SECTION 11 ARBITRATION

pursuant to the

SETTLEMENT AGREEMENT

embodying recommendations of

PRESIDENTIAL EMERGENCY BOARD NO. 219

imposed by

PUBLIC LAW NO. 102-29

NORFOLK & WESTERN RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Before John C. Fletcher, Arbitrator

AWARD ON SUBSTANTIVE ISSUES

June 12, 1992

This matter came to be heard in the offices of the National Mediation Board, in the city of Washington D. C., on May 6 & 7, 1992. Norfolk and Western Railway Company (N&W, Company or Carrier) was represented by:

Jeffrey S. Berlin, Esq.
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The Brotherhood of Maintenance of Way Employees (BMWE, Organization or Union) was represented by:

Steven V. Powers
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Vice President, Southeastern Region
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J. W. Pugh
General Chairman
T. R. McCoy, Jr.
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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 12714[1] 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. Although negotiations continued, the parties were unable to resolve their dispute and a brief strike occurred. At this point Congress intervened, enacting Public Law 102-29[2], which ultimately had the effect of imposing the recommendations of PEB 219 as though they had been

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

[2] 105 Stat. 169 (April 18, 1991)

arrived at by agreement of the parties under the Railway Labor Act[3]. On February 6, 1992, BMWE and the various carriers[4] adopted the "Imposed Agreement Pursuant to Public Law 102-29, July 29, 1991," which reduced PEB 219's recommendations to formal contract language.

Section 11 of the portion of PEB 219's report dealing with Maintenance of Way Employees recommended changes which would allow carriers to establish system-wide and regional gangs; allowing such gangs to work over specified territory of a carrier or throughout its territory, including all carriers under common control. Section 11 proposed a procedure to be followed when a carrier chose to establish such gangs, including an arbitration procedure, should the parties be unable to reach agreement concerning the changes proposed by the carrier.

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 the various carriers and the BMWE." This Committee's jurisdiction would "not overlap those areas where other recommendations have provided for a specific dispute resolution mechanism."

The procedure for establishing regional or system-wide gangs was set forth in Article XIII of the Imposed Agreement,[5] while the arbitration

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[3] 45 USC §§ 151-188

[4] Including N&W.

[5] Consistent with references in the parties' briefs, system-wide and regional gangs will be referred to hereafter as Section 11 (§11) gangs.

procedure was incorporated with similar procedures in Article XVI. Consistent with Section 12, an Interpretation Committee was created under Article XVIII.[6]

On December 13, 1991, N&W served notice upon the several BMWE General Chairmen, representing its employees, of Carrier's intent:

> **. . . to establish regional and system gangs (hereafter Designated Programmed Gangs) for the purpose of working throughout the system of the Carrier (including NW, the former Wabash, the former NKP, the former Wheeling, and the former Virginian).**

To this notice, N&W attached terms and conditions which it proposed to apply to such gangs. The parties met in conference to discuss this notice on December 30 and 31, 1991. BMWE presented a counterproposal on January 6, 1992, which was discussed in conference on January 8 and 9, 1992. N&W presented a compromise proposal on January 15, 1992, which was answered by a modified BMWE proposal on January 17, 1992. When the parties were unable to reach an agreement, N&W gave notice to BMWE of its intent to submit the matter to arbitration. Through the selection process provided in Article XVI of the Imposed Agreement, the undersigned was named as the Arbitrator.

Prior to the presentation of the merits of this dispute, BMWE raised certain procedural objections concerning N&W's notice. Hearing was held on these procedural issues on March 30, 1992, and an Award was rendered on April 6, 1992. The Award directed N&W to amend its December 13, 1991 notice within ten calendar days of the date of the Award. The parties were further directed to use the two hearing dates which had been scheduled for

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

consideration of the merits of N&W's proposal (April 20 & 21, 1992) in an attempt to negotiate an agreement. Arbitration on the merits was scheduled to resume in Washington, D. C. on May 1 & 2, 1992, should the parties fail to make an agreement.

By letter of April 14, 1992 N&W supplemented its December 13, 1991 notice. The parties met, as directed, on April 20 & 21, 1992, during which time the BMWE delivered two counterproposals. The parties were unable to reach an agreement.

By agreement between BMWE and N&W, the hearing on the merits was postponed until May 6 & 7, 1992, on which dates hearing was held in Washington, D. C. The parties further agreed to waive the time limits for issuance of this Award, until June 15, 1992, and that neither party would challenge the Award based upon time limits. The record was closed on May 7, 1992, and it was further agreed it would not be reopened except by mutual consent, and with the understanding that if it where reopened the time limit for issuance of the Award would be extended accordingly.

THE ISSUES:

As stated by the N&W in its submission, the issues presented are:

> **A. Are the terms and conditions set forth in N&W's December 13, 1991 notice (as supplemented on April 14, 1992) the appropriate terms and conditions to govern the establishment, on a continuing basis, of the regional and system-wide production gangs identified by N&W?**
>
> **B. If the answer to A is "No," what terms and conditions are appropriate?**

PERTINENT CONTRACT LANGUAGE:

The pertinent contract provisions necessary to a resolution of this dispute are Article XIII and Article XVI of the Imposed Agreement. These Articles provide:

> ARTICLE 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 (including all carriers under common control) 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 proposed 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 provided for in Article XVI. BMWE counter proposals, that are subject matter related to a carrier's proposals regarding the establishment of regional or system-wide gangs are also within the arbitrator's jurisdiction.
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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 - 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.[7]

POSITION OF THE PARTIES

The Position of the Carrier:

According to N&W, the purpose of this arbitration is to prescribe the terms and conditions that will promote operational efficiency by enabling it, on a continuing basis, to exercise the right given to it by the Imposed Agreement to establish, bulletin and fill positions on specified gangs that will largely stay together while performing production work projects programmed over two or more seniority districts. N&W submits its proposed agreement accomplishes this purpose with economy, fairness and minimal disruption to the terms of existing collective bargaining agreements.

N&W submits the result of this arbitration should be an agreement to govern the establishment, on a continuing basis, of each of the gangs it has identified in its notice, as supplemented. It first asserts these gangs all comport to the meaning of production gangs, as that term is used in the PEB Report and the Imposed Agreement. N&W argues that PEB 219 meant a production gang to be broadly defined as a gang that performs programmed work, and did not restrict such gangs based upon size, equipment consist, or performance of a limited set of permissible functions alone. N&W refers to the

[7] As noted (supra) the parties agreed that the Arbitrator had until June 15, 1992 to issue the Award on the merits of this matter.

carriers' written presentation to PEB 219, wherein production gangs were defined as:

> **Production gangs, as distinguished from gangs that do routine day-to-day maintenance, perform the major maintenance and repair projects that railroads usually program well in advance. . . . MOW production gangs typically surface track, install ties, lay rail, do bridge and building work, joint welding, ditching, ballast cleaning, frog and switch replacement, and the like.**

Noting the most prominent of production gangs are the large, highly mechanized gangs that do the work of laying rail, removing and installing cross ties, and surfacing track, the N&W asserts these are not the universe of production gangs. It argues that production gangs are distinguished from basic maintenance gangs by the manner in which the work of the gang is programmed and performed, rather than arbitrary restrictions. A basic maintenance gang, says N&W, has responsibility for performing the routine maintenance needs that develop from day-to-day on the territory to which the gang is assigned. Such gangs are organized to respond to maintenance problems as they appear. Such gangs, N&W continues, are organized as general purpose gangs to handle the needs of their assigned territory, rather than for the performance of any specific task, in contrast to the role of a production gang.

N&W avers that it has used production gangs for the following purposes:

> **a) to remove and replace rail (rail gangs);**
>
> **b) to replace defective cross ties over designated segments of track and to perform**

surfacing of track where cross tie replacement occurs (timber and surfacing or "T&S" gangs);

c) to correct track alignment in order to maintain proper track geometry between T&S and rail laying cycles (surfacing gangs);

d) rail laying and cross tie renewal projects over special segments of track which do not warrant the use of a full-size rail or T&S gang (rail transposing and tie patch gangs);

e) to install switch ties in turnouts in advance of a T&S gang (switch tie gangs);

f) to remove, clean and replace the ballast beneath cross ties (undercutting gangs);

g) to clear brush and vegetation away from the track (brush hog gangs);

h) to eliminate rail joints by thermite welding rail ends (thermite welder gangs);

i) and to perform a host of other types of programmed maintenance projects.

Some of these gangs, according to N&W, have fewer than ten employees, while others have more than eighty. Also, some are programmed to work in advance of or behind other production gangs, depending upon the task for which the gang was organized.

Secondly, N&W argues that the agreement derived from its proceeding should be of a continuing nature, rather than for a single production season. It maintains no limitation was contained in Section 11 of the report of PEB 219, nor is there any practical justification for such a limitation. N&W desires to establish a procedure which would allow employees to bid on and maintain positions on the gangs from some common seniority source. N&W states no purpose would be served by going through the process of negotiating and

arbitrating new seniority rules, as well as new rule for bidding on and obtaining positions, each year.

N&W submits the terms and conditions which it has proposed are appropriate and should be adopted.[8] Except where specifically provided otherwise, N&W requests that the N&W/BMWE schedule agreement, as modified by the PEB Report and the Imposed Agreement, govern the operation of the gangs. It suggests that it is essential for the efficient operation of the gangs that they not be subject to different rules while assigned on different territories. N&W notes that the rules it thus proposes are applicable currently to approximately 78% of its Maintenance of Way employees. It also submits these rules contain provisions which adequately cover the needs of such gangs.

The Position of the Union:

BMWE first argues that the Arbitrator must define the term "production gang" as it applies to Section 11. It submits that an appropriate definition of production gang is one which is mobile, highly mechanized, staffed by at least 25 employees and performs either rail installation or tie installation and surfacing work. It states that this definition is based largely upon the carriers' own arguments and evidence submitted to PEB 219.

As for the terms and conditions to be applied to the gangs, BMWE relies primarily upon the Award in BMWE and CSX Transportation, Inc., January 6, 1992 (Marx, Arb.), which was the first arbitration award under this procedure.

[8] In the interest of brevity, the positions of the parties will be incorporated within the Discussion below.

BMWE notes that CSXT is a rail carrier operating in the same general geographic area as N&W and competes with N&W for rail traffic in that area. BMWE further argues that BMWE-CSXT creates a standard for the Section 11 process, providing reasonable terms and conditions regarding those areas of greatest importance, i.e., duration of the agreement, meals and travel allowance, lodging, work week rules, qualification rules, free exercise of seniority and form of advertisement.[9]

BMWE denies that N&W has complied with the terms of the Procedural Award in that it has failed to identify the actual mile post locations within an operating division where the gangs will actually work during the production year. BMWE states that the failure to provide this information makes it impossible to determine if the proposed gangs are true Section 11 gangs. Additionally, BMWE submits employees will be unable to make informed choices as to which gangs they would prefer to work in without knowledge of the specific area over which the gangs will work. Accordingly, BMWE suggests that the Arbitrator has the authority to hold that N&W cannot establish any Section 11 gangs during the current calendar year. At the very least, it requests that the Arbitrator hold that N&W's failure to provide the information creates a presumption that none of the gangs in the N&W notice is a gang subject to the Section 11 process.

[9] See note 8 above.

DISCUSSION

Through the Report of PEB 219 and the Agreement imposed by Public Law No. 102-29,[10] N&W acquired the right to establish production gangs which operate either regionally or system-wide, without the need to abolish the gangs and re-establish them as they entered different seniority districts or were assigned to work throughout territory of "carriers under common control." The purpose of this arbitration is to establish and impose an agreement which would implement this right on the N&W property, which consists of the N&W, the former Wabash, the former NKP, the former Wheeling, and the former Virginian Railroads.[11]

It is not the intent of this process, nor the inclination of this Arbitrator, to expand or diminish the right of N&W to establish such gangs. Section 11, which authorizes the N&W to create these gangs, and provides the arbitral process for reaching an agreement in the event of the parties' failure to do so, does not stand by itself. Rather, it is a part of a comprehensive agreement which modifies the working conditions of employees with regard to a number of areas, including total compensation. The route followed in arriving at this "agreement" was complex and involved and by some may be deemed torturous. Notwithstanding parochial perceptions of injustice or excessive costs or

[10] 105 Stat. 169 (April 18, 1991)

[11] N&W along with NSR are a part of the Norfolk Southern Corporation. Article VI-J, Section 11 of the PEB Report permits a carrier to choose between existing regional and system wide gang rules and the regional and system wide gang rules provided by the Section 11 process. Norfolk Southern Corporation elected to have Section 11 apply to N&W and exercised the "savings clause" privilege for NSR. BMWE disputed NSC's entitlement to "split" N&W and NSR. The CIC upheld NSC election to have N&W under Section 11 and NSR retain its existing rules in the Answer to Issue No. 9, December 4, 1991. Accordingly, NSR must be treated as a separate carrier, the same as CSXT is to be treated as a separate carrier, in this arbitration proceeding.

concessions without adequate *quid pro quo*, the die has been cast and the product of PEB 219 and Public Law 102-29 is what the parties must live with until such time as they are able to negotiate something different.

It is in this context that the Arbitrator finds that the carriers who are a party to the Imposed Agreement have already paid for the rights gained in Section 11. Accordingly, the Arbitrator does not intend to revisit issues which were addressed by PEB 219.

The origination of this arbitration is Chapter VI, Findings and Recommendations of PEB 219. Part J of these Findings and Recommendations pertains to Maintenance of Way Employees. In Section 11(b)(5), PEB 219 stated the jurisdiction of arbitrators to be:

> **The jurisdiction of the arbitrator is to be confined to a determination of how the seniority rights of affected employees will be established on the combined or realigned seniority rosters.**

The Contract Interpretation Committee, however, in its Answer to Issue No. 1, Sub-question No. 5, expanded upon the arbitrator's jurisdiction. It wrote:

> **Section 11(b) of PEB 219's Report states that "either party may submit the matters set forth above to final and binding arbitration," while Section 11(b)(5) apparently contradicts Section 11(b)'s granting the parties' the right to submit matters to arbitration when it confines the jurisdiction of the arbitrator to a determination of seniority rights. The phrase "The matters set forth above" refers to items in a carrier's notice to establish regional or system-wide gangs. Those "matters" concern, inter alia, the "terms and conditions the carrier proposes to apply." It is the opinion of the Neutral Member of the Committee, in assessing the entirety of PEB 219's recommendations, that the limitation of the arbitrator's jurisdiction in Section 11(b)(5) is**

> **inconsistent with and substantively contrary to the broad scope of arbitration contemplated by Sections 11(a) and 11(b). Therefore, the Neutral Member of the Committee concludes that 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 contained in Section 11. BMWE counterproposals, that are subject matter related to a carrier's proposals regarding the establishment of regional or system-wide gangs, would also, logically, fall within a Section 11 arbitrator's jurisdiction.**
> (Underscoring in the original)

And while the form of arbitration created by Section 11 is interest arbitration, the Agreement, in Section 11(b)(3), imposes certain limitations upon the process which do not normally exist in traditional interest arbitration. For example, Section 11(b)(3) reads:

> **The arbitrator should conduct a hearing within thirty (30) calendar days from the date on which the dispute is assigned to him or her. Each party should 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 may 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.**

Significantly, this Section does not permit the acceptance of oral testimony at the hearing. The parties are required to present their entire case in written submission, including all statements of fact, supporting evidence and other relevant information. As there are no witnesses, there is no cross-examination or examination by the Arbitrator. Accordingly, much of the

information developed in traditional interest arbitration does not exist in this proceeding. This makes it difficult for the Arbitrator to apply arbitral standards which generally exist in such a process. For instance, the ability-to-pay criterion is generally considered of great importance in the determination of wage rates and other contract benefits.[12] In this case, the Arbitrator has no information about the cost benefits of regional or system-wide gangs on this property, nor the cost impact of the respective proposals in regard to items such as applicable rates of pay, travel expenses, etc. Any "evidence" available on these, and the other matters both parties are seeking to have included within this Award, is offered in the form of written declarations and attempted to be supported by vague generalities, often repetitive.[13]

The Arbitrator raises this point for two reasons. First, it has an effect upon the conclusions reached. Second, it has influenced the Arbitrator's provisions for resolution of future disputes which may develop between these parties. It is the Arbitrator's belief that the quality of his decision is enhanced by the quality of the information made available to him.

The Arbitrator understands this process to result in an Agreement which will be the basis for establishing regional and system-wide production

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12 Elkouri and Elkouri, How Arbitration Works, 4th ed., p. 825

13 To illustrate the problem, consider one facet of the parties' presentations. BMWE stresses that several of the items it seeks to have included within this Award are included in the BMWE-CSX Award, with N&W attempting to justify a number of its demands on NSR practices and agreements. Problems abound in accepting either presentation as authoritative in this type of interest arbitration. NSR practices and agreements are not presently subject to Section 11 procedures, that carrier having exercised a saving clause to keep in place its existing rules and practices. BMWE-CSX, while characterized as an arbitration award, was in actual fact the product of negotiations and agreement of those parties and this result is stated as such within the "award."

gangs this year and in future years. The agreement will cover staffing of such gangs, as well as the working conditions applicable to them. It does not make sense for the parties to go through this process each year, as BMWE now suggests. To be sure, BMWE was concerned, during the Special Board hearings, that there would not be a process which would result in continual arbitration at great expense to the Organization.[14] Thus, it is not necessary for N&W to have included in its notice the precise territory, by mile post locations, where the gangs will work during the current production season. It is sufficient that N&W has defined the work of each gang and the territorial limits over which they might work. Through the bulletin process, the employees will know the full scope of the assignments, thereby being able to make informed choices as to which gangs they prefer.

The parties are in disagreement as to what constitutes an appropriate gang. The gangs in N&W's notice range in size from a rail gang with 3 foremen, 35 laborers and 48 operators to a thermite welding gang with one welder and one helper. N&W has identified 30 distinct gangs which fall into 18 separate classifications. Of these, BMWE agrees that only rail gangs and timber and surfacing gangs are appropriate. The smallest of the gangs found acceptable by the BMWE has one foreman, 6 laborers and 17 operators, working with 9 different types of machines. Of the remaining gangs proposed by N&W, the largest has 8 employees, including a foreman and 6 machines.

BMWE has proposed a very limiting definition of Section 11 gangs. First of all, they should be limited in scope to rail installation or tie installation and

[14] Special Board (102-29) Transcript, pages 569-572.

surfacing. Secondly, BMWE's definition would limit the gangs to at least 25 employees. Finally, they must be mobile and highly mechanized. This definition would cover only 4 of the gangs proposed by N&W. By contrast, N&W broadly defines Section 11 gangs as those which perform programmed work. N&W rejects any limitation based upon size, equipment consist or performance of specific functions. In support of its definition, N&W relies upon PEB 219 language in Section 11(a) which states:

> **These gangs will perform work that is programmed during any work season for more than one seniority district.**

N&W's definition is overly broad. Significantly, it was the intent of Section 11 to provide for the establishment of production gangs to work on a regional or system-wide basis. This is exactly what the carriers sought from the PEB. In their presentations to PEB 219, the carriers wrote:

> **The carriers ask this Board to recommend the adoption to two independent proposals relating to the deployment of maintenance of way ("MOW") and signal forces across often extensive operating territories. First, that the railroads be authorized, where they do not now have such authority, to establish, on regional and system-wide bases, signal and MOW production gangs made up of employees who may perform work over the territory of any carrier or group of carriers under common control, without regard to seniority districts or other territorial work restrictions.**[15]

[15] Carriers' Submission to PEB 219, "Establishing Regional And System-Wide Gangs And Combining And Realigning Territorial Jurisdictions For Maintenance OF Way and Signal Employees, 1990," page 1.

A key element of the carriers' request was the need to eliminate the training of newly assigned employees each time the gang is re-bulletined as it crosses seniority district lines. In this regard carriers wrote:

> **In short, more experienced, increasingly productive workers are repeatedly replaced by less experienced, less productive workers. training and orienting each gang of workers new to the project adds substantial costs that would not be incurred if experienced gangs could follow thU work over seniority district lines. That production gangs tend to be relatively large, sometimes consisting of more than a hundred employees, exacerbates the problem. See Appendix A showing the equipment and manpower setup for various production gangs.**[16]

In Appendix A, the carriers illustrated a Conrail dual rail laying gang with 113 employees, a Union Pacific rail laying gang with 102 employees, a Union Pacific tie gang with 56 employees and a Union Pacific system surfacing gang with 36 employees.

The only other definition from carriers' presentations is quoted above at page 9. Under this definition, production gangs perform the major maintenance and repair projects that railroads usually program in advance, as opposed to gangs which perform routine day-to-day maintenance.

It is evident from all of the material presented to the Arbitrator that the carriers considered size and degree of mechanization to be the major factors in their request to PEB 219. It was from these presentations that PEB 219 formulated its recommendations. If the carriers intended to include, for instance, a gang which consists of only a welder and a helper, they gave no

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16 Ibid., pages 3-4.

such indication to PEB 219. Accordingly, this Arbitrator is unwilling to accept the notion that a gang consisting of but a welder and a helper, as well as other relatively small gangs, was intended to be included within the definition of a regional or system-wide production gang by PEB 219.

Nonetheless, the Arbitrator, for a host of reasons,[17] is reluctant to adopt a definition such as that proposed by BMWE, which sets minimum staffing requirements and limits N&W to only certain types of work. Instead, the Arbitrator chooses to adopt some general concepts about production gangs:

> **First - production gangs must be relatively large and relatively highly mechanized to the extent that a significant hardship would result if N&W were required to rebulletin the gangs as they crossed seniority district lines.**
>
> **Second - the work of production gangs must be specifically programmed in advance of the production season.**

This means, for example, a production gang will be assigned to replace jointed rail with welded rail over a defined territory. It does not include, for instance, a gang which is established to operate over the system or a region to replace defective switch ties wherever they might find them.

N&W has the burden of proving[18] the gangs that it proposes are production gangs, as such were envisioned by PEB 219. Except for rail gangs

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17 Say for example that the minimum staffing requirement for a production gang was set at 20 employees. If, for legitimate reasons the staffing dropped to 19 would a carrier be required to immediately treat it as a regular maintenance or section gang and until such time as the staffing again exceeded minimum numbers, work it under pre-existing conditions? Also, if a gang worked at any time with less than the minimum number of employees, would others be entitled to compensation as a result? Etc.

18 At the May 6, 1992 hearing the Arbitrator requested that N&W put its case on first, noting that by doing so it did not shoulder similar proof standards a petitioner or plaintiff must initiate to make a *prima facie* presentation inorder to generate rebuttal from an opponent. In doing so it was not intended that accepted standards of proof required in interest arbitration would be excused. Proof or

and timber and surfacing gangs, the N&W has not met this burden. The proofs available on rail gangs and timber and surfacing gangs positively manifest that they are relatively large and highly mechanized, as well as being specifically programmed in advance of the production season. The proofs available on the remainder of the gangs contained in N&W's notice do not satisfy these two tests. It should be noted that the Arbitrator is not concluding that the remainder of the gangs are not production gangs, or that they their work functions could not be included as a component of a production gang,[19] only that the Arbitrator finds that there is insufficient information to reach a conclusion that they satisfy the two tests necessary to meet the definition of a production gang envisioned by PEB 219.

Turning next to the terms and conditions under which gangs may operate, the parties first address the allocation of seniority. They are in agreement that all current employees should be placed on a single seniority roster according to their present seniority dates in their respective classifications. N&W, however, suggests that there be a second seniority roster containing the names of those employees who have been assigned to Section 11 gangs. It argues that this would give them preference for future vacancies, thereby recognizing their expertise on such gangs, as well as their demonstrated willingness to serve on Section 11 gangs. The Arbitrator agrees with BMWE that this second roster is unduly restrictive.

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persuasion standards in interest matters is expressed adequately in Hill and Sinicropi, Evidence in Arbitration, 2nd. Ed., p. 45: "While there is no burden of proof per se on either party in an interest case, if one party is making an unusual demand or one that substantially alters past practice, it is not uncommon for the interest neutral to place the burden of persuasion upon the proponent of such a proposal."

19 For example a Rail Pickup Gang, or at least the tasks associated with such a gang, could possibly be included as part of a production rail gang.

Recognizing that there are differences in the seniority rosters from one part of the N&W to the next, the Arbitrator establishes four rosters:

Roster 1	Foremen
Roster 2	Assistant Foremen
Roster 3	Machine Operators
Roster 4	Track Laborers

Employees are to be placed upon the respective rosters according to their earliest date in each classification, with a symbol indicating the district on which they hold seniority. Any disagreement as to an employee's placement on the seniority roster should be promptly resolved between the BMWE Vice President assigned to N&W and Carrier's Director Labor Relations.[20]

The process of filling positions on the gangs encompasses the bulletin process and the selection process. The format of the bulletin will be discussed below, as it requires resolution of certain issues regarding conditions sought by the parties.

It is necessary to develop a uniform bulletin and assignment process for production gangs, as each part of the N&W has a different rule. In the development of a uniform bulletin and assignment process for production gangs, the Arbitrator again reaffirms that it is not the intent of this Award to grant to the parties more than they already possess collectively under existing rules.

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[20] For purposes of placement on the four rosters established by this Award only existing dates on component rosters will be recognized. No individual will be allowed to generate a seniority roster dispute based upon an antecedent claim that his ranking and date on one of the component rosters was in error.

The proposal of N&W is, to some extent, based upon the premise that there will be a separate seniority roster for employees who have already worked on Section 11 gangs. In the absence of such a roster, N&W would make assignments first to the senior qualified applicant whose name appears on the System List in the rank corresponding to the position, and then in successively lower ranks. In the event that there is no qualified applicant, assignment would be made to the senior applicant whose name appears on the System List who has demonstrated sufficient fitness and ability, the Carrier to be the judge. Although BMWE objects to the possibility of unfairness if the N&W is the sole judge of fitness and ability, the Arbitrator finds that this provision is substantially similar to the existing N&W Rule 8, which provides that management shall be the judge of fitness and ability, subject to appeal pursuant to Rule 30, which governs grievances. In this respect, N&W's proposal is not unreasonable. Claims contending that an employee was unfairly denied the opportunity to demonstrate fitness and ability may be appealed as grievances.

Both parties would allow employees to bid on any and all gangs bulletined. Both parties also recognize that positions which are not filled through application may be filled by hiring new employees. Under no circumstances may N&W force an employee to a Section 11 gang.[21] Carriers' pleas to PEB 219 were directed toward stability and productivity within the gang. They cannot be construed as a device to place individuals who do not

[21] This, however, is not intended to modify any provisions of employee protective conditions which might require an employee to exercise seniority to positions available to him to maintain his protective payments or status.

wish to work on gangs, for whatever the cause, to accept assignment under penalty of seniority forfeiture.

The timing for the posting of bulletins and the assignment of employees must be uniform, as well. Both parties recommend that bulletins be posted for 15 days at all reporting locations, with copies to the General Chairmen, Local Chairmen and all Foreman. BMWE asks that copies also be posted at all headquarters and lodging facilities. It further asks that the General Chairmen be given their copies at least one week in advance of general distribution. This latter request is to allow the General Chairman to notify N&W of errors in the bulletin. These additional provisions do not exist in current Agreements between the parties and, therefore, will not be included in this Award.

The parties also harbor differing views on the timing of the assignment of positions. BMWE asks that positions be awarded within 15 days of the close of the bulletin. N&W would make assignments at least 15 days prior to the start of the work of the gang. Underlying this difference is the issue of when N&W must actually start employees on the gangs. BMWE is concerned N&W will bulletin the gangs and not begin them for a considerable period of time. This concern is supported by N&W's desire to list tentative starting dates for the gang in the bulletin. N&W, however, may wish to post all bulletins at the same time, even though all gangs may not commence at the same time. There is value in this, particularly if employees must stay on the gang to which assigned, as requested by N&W.

Accordingly, it is the opinion of the Arbitrator that N&W may bulletin positions on gangs, regardless of when the gang starts. The bulletin will be

opened for 15 days and awarded within 15 days from the close of the bulletin. Actual assignments will not commence until the starting date stated in the bulletin. Under this procedure, employees will retain their prior status until the gang is scheduled to start.

N&W has proposed a "bid and hold" provision which would require an employee to remain on a gang once assigned thereto. BMWE considers this restriction unfair, particularly in light of the fact that these gangs, and their operation, are unknown to the employees. There is merit, however, in N&W's request to limit turnover of employees on these gangs. A main underpinning of carriers' request for the relief it secured from PEB 219 in this area was the expense caused by turnover necessitated by existing seniority limitations. To provide some protection to N&W so that employees would not exercise seniority simply because the gang is working too far from home is not unreasonable.

Accordingly, employees who are awarded positions on Section 11 gangs will not be permitted to bid off such gangs for a period of 90 calendar days from the first day of service on the gang. There may be times when it is in the mutual interest of N&W and the employee to bid off, however, in such cases, the employee should be permitted to do so upon the concurrence of the General Chairman and the Director Labor Relations, or their designates. This procedure may also be used in cases of extraordinary hardship, but the failure to concur shall not be grievable. Additionally, for the same 90 day period, employees working on Section 11 gangs may not be displaced by an employee not assigned to a gang, unless the employee seeking to displace would be furloughed except for a displacement on a gang.

As for the work week of the gangs, N&W and BMWE both propose adoption of the National 40 Hour Work Week Rule, as modified by Section 5 of the PEB Report and Special Board No. 102-29. BMWE, however, asks for a provision to allow the accumulation of rest days. This additional request is not provided for in existing rules and is not germane to the uniform application of rules on the gangs.

Although the Arbitrator had previously stated, in the Award on Procedural Issues,[22] that the issue of work force stabilization is addressed in Article XIV of the Imposed Agreement and beyond his jurisdiction, it is not intended that this process disregard it altogether. Rather, the Arbitrator does not have jurisdiction to entertain questions on the modification of these provisions. Both parties have agreed that the provisions are applicable and they will be incorporated into the Agreement.

With regard to the format of the bulletins, the parties agree that all bulletins contain the following information, type of gang and gang number, list of positions (including types of machines in the gangs), rates of pay for advertised positions, special remarks. In addition, BMWE requests that bulletins include the type of lodging provided and the initial lodging location, the starting date and reporting location, the assigned work and rest days, a scheduled of the territory and zones over which the work is programmed, the assigned time of meal period and the hours of assignment with starting and stopping times. BMWE, on the other hand, would include the starting time on

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[22] Attachment 1, page 19.

the first day of work, the tentative first day of work and the initial assigned rest days.

As noted above, the Arbitrator has determined that the bulletin must state a firm starting date, not a tentative date. By seeking an assigned meal period time, BMWE is reaching beyond present agreements. There is no basis for modifying the present rules regarding meal periods. The agreement provides for identifying the territory over which the work is programmed, but this is for information purposes only. It is not the intent to establish a guarantee that the gang will remain employed for the duration of the schedule.

Accordingly, bulletins must include the following:

1. **Type of gang and gang number.**
2. **List of positions (including types of machines in the gang)**
3. **Rates of pay for each territory over which the gang is programmed to work**
4. **Starting date and location**
5. **Rest days**
6. **Hours of assignment**
7. **Tentative schedule of the territory over which the work is programmed, with the statement that this is for information purposes only and is not intended to establish a guarantee that the gang will remain employed for the duration of the schedule.**
8. **Remarks.**

Although both parties have requested additional conditions be included within the Agreement resulting from this process, the Arbitrator finds each of these requests to be beyond the scope of existing rules and they are not necessary to resolve inconsistencies which result from the establishment of Section 11 gangs which will work across territories of N&W which now are covered by differing agreements. In particular, both BMWE and N&W have proposed rates of pay which would be applicable to employees assigned to Section 11 gangs. Both have attempted to justify the rates proposed and the methodology followed in their development on a variety of grounds. As noted earlier, though, it is impossible for the Arbitrator to assess the merits of either proposal in accordance with appropriate and acceptable arbitral standards. To adopt either parties proposal, or something in between, would be an arbitrary exercise that must be avoided if proper foundation is absent.

Accordingly, it is the opinion of the Arbitrator that the parties are best served, and the Section 11 process is adequately satisfied, by the retention of existing rules except where specifically modified herein. To accomplish this, and to eliminate inconsistencies, whatever rules are applicable on the territory where a Section 11 gang commences service on the first work day of each work week will apply to the entire gang for that entire work week, including rest days.[23] For instance, the rates of pay for the week will be determined by the applicable rates on the territory where the gang starts

[23] "Whatever rules are applicable on the territory" means that if the Gang commences its work week on the N&W the rates and rules of that Agreement are applicable. Likewise if the start of the work week is on NKP territory, NKP rates and rules apply, etc. Individual employees will not be governed by the rules and rates of pay applicable to their home territories but instead the rates of pay and rules applicable to the territory where the work is being performed. The situation will be no different from a case of a furloughed NKP trackman accepting assignment to an N&W maintenance gang. Notwithstanding what rules obtained on NKP, while working on N&W he would be governed by N&W conditions.

work that week. Bulletins, therefore, must list all applicable rates of pay for the positions bulletined.

Based on the argument that Section 11 gangs are conceptually new, BMWE has proposed the establishment of an oversight committee and the right to reopen the terms of the Agreement at the start of each production year. The latter request is based on BMWE's assumption that N&W must renew the entire notice process each year. The Arbitrator does not find this to be the case. This Award establishes the conditions under which Section 11 gangs will operate on this property until canceled under procedures of Section 6 of the Railway Labor Act[24] or changed either by agreement between the parties or through the dispute resolution process provided herein.

Accordingly, N&W may serve notice at any time of its intent to create additional types of Section 11 gangs. If the parties, after thirty days following the notice, are unable to agree the gangs proposed by N&W are appropriate Section 11 gangs, either party may request expedited arbitration. Should either party request cancellation of the Agreement resulting from this Award it may serve an appropriate RLA Section 6 notice, consistent with existing moratorium provisions. Should either party request modification of this Agreement, it shall serve notice upon the other party, and negotiations shall commence within ten days of such notice. If the parties are unable to reach agreement on the request to modify the Agreement after thirty days, either party may request the matter be submitted to arbitration, except that neither party may request arbitration until two years from the date of this Award.

[24] 45 USC § 156.

Any disputes arising under this agreement, except that which is specifically indicated to be non-grievable, shall be resolved in accordance with Section 3 of the Railway Labor Act.[25]

The text of the Agreement imposed by this Award is appended hereto as Attachment 2.

AWARD

Issue A, as stated by N&W in its submission, is answered in the negative.

Issue B, as stated by N&W in its submission is answered:

> **The Arbitrated Agreement shall be as provided in Attachment 2, appended hereto and made a part hereof.**

The Arbitrated Agreement shall be effective June 15, 1992 and continue in force until canceled, changed or modified, as provided therein.

John C. FLETCHER, Arbitrator

Mt. Prospect, Illinois
June 12, 1992

[25] 45 USC § 153

SECTION 11 ARBITRATION
pursuant to the
SETTLEMENT AGREEMENT
embodying recommendations of
PRESIDENTIAL EMERGENCY BOARD NO 219
imposed by
PUBLIC LAW NO. 102-29

NORFOLK & WESTERN RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Before John C. Fletcher, Arbitrator

AWARD ON PROCEDURAL ISSUES

April 6, 1992

This matter came to be heard in the offices of the National Mediation Board, in the city of Chicago, on March 30, 1992. Norfolk and Western Railway Company (N&W, Company or Carrier) was represented by:

Jeffrey S. Berlin, Esq.
Mark E. Martin, Esq.
RICHARDSON, BERLIN & MORVILLO
William P. Stallsmith, Jr., Esq.
General Counsel
Robert S. Spenski
Senior Assistant Vice President Labor Relations
William L. Allman, Jr.
Director Labor Relations
Mark McMahon
Director Labor Relations

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

Steven V. Powers
Assistant to the President

Richard A. Lau
Vice President, Southeastern Region
Donald F. Griffin, Esq.
HIGHSAW, MAHONEY & CLARKE, P.C.

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 12714[1] 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. Although negotiations continued, the parties were unable to resolve their dispute and a brief strike occurred. At this point Congress intervened, enacting Public Law 102-29[2], which ultimately had the effect of imposing the recommendations of PEB 219 as though they had been arrived at by agreement of the parties under the Railway Labor Act[3]. On February 6, 1992, BMWE and the various carriers[4] adopted the "Imposed Agreement Pursuant to Public Law 102-29, July 29, 1991," which reduced PEB 219's recommendations to formal contract language.

Section 11 of the portion of PEB 219's report dealing with Maintenance of Way Employees recommended changes which would allow carriers to establish system-wide and regional gangs; allowing such gangs to work over

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

[2] 105 Stat. 169 (April 18, 1991)

[3] 45 USC §§ 151-188

[4] Including N&W.

specified territory of a carrier or throughout its territory, including all carriers under common control. Section 11 proposed a procedure to be followed when a carrier chose to establish such gangs, including an arbitration procedure should the parties be unable to reach agreement concerning the changes proposed by the carrier.

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

The procedure for establishing regional or system-wide gangs was set forth in Article XIII of the Imposed Agreement[5], while the arbitration procedure was incorporated with similar procedures in Article XVI. Consistent with Section 12, an Interpretation Committee was created under Article XVIII[6].

On December 13, 1991, N&W serviced notice upon the several BMWE General Chairmen, representing its employees, of Carrier's intent:

> **. . . to establish regional and system gangs (hereafter Designated Programmed Gangs) for the purpose of working throughout the system of the Carrier (including NW, the former Wabash, the former NKP, the former Wheeling, and the former Virginian).**

To this notice, N&W attached terms and conditions which it proposed to apply to such gangs. The parties met in conference to discuss this notice on

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5 Consistent with references in the parties' briefs, system-wide and regional gangs will be referred to hereafter as Section 11 (§11) gangs.

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

December 30 and 31, 1991. BMWE presented a counterproposal on January 6, 1992, which was discussed in conference on January 8 and 9, 1992. N&W presented a compromise proposal on January 15, 1992 which was answered by a modified BMWE proposal on January 17, 1992. When the parties were unable to reach an agreement, N&W gave notice to BMWE of its intent to submit the matter to arbitration. Through the selection process provided in Article XVI of the Imposed Agreement, the undersigned was named as the Arbitrator.

In a three way telephone conversation occurring on March 6, 1992, between Mr. Spenski, Mr. Lau and the Arbitrator, hearing scheduling was discussed. Mr. Lau indicated that several unnamed procedural issues required resolution before a hearing on the merits of N&W's notice could proceed. Accordingly, BMWE was directed to provide its statement of procedural issues to the Arbitrator and N&W by March 18, 1992, and a hearing on these issues would be held on March 30, 1992, at which time a date for hearing the merits of the matter would be agreed upon. BMWE and N&W both submitted briefs[7] (with extensive exhibits) at the March 30th hearing and at the conclusion of their presentations agreement was reached that the Arbitrator would have his decision on "procedural matters" in the hands of the parties by April 8, 1992, with the merits hearing to get under way April 20 and 21, 1992, in Washington, D. C.[8]

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[7] N&W objected to acceptance of BMWE's supporting material and brief on the grounds, *inter alia*, that it was outside the scope of the understanding reached in the three-way phone conversation between Spenski, Lau and the Arbitrator. In support of its motion it relied upon its recollections of the substance of the conference call and several letters exchanged between Spenski, Lau and the Arbitrator. N&W's objection was overruled, mainly on the grounds that the brief phone conversation dealt with a variety of matters, not the least of them being "procedural issues" and the Arbitrator could not recall that definitive understandings were obtained as to briefing of the issues, only that a statement of the issues would be filed by March 18, 1992. BMWE's brief and exhibits were accepted as a part of the record in this matter.

[8] BMWE insisted that the dates be tentative, conditioned upon the Decision on procedural issues.

THE ISSUES:

In its March 16, 1992, letter BMWE set forth its procedural issues to be:

Issue No. 1 - Definition of "Regional Production Gang"

Article VI-J-Section 11 of the Report of the Presidential Emergency Board No. 219 stipulates that carriers have the right to serve notice to establish regional or system-wide production gangs. The Brotherhood of Maintenance of Way Employees requests answers to the following threshold questions:

Sub-Question No. 1

What is the definition of a regional production gang?

Sub-Question No. 2

Are each of the gangs identified in Attachment "A" of the BMWE's Counterproposal dated January 17, 1992 to the Norfolk & Western Railway Company's (N&W) notice dated January 15, 1992, regional production gangs?

Sub-Question No. 3

Do any of the gangs identified in Section 1 of the N&W's revised notice of January 15, 1992 fit within the definition of regional production gang in Sub-Question No. 1 above?

Issue No. 2 - Regional and system-wide gang notices under Section 11(a)

If the Norfolk & Western ("N&W") intends to initiate the procedures for establishing regional and system-wide gangs under Article VI-J-Section 11 of the report of Presidential Emergency Board No. 219, what information concerning the nature and operation of the gangs must carrier furnish to the Organization in the initial written notice contemplated by Section 11(a)?

Issue No. 3 - Contents of proposals for arbitration under Section 11(a)

Are the parties required to present to the Section 11 Arbitrator their respective last written proposals to their bargaining adversary without substantive modification?

PERTINENT CONTRACT LANGUAGE:

The pertinent contract provisions necessary to a resolution of the procedural facet of this dispute are Article XIII and Article XVI of the Imposed Agreement. These Articles provide:

ARTICLE 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 (including all carriers under common control) 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 proposed 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 provided for in Article XVI. BMWE counter proposals, that are subject matter related to a carrier's proposals regarding the establishment of regional or system-wide

gangs are also within the arbitrator's jurisdiction.

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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 - 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.[9]

POSITION OF THE PARTIES

The Position of the Union:

BMWE proposes that Sub-Question No. 1 to Issue No. 1 be answered as follows:

> **Regional production gangs, except for regional production gangs engaged in surface correction work, are rail removal and installation and tie and surfacing gangs that are mobile and heavily mechanized; have twenty-five (25) or more assigned employees who begin work each day at a common reporting site; and continuously perform specific programmed major track repair and replacement work that is programmed over two or more specified seniority districts but less than all seniority districts in the N&W system, including carriers under common control. Regional production gangs engaged in surface correction work are heavily mechanized, mobile gangs that have ten (10) or more assigned employees who begin work each day at a common reporting site and continuously perform specific programmed surface correction work that is programmed over two or more specified seniority districts but less than all seniority districts in the N&W system, including carriers under common control.**

[9] On procedural issues the Contract Interpretation Committee, in its answer to issues No. 11 and 13 held in part that ". . .(4) any 'procedural issues' should be raised with the arbitrator prior to or during the initial stages of the arbitration and should be resolved by the arbitrator within seven (7) working days of the day such issues are presented to him/her, . . ."

BMWE further proposes that Sub-Question No. 2 be answered in the affirmative and that Sub-Question No. 3 be answered as follows:

> **In order for a gang to be considered a regional production gang, it must meet the definition provided in the answer to Sub-Question No. 1 above. Based upon that answer, the gangs identified as engaged in tie patching, thermite welding, ditching and yard cleaning cannot be regional production gangs. Those gangs identified as engaged in rail installation; timber and surfacing; or rail transposing may, on a case by case basis be classified as regional production gangs based upon their employee complement, the type of equipment utilized and whether such work was programmed, and if it was, whether the work was programmed over two or more seniority districts.**

BMWE deems it essential to define "regional gangs" and "production gangs" as those terms relate to §11 gangs. It relies upon the language of §11 of the PEB 219 report, testimony and submissions by the carriers before PEB 219, as well as testimony before the Special Board convened to consider clarifications and modifications to the PEB 219 report[10] . With respect to the difference between system-wide and regional gangs, BMWE argues it is important to make a distinction because the former would offer work opportunities to employees across the system, while the latter would draw its employees from the territory on which the regional gang would work. BMWE contends this is a matter of basic equity to the extent that employees who would otherwise be displaced by the activity of the system or regional gang have the opportunity to opt into the work.

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10. Special Board (102-29) Interpretation and Clarification of the Report of Emergency Board No. 219 was established pursuant to Public Law 102-29 and consisted of Robert O. Harris, as Chairman, and Margery F. Gootnick and George S. Ives as Members.

In defining production gangs, BMWE urges the Arbitrator to consider definitions offered by the parties before PEB 219, examples of actual gangs identified by carriers before PEB 219, statements of PEB 219 or the Special Board which indicate the intent of PEB 219, arbitral precedent involving this Carrier and others, trade publications' use of the term and public policy and humanitarian concerns. It submits that production gangs be limited to gangs of a specified minimum size and a high degree of mechanization. Further, it argues the work of such gangs be limited to major maintenance and repair projects which railroads generally program well in advance. BMWE submits these are the only types of gangs which would satisfy the carriers' intent of achieving savings as a result of not being required to rebulletin positions as the work moves to a different seniority district. BMWE wishes to distinguish production gangs from maintenance gangs which are presently performing work in relatively limited geographical areas with limited amounts of equipment, such as section gangs which perform routine maintenance.

BMWE proposes the following answer to Issue No. 2:

> **In order to properly institute Section 11 regional and system-wide gang procedures, the N&W must furnish the following information, in writing, to the proper BMWE representatives.**
>
> **1. The total number and types of production gangs the carrier intends to establish for the annual production season in question and the type of work each gang will perform.**
>
> **2. The number and types of positions on each gang (*i.e.*, number of trackmen, number of machine operators, number of foremen, etc.).**
>
> **3. The number and types of machines to be used on each gang.**
>
> **4. The work schedule for each production gang, including the geographical**

> territory in which the gang will work and the dates the gang will be in operation.
>
> 5. Identify any production work that will be contracted out during the production season in question.
>
> 6 Complete proposed terms and conditions of employment on the production gangs, including wages, away from home meal and lodging provisions and all applicable work rules.
>
> 7 When and how the carrier proposes to apply labor protection provisions and work force stabilization provisions.

BMWE submits the above answer would require N&W to provide a level of notice and information necessary for BMWE to make reasoned counter-proposals to the initial notice, as well as permit the parties to engage in good faith bargaining over the terms and conditions applicable to the proposed regional system production gangs. BMWE relies upon the Interpretation Committee's answer to Issue 11 and 13, which reads, in part as follows:

> PEB 219 did not anticipate that either party would seek to gain an unfair advantage or strategically delay the arbitration proceedings, either by failing to provide necessary identifying data regarding the nature and operation of the gangs sought to be established or by failing to cooperate in the establishment of the arbitration tribunals.

BMWE takes this language, particularly the phrase "nature and operation" as a requirement that N&W identify in detail the specific gangs which are the subject of its notice. It submits the failure to include in the initial notice all of the specific information contained in BMWE's proposed answer would result in the Arbitrator creating a hypothetical resolution of the dispute, which it argues is the antithesis of the intent of Article XVI of the Imposed Agreement.

To Issue No. 3, BMWE proposes the following answer:

> **Yes. The purpose of Section 11 arbitration is to resolve disputes between the parties regarding the establishment of system and regional production gangs that could not be resolved through collective bargaining. Accordingly, it is assumed that the last written proposals presented by the parties to each other represent their last, best offers and it is then the function of the Arbitrator to fashion an agreement within the limits of the proposals made by the parties during the course of their negotiations.**

BMWE argues that the above answer would promote the arbitration process by limiting the arbitrator's jurisdiction and by presenting either party from abandoning positions it purportedly took during good faith negotiations. This limitation, says the BMWE, would channel the arbitrator toward and award which is within the limits of acceptability of both sides. It further asserts the arbitrator's jurisdiction is limited to the parties' written proposals, and reasons it would be illogical to assume that the parties would be free to change those proposals at arbitration. BMWE distinguishes this arbitration from final-offer arbitration, however, in that the arbitrator is not restricted to choosing one of the two proposals, as finally submitted. Finally, BMWE suggests that the limitation it proposes would prevent "regressive bargaining."

<u>The Position of the Carrier:</u>

N&W contends that Issue No. 1 is not a procedural issue in that it does not relate to the validity of its December 13, 1991 notice or the process for obtaining an adjudication on the merits of the dispute arising from that notice, but rather, to the substance of the agreement to be imposed.

Notwithstanding this position, N&W would define a regional or system-wide gang as "one organized around a specific task or function to perform work that is programmed in advance and which covers more than one seniority district on NW." It denies that the gangs identified in BMWE's January 17, 1992 counterproposal are "regional" gangs as BMWE uses that term, but agrees they are §11 production gangs. N&W further objects to BMWE's characterization of its January 15, 1992 proposal as a revision of its December 13, 1991 notice or as a "last, best offer," noting it did not identify any gangs in that compromise proposal. N&W states that the December 13, 1991 notice is a proposal for an agreement which would give it the right to bulletin and fill jobs on gangs that will perform production work across seniority boundaries.

N&W acknowledges Issue No. 2 is a procedural question, referring to the Interpretation Committee's decision that it is. N&W does not agree, however, with BMWE's understanding of the intent of §11. According to N&W, §11 gave N&W the right to obtain an agreement which specifies the terms and conditions that will permit it, on a continuing basis, to bulletin and fill jobs on §11 gangs.

N&W denies Issue No. 3 is a procedural issue. It asserts BMWE is attempting to put limits around the substantive terms and conditions which the arbitrator may adopt in the merits phase of the proceedings. Nevertheless, it disagrees with BMWE's position, arguing the purpose of the merits arbitration is to consider the proposal contained in N&W's December 13, 1991 notice. Although N&W agrees the arbitrator may consider offers of compromise made by the parties during the negotiating period, it does not agree the arbitrator is bound by the limits of a rejected negotiating proposal.

DISCUSSION

Issue No. 1:

The question of defining regional production gangs has been addressed by the Interpretation Committee. Issue No. 1, Sub-question No. 3 before that Committee was asked and answered as follows:

> **What is the difference between Regional Gangs and System-wide Gangs?**
>
> **PEB 219 made no distinction between regional and system-wide gangs when it referenced such gangs in its recommendations. It is generally recognized that regional gangs may perform work on more than one seniority district but on less than all seniority districts, while system-wide gangs may perform work on all seniority districts of a carrier's system, which system would include carriers under common control on that system.**

Issue No. 2 was asked and answered as follows:

> **What is the definition of "production gang" for purposes of facilitating implementation of the applicable provisions of PEB 219?**
>
> **The term "production gang" or "production crew" is a common term used by the parties, and it is a term that has been in use in the railroad industry for decades. The definition of the term is not found in any specific document, either a collective bargaining agreement or a glossary of railroad terms, presented to PEB 219 in evidence or to this Committee. The BMWE and the Carriers used the term throughout the course of their detailed presentations to PEB 219, without, apparently, finding it necessary to define that term for the Board. It is true, as the Organization points out, that the need to establish production gangs, regional gangs and system-wide gangs, consistently used illustrative examples of such gangs which characterized them as "heavily mechanized" and "mobile," and he described such gangs as continuously performing specific, programmed, major repair and replacement work utilizing a substantial number**

> **of employees. However, while that general description would, apparently, meet the definition of "production gang" in many circumstances, the Neutral Member of the Committee cannot, reliably, at this time, fashion a hypothetical definition in the absence of specific facts which raise the issue of whether a particular grouping of maintenance of way employees meets the definition of a production gang.**

While the BMWE proposed answer incorporates the Interpretation Committee's answer to Issue No. 1, Sub-question No. 3, as it relates to the difference between regional and system-wide gangs, it defines "production gangs" by the nature the work performed, the size of the work force, etc. The Interpretation Committee has suggested that this might be an appropriate definition in many circumstances, but declined to impose a definition on all carriers under all circumstances.

Procedural issues are, by accepted definition, disputes which arise relative to the procedure of the arbitration. Generally, they are questions regarding compliance with time limits, the appropriateness of parties, the propriety of the carrier's notice, and the format of the arbitration proceeding. The issues raised by BMWE's question and answer, however, go to the merits of the negotiations between the parties. They are not procedural issues, and the Arbitrator, at this stage of these proceedings, will not define a regional production gang, nor will he determine whether or not the gangs identified in either N&W's communication of January 15, 1992 or BMWE's communication of January 17,1992 are regional production gangs.

Issue No. 2:

Issue No. 2 is really the fundamental dispute in the present proceeding. As noted by N&W, the Interpretation Committee has ruled this to be a

procedural question. Issue No. 13, Sub-question No. 1 before that Committee was:

> If a carrier intends to initiate the procedures for establishing regional and system-wide gangs under Section 11 of PEB No. 219, what information must the carrier furnish to the Organization in the initial written notice contemplated by Section 11 (a)?

The relevant portion of the committee's answer is as follows:

> . . . (6) the question of whether a carrier has provided the Organization with sufficient identifying data regarding the nature and operation of regional or system-wide gangs which it seeks to establish is a "procedural" issue properly presented to the Section 11 arbitrator for his/her consideration, (7) if the Section 11 arbitrator concludes that a carrier has, prior to the scheduled arbitration, failed to provide adequate identifying data regarding the nature and operation of the regional or system-wide gangs sought to be established and that the Organization has been deprived of a fair opportunity to respond, then the Section 11 arbitrator has the authority to (a) request the parties to extend the arbitration for a reasonable period of time or (b) consider a carrier's failure to timely provide adequate data as prejudicial insofar as the request to establish certain or all of the noticed regional or system-wide gangs, but that the alleged failure to provide what the Organization considers to be a "proper and complete advance written notice" regarding the nature and operations of proposed regional or system-wide gangs will not toll the time limits of Section 11, . . .

N&W argues that §11 gave it the right to bulletin and fill jobs on gangs that will perform production work in two or more seniority districts, and to obtain an agreement specifying terms and conditions that will enable it to exercise that right on a continuing basis. Its notice, therefore, would only set forth contract terms under which §11 gangs would be established and would work. Each year N&W would bulletin its production gangs in accordance with

the agreement obtained through the §11 process. BMWE, on the other hand, interprets §11 as requiring N&W to serve notice and negotiate on specific gangs each time it desires to establish §11 gangs.

During the PEB 219 proceedings, it is evident from the documentation furnished this Arbitrator that the parties addressed the need for the establishment of regional and system-wide gangs and the impact such gangs would have upon the workforce. It appears, however, that there was no discussion which would shed some light on the issue herein. Accordingly, there is no bargaining history with regard to the process by which §11 gangs are to be established. In the circumstances of the PEB proceedings this would not be unusual because of the nature of the beast and the divergent goals of the participants. Additionally, it seems that this issue was not presented to the Special Board.

Arguably, the language of Article XIII of the Imposed Agreement could support the position of either N&W or BMWE. The relevant portion of that Article reads:

> **(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 (including all carriers under common control) 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.**
>
> (Emphasis added.)

The use of the term "specified territory" implies that the carrier would, at some point, specify the territory over which the §11 gang would work, if not throughout the system. PEB 219 could have intended this information to be

part of the notice or part of subsequent bulletins. The phrase "any work season" can be read to imply the carrier is required to serve its notice for each work season. While the phrase "terms and conditions" might not normally include all of the information sought by BMWE herein, the question remains whether the notice is sufficient if it only included "terms and conditions."

The question was, however, presented to the Interpretation Committee, as discussed above. The Arbitrator notes that the Neutral Member of the Interpretation Committee was also a Member of PEB 219 and concludes, therefore, that the decisions of the Committee adequately reflect the intent of PEB 219.

A reading of the Committee's answer to Issue No. 13, Sub-question No. 1 erases any doubt that §11 requires a carrier to serve gang-specific notices. It implies that carriers must provide "sufficient identifying data regarding the nature and operation" of §11 gangs. Identifying data go beyond the contractual terms under which the gang will operate. The nature of the operation of the gang requires a delineation of the work to be performed, as well as the composition of the gang. The Interpretation Committee further addressed the issue of a carrier failing to provide sufficient information in its notice. In such case, the arbitrator has the authority to consider such a failure "prejudicial insofar as the request to establish certain or all of the noticed" §11 gangs. This language clearly implies the Committee anticipated the notices were to be gang-specific.

With this, the only appropriate manner for the Arbitrator to address Issue No. 2 is to review N&W's December 13, 1991 notice and identify what essential information, if any, it failed to furnish. Information is deemed essential if it is necessary for the BMWE to have such information to engage in

meaningful bargaining. This is not to say N&W may not provide information beyond what might be deemed essential, or that BMWE may not include in its counterproposal terms and conditions which were not addressed in Carrier's notice.

In addition to the information provided in N&W's notice of December 13, 1991, the Arbitrator finds the following identifying data to be essential:

> **1. The nature of the work to be performed by each designated Section 11 gang.**
>
> **2. The geographical limits of the work to be performed by each gang.**
>
> **3. The projected duration of the gang.**
>
> **4. The projected complement of the gang, indicating the number of covered employees in each class as well as the machines to be used.**

The issues of work force stabilization and subcontracting are addressed in Articles XIV and XVII, respectively, of the Imposed Agreement. As they are not encompassed in Article XIII, the Arbitrator finds they are beyond his jurisdiction, unless the parties specifically agree otherwise.

As the issue of the contents of the notice is a matter of first impression, it would not be appropriate to consider N&W's failure to provide the information noted above as prejudicial to its request. Instead, N&W is directed to provide BMWE with the additional information within ten (10) calendar days of the date of this Award. Upon receipt of this information N&W and BMWE are directed to use the two hearing dates scheduled for consideration of the merits of N&W's proposal (April 20 and 21, 1992) in an attempt to negotiate an

agreement. Failing to make an agreement, arbitration on the merits will resume on May 1 and 2, 1992, in Washington, D.C.[11]

Issue No. 3.

As to Issue No. 3, the Arbitrator notes the jurisdiction of the §11 arbitrator was defined by the Interpretation Committee in its Answer to Issue No. 1, Sub-question No. 5. The Committee held:

> **. . . 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 contained in Section 11. BMWE counterproposals, that are subject matter related to a carrier's proposals regarding the establishment of regional or system-wide gangs, would also, logically, fall within a Section 11 arbitrator's jurisdiction.**

It is evident from this statement that the notice, as well as any counterproposals related to the notice, are properly before the Arbitrator. There is no restriction in the PEB 219 report, the Imposed Agreement, on any of the decisions of ether the Special Board or the Interpretation Committee which would lead the Arbitrator to conclude that he must fashion an agreement which falls within the more limited parameters of subsequent offers of settlement. If an arbitration were to be so limited, the parties should have been on notice of such limitation prior to the commencement of negotiations, as it may have influenced their bargaining strategies. It is too late in the game to impose such a rule. Offers of settlement might be properly

[11] The Arbitrator concludes that item 7(a) of the Interpretation Committee's answer to Issue No. 13, Sub-question No. 1 is adequate license to extend the arbitration in this manner.

before the Arbitrator and considered in the same manner as any other evidence.

A W A R D

On the procedural issues heard on March 30, 1992, the Arbitrator makes the following determinations:

Issue No. 1 is not a procedural question and will not be addressed in this Award.

Issue No. 2 is answered in the Discussion above.

Issue No. 3 is answered in the negative.

/s/ J. C. Fletcher
John C. Fletcher, Arbitrator

Signed at Mt. Prospect, IL., this 6th day of April 1992

ARBITRATED AGREEMENT

between

NORFOLK AND WESTERN RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

June 12, 1992

WHEREAS, Section 11 of the recommendations for Maintenance of Way Employees of the report by Presidential Emergency Board No. 219 (PEB-219), as clarified and modified by the Special Board provided for in Public Law 102-29, which on July 29, 1991, became binding upon the Carrier and Organization with the same effect as though arrived at by agreement under the Railway Labor Act; and,

WHEREAS, the Carrier and Organization have taken conflicting positions with regard to the meaning and intent to the recommendations of PEB-219 and the clarifications and modifications of the Special Board made in connection with Section 11 of PEB-219's Report; and

WHEREAS, the Carrier and Organization submitted their differences to binding arbitration in accordance with Section 11(b) of the report of PEB-219 and Article XVI of the Imposed Agreement;

THEREFORE, The following shall constitute the Arbitrated Agreement of the parties hereto:

Designated Programmed Gangs (DPG's) may be established to perform production work throughout the Norfolk and Western Railway Company system without regard to former property lines or seniority districts.

For the purposes of this agreement, production work that may be performed by a DPG is confined to the following activities:

Rail Gangs

Removing worn rail and fasteners, replacing tie plates and adzing plate bearing surface of ties, installing new or relay condition rail and fasteners to standard gauge (and associated preparatory and clean up functions as long as the employees assigned are an integral part of the gang).

ATTACHMENT 2
Award of June 12, 1992

Timber and Surfacing Gangs

Replacing designated defective ties over specified track segments, ensuring anchor and spike pattern of ties are to standard, surfacing track to obtain necessary compaction lost in the tie replacement operation and ensuring track geometry is restored to standard (and associated preparatory and clean up functions as long as the employees assigned are an integral part of the gang).

The foregoing definition, however, does not limit Carrier's right to utilize non-DPG gangs to perform these work activities, nor does it limit the Carrier's right to propose and reach mutual agreement that other production work may be performed by DPG's in the future.

The terms and conditions of service on DPG's will be as follows:

Section 1 - Seniority Lists

A. DPG seniority lists shall be established for the following classifications:

Roster 1	Foremen
Roster 2	Assistant Foremen
Roster 3	Machine Operators
Roster 4	Track Laborers

All employees holding seniority under the several BMWE Agreements in place on N&W, as of the date of the Arbitrated Agreement, shall be placed on the appropriate seniority list or lists according to their earliest valid seniority date in each classification. Any disputes as to which seniority list is appropriate shall be promptly resolved between the BMWE Vice President assigned (or his designee) and the Director Labor Relations. If two or more employees have the same seniority date, they shall be placed on the seniority list in alphabetical order according the their last names.

B. Seniority lists shall show the names of the employees, their seniority ranking and their seniority dates. Each name shall be followed by one of the following zone designations:

NW	for employees on former N&W and Virginian rosters
WB	for employees on former Wabash Rosters
NP	for employees on former NKP and WLE Rosters

C. Seniority lists shall be furnished Foremen, General Chairmen and Local Chairmen, and shall be posted at convenient places available for inspection by employees interested. Seniority lists will be revised in January of each year,

and will be open to correction (as to changes and additions made to the list in the previous year) for a period of sixty days from the date the list is posted.

D. Employees obtaining seniority in a classification subsequent to the date of this Arbitrated Agreement shall be added to the appropriate seniority list according to the date such seniority is obtained.

Section 2 - Bulletining and Filling Positions

A. Bulletins advertising DPG positions will be posted at all reporting locations, with copies to the General Chairmen, Local Chairmen and all Foremen. Bulletins shall contain, at a minimum, the following information:

1. Type of gang and gang number.

2. List of positions (including types of machines in the gang).

3. Rates of pay for each territory over which the gang is programmed to work.

4. Starting date and location.

5. Rest days.

6. Hours of assignment.

7. Tentative schedule of the territory over which the work is programmed, with the statement that this is for information purposes only and its not intended to establish a guarantee that the gang will remain employed for the duration of the schedule.

8. Remarks.

B. At the start of each production season, all DPG positions, regardless of when the gangs commence work, will be bulletined for fifteen (15) calendar days and awarded within fifteen (15) calendar days from the close of the bulletin. Assignments will be effective as of the starting date specified in the bulletin.

C. Inasmuch as multiple gangs and positions might be bulletined at the same time, employees shall have the right to bid on any or all of such positions on such bulletins by indicating on the application their preference in order of the positions desired. The Carrier and Organization are directed to develop a bid form to facilitate this process.

D. Positions on DPG's will be awarded to applicants in the following order:

1. To the senior employee ranked on the DPG seniority list in the classification bulletined, who has a zone designation corresponding to one of the zones over which the DPG is programmed to work.

2. To the senior employee ranked on the DPG seniority list in the next successive lower classification(s), who has a zone designation corresponding to one of the zones over which the DPG is programmed to work.

3. To the senior employee ranked on the DPG seniority list in the classification bulletined, but who does not have a zone designation corresponding to one of the zones over which the DPG is programmed to work.

4. To the senior employee ranked on the DPG seniority list in the next successive lower classification(s), but who does not have a zone designation corresponding to one of the zones over which the DPG is programmed to work.

NOTE: In the application of Paragraphs 2 and 4, above, seniority shall prevail if fitness and ability are sufficient, of which management shall be the judge, subject to appeal. The assignment to a DPG shall not affect the seniority status of any employees in their respective zones, nor shall they establish seniority in any additional zones, except that employees promoted in accordance with Paragraphs 2 and 4, above, shall obtain seniority in the classification to which promoted in their zone in accordance with the Agreement applicable to that zone.

E. Positions which cannot be filled in accordance with Subsection D, above, may be filled by new employees, who will obtain seniority in the classification hired in the zone in which they first perform service, subject to the Agreement applicable to that zone.

F. Employees assigned to positions on DPG's will not be permitted to bid off such gangs for a period of ninety (90) calendar days from the first day of service on the gang, except with the concurrence of the General Chairman and the Director Labor Relations, or their designees. The failure to concur shall not be grievable. For the same ninety (90) calendar period, an employee assigned to a DPG may not be displaced by an employee not assigned to the gang, unless the senior employee's inability to displace would require him to be furloughed.

Section 3 - Work Week

The work week on DPG's will be governed by the National Forty Hour Work Week Rule as modified in Article 5 of the Report of PEB-219 and clarified and modified by the Special Board established pursuant to Public Law 102-29.

Section 4 - Work Force Stabilization

Work Force Stabilization as provided for in Section 13 of the Report of PEB-219 will be applicable to DPG's.

Section 5 - Effect of Other Agreements

Except as specifically provided herein, all other terms and conditions of employment for DPG's, including, but not limited to, rates of pay, filling of vacancies and payment of allowances, shall be governed by the Agreement applicable to the territory where the respective DPG commences service on the first work day of the work week for that entire work week, including rest days.

Section 6 - Additional DPG's

The terms and conditions provided for herein shall be applicable to all DPG's established in accordance with Section 11 of the Report of PEB-219. Carrier may service notice upon the General Chairmen of its intent to create additional types of DPG's. If the parties, after thirty (30) calendar days following the notice, are unable to agree the gangs proposed by the Carrier are appropriate DPG's, either party may request expedited arbitration as set forth in Section 9, below.

Section 7 - Cancellation of this Arbitrated Agreement

Should either party desire cancellation of this Arbitrated Agreement, it may serve an appropriate Railway Labor Act Section 6 Notice of this intent, however, the notice must be consistent with existing moratorium provisions.

Section 8 - Modification of this Arbitrated Agreement

Should either party request modification of this Arbitrated Agreement, it shall serve notice of such intended modification upon the other party, and negotiations shall commence within ten (10) calendar days of such notice. If the parties are unable to reach agreement on the request to modify the Arbitrated Agreement after thirty (30) calendar days, either party may request the matter be submitted to expedited arbitration as set forth in Section 9 below, except that neither party may request arbitration until two years from the effective date of this Arbitrated Agreement.

Section 9 - Dispute Resolution

A. Disputes arising under Sections 6 or 8, of this Arbitrated Agreement, shall be resolved as follows:

1. Selection of Neutral Arbitrator

Should the Carrier and Organization fail to agree on the selection of a neutral arbitrator within five (5) calendar days from the date of 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 an arbitrator by alternately striking names from the list. The party requesting the National Mediation Board to supply the list of potential arbitrators shall strike first. Neither party shall oppose or make any objection to the NMB concerning a request for such a panel.

2. Fees and Expenses

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

3. Hearings

The arbitrator shall conduct a hearing within thirty (30) calendar days from the date on which the dispute is assigned to him. 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 parties shall be entitled to present oral testimony at the hearing, subject to cross-examination by the other party and examination by the arbitrator. The arbitrator shall have the power to direct the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the arbitrator as material to a just determination of the matters submitted. An official transcript of the hearing may be made if the parties agree or if the arbitrator deems it appropriate. The parties may be represented by counsel.

4. Written Decision

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

5. Time Limits

Time limits stated herein may be extended by agreement between the Carrier and Organization, and if the extension would affect time limits applicable to the arbitrator's conduct, with his concurrence.

B. All other disputes regarding interpretation of this Arbitrated Agreement shall be resolved in accordance with Section 3 of the Railway Labor Act, as amended. Any interpretation of this Arbitrated Agreement shall take into consideration the Award of which this Arbitrated Agreement is a part.

Section 9 - Effective Date

This Arbitrated Agreement shall become effective June 15, 1992 and shall have the same force and effect as if the Carrier and Organization negotiated the result under the provisions of the Railway Labor Act. It shall remain in effect until canceled, changed or modified as provided in the procedures set forth in Sections 7 and 8.

John C. Fletcher, Arbitrator

Mt. Prospect, Illinois
June 12, 1992