

ARBITRATION

pursuant to

ARTICLE 12 OF THE AGREEMENT

imposed by

PUBLIC LAW NO. 102-29

CHICAGO and NORTH WESTERN
TRANSPORTATION COMPANY

and

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

Before John C. FLETCHER, Arbitrator

AWARD OF ARBITRATOR

December 31, 1992

This matter came to be heard in the offices of the Chicago and North Western Transportation Company, in the City of Chicago, on November 24, 1992. The Chicago and North Western Transportation Company (Carrier, Company or CNWT) was represented by:

Ms. Joan M. Hrvieux, Assistant Vice President - Labor Relations

with:

Mr. Ken Gradia, National Railway Labor Conference,
Mr. Greg Larson, CNWT Commuter Operations, and
Mr. Dave Lacy, CNWT Labor Relations,

also in attendance.

The Brotherhood of Maintenance of Way Employees (Union, Organization or BMWE) was represented by:

Mr. William A. Bon, General Counsel

with:

Mr. Steven Powers, Assistant to the President,
Mr. Ernie Torske, Vice President,
Mr. Leon Fenhaus, General Chairman, and
Mr. Kent Bushman, Vice General Chairman,

also in attendance.

BACKGROUND TO DISPUTE

As a result of the nation's railroads and several labor unions being unable to reach a settlement of their several disputes concerning wages and work rules, Presidential Emergency Board No. 219 (PEB 219) was established by Executive Order 12714¹ on May 8, 1990. Carrier and Union were parties to the proceedings of PEB 219. The Findings and Recommendations of PEB 219 were issued on January 15, 1991.

Section 9 of the portion of PEB 219's report dealing with Maintenance of Way Employees, recommended changes which would allow carriers to combine or realign seniority districts. Section 9 proposed a procedure to be followed when a carrier chose to do so, including an arbitration procedure, should the parties be unable to reach an agreement concerning the changes proposed by the carrier. Section 10 further described the arbitration process which would be applicable to such matters.

¹ 55 Fed. Reg. 19047. Members of PEB 219 were Robert O. Harris, Chairman with Richard R. Kasher and Arthur Stark Members.

Section 12 of PEB 219's report, proposed the establishment of a Contract Interpretation Committee (CIC) to resolve disputes "arising over the application or interpretation of the agreement between various carriers and the BMW." CIC's jurisdiction would "not overlap those areas where other recommendations have provided for a specific dispute resolution mechanism."

Although negotiations continued, the parties were unable to resolve their dispute and a brief strike occurred. At this point, Congress intervened, enacting Public Law No. 102-29,² which ultimately had the effect of imposing the recommendations of PEB 219, except as they might be clarified, interpreted or modified by a "Special Board" established by the Statute, as though they had been arrived at by agreement of the parties under the Railway Labor Act.³

BMW's request for Interpretation and Clarification with regard to Section 9 concerned only the question of carriers under common control and the effect of employee protection imposed by the Interstate Commerce Commission (ICC) in such cases. The Special Board answered this limited question without any further effect to the provision regarding combining or realigning of seniority districts. As the dispute herein does not involve carriers under common control, the decision of the Special Board in this regard is not relevant.

BMW, however, also requested that the Special Board modify the PEB report by eliminating Section 9 in its entirety. In rejecting all requests for modification the Special Board wrote:

² 105 Stat. 169 (April 18, 1991)

³ 45 USC §§ 151-188

The Special Board finds that the recommendations of PEB 219 are fair and demonstrably equitable. The Special Board further finds that the evidence and argument in support of the modifications was insufficient, in each and every respect, to rebut the statutory presumption of validity. For these reasons, each and every request for modification is denied.

On February 6, 1992, BMW and various carriers⁴ adopted the "Imposed Agreement Pursuant to Public Law 102-29, July 29, 1991," which reduced PEB 219's recommendations to formal contract language.

The procedure for combining or realigning seniority districts was set forth in Article XII of the Imposed Agreement, while the arbitration procedure was incorporated in Article XVI with the procedure for resolving disputes in connection with the establishment of regional and system-wide production gangs under Article XIII.⁵ Consistent with Section 12 of the PEB report, an Interpretation Committee was created under Article XVIII.⁶

On September 20, 1991, CNWT served a thirty day notice upon BMW of its intent to realign seniority districts on its Suburban Division, former Wisconsin Division⁷ and former Iowa/Central Divisions. The parties conferred on CNWT's notice on October 29, 1991, November 25 and 26, 1991 and December 17, 1991. During the next ninety days, CNWT and BMW engaged in voluntary negotiations, separate and apart from the National Agreement, to revise

⁴ Including CNWT

⁵ Hereinafter, all references will be to the Articles and Sections of the Imposed Agreement, unless specifically stated otherwise.

⁶ On August 22, 1991, the carriers and BMW selected Richard R. Kasher, a member of PEB 219, to serve as the Neutral Member of the Interpretation Committee.

⁷ Carrier's proposal regarding the former Wisconsin Division was not progressed to arbitration.

various schedule rules, including those involving seniority districts. The parties ultimately resumed negotiations under CNWT's September 20, 1991 notice on March 17 and 18, 1992. By letter dated August 10, 1992, Carrier gave notice to BMW of its intention to submit the matter to final and binding arbitration in accordance with the procedures set forth in Article XVI. On August 17, 1992, BMW advised CNWT that it was agreeable to the selection of the undersigned as the Arbitrator, but asked that arbitration not commence until the CIC had resolved Issue No. 14, which had been presented by the carriers and concerned the arbitration of Article XII matters. The parties eventually agreed to set hearing dates of November 24 and 25, 1992, for consideration of this matter.

In the interim, CIC considered and resolved Issue No. 14, dealing with the scope of the arbitrator's authority. This issue arose as a result of CIC's answer to Issue No. 1, Sub-question No. 5, regarding the arbitration of disputes over the establishment of regional and system-wide production gangs under Section 11 of the report of PEB 219. In that answer, CIC expanded the arbitrator's authority to all subject matters contained in a carrier proposal. The carrier's then took the position that Section 11(b)5 of the report was more appropriately applied to Section 9 of the report. The Neutral Member of CIC held as follows:

Issue No. 14.

In order to give substantive effect to all provisions of the parties' imposed Agreement, should Section 11(b)(5) of PEB No. 219's Report be applied to limit the jurisdiction of the arbitrator in disputes arising under Section 9 thereof to a determination of how the seniority rights of affected employees will be established on the combined or realigned seniority roster?

Answer to Issue No. 14.

It is the opinion of the Neutral Member of the Committee that it would be inconsistent with the general intent of Sections 9 and 11 to limit a Section 9 arbitrator's jurisdiction in the manner suggested by the Carriers. 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. Accordingly it is the opinion of the Neutral Member of the Committee that Section 11(b)(5) should not be placed in Section 9 and be applied in accordance with its limited terms. Rather it is the opinion of the Neutral Member of the Committee that a Section 9 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 will have upon employees affected by such change.

Hearing was held on this matter on November 24, 1992. At the conclusion of their presentations the parties agreed to extend the Arbitrator's time limit for the issuance of this award to forty-five days due to the ensuing holidays.

THE ISSUE

The Issue before the Arbitrator is:

May CNWT realign seniority districts as proposed in its September 20, 1991 notice to BMW, served pursuant to Article XII of the Imposed Agreement? If the realignment of seniority districts is appropriate, how shall the seniority rights of affected employees be established?

RELEVANT CONTRACT LANGUAGE

The relevant contract language consists of the following provisions of the Imposed Agreement Pursuant to Public Law 102-29 and the indicated Rules of the CNWT - BMW Agreement.

A. Imposed Agreement:

ARTICLE 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 their bargaining representative of its desire to combine or realign seniority districts, including all carriers under common control, specifying the nature of the intended changes. The protection of the Interstate Commerce Act will continue to apply to all such combinations and realignments.

Section 2 - Arbitration

If the parties are unable to reach 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.

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Nothing in this Article is intended to restrict any of the existing rights of a carrier.

This Article shall become effective ten (10) days after the date of this Agreement except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representative on or before such effective date.

ARTICLE XVI - ARBITRATION PROCEDURES - STARTING TIMES, COMBINING OR REALIGNING SENIORITY DISTRICTS, AND REGIONAL AND SYSTEM WIDE GANGS

Section 1 - Selection of Neutral Arbitrator

Should the parties fail to agree on selection of a neutral arbitrator within five (5) calendar days from the submission to arbitration, either party may request the National Mediation Board to supply a list of at least five (5) potential arbitrators, from which the parties shall choose the arbitrator by alternately striking names from the list. Neither party shall oppose or make any objection to the NMB concerning a request for such a panel.

Section 2 - Fees and Expenses

The fees and expenses of the neutral arbitrator should be borne equally by the parties, and all other expenses shall be paid for by the party incurring them.

Section 3 - Hearings

The arbitrator shall conduct a hearing within thirty (30) calendar days from the date on which the dispute is assigned to him or her. Each party shall deliver all statements of fact, supporting evidence and other relevant information in writing to the arbitrator and to the other party, no later than five (5) working days prior to the date of the hearing. The arbitrator shall not accept oral testimony at the hearing, and no transcript of the hearing shall be made. Each party, however, may present oral arguments at the hearing through its counsel or other designated representative.

Section 4 - Written Decision

The arbitrator shall render a written decision, which shall be final and binding, within thirty (30) calendar days from the date of the hearing.

B. CNWT - BMW Agreement:

Rule 5 - Seniority Districts

For purposes of determining seniority districts, the Chicago and Suburban Divisions shall be considered as a single division and the Wisconsin and Ore Division shall be considered as a single division. Subject to the above exceptions, each operating division will constitute a seniority district for B&B employees, and a separate seniority district for Track Department employees.

Except for the Chicago - Suburban Divisions, each track seniority district will be divided into zones to be known as Zone A, Zone B, etc. An employee whose position is abolished or who is displaced through the exercise of seniority will not be required to displace into another zone of his seniority district, but will be privileged to do so. An employee desiring to stay within the zone encompassing the railroad territory of the job previously held by him will not suffer loss of seniority in higher classification under Rule 13 by displacing an employee in a lower classification within the zone; i.e., he will continue to hold all seniority theretofore attained within the entire seniority district. Seniority districts are identified as follows:

<u>Division</u>	<u>B&B</u>	<u>Track</u>
Central	B-2	T-2
Illinois	B-3	T-3
Iowa	B-4	T-4
Western	B-6	T-6
Twin Cities	B-7	T-7
Wisconsin - Ore	B-8	T-8
Chicago - Suburban	B-9	T-9

Zones of the above seniority districts are identified geographically as set forth in Appendix "F"

Rule 6

A change in operating division will not automatically constitute a change in seniority districts.

In case of a change in operating divisions, the seniority rights of employees affected will be adjusted by the Company with the properly constituted committee and/or the General Chairman representing the employees.

THE POSITIONS OF THE PARTIES

The Position of the Carrier:

CNWT first asserts that the jurisdiction of the Arbitrator is limited to 1), a determination of whether each proposed new seniority district represents a justifiable need in the context of the alleged impact that change would have upon employees affected by such change, and 2), a determination of how the seniority rights of affected employees will be established on the combined or realigned roster. Carrier derives this limitation on the Arbitrator's jurisdiction from the CIC Answer to Issue No. 14, and argues that the Arbitrator has no authority to add or detract from the provisions of the PEB 219 Report or the Imposed Agreement. The Carrier further cites this Arbitrator's Award in the N&W-BMWE⁸ arbitration on the implementation of the regional and

⁸ N&W v. BMW, Award on Substantive Issues, Fletcher, Arb. (June 12, 1992)

system-wide gang provisions of the Imposed Agreement, which recognized that this process was not a means to obtain that which could not be gotten from PEB 219.

Carrier submits that any proposal to realign or combine seniority districts which falls within the parameters of the evidence before PEB 219 must be deemed to satisfy the "justifiable operational need" test articulated by the CIC. Citing the testimony before PEB 219, CNWT avers seniority district changes should be allowable when districts are small in size and where work has been reduced for reasons such as line abandonments. Carrier also cites examples where seniority districts were no longer compatible with supervisory and/or managerial territories, traffic pattern, etc., due to consolidations, mergers and other operational changes.

In explaining the CIC's Answer to Issue No. 14, CNWT states the Neutral Member made it clear that an arbitrator would have the jurisdiction to rule on whether or not a carrier's proposed change purports to serve the purpose which was presented to the PEB, i.e., the realignment of seniority districts meets an operational need of the carrier. According to the Carrier, the Neutral Member recognized there were no standards of operational necessity established by the PEB, but carriers were given a rule granting relief on the basis that any such carrier proposals would only be served under such circumstances.⁹ Carrier, thus, concludes that the impact on employees would be justified if the operational necessity contemplated by PEB 219 has been met.

⁹ See the testimony of carrier witness Peifer, PEB Tr. at p. 1751.

Carrier explains that its Maintenance of Way seniority districts were originally established to correspond with its operating divisions, with each district being subdivided into zones. Each employee, according to Carrier, has a home zone and may, but is not required to, exercise seniority to any other zone within the employee's seniority district.

Carrier's first proposal is to realign Suburban Seniority District No. 9 by moving portions of Seniority District No. 3 (formerly Illinois) and Seniority District No. 8 (formerly Wisconsin - Ore) into District No. 9. CNWT has explained that the three lines of track involved would extend District No. 9 to cover all trackage over which Carrier operates suburban commuter service under a Purchase of Service Agreement with METRA, the Northern Illinois regional transportation authority.

Carrier cites several reasons as its basis for showing an operational necessity for expanding District No. 9 by the transfer of territory from Districts 3 and 8. It notes that all track maintenance work performed in the commuter territories is performed at approval and cost of METRA, and failure to comply with predetermined schedules may result in the loss of revenue for future planned projects. Carrier submits that poor utilization of employees and equipment due to turnover, lack of specialized skills, etc., justifies an operational need to realign the districts so that the suburban territories encompass one district.

According to Carrier, maintenance work in the suburban territory differs significantly from that in freight territories. It notes that most of the traffic is high speed, first class trains operating by timetable, and work must

be scheduled to accommodate this traffic and not interfere with rush hour commuter trains. Carrier states that grade crossings, stations and platforms must be maintained to accommodate large numbers of pedestrians and commuters, necessitating skills different from those required of employees who work in more rural areas. Carrier also expects its employees who work in suburban commuter territories to be familiar with the streets and highways of congested suburban communities, thereby enabling them to travel between stations and work locations on a timely basis.

Carrier raises employee and public safety as an issue, noting that heavy, sophisticated equipment is used in heavily populated urban areas, and employees are required to work in locations with heavy train and automobile traffic. Carrier suggests the movement of employees between freight only and commuter territories tends to compromise safety.

CNWT gives several examples of poor utilization of employees and equipment which it states are the result of multiple seniority districts in this territory. Some of these examples are, according to Carrier, the result of special qualifications, such as vehicle licenses, or skills, such as operating a boom truck. Carrier further asserts the multiple districts result in imbalances in the work force, with the Suburban Division being required to hire new employees while employees in District Nos. 3 and 8 are furloughed. Carrier suggests this also affects its ability to call the proper employees for service in emergency situations which may arise from time to time.

Carrier argues that the impact of the realignment of District 9 on the employees affected in District Nos. 3 and 8 will be minimal. It notes that the

new district will be comprised of three lines (in addition to the Chicago Freight Terminal) extending 52.2 miles north, 63.1 Miles northwest and 38.1 miles west of Chicago.

Carrier's second proposal concerns the realignment of seniority districts within the state of Iowa. CNWT proposes to transfer one section of track (Yale to Perry via Herndon) from District No. 4 (formerly Iowa Division) to District No. 2 (formerly Central Division), and two sections of track (Marshalltown to Steamboat Rock and Marshalltown to Powerville) from District No. 2 to District No. 4.

According to Carrier, each of these sections of track is no longer physically connected to other trackage within the respective seniority district due to line abandonments and/or sales, but is connected to the seniority district to which Carrier proposes they be transferred. CNWT submits this is a classic example of the case presented to the PEB wherein, due to line abandonments, sales, etc., the size and shape of the railroad is greatly altered, leaving certain seniority districts and boundaries outdated and affecting day-to-day maintenance work that has no relationship to the current organization. Carrier states that it has been using employees from seniority districts on the connecting trackage to perform maintenance work on these line segments, even though the employees are from a different seniority district and it is required to pay claims as a result. Carrier asserts that the impact on employees is nonexistent due to the relatively small size of the sections of trackage involved.

To accomplish the change in District No. 9, Carrier proposes first identifying the jobs which will be transferred from Districts Nos. 3 and 8, and then transferring an equivalent number of employees, dovetailing their seniority onto the new District No. 9 roster. Under Carrier's proposal, employees transferring to District No. 9 would retain seniority in their former districts for up to two years. During those two years, any employee exercising seniority back to his former district would forfeit seniority in District No. 9. Carrier states that this limitation would provide for a stable, experienced and cohesive workforce in its suburban territories. Carrier finally proposes to divide what is now Zone B of Seniority District No. 9, i.e., the Suburban Division, into three zones, with Zone B covering the territory from Chicago to Geneva, Zone C covering the territory from Chicago to Harvard and Zone D covering territory from Chicago to Kenosha.

Asserting its proposal is fair and equitable to all employees, Carrier states the proposal treats seniority currently held under two separate rosters as uniform and equivalent for purposes of creating a single roster and permits all employees on the roster to have a similar ability to obtain a position any where in the newly realigned district.

With regard to the realignment of Seniority District Nos. 2 and 4, Carrier claims that there will be no abolishment, establishment or transfer of positions and, consequently, there would be no need to provide for the allocation of seniority rights of any employees.

The Position of the Organization:

The Organization first states that the CIC's Answer to Issue No. 14 is dispositive of the scope of the Arbitrator's jurisdiction in this matter. BMW finds it noteworthy that the Neutral Member did not simply require carriers to demonstrate some operational need in order to prevail. Instead, the Organization asserts that the CIC articulated a balancing test, requiring a carrier to show an actual operational need of sufficient gravity to tip the scales against the adverse impact on employees and, thus, toward the carrier's desired changes.

BMW further asserts that mere change within a carrier's management structure cannot form the basis for disruptive modifications of seniority districts. It concludes that changes in management territories do not necessarily mean that a significant operational need to modify seniority territories results from each change.

Looking at the change proposed in Iowa first, the Organization insists that each change would result in a loss of work opportunities for those employees whose seniority presently entitles them to service the trackage in question. With regard to the gang headquartered at Jefferson, Iowa, and responsible for maintenance on the Yale to Perry line, the Organization suggests the loss of this work may make them more susceptible to seasonal employment fluctuations.

Further, the Organization argues Carrier does not have an actual operational need of sufficient magnitude to justify the disruption of the

involved employees' work lives. BMWWE submits that most of the involved line segments can be performed using equipment transported by truck. It also avers that the highway mileage to these trackage segments is less from the existing crews' headquarters than it is from the headquarters of the crews in the proposed realigned districts.

BMWWE claims that the affect of the proposed changes to the suburban territory is even more significant. According to the Organization, there are approximately twenty-eight positions on the twenty miles of trackage between Des Plaines and Harvard, which represents half of all the positions in District No. 8. The Organization insists that the availability of this work is important to District No. 8 employees, since it is an important buffer against seasonality of employment on the remainder of the district. The Union notes that certain employees who live some distance from the suburban territory choose to work on gangs that are activated during good weather inorder to perform work over positions of the district closer to their homes, but exercise seniority to suburban positions when those jobs are cut off at the onset of bad weather.

The Organization attributes Carrier's difficulties to poor managerial organization rather than the structure of existing seniority districts. It points out that three Carrier roadmasters are responsible for work performed on the three line segments covered by Carrier's proposal, and their territories do not conform to the territories encompassed within existing seniority districts. BMWWE argues that Carrier's problems are the result of an inability to rationally allocate resources, in particular the utilization of heavy equipment. It submits that there is no assurance a realignment of seniority districts, as proposed, will alleviate any of Carrier's stated problems.

BMW submits that its proposal for determining the seniority rights of employees affected by a realignment of seniority in the suburban territories, should such a realignment be granted by the Arbitrator, is a workable formula which would ameliorate, to the greatest extent possible, the adverse effects the realignment would have on seniority.

The Organization proposes that both permanent and seasonal positions for the track and bridge and building sub-departments on the new seniority districts be in direct ratio to the number of track and bridge and building sub-department positions that are on the territory as of a date certain. Under the Organization's proposal, this ratio would apply only to employees holding prior rights, which would be all employees on the District Nos. 3 and 8 rosters as of the date of the agreement. New hires, suggests the Organization, would come into their respective districts without any expectations that they could work in realigned District No. 9 on the former District Nos. 3 and 8 territories by way of prior rights.

DISCUSSION

The parties are in agreement that the jurisdiction of the Arbitrator is defined by the CIC's Answer to Issue No. 14, and consists of addressing the appropriateness of Carrier's proposal regarding the realignment or combination of seniority districts, as well as determining how the seniority rights of affected employees will be established. They are not in agreement, however, with regard to the standards which should govern the Arbitrator's judgment in the first question.

Carrier has, in effect, argued that its burden is simply to demonstrate that its proposal represents a justifiable operational need. It further echoes presentations before PEB 219 and the Special Board, suggesting that carriers would not propose seniority district changes unless they had a justifiable operational need to do so. In a sense, CNWT is arguing that its proposal is valid if it says it is valid. This tautological reasoning is not acceptable. Experience suggests that if a proposal is valid, then it is not impossible to demonstrate such validity with more than an argument that it should be considered valid because it would not be proposed if it were not valid.

The Arbitrator is unable to reference specific language where the CIC rejected carriers' tautological reasoning, however, if the notion was correct, the CIC would not have possessed a basis to extend the arbitrator's jurisdiction to the additional authority to determine the appropriateness of a carrier's proposals. Thus, the tautological, if not simplistic notion that proposed seniority district changes are justifiable because they would not have been proposed unless an operational need existed, is specifically rejected in this arbitration.

Secondly, the arbitrators' investigation does not end if there is a finding of justifiable operational need. The Arbitrator agrees with the Organization that there is a "balancing test." Looking at the CIC's Answer to Issue No. 14, it is apparent the additional authority was given to arbitrators because "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." Accordingly, the CIC extended the arbitrators' authority to include "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." If a balancing test were not envisioned by the CIC, the additional language would not be necessary.

Clearly, the greater the adverse impact upon the affected employees, the greater is the operational need which must be demonstrated by the carrier for the arbitrator to permit the change.

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.

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 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, even though the particular arbitrator is not convinced. This would be similar then, to the "substantial evidence" test applied by arbitrators in this

industry to discipline cases. In such matters, an arbitrator will uphold discipline if the evidence, taken as a whole, could lead a reasonable person to agree with carrier's conclusion.

Accordingly, in reviewing Carrier's seniority district realignment proposals, the test to be applied in this arbitration is whether the evidence presented is capable of justifying an operational need in the context of the impact those changes would have upon affected employees.

Turning to the merits of the proposed changes in Iowa, the Arbitrator finds that Carrier has presented a justifiable operational need in the context of the impact those changes would have upon affected employees. Carrier has demonstrated there will not be significant impact upon the affected employees who will either obtain or lose the right to perform work on the territories involved. The evidence shows that the work is presently being performed by the employees of the seniority district to which the Carrier intends to transfer the line segments, notwithstanding the resultant claims. Thus, there will be no change in the amount of work performed. There is no showing that any employee will be relocated as a result of the change. The only apparent effect is that the employees will lose the benefit of the payment of claims when employees from one seniority district performed work on a different seniority district.

On the other side of the equation, Carrier has demonstrated an operational need to realign the districts. The lines in question, due to sales and/or abandonments, no longer have a physical connection to any trackage from their respective districts. If one were to draw seniority districts on a map

as it exists today, there would be no logical reason for placing these line in their present districts. Realigning the districts would afford Carrier a more rational allocation of personnel and equipment.

As there is no evidence that any employees would be displaced as a result of these realignments, the Arbitrator will direct that Carrier may make the requested changes without further change or alteration to the seniority rights of any employees in the seniority districts losing the segments of trackage.

In the suburban territories, on the other hand, the Organization has presented compelling evidence that employees would be significantly affected by the transfer of District No. 3 and 8 trackage to District No. 9. It is evident that employees have been able to exercise seniority to and from these line segments as work opportunities in the balance of their seniority districts expand or contract. The suburban jobs provide work to senior employees when seasonal jobs are no longer available in freight territory. Removing these territories from District No. 3 and 8 would require employees to either forego such winter employment or relocate closer to Chicago to work suburban jobs the full year. Consequently, Carrier must demonstrate that it expects to acquire greater benefits than were required to support a justifiable operational need for the Iowa changes.

One factor to be considered is the relationship between Carrier and METRA, the governmental agency for which Carrier operates commuter trains. Budgeting and funding for the commuter operation takes into account the entire trackage within the suburban territories. It would certainly

facilitate this process if it were encompassed in a single seniority district, as Carrier proposes.

Perhaps the strongest argument on Carrier's behalf was actually made by the Organization. In its argument to the Special Board, created by Public Law 102-29, wherein the Organization sought the removal of Section 9 from the PEB 219 Report, CNWT's suburban operation was cited as an example. The Organization wrote:

The carriers, without any real supporting evidence, complained that seniority districts were simply too small. In light of the regional districts for most production gangs, the size of seniority districts is not a critical factor. Moreover, under certain circumstances, safety and operating factors militate in favor of small seniority districts. A quintessential example of this phenomenon is the Chicago and North Western Suburban district which encompasses the Chicago commuter territory. Due to the high density, high speed commuter operations, working in this territory requires knowledge and experience unlike any other segment of the Chicago and North Western. Public safety, employee safety and efficiency all support the notion that this relatively limited geographic area should be operated as a separate seniority district. Combining this territory with the much large surrounding seniority districts would permit (and in some cases require) employees from low density rural secondary lines to claim positions in this specialized area thereby displacing the more experienced employees. Safety and productivity would both suffer under such circumstances.¹⁰

While BMW's argument seeking modifications of the recommendations of PEB 219 is against the expansion of present District No. 9, it can also be looked at as an argument for separating the trackage Carrier seeks to separate from parts of District Nos. 3 and 8 which are exclusively freight lines. It is all a matter of perspective. In fact, the very reasons the Organization has given

¹⁰ Requests for Modification of the Recommendations of Presidential Emergency Board No. 219, Brotherhood of Maintenance of Way Employees, Section 9, Page 13.

herein for why the employees would be adversely affected are the same reasons why it had argued before the Special Board that the district should not be expanded.

Safety of employees and the public is a significant factor which cannot and had ought not be attempted to be quantified monetarily. Setting off the freight territories from the suburban commuter territories, where different skills and experience are necessary, and where continuity of the work force is of substantial benefit, is an operational need of sizable magnitude. Accordingly, the Arbitrator finds that the Carrier has presented a justifiable operational need in the context of the impact those changes in seniority district realignments would have upon the affected employees.

With regard to determining the seniority rights of affected employees, the Arbitrator finds that the BMW proposal is unacceptable. That proposal would give District Nos. 3 and 8 employees prior rights to a proportionate number of jobs within District No. 9 for an indefinite period of time. Aside from the administrative complications which would ensue, this would permit employees to exercise seniority freely from the freight lines to the commuter lines. This is precisely what the Carrier is seeking to avoid, and what the Organization has gone on record as stating is undesirable. What is more, in substance, adoption of the Organization's proposal would make almost meaningless the seniority district realignment because the solution would not produce constructive change.

Carrier's proposal on the other hand would grant suburban seniority only to those employees who are now holding the affected jobs. As the

Organization has pointed out, it is only the timing of the agreement or this Award that would determine whose seniority is transferred under such a proposal.

It seems that a more appropriate solution would be to dispose of the seniority issue consistent with principles developed in the parties prior bargaining on such matters and considerations developed in other applications, such as merger protective conditions and line abandonments. Thus, the Arbitrator directs that Carrier's proposal to realign Seniority District No. 9 by adding the designated portions of District Nos. 3 and 8, as well as create three zones, is granted, but subject to the following conditions for the determination of seniority rights of affected employees:

1. Employees presently working on positions in the territories to be transferred to Seniority District No. 9 shall be placed on the seniority roster for that district and zone, with their seniority date(s) dovetailed. This shall constitute their primary seniority. They shall retain seniority on their previous seniority district as a secondary seniority.
2. All other employees on the roster of Seniority District No. 3, shall be given secondary seniority on Seniority District No. 9, Zone B, such seniority being dovetailed based upon District No. 3 date(s).
3. All other employees on the roster of Seniority District No. 8, shall be given secondary seniority on Seniority District No. 9, Zone C or D (determined by which Zone is closest to their present District 8 Zone seniority, computed by rail miles), such seniority being dovetailed based upon District No. 8 date(s).
4. Any employee who voluntarily exercises seniority to his or her secondary seniority district shall forfeit his or her primary seniority. Any exercise of seniority shall be considered voluntary as long as a position of the same class is available in the primary seniority district, regardless of zone.

5. If after the expiration of six (6) years from the date of this Award, an employee has not exercised his or her secondary seniority, then at that time his or her secondary seniority shall be terminated.
6. The transfer of territory herein provided shall not in and of itself give any employee displacement rights.
7. New seniority rosters will be published for each of the affected seniority districts within thirty (30) days of the date of this Award. Such rosters and a synopsis of this Award will be posted on all bulletin boards in the applicable seniority districts. The new rosters will be open to protest for thirty days (30) days from the date of posting.

AWARD

Carrier's request for realignment of Seniority District Nos. 2 and 4 in Iowa is granted. No seniority modifications are required by this realignment. Carrier's request for realignment of Seniority Districts Nos. 3, 8 and 9 is granted, subject to the above enumerated conditions for the establishment of seniority of affected employees.



John C. Fletcher, Arbitrator

Mt. Prospect, Illinois
December 31, 1992