IN THE MATTER OF THE

ARBITRATION BETWEEN

BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

BACKGROUND

This dispute concerns the Carrier's plan to combine and realign the 47 seniority districts of maintenance of way employees into nine seniority districts. The Carrier urges that it has a right to do so, given the terms of the parties' collective bargaining agreement (CBA) and given the record before me. The BMWE disagrees. This issue contains within it a number of sub-issues which will be described later in this opinion.

The Carrier operates as a single line rail system. It is a product of many mergers over the years. Because of these mergers, it has six different CBAs with BMWE. It employs more than 8,000 maintenance of way people. They are represented by the BMWE.

These employees repair and maintain the track, roadbed, bridges, and structures. Maintenance of the track includes replacing worn rails and ties, cleaning and replacing the ballast roadbed, and keeping brush and trees from obstructing the track. It involves both periodic, programmed maintenance and repair of trouble spots. Employees are organized into three different kinds of gangs - section, district, and regional or system-wide.

A section gang is a group of three to six employees who are responsible for maintaining a certain section of track. That section is defined by milepost numbers. The gang's territory may vary from ten miles with a large switch yard to over 100 miles on low density branch lines. Its employees have a fixed headquarters location. They generally report to work at that location and return there

at the end of the day. The gang may perform work on its own or it may support the activities of a district gang or a regional or system-wide gang.

A district gang is not limited to a defined segment of track. It can work throughout an entire seniority district. It may have a headquarters in which case the gang begins and ends its day at a fixed point. Or it may be mobile in which event the gang reports directly to the job site and may travel throughout the district. District gangs perform a wide variety of functions and use expensive and sophisticated equipment.

Certain specialized gangs are permitted to cross district lines pursuant to applicable CBAs. These gangs are limited to a certain territory which encompasses two or more seniority districts. They are referred to as Group 1, 2 and "V" operators as well as Appendix "W" Welders.

Since 1991-92, the Carrier has had a right to establish regional gangs within a multi-district area or system-wide gangs anywhere within the Carrier's rail system. They have few or no geographic constraints. They have been defined in a leading case by Arbitrator Sickles in June 1992 as being "heavily mechanized and mobile continuously performing specific programmed, major repair and replacement work utilizing a substantial number of employees." These gangs have typically consisted of 20 to 80 employees with as many as 40 pieces of special equipment. They relay continuously welded rail, replace ties, under-cut ballast, and surface track. They function like an assembly line stretching out over several miles as they move down the track and make repairs.

Employees use their seniority to bid and hold positions on various kinds of gangs. With few exceptions, such as regional or system gangs, employees can only work in the district in which they have seniority. They can exercise their seniority to bid on vacancies in section, district, regional or system gangs and to bid on certain equipment positions which demand special skills. There are presently 47 seniority districts. They range in size from less than 200 track miles to over 2,000 track miles.

The headquarters sites are often, but not always, close enough to where employees live so that they can go home at the end of the day. An important objective of the BMWE for some years has been to maximize the number of employees with headquarters jobs - section gangs and often district gangs -

so that they can avoid excessive travel and enjoy a normal family life. Or, to express the point somewhat differently, it wishes to prevent further dispersal of employees across the Carrier's system in order to limit travel and allow employees more time with their families. This "quality of life" question is in a real sense one of the underlying causes of this dispute.

The national rail industry negotiations which began in 1988 failed to produce a new CBA. That impasse resulted in the appointment of Presidential Emergency Board (PEB) No. 219. The carriers as a group were anxious to improve the efficiency of its maintenance of way function. To achieve that goal, they asked the PEB to provide them with the right to "realign or combine existing seniority districts" and to "eliminate restrictions on the establishment of regional and system-wide production gangs." PEB 219 was sympathetic to this goal and recommended in January 1991 the kind of relief sought by the carrier group.

Because the PEB's report was not accepted by the parties, the Congress intervened and passed legislation, Public Law 102-29, resolving the dispute. Congress imposed the terms of the PEB's recommendations on the rail industry and the rail unions subject only to possible modification of those recommendations through a Special Board for the Interpretation and Clarification of the PEB report. That Special Board ruled in July 1991 that no modifications of the PEB recommendations were justified. Consequently, those recommendations were imposed upon the parties as the terms and conditions of their new CBA.

The relevant provisions of the Imposed CBA, dated July 29, 1991[1], essentially mirror the PEB recommendations. They are found in Articles XII and XIII and read in part:

XII - Combining or Realigning Seniority Districts

Section 1 - Notice

A carrier shall give at least thirty (30) days written notice to the affected employees and

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[1] The Imposed CBA was actually executed on February 6, 1992.

their bargaining representative of its desire to combine or realign seniority districts...specifying the nature of the intended changes. The protection of the Interstate Commerce Act will continue to apply to all such combinations or realignments.

Section 2 - Arbitration

If the parties are unable to reach an agreement within ninety (90) calendar days from the serving of the original notice, either party may submit the matter to final and binding arbitration in accordance with the terms of Article XVI.

XIII - Regional and System-Wide Gangs

(a) A carrier shall give at least ninety (90) days written notice to the involved employee representative(s) of its intention to establish regional or system-wide gangs for the purpose of working over specified territory of the carrier or throughout its territory...to perform work that is programmed during any work season for more than one seniority district. The notice shall specify the terms and conditions the carrier proposes to apply.

(b) If the parties are unable to reach agreement concerning the changes proposed by the carrier within thirty (30) calendar days from the serving of the original notice, either party may submit the matter to final and binding arbitration in accordance with Article XVI.

(c) All subject matters contained in a carrier's proposal to establish regional or system-wide gangs, including the issue of how seniority rights of affected employees will be established, are subject to the expedited arbitration procedures...in Article XVI...

The Carrier notified BMWE in October 1991 that it intended to establish regional and system-wide gangs pursuant to Article XIII. BMWE believed this notice was premature because of the large number of pending issues with respect to the meaning and application of the imposed contract language. A Contract Interpretation Committee (CIC) was formed, as recommended by the PEB, to deal with

these issues. Various CIC decisions followed. Some dealt with the nature of the system and regional gangs contemplated by Article XIII and with the scope of a carrier's notice obligation in creating such gangs. Others addressed the jurisdiction possessed by an Article XII or Article XIII arbitrator, namely, what exactly an arbitrator is authorized to decide under each of these provisions.

In this connection, it should be noted that the carrier group urged that when seniority districts are combined or realigned, an Article XII arbitrator is limited to determining how the seniority rights of the affected employees would be established in the new seniority district(s). The CIC rejected that position. Its answer is important to the present case:

> ...Combining or realigning seniority districts may have a significant impact upon the day-to-day lives of those employees who will be subject to the new geographic territory contemplated by a combined or realigned seniority district...[I]t is the opinion of the Neutral Member of the Committee that a[n]] Article XII] arbitrator, in addition to determining how the seniority rights of affected employees will be established, should also have the additional authority to determine whether the proposed new seniority district represents a justifiable operational need in the context of the alleged impact that change would have upon employees affected by such change. (Emphasis added)

Disputes arose at this Carrier and elsewhere concerning the regional and system-wide production gangs permitted by Article XIII. Several arbitration awards were issued on this subject. Arbitrator Sickles, as stated earlier, defined this kind of gang as "heavily mechanized and mobile continuously performing specific programmed, major repair and replacement work utilizing a substantial number of employees." He held that such a gang "shall consist of no fewer than 20 employees." He held too that the Carrier was required to provide detailed notice of each such gang's operating territory for the year subject to certain permissible deviations but that the seniority districts mentioned in the notice could not be enlarged. Other arbitrators - Lieberman, Fletcher, and Meyers - followed Sickles' lead although only the Sickles and Lieberman cases dealt with this particular Carrier.

The national rail industry negotiations which began in 1994 failed to produce a new CBA. That impasse resulted in the appointment of PEB No. 229. The carrier group revisited the regional and system production gang issue. It sought the right to form such gangs under Article XIII without having to relinquish any existing gangs under local agreements then in effect; it sought a new definition of a regional or system production gang that would encompass "any crew that performs repetitive functions on a day-to-day basis, regardless of the size of the gang or the specific type of work performed." PEB 229 did not accept these proposals and expressly affirmed the Sickles definition of a production gang. It recommended a shorter notice period for a carrier, a list of information to be included in such notice, the payment of a "production incentive" for regional and system gangs, and a new mileage-based travel allowance for all mobile employees including those in regional or system-wide gangs. Its recommendations were largely adopted by the parties and a new CBA was signed on September 26, 1996.

The instant dispute arose on April 7, 1998, when the Carrier informed BMWE that it intended to combine the existing 47 seniority districts into nine new districts. The Carrier explained that the following considerations account for the design of the nine new districts. First, it wanted "the districts to be sufficiently large that they would allow district mobile gangs and other positions to work over a wide enough territory to maximize the utilization of employees and equipment assigned to such gangs and positions...." Its further objective was to "make the maximum use of track time available for maintenance of way track and bridge projects" and to "use more specialized gangs to accomplish various tasks."

Second, the Carrier sized the new districts so that there would be "a relatively balanced distribution of employees and work across the new districts." It claimed the present arrangements - given the large variation in track miles, work and employees between districts - "result in inefficiencies in the utilization of employees and equipment." Third, it tried to avoid splitting up any of the 47 present districts in order to minimize disruption. It sought to "include them intact in a new district" and it was able to do so for 42 of the 47 districts. Fourth, it noted that some of the seniority districts under the Santa Fe CBA are comparable in size to the proposed new districts. Fifth, it alleged it "took into account the interests of employees in designing the new districts." It

emphasized that larger districts mean "more work opportunities" and hence "more money" and that its proposal has certain features, "prior rights" and "grandfather rights" which should help to stabilize employees' work locations. It emphasized too its proposed weekend travel allowance.

As a practical matter, the Carrier's proposal would mean that district mobile gangs, some 24 percent of the BMWE bargaining unit, would work in a far larger seniority district. That would in turn mean far more travel for most of these employees. No doubt the proposal would have a real effect upon district and station headquartered gangs which together comprise 47 percent of the bargaining unit. The greater the distances employees travel, the less likely they will be able to enjoy the stability of a headquarters job. Indeed, the new large districts would apparently have fewer headquarters jobs.

The parties met and discussed the Carrier's proposal at length. BMWE made a counterproposal which addressed just five of the 47 seniority districts and just 454 track miles out of the 34,000 track miles in the Carrier's system. It provided for a few seniority district combinations and realignments but made such changes subject to a number of restrictions. None of this gave the Carrier the kind of relief it sought. Although progress was made in these negotiations, it was not substantial enough to bridge the parties' differences.

The Carrier notified BMWE by letter on August 4, 1998, that it was submitting this Article XII dispute over the seniority districts to arbitration. BMWE responded on September 4, 1998, objecting to the Carrier's proposal. There are several strands to the argument it made at that time. First, it said Article XII "was intended to provide a mechanism whereby 'odd' parts or portions of seniority districts...no longer attached to a main seniority district as a result of line sales or abandonments could be realigned." Second, it said Article XIII was the appropriate "provision provided to the Carrier for the establishment of region gangs..." Third, it said the Carrier's proposal is "nothing more than yet another attempt...to establish region or system gangs" in a way which would avoid Article XIII restrictions. Fourth, it said the Carrier has failed in any event to demonstrate "a justifiable operational need for the change..." Fifth, it said any such operational need would be far outweighed by the adverse impact of the proposed seniority districts upon

the district and station gangs. Its belief was - and still is - that Article XII is being invoked by the Carrier here for the sole purpose of developing the very regional gangs it could not create through Article XIII.

The parties chose the undersigned to serve as arbitrator of this dispute. Pre-hearing submissions and reply submissions accompanied by books of exhibits were filed. A hearing was held on November 11 and 12, 1998. The Carrier was represented by Ronald M. Johnson and Amy B. Smith, Attorneys (Akin Gump Strauss Hauer & Feld); BMWE was represented by Steven V. Powers, Director of Arbitration. My efforts to settle the dispute through mediation failed. A further post-hearing submission was filed at my request on December 1, 1998, and numerous letters of clarification were sent to me by the parties between December 9, 1998 and January 8, 1999. The parties waived the 30-day time limit in Article XVI for the issuance of the award.

DISCUSSION AND FINDINGS

Some general observations seem appropriate at the outset. This case illustrates the kind of struggle that so often occurs in a bargaining relationship during the life of a CBA. The Carrier seeks greater flexibility, namely, seniority district combinations that will permit a district gang to work a far larger territory without the restrictions that apply to regional or system production gangs. BMWE seeks stability, namely, continuity of seniority districts so that the long-standing district and regional gang arrangements can be maintained. This clash in values is understandable.

However, the parties' difficulty in resolving this dispute is not due to differences in philosophy. It is due in large part to the fact that the parties had nothing to do with the drafting of the CBA language upon which this case turns. That language was imposed on the parties by PEB 219 and the System Board through an Act of Congress. Certain minor modifications of this language occurred through the parties' acceptance of the PEB 229 recommendations.

What is significant is the absence of any true negotiating history for Articles XII and XIII. Those provisions had their genesis in the work of PEB 219. Given the extraordinary scope of the PEB 219 report, that Board made no attempt to explain how those provisions might properly be applied to achieve the carrier-group goal of

greater efficiency. Nor did it anticipate that these provisions might be interrelated in some way. Hence, the arbitrator is confronted here by the bare contract language with the knowledge that PEB 219 intended to allow carriers to invoke Articles XII and XIII for the purpose of improving their operating efficiency. These were not unlimited rights, as can be seen from subsequent CIC rulings and arbitration awards.

Numerous issues have been raised by the parties. They will be separately considered.

I - The Moratorium Questions

BMWE contends that the Carrier's April 7, 1998 notice of its intent to combine seniority districts is "precluded by the moratorium provisions of Article XVIII", Section 2(a) and (b) of the September 1996 CBA which reads in part:

> 2(a) The purpose of this Agreement is...to settle the disputes growing out of the notices dated November 1, 1994 and served upon the [BMWE]...by the carriers...on that date, and notices dated on or subsequent to November 1, 1994, served by the [BMWE]...upon such carriers.
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> 2(b) No party to this Agreement shall serve, prior to November 1, 1999...any notice or proposal for the purpose of changing the subject matter of the provisions of this Agreement or which proposes matters covered by the proposals of the parties cited in paragraph (a) of this Section... (Emphasis added)

BMWE alleges that the "essence" of the Carrier's proposal "does not go to seniority districts at all, but is instead a thinly veiled attempt to change the contract provisions that control the operation of mobile gangs." It stresses that "the establishment and operation of various types of mobile gangs...were the subject of virtually non-stop negotiations and compulsory 'interest' and 'rights' arbitration from 1991 through 1996." It believes that the resultant "terms and conditions [of employment] for mobile gangs...are now protected from proposals for change..." by the moratorium language. It argues that the Carrier should not be allowed to do indirectly through seniority district combinations under Article XII what it could not do directly under Article XIII and that the Carrier should file a

"Section 6 notice" seeking the proposed seniority district changes on November 1, 1999, when the moratorium expires.

There are several difficulties with this argument. To begin with, Article XII and Article XIII establish two separate and distinct paths through which the Carrier may seek a more efficient operation. The Carrier is not limited to one path or the other. It is free to choose both. The fact that its efforts between 1991 and early 1998 concerned only regional and system gangs under Article XIII does not mean it surrendered its right to seek to combine seniority districts under Article XII.

But BMWE's position is far more specific than my words suggest. There are two facets to its argument. First, it asserts that the Carrier's proposal "substantially changes the terms and conditions of employment for mobile gang employees from the provisions that were established in the 1996 [CBA]." It stresses that Articles XIV and XVI entitle regional and system gangs to such benefits as "advance programming or notice...", a "production incentive bonus", a "travel allowance", and a "six-month work guarantee or supplemental unemployment benefit." It notes that under the Carrier's plan, the new district mobile gangs would not receive such benefits (or in the case of the travel allowance, a reduced benefit) even though they are to cover areas equivalent to what regional gangs have covered in the past. It alleges that such arrangements serve "the purpose of changing the subject matter of the provisions of this Agreement..." and are hence a violation of the moratorium provision.

This argument is not persuasive. It treats the proposed new district mobile gangs as if they were regional gangs. But the two, notwithstanding some similarities, are not the same. Article XII allows seniority districts to be combined. If the combination is justified, then new district boundaries have to be drawn and new district gangs will necessarily work in a much larger territory. This would not alter in any way the Article XIV and XVI rules with respect to regional gang benefits. Those benefits would remain in place for any regional or system gang.[2] The

[2] Whether those benefits should be extended in some form to the proposed new district mobile gangs, assuming the Article XII combination of districts is justified, is dealt with in Part III of this opinion.

district gangs are obviously not going to eliminate regional gangs. Indeed, the Carrier has evidently scheduled some 37 regional gangs for the 1999 maintenance season and 27 of them are expected to work in more than one of the proposed new districts.

BMWE's real complaint is that the Carrier's use of Article XII to combine seniority districts will create single districts equivalent to what would have previously been regarded as regions and that the district gangs will thereby be called upon to do what otherwise would have been regional gang work without any of the restrictions imposed by Article XIII on regional gang use (or without any of the benefits set forth in Articles XIV and XVI). Its position is, in short, that Article XII is being manipulated to provide a result contrary to certain express provisions of the CBA.

This argument is not without a surface appeal. The problem is, however, that it overshoots its mark. If BMWE were correct, then the combination of any two seniority districts would be improper because the new combined district would permit a district gang to work across old district lines in a manner previously reserved for regional gangs. Through such reasoning, Article XIII would effectively trump Article XII, and the Carrier would, apart from minor realignments, be denied the right to combine any districts. That could not possibly be what PEB 219 intended. Contract language is written to have meaning. Article XII states, in clear and unambiguous terms, that the Carrier may seek to "combine" or "realign" seniority districts subject of course to the reasonableness limitation imposed by the CIC. Any such combination, however minor, will necessarily expand a district gang's work territory. Seniority districts were not frozen in place.

True, in the PEB 229 proceeding, the carrier-group requested that a regional or system gang be redefined to encompass "any crew that performs repetitive functions on a day-to-day basis, regardless of the size of the gang or the specific type of work performed." The PEB did not accept this proposal. But the Carrier's failure to achieve such a redefinition under Article XIII has nothing to do with the Carrier's right to seek to combine seniority districts under Article XII and thus enlarge the territory of a district gang. To repeat what I said earlier, Articles XII and XIII are separate and distinct paths through which the Carrier may pursue a more efficient operation.

In this same PEB 229 proceeding, BMWE sought to have Article XII repealed arguing that it "provides a subterfuge for the creation of region and system-wide gangs." The PEB did not accept this proposal. Indeed, nothing in the PEB 229 and PEB 219 reports suggest that the work areas of district gangs are to be frozen, that such work areas would remain the same throughout the life of the CBA.

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BMWE's second argument under the moratorium language of Article XVIII requires some history to be understood. Rule 7F of the September 1982 CBA between a then smaller Carrier (i.e., encompassing fewer railroads) and BMWE permitted regional gangs to work across certain named seniority districts. After PEB 219 established rules through which the Carrier could create regional and system gangs, the CIC held that the Carrier had to elect either to adhere to such PEB 219 rules or to rely instead on then existing "local rules" such as Rule 7F. The Carrier chose the PEB rules which meant it could no longer invoke any "local rule" to justify a regional gang.

BMWE contends that the Carrier seeks, through the proposed combination of seniority districts, to establish district gangs in territories almost identical to the regional territories set forth in Rule 7F. It stresses, in this connection, PEB 229's rejection of a carrier-group proposal that carriers be "authorized to form new regional and system gangs under the PEB 219 rules, without relinquishing any existing gangs under local rules." It believes that the Carrier's current proposal to combine seniority districts would have the effect of allowing the formation of "both PEB type regional and system gangs and Local Rule 7 type regional gangs", that the "purpose" of such combined districts would be to "chang[e]...the subject matter of this Agreement", that the Carrier is "propos[ing] matters covered by the proposals of the parties..." before PEB 229, and that therefore the combined districts are prohibited by the moratorium provisions.

This argument fails for much the same reasons as have already been expressed. The Carrier's proposal does not attempt to reinstitute any "local rule" such as 7F with respect to the formation of regional gangs. It invokes Article XII instead to combine seniority districts and thereby create a larger territory for a district gang. True, a few of the combined districts may roughly mirror areas in which regional gangs were permitted under Rule 7F.

To that extent, the Carrier appears to be seeking to achieve through Article XII what it could not achieve through Article XIII or through "local rules." But the CBA, as explained earlier in detail, offers the Carrier more than one path to greater efficiency. The combination of seniority districts is one of its options. When the Carrier chooses this option and provides the appropriate justification, it can then establish larger seniority districts and hence larger work territories for district gangs. The fact that a few of the combined districts would be similar to earlier regional areas permitted by "local rule" is not sufficient reason to bar the Article XII combination.

True, the carrier-group asked PEB 229 to restore its authority to maintain regional gangs under "local rules" notwithstanding a carrier's acceptance of the PEB 219 rules. True, that request was denied by PEB 229. None of this, however, involved Article XII rights. The carrier-group was concerned about the relationship between Article XIII and "local rules." Neither this carrier proposal nor PEB 229 were focused at that point on Article XII rights. But BMWE was well aware of the possible impact of such rights upon the formation of regional gangs. That is precisely why it asked PEB 229 to repeal Article XII as a potential "subterfuge for the creation of region and system-wide gangs." BMWE's position was rejected by PEB 229. Article XII remained in the CBA. For the arbitrator to embrace the BMWE argument would be to substantially nullify Article XII, something that PEB 229 refused to do.

II - Authority of the Article XII Arbitrator

The parties disagree on the scope of my authority under Article XII.

BMWE contends that an Article XII case is a narrow "rights" arbitration involving the interpretation and application of contract language. It recognizes that Article XII speaks in "general" terms but emphasizes that the CIC ruling in October 1992 "specifically" describes the "limited jurisdiction" of the arbitrator in these words:

> ...an [Article XII]...arbitrator, in addition to determining how the seniority rights of the affected employees will be established, should also have the additional authority to determine whether the proposed new seniority district represents a

> justifiable operational need in the context of the alleged impact that change will have upon employees affected by such change.

It emphasizes further that the Article XII notice contemplates simply a "desire" to combine seniority districts and makes no mention whatever of a desire to "change other terms and conditions of employment." It believes, in other words, that the Carrier cannot attempt in this proceeding to alter the benefits of district mobile gangs in order to reduce the "alleged impact" of the proposed seniority combination. It stresses too that Article XIII, in dealing with the establishment of regional or system gangs, calls for the Carrier to give "notice... [of] the terms and conditions...[it] proposes to apply" and that no such language is found in Article XII. Its position therefore is that my role here should be a simple "yes" or "no" to the proposed combination and that I have no authority to construct an intermediate solution based on my views of what might be a reasonable accommodation of the conflicting interests.

The Carrier, on the other hand, sees this phase of the case as an "interest" arbitration. It urges that nothing in Article XII "suggests that the arbitrator is limited to accepting or rejecting a carrier's proposal." It contends that Article XII provides that when the parties fail to agree on a carrier's proposal, "either party may submit the matter to final and binding arbitration" and that this latter language is the "standard formulation for interest arbitration." It stresses the terms of the PEB 219 report which is the basis for Article XII, "arbitration...should be made available where the parties fail to agree...in matters concerning...combining or realigning seniority districts." It asserts that an Article XII question is not a "rights" arbitration because it does not arise out of a claim that the carrier violated a term of the CBA. It contends, moreover, that the CIC ruling adopted an expansive view of the arbitrator's authority and did not limit the arbitrator to acceptance or rejection of the carrier's proposal. It claims that had the CIC intended such a limitation, it would have so stated. Its position is that the arbitrator is free to provide something other than a "yes" or "no" answer to the proposed combination and that he has the authority, where appropriate, to determine the conditions under which a combination of seniority districts would be justifiable.

There is something to be said for both positions. Consider, however, the language of Article XII. It says

that a carrier shall give notice of "its desire to combine ...seniority districts..." and that should the parties fail to agree on the proposed combination, "either...may submit the matter to final and binding arbitration..." A "desire" to combine is a far cry from a "right" to combine. The arbitrator is expected to determine the circumstances under which the "desire" can be fulfilled and become a "right". The submission of "the matter" to arbitration plainly suggests that whether a proposed combination is warranted and what conditions, if any, should be applied to the combination are open questions for the arbitrator. The Article XII formulation - "If the parties are unable to reach agreement within..., either party may submit the matter to final and binding arbitration..." - involves precisely the kind of language used by parties who intend to resolve a problem through "interest" arbitration.

Indeed, Article XII provides no standards with respect to how the propriety of a proposed combination should be judged. If that were all that was before me, it would be perfectly clear that Article XII calls for "interest" arbitration. The Carrier's "operational need" for the seniority combination would have to be weighed against the "alleged impact" of the combination upon employees. That is the stuff of an "interest" arbitration.

Because the carriers and the unions were uncertain as to the authority of an Article XII arbitrator, they sought clarification. The resultant CIC ruling, quoted above, simply made explicit the kinds of considerations which an arbitrator would necessarily have to weigh in determining the propriety of a seniority combination. The question is whether that ruling somehow transformed what is plainly an Article XII "interest" arbitration into an Article XII "rights" arbitration. My answer is "no".

The CIC ruling was interpreted by Arbitrator Fletcher in a December 1992 dispute between the Chicago & Northwestern and BMWE. He described the CIC ruling as a "balancing test" between the "operational need" of the carrier and the "adverse impact" upon employees. Nothing in the CIC ruling or the Fletcher award says, or even suggests, that this "balancing" must end in an "all or nothing"

decision.[3] The very act of "balancing" suggests that the answer may lie in a reconciliation of competing interests in an attempt to find a workable solution, for instance, by limiting the scope of the combination or by reducing the "adverse impact". If, as I have already held, the Article XII "right" is conditional, then it seems perfectly sensible to describe the conditions to be met in order for the "right" to be exercised. That may seem like the work of a "rights" arbitrator but the determination of such conditions is really more like the work of an "interests" arbitrator.

Indeed, the difference between these types of arbitration in this particular setting seem artificial. Let me illustrate the point through a hypothetical. Suppose an arbitrator finds a given seniority combination to be unwarranted. Surely, he has an obligation to explain the reasons for his ruling. Those reasons are likely to involve the absence (or presence) of certain critical factors, "A", "B" and "C". That is what a rights arbitrator does. How would an "interests" arbitrator behave in this situation? He would in my opinion do much the same thing. He would say that the combination would be justified if the carrier put into effect (or eliminated) factors "A", B" and "C". Realistically viewed, the decisions are almost identical.

Finally, Article XII clearly calls for "interest" arbitration in some respects. It contemplates a decision as to how seniority rights of the affected employees will be established. It provides no guidelines for this exercise. The questions are obvious. Whether certain affected employees should be given "prior rights" or "grandfather rights" as proposed by the Carrier, or some other kind of seniority protection? How should employees from different seniority districts be joined together for seniority purposes in a combined district? These are "interest" arbitration questions. This helps buttress the notion that

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[3] True, a simple "yes" or "no" answer may sometimes be all that is necessary. A large "operational need" will prevail over a small "adverse impact". Or a small "operational need" will yield to a large "adverse impact". These are the easy cases. But when a large "operational need" is juxtaposed against a large "adverse impact", which may well be the situation in this case, the problem does not lend itself to a single "yes" or "no" response.

Article XII disputes, including the propriety of a proposed combination of districts, were meant to be resolved through "interest" arbitration.

For these reasons, and in view of the broad authority conferred on the arbitrator through Article XII, my conclusion is that the issue in Part III should be dealt with as an "interests" case.

III - Combination of Districts

The Carrier has proposed combining the existing 47 seniority districts into nine. BMWE objects. The parties disagree both as to the weight to be accorded the Carrier's operational need and the extent to which the combination would have an adverse impact on the employees.

Arbitrator Fletcher's comments on this matter are worth noting:

> This balancing test should not be confused with the burden of proof. Operational need may be shown by a variety of factors, including, but not limited to, availability of personnel and equipment, training, safety and financial implications. It is presumed that a carrier will propose a change to obtain a benefit in one or more of these factors. The balance, therefore, is between the degree of benefit to the carrier and the impact upon the employees.
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> As for the burden of proof, this Arbitrator finds it significant that the CIC required the operational need to be "justifiable" rather than "justified." It must be presumed that the choice of terms was deliberate. While the difference between "justifiable" and "justified" may seem subtle, it is, for arbitrators, significant. The latter term implies that the operational need has been justified in the mind of the arbitrator. The former term requires that the evidence presented by the carrier be capable of justifying an operational need. It is sufficient that the evidence could justify the need to a reasonable person...

The Carrier has a strong case. It has demonstrated that the combination of seniority districts will allow for "better utilization of employees, better utilization of

equipment, and better utilization of windows of track time available for track repairs and maintenance." Such efficiencies would mean fewer district mobile gangs, less equipment, and greater productivity from certain specialized positions. Altogether these changes would, according to the Carrier's estimate, reduce employees and equipment by approximately 15 percent with an annual cost savings of $24.5 million.

These benefits were described in some detail by the Carrier. The primary savings would be derived from the much larger work territory for a district mobile gang in a combined district. Presently, a district gang assigned for instance to tamping track or replacing ballast may only work up to the geographic boundary of the district. It is expected to stop when it reaches that boundary. The equipment used by the gang then often sits idle while the Carrier rebulletins positions for this gang in the next district and waits for employees in the next district to bid for these positions. That process may take a few days. Meanwhile, the employees who had been assigned to this gang are disbanded and must bid on other positions within their district. The inefficiency of these arrangements, both from the standpoint of men and equipment, should be apparent. The combined seniority districts would create a far larger territory for a district gang and thus permit gangs to remain intact for a longer time with far more continuity and fewer delays.

There are rail defect test cars and rail recovery trains. Each has its own crew. Each crew is supported by available employees from successive station gangs as the test car or recovery train moves through given district territory. This arrangement has certain inefficiencies. For example, the section gangs on such an assignment experience a certain amount of idle or standby time. And the section gangs are not always proficient in this work because they only occasionally do it. The combined seniority district would create a far larger territory and enable the Carrier to have a dedicated test car crew and a dedicated recovery train crew in every district. The crews would be larger than they now are and would follow the car or train throughout the district. That would in turn relieve the section gangs of this type of responsibility and allow them to remain on their assigned gang work. The resultant efficiencies seem self-evident.

Another example involves the rebuilding of existing structures. On roughly one-third of the Carrier's rail

system, this rebuilding is limited to district maintenance bridge crews. These crews, in the Carrier's opinion, generally do not perform this work efficiently because they do it only on a sporadic basis. The tools and equipment they use for this work are idle most of the time. The combined seniority districts would remedy the problem. They would enable the Carrier to keep a district bridge crew busy full-time on rebuild projects. Such a crew would, through such continuous exposure to rebuild work, enhance efficiency.

Similarly, a bridge crew occasionally needs assistance and expertise in its work. If another crew is not available within its seniority district, the Carrier must look to another district for help. But absent an emergency or absent BMWE's consent, the Carrier cannot move a bridge crew across district boundaries to provide this assistance. This serves to increase the cost of the particular project. The combined districts would provide the kind of flexibility that would minimize the problem. The combined districts would also enlarge the number of bridge repair jobs within a district - and thus allow better planning so that lesser distances would have to be traveled in moving from one job to the next.

The merger of the Burlington Northern and Santa Fe railroads created locations in the rail system where there are parallel lines, each in a different seniority district. When work opportunities are limited to one of the two lines, employees on one line may have to be furloughed even though work is available for them on the other line. Sometimes employees on one line are being hired while employees on the other line are being furloughed. This clearly is an inefficient use of the Carrier's work force. The combined seniority districts would eliminate the problem by expanding work opportunities and avoiding unnecessary furloughs.

Other examples were also given of the many efficiencies that the Carrier would realize through the combination of districts. BMWE insists, however, that greater efficiency is simply an attempt to reduce costs and that "saving money is not an 'operational need'". Arbitrator Fletcher's award appears to have considered this very point. He held that "operational need" is a concept whose broad reach extends to such matters as "financial implications." Surely, the quest for greater efficiency is based on "financial implications." This quest, I suspect, would typically be the driving force behind a combination of districts which promises certain financial advantages. BMWE would restrict "operational

need" to situations where "present seniority district rules were somehow preventing [the Carrier] from getting employees to where work needs to be done." Such a restriction is far too narrow a reading of the term "operational need."

BMWE also stresses that in meetings with the Carrier prior to this arbitration, the Carrier expressed a willingness to accept an "option" which would have preserved the existing 47 seniority districts. But the Carrier conditioned that "option" upon BMWE's acceptance of district mobile gangs being able to move into "any contiguous district, specified parallel districts, [and] specified next adjacent districts." Its willingness to compromise in this fashion in no way diminished its right to seek to combine districts under Article XII. The fact that its proposed combination is driven by its felt need for district mobile gangs to operate in larger territories is merely another way of expressing its need for greater efficiencies and lower costs borne of such efficiencies.

The Carrier has demonstrated a large "operational need."

* * *

"Operational need" must be balanced against the "adverse impact" on employees. BMWE asserts that the proposed combination would mean that present district employees would "have their geographic work territories quadrupled or quintupled and suffer the associated disruption to their family, community and personal lives." It asserts further that the combination would mean that district mobile gang employees would "be required to work under less favorable rules for far less pay than they would have been entitled to receive for performing similar work on similar geographic territories on a PEB 219 type regional gang."

It is true, as the Carrier notes, that 52 percent of the maintenance of way employees are currently in mobile positions. But it is also true that the proposed combination would mean much larger districts and hence far more travel for district mobile gangs. That in turn would mean such mobile gang employees, some 24 percent of the work force, would be away from home for longer periods. Moreover, the Carrier would apparently transform some (perhaps many) of the district headquartered gangs into district mobile gangs. The impact would be large indeed, as many as 30 to 40 percent of the employees, having their time

at home reduced. For most people, even those required to spend part of their week traveling, time at home is important. That the Carrier's proposal would have an "adverse impact" on the work force seems clear.

On the other hand, as the Carrier points outs, railroad work necessarily entails a good deal of travel. The shop crafts and clerical craft are the only ones who are largely insulated from travel demands. Maintenance of way employees have always been expected to travel. The proposed combination thus entails largely a difference in degree rather than a difference in kind. This reality may to a limited extent be seen as modifying the "adverse impact." But there can be no doubt that, from a "quality of work life" standpoint, the Carrier's plan will have a true "adverse impact."

However, the second BMWE objection, namely, "less favorable rules...far less pay...", is remediable to a substantial extent. As explained in Part II of this opinion, this phase of the case is an "interest" arbitration. The arbitrator is therefore free to establish certain "rules" or "pay" arrangements for district mobile crews under the proposed combination as a means of reducing the "adverse impact" and thereby justifying a finding that "operational need" outweighs "adverse impact." In other words, the Carrier's acceptance of these arrangements is a pre-condition to the arbitrator's approval of the combined districts.

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. 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.

Moreover, such district mobile gangs should be entitled to a production incentive bonus if the employee remains on the gang for six months. If 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.

In addition, the parties should establish a joint committee in each of the combined districts to consider ways in which travel requirements of district mobile gangs in the new districts might be reduced without interfering with "operational needs."

My conclusion, as already stated, is that "operational needs" are sufficiently substantial, even when balanced against "adverse impact", to justify the proposed Article XII combination of seniority districts, provided however that the Carrier effectuate the new "rule" or "pay" arrangements set forth above and implement the "prior rights" and "grandfather rights" which were part of its proposal.

IV - Effect of Merger Protective Agreement

BMWE relies also on the January 26, 1968 Merger Protective Agreement (MPA) negotiated in anticipation of the merger of the then Burlington Lines and the Great Northern Pacific. The Interstate Commerce Commission (ICC) made this MPA a condition of its approval of the merger which finally took place on March 2, 1970. Appendix K of the MPA reads in part:

> Notwithstanding any of the provisions of...[the MPA] or related provisions contained in Memoranda of Understanding and included as Appendix to said agreement, the parties signatory hereto agree as follows:

> Recognizing that maintenance of way work is not susceptible to transfer, employees represented by the...[BMWE] should not be required, through implementing agreements or otherwise, to transfer from one seniority district...to another as such seniority districts...exist on the date of consummation of the merger... (Emphasis added)

BMWE argues that this appendix K language creates "a blanket prohibition on the transfer of maintenance of way employees from one seniority district to another..." and that the Carrier's proposed combination of seniority districts is unwarranted because it "will result in the transfer of employees from their seniority district into a new consolidated/region."

This argument is not persuasive. The purpose of Appendix K appears to be to prevent employees from being required to move from one seniority district to another, from being required to change their physical location. No such requirement is involved here. What the Carrier proposes is to combine seniority districts, thus creating much larger districts. Employees stay in place. They are not compelled to move. District mobile gangs in a combined district may well be called upon to serve a larger territory and thus incur larger travel demands. But that fact does not mean that members of such gangs will have been "transferred" within the meaning of Appendix K. A Carrier's action in combining districts is not the same thing as "transferring" an employee from one district to another.

Equally important, Appendix F of the MPA provides in part:

> Said [MPA] shall not be construed or used to prohibit or in any way limit the rights and obligations of any of the carriers or the [BMUE] parties to such Agreement to modify or make changes in agreements affecting rates of pay, rules or working conditions which may be effectuated through concerted or national handling in the railroad industry. (Emphasis added)

This language fits the present case. Seniority district arrangements are "rules" or "working conditions." They are covered by provisions of the CBA or Memoranda of Understanding. Appendix F says in effect that nothing in "said [MPA]", which of course includes Appendix K, shall be read to limit in any way the "right" to "modify or make

changes" in such provisions where such changes are "effectuated through...national handling in the railroad industry." Article XII permits a combination of seniority districts in appropriate circumstances. Article XII is the product of "national handling in the railroad industry", namely, the PEB 219 recommendations in 1991 approved by a Special Board and by Congress in Public Law 102-29. Article XII thus became part of the February 6, 1992 Imposed CBA and later part of the September 26, 1996 negotiated CBA. For those reasons, Appendix K cannot be used "in any way to limit the right..." of the Carrier to invoke Article XII in an attempt to combine districts. Appendix F prevents Appendix K from being used in that manner. To rule otherwise would be to find that Appendix K effectively bars the Carrier from exercising any meaningful Article XII initiatives. The Carrier's reliance on Appendix F is not precluded by the "Nemitz doctrine", Norfolk & Western Ry. v. Nemitz, 404 U.S. 37 (1971).

I recognize the tensions between Appendix K and Appendix F. The former says its restrictions on "transfer" apply "notwithstanding any of the provisions of...[the MPA] or related provisions...included as Appendix..."; the latter states that "said [MPA]", a clear reference to the MPA as a whole including its Appendices, "shall not be construed..." to limit certain Carrier actions. This apparent conflict can best be resolved, for reasons already expressed in this opinion, by viewing Appendix K as applying to actual "transfers" rather than the creation of larger work areas through a combination of seniority districts.

AWARD

The Carrier's proposed combination of seniority districts does not violate the moratorium provisions of the September 26, 1996 CBA. The question of whether the Carrier may effect such a combination under Article XII is an "interests", not a "rights", arbitration. The Carrier has demonstrated sufficient "operational need", balanced against "adverse impact", to justify this Article XII combination provided, however, that it satisfies the various conditions set forth in Part III of the foregoing opinion. None of these findings are precluded by the terms of the MPA.

Dated: March 11, 1999

Richard Mittenthal, Arbitrator