SPECIAL BOARD OF ADJUSTMENT

In the Matter of the Arbitration Between:	)	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,	)	
Organization,	)	
and	)	
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,	)	**OPINION AND AWARD**
Carrier.	)	

Hearing Date: September 12, 2000
Hearing Location: Denver, Colorado
Date of Award: November 30, 2000

MEMBERS OF THE BOARD

Organization Member: Steven V. Powers
Carrier Member: Wendell A. Bell
Neutral Member: John B. LaRocco

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Special Board of Adjustment

Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway Company

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OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Special Board of Adjustment has jurisdiction over the parties and the subject matter of the dispute regarding Question No. 1 herein; that this Board is duly constituted by an Agreement dated May 11, 2000; and that all parties were given due notice of the hearing held on this matter.

I. INTRODUCTION

The parties were unable to agree upon an issue to submit to the Board. Each party framed its issue with wording slanted toward its desired outcome. Attachment A of the May 11, 2000 Arbitration Agreement sets forth each party's Question at Issue as follows:

Question No. 1

BMWE's Statement of Question No.1

> Does the Work Force Stabilization (WFS) Program (effective on January 18, 1994 and applied retroactively to July 29, 1991) apply to all district mobile gangs on BNSF?

BNSF's Statement of Question No.1

> Are district mobile gangs subject to the informational notice requirement in Article H of the August 12, 1999 "Omnibus Agreement", or the notice requirement in Article IV of the January 18, 1994 Workforce Stabilization Agreement?

Question No.2

> BNSF has presented Question Nos. 2(a) and (b) below and asserts that they are related to BNSF Question No. 1 above and that a Board established pursuant to Section 3, Second, such as this Board, has jurisdiction to hear and answer these questions. However, as a threshold jurisdictional matter, BMWE asserts that a Board established pursuant to Section 3, Second, such as this Board, has no jurisdiction to hear and decide such questions because they fall within the exclusive jurisdiction of the Work Force Stabilization Select Committee. Which party is correct as to the proper jurisdiction for resolving these disputes, BMWE or BNSF?*

(a) Must district mobile gangs, once established, continue in existence for not less than 6 months?

(b) Must district mobile gangs be established on or before June 30 of each calendar year, so that they can have not less than 6 months work within a calendar year?

* NOTE: If BNSF is correct, this Board shall answer Questions 2(a) and (b). If BMWE is correct, either party may refer Questions 2(a) and (b) to the Select Committee.

Setting aside the jurisdictional issue, the essence of this dispute centers on whether the Carrier must provide the Organization's representatives with notice in compliance with Article IV of the Work Force Stabilization (WFS) Program as a condition precedent to establishing District Mobile Gangs (DMG).

II. BACKGROUND AND SUMMARY OF THE FACTS

A. Pertinent Agreement Provisions

Following the issuance of a March 11, 1999 arbitration decision approving the Carrier's system-wide seniority district consolidation proposal, the parties engaged in intensive negotiations concerning the implementation of the seniority district consolidation. The parties also bargained over other subjects. Some were only peripherally related to seniority district consolidation.

On August 12, 1999, the parties entered into the Seniority Districts Consolidation Agreement. Section V of the Seniority Districts Consolidation Agreement reads:

> 5. Within each newly consolidated district, district mobile gangs will conform to the following conditions:
>
> A. Each employee assigned to any district mobile gang who does not leave the gang voluntarily for a period of at least six (6) months shall be entitled

to a lump sum payment annually equal to 5% of his/her compensation earned during the calendar year on that gang. Such compensation shall not exceed $1,000 and shall be paid within 30 days of the completion of the employee's service on the gang; for mobile gangs not required to be disbanded each year, payment will be made within 30 days of the completion of each calendar year. If the company disbands the gang in less than six months, the company will be responsible for payment of the production incentive earned as of that date.

B. The Work Force Stabilization (WFS) Program (effective on January 18, 1994 and applied retroactively back to July 29,1991) shall apply to all district mobile gangs, and shall entitle an employee initially assigned to a WFS gang when it starts its work during the production season for the calendar year, six months of WFS work benefits or WFS unemployment benefits, subject to the terms of that Program.

C. The travel allowance provided by Article XIV of 1996 National Agreement will apply to all district mobile gangs.

D. A district mobile gang meeting Arbitrator Sickles' definition of a regional/system gang and working on seniority districts that are under the former Santa Fe -BMWE Schedule will receive per diem payments on a 7-day basis.

When the parties wrote Paragraph 5(B) of the Seniority Districts Consolidation Agreement, they used, as a model, the language in Article XII, Part C of the September 26, 1996 National Agreement. Article XII, Part C states:

Article XII(C) Part C - Work Force Stabilization

The Work Force Stabilization (WFS) Program effective on January 18, 1994, and applied retroactively back to July 29, 1991 shall continue in effect for the new agreement, and shall entitle an employee initially assigned to a WFS gang when it starts its work

> during the production season for the calendar year, six months of WFS work benefits or WFS unemployment benefits, subject to the terms of the agreement.

Also on August 12, 1999, the parties entered into the District's Consolidation-Related Agreements (hereinafter called the "Related Agreements"). The preamble to the Related Agreements states:

> 1. The purpose of this agreement is to specify the other agreements made by the parties in connection with the seniority consolidation bargaining.

Article H of the Related Agreements provides:

> Article H. Mobile Crews: Schedules and/or Notices:
>
> 1. Region/System Gangs:
>
> There will be no change to the current notice provisions applicable to Region/System Gangs.
>
> 2. District Mobile Gangs Meeting the "Sickles" Definition:
> District Mobile Gangs meeting the "Sickles" definition will be provided with an informational notice on the bulletin when established. The informational notice will contain the type of gangs, the anticipated work locations, beginning milepost, ending milepost, and start date. It is understood that information provided concerning the anticipated schedule of work for the mobile gangs shall be for information only, shall be subject to change without notice, and shall not constitute a guarantee that the gang will perform the work specified or at the time and place specified. Attachment No. 3 to this Agreement contains a typical example of the form of the notice to be provided under this provision.
>
> 3. District Mobile Gangs or Positions Not Meeting the "Sickles" Definition;
>
> District Mobile Gangs or position(s) not meeting the "Sickles" definition will be provided with an informational notice. The informational notice will be provided at the time of the bulletin. The notice will describe work locations where the mobile position(s) is

> expected to work and the duration of the project if possible. It is understood that information provided concerning the anticipated schedule of work shall be for information only, shall be subject to change without notice, and shall not constitute a guarantee that the gang or position(s) will perform the work specified or at the time and place specified.

Both the Seniority Districts Consolidation Agreement and the Related Agreements became effective September 11, 1999.

On June 10, 1999, the parties entered into a Side Letter that addressed the transition period for both Seniority Districts Consolidation Agreement and the Related Agreements, as follows:[1]

> This Side Letter will refer to the various seniority redistricting Agreements dated June 10, 1999. The parties agree that all District Mobile Gang positions will be rebulletined as part of the Implementation of these Agreements and Awards on each new expanded district. It is understood that during the remainder of the 1999 work season there will not be adequate time left in the year for the Carrier to provide the six months work referred to in the Agreements, relevant Awards and the Workforce Stabilization Agreement. For this reason, the provisions of the Workforce Stabilization Agreement are suspended for the remainder of the 1999 calendar year. The parties further agree that upon rebulletin of the District Mobile Gang positions, the bonus payments that may be due an eligible District Mobile Gang employee will be pro-rated for the Remainder of 1999.

The informational notice referred to Article H of the Related Agreements is patterned after Schedule Rule 7(D) of the 1982 Burlington Northern Schedule Agreement. Rule 7(D) reads:

> D. Any information contained on the bulletin concerning the anticipated schedule of work for the gang shall be for information only, shall be subject to change without notice, and shall not constitute a guarantee that the gang will perform the work specified or at the time and place specified.

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[1] The Side Letter was entered into at approximately the same time the parties tentatively agreed to the Seniority Districts Consolidation Agreement and the Related Agreements. Thus, the date of the Side Letter precedes the signing date of the two main agreements.

The Organization and the National Carriers Conference Committee, the national bargaining agent for most railroads including the Carrier herein, developed the WFS Program which became effective January 18, 1994, retroactive to July 29, 1991. Article IV of the WFS Program states:

> IV. NOTICE
>
> A. Pursuant to Article XIII, each carrier is required to provide at least ninety (90) days written notice of its intention to establish regional or system-wide production gangs. To encourage and facilitate timely and full discussion of relevant issues, each carrier shall provide notice to the appropriate organization representative of its tentative plans to establish WFS gangs no later than 75 days preceding the beginning of the calendar year for which the programmed work is scheduled.
>
> B. This notice requirement will be effective for the 1994 work season and beyond but will not be applicable on a carrier on which an arbitration award or voluntary agreement has already set forth notice requirements. However, a carrier not required to provide notice pursuant to Article XIII will, prior to the beginning of each production season beginning with the 1994 work season, provide notice pursuant to Article XIV of the number and staffing of the regional or system-wide production gangs to be established for such season.

The parties concur that, on this property, the Article IV notice has been reduced to 30 days before the start of the calendar year.

Article VII of the WFS Program provides:

> VII. FUNCTION OF SELECT COMMITTEE
>
> A. In accordance with its charter, the Select Committee shall continue in existence to help ensure that this program is applied and utilized effectively and evolves to achieve its full potential. Its specific duties shall include:
>
> 1. Monitoring WFS Program. The Select Committee shall have the authority to revise and amend the current program in order that it achieve

intended results. In light of this, the Select Committee has refrained from addressing many hypothetical issues, choosing rather to reserve its right to make revisions and amendments upon observing actual experience under the program.

2. Dispute Resolution. The Select Committee shall also function as a dispute resolution forum and the Select Committee shall be the forum for resolving disputes arising under the relevant Articles of the February 6, 1992 Imposed Agreement except where it does not have jurisdiction or declines to exercise jurisdiction and designates the appropriate forum. When either party requests the Select Committee to adjudicate a claim or dispute, the Select Committee shall make a threshold determination over whether the Select Committee properly has jurisdiction over the particular dispute or claim.

If the Select Committee asserts jurisdiction over a dispute or claim, it will have full authority to fashion any appropriate remedy. In addition, the Select Committee will exercise its discretion, consistent with due process, as to the appropriate procedure for resolving a dispute or claim.

If the Select Committee determines the dispute or claim is beyond its jurisdiction or declines jurisdiction and designates the appropriate forum, the time limits involved in any associated claims and grievances will be held in abeyance until thirty (30) days after the parties on the property have received the claim or dispute from the Select Committee.

In the event a dispute is returned to the local property, the claim shall be submitted to the highest carrier official assigned to handle such disputes and thereafter progressed in accordance with applicable local rules.

B. Notwithstanding the provisions of Part A of this Article, claims and disputes over the scope and meaning of "emergency" as used in Article V and over the scope and meaning of "economic adversity" as used in Article V are within the jurisdiction of the Select Committee.

> C. Notwithstanding the provisions of Part A of this Article, a claim involving WFS unemployment benefits, as set forth in Article II, shall be filed directly with the Carrier's highest designated officer designated to receive such claims. If such claim is denied in whole or in part by the designated Carrier Officer, such Officer and the General Chairman shall promptly confer on the matter. The General Chairman may submit such claim to the Select Committee which shall assert jurisdiction over such claim.

B. Consolidation of Seniority Districts

On April 7, 1998, the Carrier notified the Organization of its intent to consolidate the 47 existing seniority districts into nine seniority districts. One of the main goals of the Carrier's seniority districts consolidation proposal was to allow DMGs, which are constrained to a single seniority district, to work over larger territories. Without consolidating seniority districts, the Carrier would be relegated to using Regional-System Gangs (RSG), which may cross seniority district boundaries, to cover large territories. The Organization rejected the Carrier's proposal. Since they were unable to reach a mutual understanding, the parties progressed the seniority consolidation issue to arbitration.

In arbitration, the Carrier proffered evidence that operational necessity warranted the consolidation of seniority districts. The Organization brought forward evidence that the employees would incur unduly harsh working conditions if districts were consolidated. The Organization also alleged that the Carrier's seniority district consolidation proposal was just a gambit to circumvent the WFS Program. Put differently, with just nine mammoth seniority districts, DMGs would be equivalent to RSGs, but members of DMGs would not have the benefits and procedural safeguards of the WFS Program.

On March 11, 1999, Arbitrator Richard Mittenthal issued a decision adjudging that the Carrier proffered persuasive and proper justification for consolidating 47 seniority districts into nine seniority districts. *Brotherhood of Maintenance of Way Employes v. Burlington Northern Santa Fe Railway Company*, (Mittenthal, 1999) (Hereinafter referred to as the "*Mittenthal Award.*) While he found that the Carrier's operational needs outweighed the adverse effect on maintenance of way employees, Arbitrator Mittenthal was concerned about the expansion of territory over which DMGs could operate. To ameliorate some of the adversities affecting members of DMGs on large seniority districts, Arbitrator Mittenthal addressed, to a certain extent, benefits that ought to accrue to employees on DMGs. In his Opinion, Arbitrator Mittenthal wrote:

> To begin with, assuming the existence of combined districts, a district mobile gang would then in many respects resemble the PEB 219 regional gang. Indeed, if a district mobile gang were to consist of 20 or more employees who were "heavily mechanized and mobile continuously performing specific programmed major repair and replacement work . . .", it would be indistinguishable from a regional gang. It should, in these circumstances, be entitled to all the benefits a regional gang enjoys.
>
> Even if, assuming combined districts, a district mobile gang does not meet Arbitrator Sickles' definition of a regional gang, it would still be sufficiently similar to a regional gang to warrant many of the same benefits.[2] This district mobile gang would be responsible for an area very much like the area covered by a regional gang and would ordinarily no doubt be specialized and mechanized to some degree. An informational notice should be posted with respect to this gang's work locations so that employees would know in advance what commitment they are making in bidding for a particular gang.

[2] In Article XVI, Section 2 of the 1996 National Agreement, the parties adopted the definition of a RSG previously promulgated by Arbitrator Joseph Sickles during the course of adjudicating questions concerning the prior imposed National Agreement. The definition is: "... a regional and system-wide production gang shall be a gang that is heavily mechanized and mobile, continuously performing specific, programmed, major repair and replacement work utilizing a substantial (no fewer than twenty) number of employees."

> Moreover, such district mobile gangs should be entitled to a production incentive bonus if the employee remains on the gang for six months. It the gang works less than six months, the bonus would be prorated. The size of the bonus and the precise circumstances under which the gang would qualify for the bonus are matters for the parties to negotiate. Should they be unable to agree, they may return to the arbitrator for a final ruling on this matter. In addition, the members of such mobile gangs should receive the travel allowance provided by Article XIV of the CBA. Finally, those members who qualify for the production incentive bonus should also be covered by the "work . . . stabilization" guarantee in effect for regional gangs, namely, the six-month work guarantee or, in the event of a layoff, a supplemental unemployment benefit.

C. Negotiating History

After the Carrier acquired the license to establish nine large seniority districts in lieu of the existing 47 seniority districts, the Carrier and the Organization commenced negotiations to implement the consolidation of seniority districts.[3] The negotiations culminated with the parties entering into the August 12, 1999 Seniority Districts Consolidation Agreement and the August 12, 1999 Related Agreements (with ancillary Side Letters).

The negotiators differ not only on how they interpret Section 5(B) of the Seniority Districts Consolidation Agreement but also on discussions across the bargaining table concerning advance notice for DMGs.

In his declaration, Ernest L. Torske, an Organization Vice President, attested that the parties, via Section 5(B), agreed to apply the entire WFS Program to all DMGs. Vice President Torske related that inasmuch as DMGs were added to the WFS Program, the negotiators did not discuss specific sections of the WFS Program. Joel Myron, the Organization's Director of Strategic

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[3] The Carrier submits that it could have unilaterally created the nine seniority districts. The Organization submits that the Carrier could not have accomplished seniority consolidation without reaching implementing agreements with the Organization.

Coordination and Research, wrote that he understood that the Carrier had agreed that the entire WFS Program would be applied to all DMGs. Director Myron stressed that the negotiators did not engage in any discussions about changing the WFS Article IV notice requirements because their agreement to apply the entire WFS Program to DMGs was based on the language in the *Mittenthal Award.*

Dennis J. Merrill, the Carrier's General Director of Labor Relations - Support Crafts, attested that he informed the Organization's negotiating team that the Carrier was disenchanted with the WFS advance notice provisions because they were onerous and precipitated constant disputes between the Organization and the Carrier. Merrill acknowledged that the *Mittenthal Award* could be construed to require WFS Article IV Notice for DMGs satisfying the Sickles' definition of a RSG but, in his view, the *Mittenthal Award* only required informational notice for DMGs not meeting the Sickles' definition of a RSG. Therefore, Merrill proposed, and he believes that the Organization negotiators accepted his proposal, that the Carrier could establish DMGs by tendering informational notice only as described in Articles H(2) and H(3) of the Related Agreements. Merrill went on to state that the parties did not discuss any type of notice besides the informational notice. Merrill asserted that the Carrier agreed to provide the Organization's members with many benefits in exchange for the informational notice. In sum, Merrill implies that, to avoid the imposition of WFS Article IV Notice for DMGs meeting the Sickles' definition, the Carrier agreed to give the Organization certain benefits so that informational notice only would apply regardless of whether the DMGs satisfied or did not satisfy the Sickles' definition. The Carrier's General Director - Labor Relations, Wendell Bell, concurred with Merrill that the Carrier wanted relaxation of notice requirements. Bell explained that, from the Carrier's perspective, Section 5 of the Seniority Districts Consolidation Agreement addressed pay and benefit improvements consistent with those economic

items specifically listed in the *Mittenthal Award.* Bell emphasized that, in connection with the bargaining that led to Section 5, neither party uttered the word "notice." John J. Fleps, the Carrier's Vice President of Labor Relations, wrote that notice was one of the last major issues confronting the negotiators. Fleps was certain that he and his counterpart, Myron, reached a meeting of the minds that the notice would remain the same for RSGs and that informational notice would be applicable to all DMGs. Fleps and Thomas M. Rolling (the Carrier's Director of Labor Relations - Support Craft) stated that WFS notice was not discussed at the bargaining table and that no Organization representative ever suggested that Article IV of the WFS Program must be applied to all DMGs. Fleps attested that, in exchange for achieving solely informational notice for DMGs, the Carrier sweetened the meals and lodging payments for force assigned headquarter employees.

D. Events Subsequent to September 11, 1999

Between September 11, 1999 and the end of the year, the Carrier established dozens, if not hundreds, of DMGs. In each instance, the Carrier provided informational notice only. The Organization frequently objected to the adequacy of the informational notices yet, the Organization did not allege that the Carrier should have also tendered WFS Article IV Notice prior to creating these DMGs.

On October 29, 1999, the Carrier submitted the advance notice, pursuant to WFS Article IV, for RSGs scheduled to operate during the 2000 calendar year. According to Merrill, an Organization representative never alleged that the Carrier failed to provide a similar advance notice for the DMGs. Merrill further related that between January and March, 2000, the Carrier established 1,400 new positions on various DMGs predicated solely on informational notice. The Organization did not challenge the absence of WFS Article IV Notice.

On March 20, 2000, the Organization representatives wrote the Carrier charging that the Carrier failed to give WFS Article IV Notice before establishing DMGs.[4] The Organization demanded that the Carrier henceforth provide WFS Article IV Notice before establishing any DMG.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

In addition to the informational notice requirement set forth in Article H of the Related Agreements, the Carrier must give WFS Article IV Notice to the Organization's representatives pursuant to the clear, unambiguous and unmistakable language of Section 5(B) of the Seniority Districts Consolidation Agreement. The WFS Article IV Notice and the informational notices are different types of notices aimed at different audiences. The WFS Article IV Notice apprizes the Organization's representatives of the impending program for a DMG so that the parties have an opportunity to discuss changes to minimize the adverse effects on the employees or to increase Carrier efficiencies. The informational notice goes to employees so that they can make intelligent decisions about when and where they want to work. Thus, the two types of notice are complementary.

The plain language of Section 5(B) states that the WFS Program applies to all DMGs. The introductory clause of Section 5(B) contains the mandatory words "shall apply" leaving no uncertainty that the WFS Program governs "all" DMGs (making no differentiation between DMGs meeting or not meeting the Sickles' definition). The negotiators could not have adopted clearer or plainer language. In addition, the closing clause states that employees assigned to a DMG will enjoy

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[4] The Organization's letter confirmed a March 17, 2000 telephone conference call between Organization representatives and Carrier officers.

the benefits of WFS ". . . subject to the terms of that Program." This final phrase of Section 5(B) underscores the fact that the parties adopted the WFS Program for all DMGs. There are not any exceptions. Mittenthal recognized that the Carrier was consolidating seniority districts to circumvent the WFS Program and so, the *Mittenthal Award* imposed the WFS Program on all DMGs.[5]

The negotiators imported the language in Article XII, Part C of the September 26, 1996 National Agreement into Section 5(B) of the Seniority Districts Consolidation Agreement. This reinforces the negotiators' intent to apply the complete WFS Program to DMGs. Moreover, the WFS Program is a comprehensive program not susceptible to parsing out various components. It would be illogical and senseless for the negotiators to pick and choose portions of the WFS Program. Rather, logic dictates that the negotiators purposefully adopted the entire WFS Program for the benefit of DMGs.

Like Section 5(B) of the Seniority Districts Consolidation Agreements, Article H of the Related Agreements is clear and unambiguous. There is not any language in Article H demonstrating that it supersedes Section 5(B).

The Carrier conjures up ambiguities in Section 5(B) where none exist. In a futile attempt to find some ambiguity, the Carrier marches a parade of horrible ramifications before this Board that will allegedly occur if this Board decides that the Carrier must tender WFS Article IV Notice before establishing DMGs. Initially, the Organization notes that the parade of horribles is an equitable argument not relevant to construing contracts. The Carrier is attempting to bootstrap extrinsic evidence into the record in an effort to change clear contract language. Equity does not relieve the

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[5] The Organization did not publicize the Article IV Notice requirement in its internal communication to members because, in the Organization's newsletter, which has only limited space, the Organization informs employees of those items that directly touch the membership. The Article IV Notice goes to the General Chairmen and not the members.

Carrier of what it now perceives as a bad bargain. Nevertheless, even if the dire consequences are relevant, the Carrier's remedy lies with a petition to the Select Committee. The Select Committee has exclusive jurisdiction over the WFS Article IV Notice provisions. The Select Committee can address anomalies pursuant to Article VII of the WFS Program. The Carrier has presented its hardship argument to the wrong forum.

In the end, the Carrier's alleged ambiguities cannot overcome or contradict the "shall apply" language in Section 5(B) of the Seniority Districts Consolidation Agreement.

Inasmuch as the language in Section 5(B) is plain and unambiguous, this Board may not consider extrinsic evidence.[6] Nevertheless, both the past practice and the negotiating history buttresses the Organization's interpretation of Section 5(B).

The Carrier misrepresents the bargaining history. The parties bargained about many subjects following the issuance of the *Mittenthal Award*. The bargaining was far more complex than the Carrier's simplistic *quid pro quo* representation. Indeed, the Carrier was unable to implement seniority consolidation without first negotiating with the Organization. Had the Carrier unilaterally implemented the *Mittenthal Award*, it would have encountered formidable obstacles if not utter chaos.

Throughout negotiations, the Carrier negotiators never suggested that the WFS Article IV Notice would not apply. Since the parties agreed to apply the entire WFS Program to DMGs, it was unnecessary for them to discuss any individual aspect of the WFS Program. Therefore, the Organization's negotiators did not walk the Carrier officers through each and every Article of WFS. The Carrier negotiators acknowledged in their statements that the negotiators did not dissect each

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[6] This Board cannot use bargaining history to vary or alter the clear and unambiguous contract language.

term and condition of the WFS Program which implies that the entire program was being applied to DMGs.

In the June 10, 1999 Side Letter, the parties suspended the application of the WFS Program for the remainder of 1999. As a result, the Organization could not possibly challenge the Carrier's failure to provide WFS Article IV Notice for DMGs established in 1999. Via the March 20, 2000 letter, the Organization promptly objected to the absence of the WFS Article IV Notices for DMGs established in 2000. The Seniority Districts Consolidation Agreement and the Related Agreements were significant new undertakings and the Carrier insisted on hastily implementing the consolidation. The Organization had to address many problems and thus, it raised the notice issue as soon as the dust settled. Had the Carrier implemented the contracts with prudence and deliberation, the issue may have been joined before the Carrier established any DMGs in the 2000 calendar year.

With regard to the Carrier's Question Nos. 2(a) and 2(b), this Board lacks jurisdiction to answer them. Article VII(A)(2) of the WFS Program provides that the Select Committee ". . . shall be the forum for resolving disputes . . ." arising under the WFS Program. Moreover, the Select Committee is charged with monitoring the WFS Program to insure that the program achieves its intended and full potential.

Last, the Carrier has not posed its questions within the context of an actual controversy. The Select Committee may not be amenable to adjudicating a hypothetical dispute. In any event, the Select Committee has the jurisdiction to make the threshold determination if it wants to answer the Carrier's questions.

B. The Carrier's Position

The Organization bears the burden of proving that the Carrier is required to tender WFS Article IV Notice in addition to the informational notice provided by Articles H(2) and H(3) of the Related Agreements.

Section 5(B) of the Seniority Districts Consolidation Agreement cannot be considered in a vacuum. Rather, this Board must look at other terms of the Seniority Districts Consolidation Agreement, the provisions in the Related Agreements as well as the *Mittenthal Award* to glean the intent of the parties.

Mittenthal ruled that the Carrier need only give informational notice before establishing DMGs that did not meet the Sickles' definition of a RSG. The *Mittenthal Award* could arguably be construed as requiring WFS Article IV Notice for those DMGs satisfying the Sickles' definition of a RSG. Article H(3) of the Related Agreements merely restated what Mittenthal decided with regard to DMGs not meeting the Sickles' definition of a RSG but Article H(2) was, perhaps, a deviation from what Mittenthal contemplated in his decision for DMGs meeting the Sickles' definition of a RSG. More importantly, the *Mittenthal Award*, standing alone, demonstrates a fatal defect in the Organization's interpretation of Section 5(B). The Organization argues that the parties applied WFS, in its entirety, to all DMGs in conformity with the *Mittenthal Award*. However, the *Mittenthal Award* unambiguously held that informational notice was the only type of notice necessary for DMGs not meeting the Sickles' definition.

Next, the detailed description of the informational notices in Articles H(2) and H(3) of the Related Agreements are specific provisions that are paramount to the general provisions in Section 5(B). Section 5(B) does not even mention the concept of notice. The fact that Section 5(B) is silent

with regard to notices raises a latent ambiguity. The silence was filled in with great specificity by Article H.

Nevertheless, the Organization argues that the Carrier must give two notices for each and every DMG: WFS Article IV Notice and informational notice under Article H. These two notice provisions are conflicting and incongruous. First, if two notices were required, one would expect each notice provision to refer to the other. Article H, with the topical heading, "Notice," clearly pertains to notice but the provision alludes to neither Article IV of the WFS Program nor Section 5(B). Second, the informational notices for both Sickles and non-Sickles DMGs are not final. The provisions of Articles H(2) and H(3) permit changes in DMG work without further notice and, indeed, the notices do not constitute a guarantee that the specified work will be performed at the specified place. The WFS Article IV Notice is far more restrictive than informational notice. While some modifications are permissible subsequent to serving an WFS Article IV Notice, the limitations on such notice are inconsistent with the Carrier's ability to make liberal changes after the informational notice is served. Thus, the notices are mutually exclusive. The Article H informational notice becomes meaningless if the Carrier is bound to serve notice in conformity with Article IV of the WFS Program.

Although Section 5(B) of the Seniority Districts Consolidation Agreement is vague and poorly drafted, the provision was intended to enumerate the economic benefits accruing to members of DMGs. Section 5(B) specifically speaks to the work benefits and unemployment benefits in the WFS Program. But Section 5(B) stops there. It goes no further. In particular, the language of Section 5(B) does not end after the introductory clause. If it did, the Organization's interpretation might have some merit. If the Organization's interpretation was reasonable, the drafters of Section

5(B) would not have inserted the middle clause referring to the WFS work benefits. The middle clause of Section 5(B) clarifies and limits the introductory clause. The middle clause shows that Section 5(B) was a shorthand reference to including the WFS monetary benefits in a package of agreement benefits for members of DMGs. The parties picked and chose individual items from the WFS Program just as Mittenthal did. At the very least, the middle clause creates an ambiguity.

The Organization's interpretation is neither practical nor reasonable given the disruption that would ensue throughout the Carrier's system if WFS Article IV Notice is applicable to all DMGs. Article IV WFS Notice would severely hamstring the Carrier's operations so that the Carrier would forfeit the efficiencies gained by consolidating the seniority districts. The Organization is improvidently attempting to undo the *Mittenthal Award* which granted to the Carrier the right to consolidate the seniority districts. The Article IV Notice would thwart the Carrier from achieving the operational necessities which, as Mittenthal found, justified consolidating seniority districts. The stakes are high. Application of the WFS Article IV Notice would rob the Carrier of the needed productivity gains mandated by the *Mittenthal Award.* The Organization is estopped from relitigating issues resolved by the *Mittenthal Award.*

The negotiating history demonstrates that the Carrier's top priority was to achieve informational notice for all DMGs. The Carrier purposely and successfully made certain that, with regard to advance notice, there would be little distinction between DMGs that satisfied the Sickles' definition and DMGs that did not satisfy the Sickles' definition. The Carrier wanted to retain the flexibility of operating DMGs afforded by the consolidation of seniority districts. In exchange for a relaxation of the WFS Article IV Notice requirement arguably imposed by the *Mittenthal Award* for DMGs satisfying the Sickles' definition, the Organization obtained many generous benefits.

Moreover, it is totally unbelievable that the Carrier, having won informational notice for non-Sickles DMGs before Mittenthal, would relinquish such a critical victory knowing that the WFS Article IV Notice would destroy the efficiencies of DMGs operating in large seniority districts. The Carrier bought and paid for the informational notice.

As the statements of the Carrier negotiators indicate, the parties vigorously and extensively bargained over notice. Those same statements disclose that the parties never discussed applying the WFS Article IV Notice to DMGs. In sum, Article H of the Related Agreements went beyond the *Mittenthal Award* to provide more economic benefits for the Organization's members and, in return, the Carrier attained informational notice only for all DMGs. Anything more than informational notice was a deal breaker as far as the Carrier was concerned. The Carrier negotiators would never have agreed to Section 5(B) if they had any inkling that Section 5(B) incorporated the WFS Article IV Notice requirement.

The Organization's interpretation is contrary to a past practice. Beginning in September 1999 and through mid-March 2000, the Carrier sent out a plethora of informational notices in conjunction with the establishment of hundreds of DMGs. Throughout this period, the Organization did not object to the Carrier's notices as being incomplete because it had not also (or earlier) tendered WFS Article IV Notice. The Organization complained about the sufficiency and the content of the informational notices but it never protested that the Carrier failed to give WFS Article IV Notice. Because the Organization did not file a formal objection until March 20, 2000, the five-month past practice shows that the Organization had stumbled upon a novel interpretation of Section 5(B) of the Seniority Districts Consolidation Agreement. Stated differently, by failing to timely object to the absence of WFS Article IV Notices, the Organization acquiesced that Article H of the Related

Agreements, standing alone, governs notice for all DMGs. The Organization's novel interpretation of Section 5(B) was an afterthought.

Concomitantly, the Organization's plain language argument is refuted by its words and deeds. The Organization not only would have objected, at least in early January 2000, to the lack of WFS Article IV Notices but the Organization also would have conspicuously announced to its members the negotiating coup that it had achieved if Section 5(B) means what the Organization claims it means. In the internal newsletter that the Organization sent to its members explaining the major aspects of the Seniority Districts Consolidation Agreement and the Related Agreements, the Organization does not mention WFS Article IV Notice. If the Organization had obtained WFS Article IV Notice for all DMGs at the bargaining table, surely the Organization would have bragged about its magnificent achievement to its members.

This Board has jurisdiction to consider Question Nos. 2(a) and 2(b). Just as Section 5(B) of the Seniority Districts Consolidation Agreement does not encompass the WFS Article IV Notice provisions, Section 5(B) also does not incorporate the Select Committee. Thus, the Select Committee lacks any jurisdiction to determine issues regarding DMGs. The Select Committee sits to adjudicate matters related to RSGs. It cannot pass judgment on DMGs. The Select Committee has jurisdiction over national issues as opposed to a dispute restricted to one property. Contrary to the Organization's assertion, an actual dispute exists concerning whether the Carrier can establish DMGs in the last six months of a calendar year and whether DMGs established at any time must endure for a minimum of six months. Resolving Question Nos. 2(a) and 2(b) does not require this Board to interpret the WFS Program.

This Board should answer "No" to each of the questions. Nothing in the Seniority Districts Consolidation Agreement or the Related Agreements prevents the Carrier from terminating DMGs before the expiration of six months. The members of DMGs receive the economic benefits, including the work guarantee, as specified by the *Mittenthal Award* and Section 5 of the Seniority Districts Consolidation Agreement. There would be no reason to mention the work guarantee or the unemployment benefit if the DMGs must endure for a minimum of six months. Similarly, nothing in Article H of the Related Agreements, which describes the type of work DMGs perform, suggests that they must last for six months. It logically follows that the Carrier can create a DMG during the last six months of any calendar year. The work or unemployment benefits can still be calculated and can easily be carried over from calendar year to calendar year.

IV. DISCUSSION

The *Mittenthal Award* was the catalyst for the Seniority Districts Consolidation Agreement and the Related Agreements. Prior to the March 11, 1999 *Mittenthal Award*, the parties were uncertain whether the Carrier could consolidate seniority districts, and if so, the location of the new district boundaries. Mittenthal realized the enormity of fashioning nine seniority districts on a massive railroad system given that the Carrier and its predecessors had for decades observed the principle of seniority according to small, local districts. While the *Mittenthal Award* gave the Carrier the green light to consolidate 47 districts into nine districts, Arbitrator Mittenthal was also concerned that such a significant and dramatic change in seniority would adversely impact the employment conditions (as well as the personal lives) of maintenance of way employees. As a result, the *Mittenthal Award* laid a foundation of benefits designed to soften the blow on employees caused by

the advent of nine large seniority districts. The genesis of the parties' conflict herein stems from Mittenthal's rulings on the nature of the cushion afforded to the affected employees.

Thus, the starting point for interpreting the Seniority Districts Consolidation Agreement and the Related Agreements is to fully understand the *Mittenthal Award* especially the extent to which the decision delineated the application of the WFS Program to the DMGs.[7]

A close perusal of the Mittenthal Award reveals that the arbitrator did not view the Carrier's seniority district consolidation proposal as a pretext for the Carrier to circumvent the WFS Program. The *Mittenthal Award* fell far short of holding that, after the consolidation of seniority districts, all DMGs would be equivalent to RSGs. Mittenthal never suggested that DMGs operating within large seniority districts would precipitate the extinction of RSGs. Instead, Mittenthal observed that a DMG satisfying the Sickles' definition of a RSG would be "indistinguishable" from a RSG. The *Mittenthal Award* set apart those DMGs not satisfying the Sickles' definition of a RSG. Mittenthal wrote that non-Sickles' DMGs are "similar" to, but not identical to, RSGs. Thus, the *Mittenthal Award* drew a distinction between DMGs meeting the Sickles' definition of a RSG and DMGs not meeting the Sickles' definition of a RSG.

Mittenthal tailored the benefits to match the type of DMG. Mittenthal found that DMGs meeting the Sickles' definition ". . . are entitled to all the benefits a regional gang enjoys." Next, Mittenthal concluded that DMGs not meeting the Sickles' definition ". . . warrant many of the same benefits . . ." afforded to RSGs. Mittenthal did not use the adjective "all" before "benefits" for the

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[7] Subsequent to the Mittenthal Award, the Carrier held the power to unilaterally consolidate the seniority districts across its system. However, had the Carrier acted unilaterally, the Carrier would have experienced anarchy. The Carrier would have been faced with constant and continuing disputes. The Carrier wisely sought and obtained the Organization's agreement in fixing the terms and conditions associated with the mammoth undertaking. In other words, following the *Mittenthal Award*, the parties had to cut a deal on implementing the seniority district consolidation.

non-Sickles' DMGs as he did for the Sickles' DMGs. Since Mittenthal held that "all" RSG benefits apply to the Sickles' DMGs, he did not have to enumerate those benefits. But, when it came to describing "many of the same benefits," Mittenthal listed the benefits that should accrue to DMGs not meeting the Sickles' definition. In particular, Mittenthal imposed an informational notice obligation on the Carrier. Because Mittenthal did not state anything about WFS Article IV Notice, the informational notice was one of the differences between "all the benefits" and "many of the same benefits." Mittenthal's holding that some DMGs continued to be separate and discrete from RSGs starts this Board down a path of contract construction that is at odds with the Organization's interpretation. The *Mittenthal Award* did not adjudge that the complete WFS Program applied to all DMGs.

For either parties' interpretation of Section 5(B) of the Seniority Districts Consolidation Agreement to be accurate, the negotiators had to substantially deviate from the *Mittenthal Award.* If the Organization is correctly interpreting Section 5(B) and Article H of the Related Agreements, the negotiators had to expand informational notice to DMGs meeting the Sickles' definition and expand the WFS Article IV Notice to DMGs not meeting the Sickles' definition. If the Carrier's interpretation of Section 5(B) and Article H is correct, the negotiators jettisoned the WFS Article IV Notice for DMGs satisfying the Sickles' definition and extended the informational notice requirement to those DMGs.

Thus, it is not surprising that both Section 5(B) of the Seniority Districts Consolidation Agreement and Articles H(2) and H(3) of the Related Agreements do not specifically track the *Mittenthal Award.* However, to reiterate, the theme derived from the *Mittenthal Award* raises a reasonable inference that the WFS Program, in its entirety, would not apply to all DMGs. This

inference is not dispositive and thus, this Board must engage in a careful analysis of the relevant provisions of the Seniority Districts Consolidation Agreement and the Related Agreements.

The parties lifted most of the language found in Section 5(B) from Article XII, Part C of the September 26, 1996 National Agreement. The wording is almost verbatim. However, the origin of the Section 5(B) language is of little help in construing the provision. Article XII, Part C of the National Agreement addressed RSGs, that is, gangs covered by the WFS Program. The parties apparently adopted the Article XII, Part C language governing RSGs in an attempt to express the benefits applicable to DMGs. Copying most of Article XII, Part C into Section 5(B) was an unartful way of expressing the degree to which the WFS Program would apply to DMGs. In sum, the language lifted from the 1996 National Agreement did not fit neatly into the Seniority Districts Consolidation Agreement.

The language in Section 5(B) raises a sufficient amount of doubt concerning the plain meaning of the words therein. For several reasons, this Board concludes that Section 5(B) cannot be accorded any particular meaning based solely on the literal language of the provision.

First, the Board is perplexed by the reference to "a WFS gang" in Section 5(B) when the parties are referring to DMGs even though the Board realizes that the parties lifted the phrase from the 1996 National Agreement. A WFS gang was historically covered by the WFS Program, that is, a RSG. If the parties wanted to be clear in Section 5(B), they would have called the gang a DMG, which would be consistent with the earlier reference to DMGs. The reference to a WFS gang makes one wonder what the negotiators were trying to accomplish.

Second, if the drafters of Section 5(B) intended to apply the entire WFS Program to all DMGs, the provision would have ended after the phrase "shall apply to district mobile gangs." The

clause following this phrase addresses the work and unemployment benefits which are only two aspects of the WFS Program. This clause could be construed to mean that the parties did not contemplate applying the entire WFS Program to all DMGs.

Third, like subsection (B), the other subsections of Section 5 do not mention notice. Rather, the terms dwell extensively on economic enhancements consistent with the work and unemployment benefits specifically written into Section 5(B). Indeed, this recitation of economic benefits roughly conforms to Mittenthal's list of benefits for DMGs not meeting the Sickles' definition. Thus, on its face, Section 5 addresses substantive economic matters but not processes such as notice. The structure of Section 5, including subsection (B), indicates that the provision is primarily intended to cover economic matters.

Thus, for the above related reasons, the plain meaning of Section 5(B) is not as obvious as the Organization asserts.

This Board may not construe Section 5(B) in a vacuum. The parties adopted Section 5(B) and the Seniority Districts Consolidation Agreement in conjunction with the Related Agreements. The preamble to the Related Agreements announces that the two contracts must be read in tandem. The Seniority Districts Consolidation Agreement is incomplete without considering the terms and conditions of the Related Agreements.

Reading Section 5 of the Seniority Districts Consolidation Agreement and Article H of the Related Agreements together reveals that the Carrier's interpretation of the two provisions is not only reasonable but also supported by the pertinent language in those provisions.

If, as the Organization argues, all DMGs are indistinguishable from RSGs in terms of the application of the WFS Program, the parties would not have needed to write Article H(1) of the

Related Agreements. Declaring that RSGs are still entitled to the WFS Article IV Notice provisions (as amended on this property) was necessary because the parties developed a different notice requirement for DMGs. The parties wanted to be certain that the Carrier could not later contend that it only had to give informational notice as the prerequisite for establishing RSGs. The presence of Article H(1) shows that the parties wanted to exempt RSGs from the remaining notice terms of Article H which, in turn, suggests RSGs would be treated differently from DMGs.

Next, Articles H(2) and H(3) separate DMGs according to the Sickles' definition just as Mittenthal did. Yet, unlike Mittenthal, the parties wrote, in Article H(2), an informational notice requirement for DMGs meeting the Sickles' definition. This variance from the *Mittenthal Award* directly conflicts with the Organization's interpretation of Section 5(B). WFS Article IV Notice is incompatible with informational notice. The two types of notices are not harmonious. Article H(2) provides no guarantee that the gang will perform the work specified or at the time and place specified. The Carrier can make substantial changes even after serving the informational notice. The degree of subsequent changes after an Article IV Notice is served are constrained. Thus, the notice in Articles H(2) and H(3) directly conflict with the more formal and more rigid notice required by Article IV of the WFS Program. The two types of notices are not reconcilable.

Therefore, if Section 5(B) means that the Carrier must serve WFS Article IV Notice in addition to informational notices, the Carrier would lose much of the flexibility given to the Carrier by Articles H(2) and H(3). This would mean that Article H(2) would become meaningless (albeit, the Organization is correct that the Article H notices would give some information to its members). Nevertheless, the language concerning the absence of any guarantee would be rendered superfluous. The parties do not write their agreements only for provisions to be rendered meaningless. The only

way that sustenance can be given to Articles H(2) and H(3) is if Section 5(B) is restricted to covering the substantive work and unemployment benefits of the WFS Program.

In addition, Articles H(2) and H(3) contain specific language that controls over the general Section 5(B) language unartfully lifted from the 1996 National Agreement. Section 5(B) does not even contain the word "notice." Articles H(2) and H(3) describe the form and substance of the notice in great detail. The description does not give even a hint that the informational notice follows an earlier served notice. Surely, the negotiators would have made some allusion to WFS Article IV Notice if they had agreed that that type of notice would precede the informational notice. When the terms of the Seniority Districts Consolidation Agreement and the Related Agreements are read as a whole, the specific language in Articles H(2) and H(3) prevail over the general language in Section 5(B).

This Board concludes that the WFS Article IV Notice does not apply to DMGs.

In reaching our decision, this Board did not address or consider any extrinsic evidence including the negotiating history or any alleged past practice.

Turning to the issue of the Board's jurisdiction over Carrier's Question Nos. 2(a) and 2(b), we hold that the Select Committee has primary jurisdiction over those issues. In Section 5(B) of the Seniority Districts Consolidation Agreement, the parties applied the work and unemployment benefits of the WFS Program to all DMGs. How the application of those benefits may or may not influence the establishment of DMGs during the last half of the year or fix a minimum duration for the gangs established at any time, is an issue which the Select Committee should have the threshold opportunity to address. The Select Committee is charged with monitoring the WFS Program to insure that it accomplishes its intended result in a dynamic work environment. Even though the

parties took part of the WFS Program provisions and incorporated them into a property agreement, the issue may overflow to the WFS Program. Put differently, how the WFS benefits might be relevant to Carrier Question Nos. 2(a) and 2(b), could affect how the WFS benefits are applied nationally.

If this Board were to decide Question Nos. 2(a) and 2(b), this Board could not only be infringing on the jurisdiction of the Select Committee to monitor WFS but we also might change the terms and conditions of the WFS Program. Whether the Carrier's questions present a purely local dispute or a dispute involving an interpretation of the WFS Program should initially be made by the Select Committee.

In conclusion, the Select Committee has primary jurisdiction over Question Nos. 2(a) and 2(b).

It is possible that the Select Committee may decide that the questions posed by the Carrier do not rest on interpreting the WFS Program. Should the Select Committee decline jurisdiction over Carrier Question Nos. 2(a) and 2(b), the last two paragraphs of Article VII(A) of the WFS Program provide for the further handling of the dispute on the property. Therefore, while the Select Committee has primary jurisdiction (akin to a right of first refusal) over the questions, the Select Committee may not have exclusive jurisdiction.

AWARD AND ORDER

BMWE's Statement of Question No. 1:

> Does the Work Force Stabilization (WFS) Program (effective on January 18, 1994 and applied retroactively to July 29, 1991) apply to all district mobile gangs on BNSF?

Answer to BMWE's Statement of Question No. 1:

The WFS Article IV notice provisions are not applicable to DMGs on the BNSF.

BNSF's Statement of Question No. 1:

Are district mobile gangs subject to the informational notice requirement in Article H of the August 12, 1999 "Omnibus Agreement", or the notice requirement in Article IV of the January 18, 1994 Workforce Stabilization Agreement?

Answer to BNSF's Statement of Question No. 1:

The WFS Article IV Notice provisions are not applicable to DMGs on the BNSF.

BNSF's Statement of Question Nos. 2(a) and (b):

BNSF has presented Question Nos. 2(a) and (b) below and asserts that they are related to BNSF Question No. 1 above and that a Board established pursuant to Section 3, Second, such as this Board, has jurisdiction to hear and answer these questions. However, as a threshold jurisdictional matter, BMWE asserts that a Board established pursuant to Section 3, Second, such as this Board, has no jurisdiction to hear and decide such questions because they fall within the exclusive jurisdiction of the Work Force Stabilization Select Committee. Which party is correct as to the proper jurisdiction for resolving these disputes, BMWE or BNSF?*

(a) Must district mobile gangs, once established, continue in existence for not less than 6 months?

(b) Must district mobile gangs be established on or before June 30 of each calendar year, so that they can have not less than 6 months work within a calendar year?

* NOTE: If BNSF is correct, this Board shall answer Questions 2(a) and (b). If BMWE is correct, either party may refer Questions 2(a) and (b) to the Select Committee.

Answer to BNSF's Statement of Question Nos. 2(a) and (b):

The Select Committee has primary jurisdiction over Questions 2(a) and (b).

Dated: November 30, 2000

Steven V. Powers
Organization Member

Wendell A. Bell
Carrier Member

John B. LaRocco
Neutral Member