-hearing statements of position supplemented by numerous documentary exhibits. At said hearing the parties were afforded a full opportunity to present evidence through the testimony of witnesses and in additional documentary proofs, and counsel had the opportunity to engage in a broad range of cross-examination. After the close of the evidentiary hearings further arrangements were made between counsel and the Board by which the parties had the opportunity to file post-hearing and reply briefs/submissions and certain specified additional documentary evidence.

Background Facts

Mr. E.L. Pruitt, General Chairman of the BLE, Mr. Michael Ashbridge, Local Chairman of the BLE, Mr. Richard Ford, General Chairman of the ATDA, Mr. Louis English, Local Chairman of the BLE, Mr. Clarence Foose, Vice President of the BMWE, Mr. Tom Kendall, Local Chairman of the IBofB, Mr. Daniel Carlin, Local

Chairman of the IBF&O, Mr. P.A. Larson, Local Chairman of the IAM, and Mr. Val VanArtsdalen, Vice President of the BRS testified in support of the Organizations' position that the transactions violated their respective collective bargaining agreements and that the methods by which the Carrier consummated the transactions evidenced a lack of good faith.

Mr. Thomas Matthews, the Carrier's Chief Administrative Officer who was also responsible for Labor Relations, and Mr. Kenneth Dixon, the Carrier's Managing Director of Plant Rationalization, testified regarding the considerations which the Carrier reviewed and the activities undertaken prior to the consummation of the leases and the sales.

SP, a subsidiary of Rio Grande Industries, Inc., and the St. Louis Southwestern Railway Company, known as the "Cotton Belt", operated a 11,699 mile rail system throughout the western and southwestern United States in 1988. A number of those rail lines are in the state of Oregon.

The Carrier has a main line entering Oregon from the California border, traveling north to Portland, with yards at Eugene, Albany and Salem. There is a second line which extends into Oregon from California, known as the Siskiyou Line, and this line connects with the Carrier's main line near Eugene, Oregon. Additionally, the Carrier operated several branch lines in Oregon; specifically, the Coos Bay Line extending from Eugene west to the coast and then south past Coos Bay, the West-Side branch lines, which are a series of connected branches on the west side of the main line and which intersect with the main line near Portland and at Albany, and the East-Side Lines, which are separate lines on the east side extending off the main line, with one line connecting at Albany, one line connecting at Salem and Woodburn, and one line that is north of Canby. With the exception of the West-Side branch line running from Corvallis to Monroe and then to Dawson, none of the other SP lines in Oregon were listed on its system map as being "potentially subject to abandonment". These facts regarding the operation of the Carrier's lines were gleaned, essentially, from Organizations Exhibit Nos. 18 and 19, the Carrier's System Map and the detailed, computer-generated slide presentation conducted by the Organizations at the June 3 and 4, 1993 hearings.

There is also evidence in the record which establishes that each of the involved Labor Organizations and the Carrier are parties to collective bargaining agreements, which contain reasonably similar provisions regarding each craft or class' "scope" of work. Rather than identifying each of the relevant scope clauses and the specific language of each, it is enough to note that the members of each craft or class generally retain the "exclusive right" to the work covered by their agreement and the right, by dint of their seniority, to "preference in assignments". Each of those collective bargaining agreements were introduced by the Organizations in Exhibit Nos. 1 through 9 and were sponsored, verified and supported by the declarations of General Chairmen or International Representatives of the involved Organizations.

The genesis of the instant dispute began when the Carrier determined, due to financial considerations, that it would no longer operate the subject branch lines in Oregon. After some preliminary meetings with several of the Organizations, the Carrier notified its customers, on or about December 12, 1991, of its intent to lease certain branch lines and further advised that, while the SP was not "proposing discontinuance of rail service", it was seeking to provide such service in a "more flexible and cost efficient manner". At or about the same time, Mr. Dixon, the Carrier's Managing Director of Plant Rationalization, wrote to a number of the potentially concerned representatives of the Organizations as follows:

> When we begin a project involving possible divestiture of a branchline operation, it has been our practice to advise the affected shippers, politicians and our employees. As you know, we had an unintended breakdown in the notification process with the San Joaquin Valley project when my letter of February 13, 1991 was not distributed as requested. We do not wish to repeat that experience so I am sending you this advice individually.
>
> We are now beginning a project involving the branchline network in Oregon north of Eugene. Attached is a copy of the letter being sent to our branchline customers together with a map showing the lines which may be involved.
>
> Our Oregon Division Superintendent, Bob Melbo, has also scheduled meetings with all of the Local Chairmen and will provide them with this same information.
>
> As all of us attending the recent Leadership Conference in Burlingame know, we must make some serious changes to the way we do business if we

expect this company to survive. Restructuring of light density feeder lines is one the things we must do.

Many parts of our branchline network are very expensive to operate within our organizational structure. Survival of many lines will be dependent on our ability to use a work force more efficiently and to create an entirely new locally focused management structure.

As we evaluate the possible options for the Oregon lines, I would welcome any suggestions from our employee representatives. We would give any employee group sponsored proposal for acquisition and/or operation of line segments very serious consideration and I would welcome the opportunity to discuss ideas with you.

The effect on current employees is an important part of our evaluation of options. Accordingly, it is our desire to work with reputable shortline/regional operators who display an interest in offering current employees the opportunity to participate in a new company. We have also been very candid with all parties about the need for new operations to be economically sound without reliance on projections of new traffic.

Please feel free to contact me if I can be of assistance to you and your membership as we begin to explore the options with this project. I will continue to advise you as we progress.

Subsequent to the issuance of this letter there were some meetings between the Carrier and Organization Representatives at which the Carrier's alleged need to attain labor cost savings, including the possibility of leasing to non-union operators who would "remove craft lines", was discussed. When those meetings, which addressed among other proposals the renegotiation of existing collective bargaining agreements, did not prove productive, the Carrier entered into the lease and sale arrangements described above.

In early 1993 SP confirmed its intent to lease approximately 3,000 miles of track in Oregon to a subsidiary of an entity known as Genessee and Wyoming Industries (hereinafter "GWI"). The Organizations have entered as exhibits and made reference to local newspaper accounts in which it was reported that GWI had pledged to spend eleven million dollars on the branch lines over the lease period, and that SP was entering the lease arrangements as a way to escape high labor costs and work rules under its collective bargaining agreements. It was further reported that approximately two hundred SP employees in Oregon would lose their positions as the result of the lease program.

In its description of the factual background in this case, in its pre-hearing brief, the Organizations delineate the number of employees in each involved craft or class who were associated with the work performed on the West-Side and the East-Side and the so-called Mololla branch lines. In this factual description, the Organizations, seeking to demonstrate the adverse impact upon employees associated with the subject lines, referred to documentary exhibits which included abolishment notices issued beginning in December, 1992. These notices indicate, for example, that on the West-Side Lines, three machinist, four boilermaker, nine electrician, nine laborer, seven sheet metal worker, eleven engineer, and eighteen maintenance of way positions were listed for abolishment; and that there would be a reduced dispatcher work load and the relocation of the signal maintainer at Albany.

Since the consummation of the leases and sale, the record evidence indicates that there has been little if any change in the manner of operation or the movement of traffic or the volume of traffic associated with the subject branch lines, and that a number of SP positions associated with the lines have been abolished. The evidence of record also establishes that the lessees, in many cases, are paying their employees, some of whom are former SP employees, three to five dollars per hour less in wages than similarly-situated employees earn with the SP.

In its presentation and briefs, the Carrier has referred to the proceedings before Presidential Emergency Board No. 219. Prior to the lease and sale arrangements involved in the instant case, Presidential Emergency Board No. 219 (hereinafter "PEB No. 219") was established on May 3, 1990 to consider numerous disputes between all rail labor organizations, except the IAM&AW, and rail management. One of the issues submitted by rail labor for PEB No. 219's consideration was the so-called "Line Transfer Dispute". In its submission of this issue to PEB No. 219 and in its recommendation for resolution of the Line Transfer Dispute, rail labor stated as follows:

> Beginning in April 1988, the rail labor organizations served notices on the carriers to negotiate an agreement to deal with the manner in which employees are and will be affected by the carriers' decision to transfer existing rail lines to other entities, either existing or newly-formed rail carriers, for continued rail operations by those other entities. Rail labor's notices proposed an agreement that would deal with this adverse impact in the following manner: the proposed agreement would prohibit the carriers

> from reducing the number of employees in service as of a certain date; protect an employee's level of compensation; require advance notice of any transfer of any interest in a rail line and, if requested, the negotiation of an implementing agreement; require the selling carrier to include a successorship obligation in any contract selling or transferring a rail line for continued operations; provide treble damages to employees who may be wrongfully deprived of benefits under the agreement; and provide for the creation of a special board of adjustment to resolve any dispute over the interpretation or application of the agreement.

While PEB No. 219 addressed numerous issues applicable to the *individual crafts or classes who participated in the* proceedings, the Line Transfer Dispute was not the subject of PEB No. 219's Report.

Evidence in the record also establishes that prior to the instant transactions the SP had engaged in the following branch line dispositions; (1) the Eel River, Carlota, Korblex and Samoa branch lines in California were sold to the Eureka Southern Railroad on December 25, 1984, (2) the Santa Cruz branch line in California was sold to Roaring Camp on May 10, 1985, (3) the Lake County, Oregon branch line was sold to Lakeview on October 29, 1985, (4) the Susanville, California branch line was leased to the Quincy Railroad on November 17, 1985, (5) the Hayden, Arizona branch line was sold to the Copper Basin Railroad on May 30, 1986, (6) Llano, Texas branch line was sold to the City of Austin on June 30, 1986, (7) the Tillamook, Oregon branch line was leased and sold to the Port of Tillamook Bay on September 27, 1986, (8) the Napa, California branch line was sold to the Napa Valley Wine Train on December 30, 1986, (9) the Bayou Sale, Cypremort and Houma, Louisiana branch lines were sold to the Louisiana Delta Railroad on December 30, 1986, (10) the Globe, Arizona branch line was sold to the Arizona Eastern Railroad on October 7, 1988, (11) the Arvin, Clovis, Coalinga, Exeter, Oil City, Richgrove, Stratford and Visalia, California branch lines were leased to the San Joaquin Valley Railroad in January, 1992, (12) the Gonzales, Texas branch line was sold to the Texas, Gonzales and Northern Railroad on February 23, 1993, and (13) the Douglas, Arizona branch line was sold to the San Pedro & Southwestern Railroad on February 23, 1993.

As will be more fully discussed below, the SP has argued that in none of these transactions did the Organizations assert that the Carrier was prohibited by its agreements from selling and/or leasing low density rail lines.

While the parties have not been able to stipulate as to the precise issues before the Board, the general questions are, as stated by the Organizations, whether the involved transactions violate the existing collective bargaining agreements, generally, and the scope clauses, specifically, and whether the evidence shows bad faith on the part of the Carrier in consummating the leases and the sale.

Position of the Organizations

The Organizations submit that the Board was created to consider contract interpretation issues arising as the result of the Carrier's decision to transfer to three newly-formed carriers the right to perform what the Organizations characterize as SP's "gathering and distribution" functions on several of its branch lines in Oregon. The Organizations contend that the SP has agreed, as an essential part of its collective bargaining agreements with the Organizations, that craft work of the SP, which is to be performed on and in connection with the branch lines, will be performed by SP employees who hold the requisite seniority. The Organizations assert that the SP has breached those commitments by transferring its branch lines in the Willamette Valley in Oregon to the three newly-formed carriers for those carriers to perform the SP's branch line work for the benefit of the SP and as agents for the SP.

The Organizations argue that it is significant that the Carrier does not dispute the Organizations' contentions that the SP, through its express agreements with the Organizations, by custom and practice, and through the fact that the agreements are negotiated by the <u>exclusive</u> representatives of the particular craft or class, has agreed that the work of the Carrier within the scope of those agreements shall be reserved for employees who hold the appropriate seniority under those agreements. The Organizations maintain that the Carrier cannot dispute this contention because it is axiomatic that every contract must have a subject matter, and the subject matter of each of the collective bargaining agreements at issue is the Carrier's craft work. In support of this principle, the Organizations cite In Re BLE and Louisiana and Arkansas Ry., NRAB (1st Div.) Award No. 351, June 4, 1935 (Swacker). The Organizations also argue that the SP's leasing and selling its branch lines in Oregon breached the Carrier's commitment to have craft employees perform craft work, because the SP did not relinquish its need to perform that work when it transferred the subject branch lines. Rather, the Organizations argue that the SP entered into the line transfer agreements in order to strengthen its presence in the markets it served in the areas of those branch lines. The Organizations maintain that the evidence of record establishes that the SP decided to enter into these transactions because the Carrier had concluded that a lower cost operator, who also dealt directly with the shippers on those lines (something the SP was unwilling to do), could retain the existing traffic on those lines and, most likely, could generate additional traffic from those lines. The Organizations submit that the evidence of record further establishes that the SP concluded that such arrangements would benefit the Carrier's overall profitability. In support of this contention, the Organizations point out that the SP was not willing to abandon those markets nor was it willing to allow its competitors, the Burlington Northern and Union Pacific Railway Companies, to gain any of that traffic; a likely occurrence if the SP relinquished its control over the traffic lines. The Organizations opine that, consequently, the SP structured the line transfers so that the new operators were required to interchange all interline movements with the SP and were prohibited from dealing with any other rail carrier.

The Organizations submit that in order to achieve its objectives, the SP arranged for the new operators to act as the Carrier's agent for all interline movements on the subject branch lines, and the SP prohibited the newly-formed carriers from acting on behalf of any other rail carrier. The Organizations point out that the SP, in the lease and related agreement provisions, included monetary penalties, which prohibited the new carriers from interchanging traffic with anyone else but the SP. As an example, the Organizations point out that the lease with the W&P provides that the monthly rent for the lines is $175,000; but if the W&P does not interchange any cars with a carrier other than the SP, then the new operator will receive a credit of $174,900 against the normal monthly rent. The Organizations point out, additionally, that the trackage rights agreement with the W&P includes a monthly rental of $100,000, which is reduced to $100 if the W&P does not use the trackage rights to interchange with any carrier, except the SP. The Organizations assert, in sum, that the Carrier transferred its Oregon branch lines to the new carriers, but restricted those carriers' independence in order to assure the SP's continued control over their markets.

The Organizations maintain that these restrictions are unique to the SP, and require a finding that the new operators are agents of the Carrier for the movement of all interstate traffic. The Organizations contend that the restrictions upon the new carriers' operations are such that those new carriers operate in interstate commerce solely for the benefit of the SP. The Organizations submit that all interline traffic, which the new operators move on those lines, is "gathering and distribution" traffic, moves for the benefit of the SP, under SP contracts or rates, and for the account of the SP. The Organizations point out that the SP bills the shippers and pays the new operators, as switching carriers, a charge for each movement. The Organizations argue, in other words, that the new carriers are performing train movements and all related work for the benefit of the SP and under the control of the SP. Accordingly, the Organizations contend that these actions violate the applicable collective bargaining agreements which provide SP craft employees with the right to perform that labor for the SP.

The Organizations state that the SP seeks to justify its actions by asserting that it has the managerial prerogative to sell, lease or otherwise transfer its rail assets, and that any subsequent event to implement that decision cannot be deemed to be a violation of the collective bargaining agreements. The Organizations argue that there is no merit in the Carrier's position. First, the Organizations submit that it is clear that a rail carrier can enter into an agreement to limit its managerial prerogatives, and that said rail carrier is not free, thereafter, to ignore those restrictions whenever it concludes that it should exercise what has become a limited prerogative. In support of this principle, the Organizations cite the Washington Job Protection Agreement of 1936. Secondly, the Organizations contend that the decision which the SP has made in this case does not involve the Carrier's "leaving the market", the type of managerial prerogative which the courts have considered is being exercised in the typical line sale case, because the SP has no intention to leave the branch line markets. The Organizations point out that, in fact, the SP has done everything it could to strengthen its presence in and its control over those markets. The Organizations assert that the decision made by the SP in this case is one concerning the utilization of its work force and how best to have its "gathering and distribution" work performed. The Organizations maintain that this type of management decision is one which the courts have uniformly held requires bargaining and compliance with the status quo obligations, and, thus, cannot in any way be viewed as relieving the Carrier of its existing contractual obligations.

Based upon the foregoing facts and arguments, the Organizations submit that the SP's attempts to justify its actions as an exercise of unlimited managerial right must fail and be rejected.

Position of the Carrier

The Carrier contends that the bargaining history concerning the Organizations' proposed limitations regarding shortline transactions submitted before PEB No. 219 is uncontested. The Carrier points out that those proposals applied to both sale and lease transactions, and that the Organizations' Section 6 notices sought a blanket prohibition upon any type of branch line disposition. The Carrier argues that the Organizations' proposals regarding line dispositions made before PEB No. 219 are virtually identical to the arguments made before this Board. The Carrier then compares the proposals and arguments before PEB No. 219 made by rail labor and the arguments presented to this Board. For example, the Carrier points out that the Organizations in this case claim, as a central premise, that the branch lines are still viable and thus will be used for "continued rail operations"; and then point out that this argument is virtually identical to the assertion made before PEB No. 219, to the effect that carriers violated collective bargaining agreements by disposing of rail lines where there would be such "continued rail operations". Additionally, the Carrier submits that rail labor, as did the Organizations here, argued before PEB No. 219 that the work being performed on the branch lines "belonged" to the members of the crafts or classes under the existing collective bargaining agreements.

The Carrier maintains that PEB No. 219 rejected rail labor's attempt to place any limits on branch line transactions, and that such rejection forecloses the Organizations' claims in the instant case. The Carrier submits that had the agreements prohibited branch line transactions, there would have been no need for rail labor to seek contractual limitations via the collective bargaining process before PEB No. 219.

The Carrier then points to the "Moratorium Clause" in the *Report of PEB No. 219,* and *characterizes the provision* as "extremely broad"; and points out that the Special Board, established by statute for purposes of clarifying or modifying the Report of PEB No. 219, found that all matters involving "subjects which were referred to in notices served during the present round of negotiations are barred until January 1, 1995." The Carrier asserts that the "subject" of branch line disposition was contained in the Organizations' Section 6 notices and was discussed at length before PEB No. 219. Accordingly, the Carrier argues that sustaining the Organizations' position in this case would have the same effect as granting to the Organizations the terms and limitations proposed in their Section 6 notices.

The Carrier further contends that the Organizations bear the burden of proving their claim that the Carrier violated the collective bargaining agreements by selling and/or leasing lines in Oregon. The Carrier maintains that the Organizations cannot point to any provisions in the agreements which limit the ability of the Carrier to sell and/or lease rail lines or which limit the structure or terms of such transactions. The Carrier argues that the Organizations' Section 6 notices seeking to limit line dispositions prove that the agreements contain no limitation on shortline transactions. The SP in support of this contention refers to what it states is "one prior decision" that held that a Section 6 notice regarding the subject of shortline dispositions may not be served when a moratorium clause is in effect; UTU and NRLC Joint Interpretation Committee, March 20, 1987 (Arbitrators Peterson and Kasher).

The Carrier asserts that co-existent and commensurate with the right to sell or lease branch lines is the ability to complete the transaction without reference to scope, seniority and/or furlough provisions in the agreements. The Carrier states that if the SP is contractually authorized to engage in a shortline transaction, it follows that the SP is authorized to take those related actions necessary to implement that corporate decision. The SP maintains that, as the Carrier has the right to sell and/or lease low density branch lines, all actions which logically flow from that right are also proper under the agreements.

The Carrier submits that if the collective bargaining agreements prohibited shortline transactions, there would have been no need for the Organizations to serve the Section 6 notices seeking to prohibit such transactions.

The Carrier posits that the arbitration process is used for the purpose of interpreting disputed provisions in a collective bargaining agreement; and cannot and should not be used to create contractual terms or to negotiate terms when the parties have been unable to do so. The Carrier points out that this Board's jurisdiction is confined to interpreting and applying agreements, and that the Board must function within that limited jurisdiction. The Carrier suggests that if the Organizations seek to obtain restrictions on shortline transactions those limitations should be achieved through collective bargaining and not arbitration.

The Carrier maintains that there is no agreement provision prohibiting shortline transactions, and thus the Carrier's right to sell and/or lease rail lines to independent shortline operators must be read in the context of court decisions which have upheld a carrier's right to make fundamental decisions concerning the future direction of its business. In support of this contention, the Carrier cites P&LE v. RLEA, 491 U.S. 490 (1987) and several other decisions by the federal courts. The Carrier argues that these citations are particularly applicable in the instant case.

The Carrier points out that the record evidence establishes that the SP's shortline program is an integral part of its overall business plan and strategy to restore profitability; that virtually all major rail carriers have engaged in shortline transactions and rationalized their physical plants in view of the competitive realities of rail transportation; and that the courts, in the absence of a collective bargaining agreement prohibition, have upheld a rail carrier's right to engage in such transactions.

The Carrier further points out that the Interstate Commerce Commission (hereinafter the "ICC") has actively encouraged the creation of shortline and regional carriers through a public policy that has been in place since 1986. The SP submits that it is the only Class 1 carrier that has not engaged in significant shortline transactions; and that similar shortline transactions have received approval from the ICC.

The Carrier maintains that while the Organizations may disagree with the ICC's refusal to impose employee protection in cases involving shortline transactions, they cannot use the collective bargaining agreements to remedy those concerns.

Based upon the foregoing facts and arguments, the Carrier requests that the Organizations' claims be denied.

Findings and Opinion

In its reply brief/submission, the SP iterates its claim that the subject matter of branch line leases and/or sales is not governed by the provisions in the collective bargaining agreements cited by the Organizations; and that past practice of the SP in consummating branch line sales and leases, as well as evidence regarding other Class 1 carriers' engaging in such transactions without objection from rail labor, supports the Carrier's underlying position that there is no merit in the Organizations' claims.

In its post-hearing brief/submission, the Organizations dispute the Carrier's assertion that rail labor's unsuccessful proposal to negotiate an agreement regarding shortline transfers establishes the Carrier's contractual right to sell and/or lease rail lines. The Organizations argue in their reply that the SP can point to no agreement provision which gives the Carrier the right to transfer its assets to another and for that new entity to perform the SP's labor.

Those arguments focus this Board's attention upon the central issue; that is, what rights and obligations flow from the scope and seniority provisions in the collective bargaining agreements cited by the Organizations which are applicable to the lease and sale transactions involving the Oregon branch lines. While that is the main focus of the Board's attention, the parties have discussed a number of ancillary factual, operational and legal subissues which should, to some extent, be addressed.

First, while there are many facts and issues in dispute, it is uncontroverted that the SP has, for some time, faced significant financial problems which have been recognized by at least two Presidential Emergency Boards, established pursuant to Section 10 of the Railway Labor Act, as well as by the rail labor organizations themselves. For example, PEB No. 219 recommended that the rail labor organizations "sympathetically examine the situation [the SP's ability to pay Class 1 carrier wage rates]"; and, in fact, as a result of the Emergency Board's recommendations, the SP was not required to pay the same wages as were other Class 1 railroads to crafts or classes subject to the Emergency Board's jurisdiction, which wage increases had been recommended and required by the statutory imposition of PEB No. 219's recommendations.

The Carrier's financial condition is not being considered because of its direct relevance to the instant dispute, but is being discussed in order to put into proper factual context the circumstances attendant to the Carrier's lease and sale of the Oregon branch lines. This factual context establishes, without question, that the leases and sale were consummated in an environment of serious economic problems. The documentary evidence of record further establishes that the lack of profitability on the Oregon branch lines was the major motivating factor for the Carrier's determination to find other operators to lease and/or buy those lines; and while standard railroad labor costs contributed, in part, to the SP's decision to lease and sell the Oregon branch lines, as will be more fully discussed below, the evidence does not establish that the desire to achieve lower labor costs was the prime or sole factor which led the

Carrier's Plant Rationalization planners to recommend the Oregon branch line transactions.

After fully considering the substantial testimony and documentary evidence in this record regarding the Oregon branch lines transactions and the extent to which the parties met and discussed those transactions before they were consummated, this Board finds insufficient evidence in the record to conclude that the Carrier (1) was motivated exclusively by its desire to reduce labor costs when it leased and sold the branch lines, (2) was guilty of engaging in "bad faith" in its dealing with the labor organizations prior to consummating said agreements, and/or (3) was party to a "sham" agreement with any outside operator, which operator had been created exclusively for the purpose of avoiding collectively bargained contractual obligations.

First, as noted above, there is overwhelming evidence in this record to establish that the Carrier did not have the ability, based upon existing operating costs, to continue to run the branch lines and not suffer financial shortfalls. Labor costs associated with the Oregon branch lines were only one ingredient in the financial mix. For example, the fact that the new operators did commit to spend in excess of eleven million dollars to upgrade the branch line operation supports the conclusion that the line transactions were not motivated exclusively by labor cost considerations.

Secondly, there is insufficient showing to establish that the Carrier failed to "step forward" in a timely and constructive effort to negotiate some arrangement whereby an employee purchase of the lines option or the renegotiation of collective bargaining agreements could have provided an alternative facility for the retention of the Oregon branch lines within the operational control of the Carrier. Such arrangements or negotiations are complex and difficult, at best, and the evidence does not support a finding that the Carrier was not sufficiently forthcoming so that its efforts can be characterized as having been exercised in "bad faith".

Thirdly, there is insufficient evidence in this record to establish that the W&P, the WVRY and/or the MWRY are not bona fide carriers engaged in the business of railroading for the purpose of obtaining a profit through their operating efforts. This Board has no factual basis to challenge the evidence in the record regarding the independence of the shortline operators or the Carrier's assertion that it entered into long-term leases with reputable and established shortline operators for the East and West Side Lines. Nor is there preponderant evidence which would establish that the SP exercises control over the operations on those lines, or that the SP has an ownership interest in the shortline operators or their parent companies, or that the SP is involved in the management and/or supervision of the shortline operators' employees. Accordingly, there is no reason for this

Board to conclude that there is a "corporate veil to be pierced" for the purpose of establishing that the W&P, the WVRY and/or the MWRY are controlled by the SP.

Based upon the Organizations' Section 6 notices served in 1988, there is some substantial merit in the Carrier's position that the line transfer transactions in this case are of the type which the Organizations sought to address through the negotiation of protective and/or other forms of compensation.

Subsequent to the issuance of the Report of PEB No. 219 on January 15, 1991, the Congress of the United States established, pursuant to Public Law 102-29, a "Special Board". This Special Board was charged with considering requests for clarification or modification of the Emergency Board's Report.

In the context of the issues before this Board, the following excerpt from a Request for Modification made by the Shopcraft Unions, found in Carrier Exhibit "F", is significant. The Modification Request was addressed to the "Moratorium" recommendation made by PEB No. 219 in Section "O" of its Report. PEB No. 219 recommended that there be a "moratorium period for all matters on which notices might properly have been served when the last moratorium ended on July 1, 1988 to be in effect through January 1, 1995". In seeking to modify the moratorium, specifically insofar as "Line Sales on a Case-by-Case Basis" was concerned, the Shopcraft Organizations posited as follows:

As interpreted by this Board [the Special Board], the PEB's recommended moratorium is "all-inclusive", barring from the RLA [Railway Labor Act] bargaining process until January 1, 1995 "[a]ll matters involving subjects which were referred to in notices served during the present round of negotiations". Unless modified, this moratorium would prevent the organizations from requesting a carrier to bargain over the effects of a line sale or similar transaction which is not subject to Interstate Commerce Act protective conditions. The foreclosure of bargaining over the effects of transactions which directly result in the elimination of jobs is wholly inequitable.

There can be no denying that the issues of the carriers' ability to engage in line sales and similar transactions over the unions' objections and the effect of such transactions on carrier employees were of paramount importance in the relationship between the organizations and the carriers in the past five-seven years. The Section 6 Notices which the organizations served in this bargaining round sought to establish a uniform set of procedures and protections which would apply in such situations. The carriers counterproposed a uniform buy-out process. The PEB recommended an agreement which did not address any uniform treatment of line sales and similar transactions.

Because of the dire impact a line sale transaction can have on an employee's very livelihood, this Board should modify the PEB's recommended moratorium to allow an organization to pursue an agreement to ameliorate that impact when a line sale is contemplated. Such a limited exemption from the moratorium would be transaction-specific; that is, any notice served by the union would be directed at the effects of a specific sale on a particular group of affected employees. Allowing the union to address the effects of a transaction in this way would <u>not</u> result in the transaction being stopped or otherwise prevented from going forward as contemplated by the selling carrier and acquiring non-carrier. It would merely permit the union an opportunity to convince the carrier of the hardships which may result from the transaction and to obtain appropriate relief to soften the blow for the employees who are affected.

In the <u>P&LE</u> case, the Supreme Court specifically held that such matters are bargainable. See, <u>Pittsburgh & Lake Erie Railroad Co. v. RLEA,</u> ____ US ____, 105 L.Ed. 2d 415, 435 (1989).

There remains no other effective way for the unions to obtain any consideration for their members affected by a line transfer. The employees may not succeed in obtaining the relief they seek, but on an issue of this importance to their continued employment, they certainly are entitled to an opportunity to try.

> This Board should be aware that prior to April 1988, when this bargaining round started, the carriers consistently argued that union notices to bargain over the effects of line sales were barred by the moratorium provisions in the last national agreements. Any dispute over a union's right to serve such a notice, they maintained, raised a minor dispute. See, Decision of Joint Interpretation Committee, Article XVI, National Mediation Agreement of October 31, 1985, United Transportation Union and National Carriers' Conference Committee (March 20, 1987; Kasher and Peterson, Arbitrators) (Attached hereto as Exhibit A).
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> The Board should also be aware of what the carriers, armed with a moratorium preventing bargaining over line transfers, can and will do. Burlington Northern, for example, recently told the Washington State Senate that it engaged in a program to "create" short lines and continues to hold a financial interest in short lines over and above freight car interchange agreements.

In spite of this well-articulated equitable plea and similar positions advocated by other rail labor organization representatives, the Special Board, in a report issued on July 18, 1991, rejected rail labor's request to modify PEB No. 219's moratorium provisions, and thus the subject matter of line sales/transfers was reserved for bargaining in the next round of negotiations under the provisions of the Railway Labor Act.

The above-quoted excerpt can lead to no other conclusion but that rail labor was seeking to establish "a uniform set of procedures and protections which would apply in such situations"; showing rail labor's recognition that it needed some facility to address "issues of the carriers' ability to engage in line sales and similar transactions over the unions' objections". Additionally, there is recognition that "There remains no other effective way for the unions to obtain any consideration for their members affected by a line transfer". In this Board's opinion, if rail labor had a clear and unequivocal remedy in the various scope and/or seniority provisions of applicable collective bargaining agreements, it is unlikely that it would have cast its prayer for relief from the moratorium in the context of its members having no way to obtain "any consideration" for a line transfer.

This Board also recognizes the difference between a "minor" dispute and a "major" dispute, as those terms of art are respectively defined by Section 3 and Sections 5 and 6 of the Railway Labor Act. The Board further recognizes that the Organizations here have directed their focus at the scope and seniority provisions of the applicable collective bargaining agreements, and argue that the transactions here violate those provisions.

However, while various courts have relied upon the premise that disputes of the type here are "minor" disputes, those decisions do not, in the opinion of this Board, establish that there is agreement language which supports the position of the Organizations.

This Board has found that the Oregon branch line transfers were bona fide, even if the new operators are engaged primarily in what the Organization characterizes as a "gathering and distribution" function. This Board agrees with the Carrier's contention that merely because the Oregon branch line transactions (1) redound to the Carrier's benefit, (2) are structured in such a way that allows the Carrier to "remain in the market" and (3) contain significant incentives in the leases for the new operators to interchange exclusively with the SP does not result in a conclusion that the collective bargaining agreements' scope and seniority provisions have been violated.

This Board is obligated, if the Organizations' claims are to be sustained, to find some support in the provisions of the collective bargaining agreement for such a conclusion; and as the Organizations claim that the Oregon branch line transactions violate the collective bargaining agreements, it is, in this Board's opinion, their obligation to point to specific language and/or past practice and/or a manifestation of mutual intent which would establish that the parties agreed that transactions like the Oregon branch line leases and sale could not be consummated without the Organizations' consent or if such transactions were unilaterally consummated by the Carrier they would violate the collective bargaining agreements. Before it would be proper for this Board to resolve the "merits" of the Organizations' claims, this Board must first find that transactions such as the Oregon branch line leases and sale were specifically addressed in the agreements of the parties. It is enlightening, in this regard, to consider the decision of Special Board of Adjustment No. 1018. That Board considered a matter involving CSX Transportation Inc. and twelve rail labor organizations and/or separate divisions of those organizations, eight of whom are parties before this Board. In addressing the question of a line sale by the CSX, insofar as it impacted upon the parties' respective collective bargaining agreements' rights and obligations, Special Board of Adjustment No. 1018 observed as follows:

> Contrary to Carrier's contention that the RIF or furlough provisions are so "broadly drawn" as to permit job abolishments for any reason, including line sales, this Board finds that such contention is not dispositive. Even assuming, arguendo, that the RIF or furlough provisions were intended to include line sales, there is simply nothing in these provisions to indicate that the agreement negotiators contemplated, anticipated or intended that this language would apply to line sales in such a manner as to bar the filing of Section 6 Notices, thus depriving the Organizations of statutory recourse to the Railway Labor Act.
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> Thus, it is clear that there is nothing in these agreements which prohibits the sale of the Carrier's assets; the Carrier is free to do so, and the Organizations do not disagree. It is equally clear, however, that there is nothing in these agreements that waives the right of the Organizations to invoke their statutory rights to bargain over the effects of such sale on the employees they represent. (SBA No. 1018, CSX and Various Labor Organizations, pages 17-18, December 18, 1988, Arbitrators Dennis, Marx and Zumas)

While Special Board of Adjustment No. 1018 was considering a "line sale" in the context of agreement provisions concerning the right to issue abolishment notices, the rationale of Special Board of Adjustment No. 1018, just cited above, is, for all practical, structural and contractual purposes, equally applicable in this case. Reviewing the applicable scope and seniority provisions in the collective bargaining agreements, this Board cannot find or discern any specific language or implied intent which would apply to the question of leasing and/or selling branch lines. Accordingly, there is no ability to render an interpretation as to how a line transfer should be viewed in the context of said scope and/or seniority provisions.

What is clear is that the scope and seniority provisions in the subject collective bargaining agreements were negotiated years before the federal government determined that "deregulation" was a panacea for the transportation industries' ills. With deregulation, rail carriers obtained greater opportunities and flexibilities to engage in the type of transactions which are the subject matter of this dispute; and the ICC refrained, in many cases, from imposing the standard-type of protective conditions in such matters. As a result, many Class 1 railroad jobs have been lost; but that result does not require a finding that specific terms in collectively bargained agreements have been violated.

There is substantial equity in the detailed and well-presented arguments of the Organizations. However, this Board is constrained to conclude that there has been no violation of agreement provisions. In the absence of specific agreement language addressing the subject matter of line transfers and/or prohibiting the types of transactions engaged in by the SP with the W&P, the WVRY and the MWRY and/or in the absence of a mutually recognized past practice of long-standing, which would prohibit such transactions absent agreement of the parties, this Board has no basis upon which to conclude that there has been an agreement violation.

Accordingly, this Board concludes that the Organizations' claims that the scope and seniority provisions were violated by the Oregon branch line leases and sale should be denied.

Award: The Organizations' claims are denied in accordance with the above findings. This Award was signed this 9th day of August, 1993.

Richard R. Kasher

Richard R. Kasher, Arbitrator