Before
PETER R. MEYERS
Arbitrator

In the Matter of the Arbitration
between

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	Arbitration pursuant to Sections 6 and 9 of the June 12, 1992, Arbitrated Agreement
and	
NORFOLK & WESTERN RAILWAY COMPANY	

DECISION AND AWARD

Appearances for the Carrier

Jeffrey Berlin--Counsel
Mark Martin--Counsel
William P. Stallsmith, Jr.--Senior General Attorney
P. R. Ogden--AVP-Maintenance
Richard R. Pressley--General Division Engineer, Ft. Wayne
Timothy J. Drake--Division Engineer, Ft. Wayne
W. L. Allman, Jr.--Director, Labor Relations
D. L. Kerby--Labor Relations Officer

Appearances for the Organization

William A. Bon--General Counsel
Steven V. Powers--Assistant to President
Richard A. Lau--Vice President, Southeastern Region
Kenneth R. Masen--Vice President
Tom McCoy--Vice Chairman
Richard L. Taylor--General Chairman
Paul R. Beard--General Chairman
Tom Mulford--Vice Chairman

This matter came to be heard before the undersigned Arbitrator, Peter R. Meyers, on October 20, 1992, at 175 West Jackson Boulevard, Room A-1918, Chicago, Illinois 60604-2701. Jeffrey Berlin presented for the Carrier; William A. Bon and Steven V. Powers presented for the Organization.

Introduction

On May 8, 1990, Presidential Emergency Board ("PEB") Number 219 was established by Executive Order 12714; PEB 219 was empowered to address several disputes over wages and work rules that had arisen between the railroads and several labor unions, but that the railroads and unions had not been able to resolve through negotiation. Both the Norfolk & Western Railway (hereinafter "the Carrier") and the Brotherhood of Maintenance of Way Employees (hereinafter "the Union") were involved in the proceedings before PEB 219.

PEB 219 issued its findings and recommendation in a Report to the President on January 15, 1991. Congress then enacted Public Law 102-29, which imposed these recommendations upon the parties; ultimately, PEB 219's recommendations were formally adopted by the Union and various railroads, including the Carrier, in the "Imposed Agreement Pursuant to Public Law 102-29, July 29, 1991" (hereinafter "the Imposed Agreement").

PEB 219's recommendations dealt with several different issues and disputes. Only one portion of its Report, and the corresponding section of the Imposed Agreement, is at substantive issue here. Section VI.J.11 of PEB 219's Report (also referred to as "Section 11") and Article XIII of the Imposed Agreement set out the basic mechanism under which the Carrier may establish regional or system-wide production gangs to perform programmed work over more than one seniority district; these production gangs occasionally have been referred to as "Section 11 gangs" or "designated programmed gangs (DPGs)." The specific issues and

disputes relating to the implementation of this Article and the establishment of such production gangs have generated additional agreements, findings, and arbitration decisions between the parties. Those that are particularly relevant to the instant matter include the Arbitrated Agreement Between N & W and BMWE Dated June 12, 1992 (hereinafter "the Arbitrated Agreement"), and the associated June 12, 1992, Award on Substantive Issues, issued by Arbitrator John C. Fletcher (hereinafter "the Fletcher Award").

In brief, the Arbitrated Agreement and the Fletcher Award dealt with, among other things, defining the type of gang that the Carrier was authorized, under PEB 219's recommendations, to establish as a regional or system-wide gang. The Arbitrated Agreement describes two types of gangs that definitely qualify as Section 11 production gangs that can be established to work across seniority district lines under the terms of PEB 219's recommendations and the Imposed Agreement: rail gangs and timber & surfacing gangs (also referred to as "tie & surfacing gangs" and "T&S gangs"). The Arbitrated Agreement also provides that the Carrier can establish gangs performing other types of work as Section 11 gangs either through agreement with the Union or, failing that, through arbitration. The Fletcher Award confirmed that rail gangs and T&S gangs qualified as Section 11 production gangs; the Fletcher Award also addressed the terms and conditions that should apply to Section 11 production gangs and the problem of defining "production gang" for purposes of Section 11.

The instant dispute developed when the Carrier notified the Union, on July 21, 1992, of its intent to establish five additional types of production gangs: surfacing gangs; rail transposing gangs; tie patch gangs; gauging gangs; and bush hog gangs. The parties failed to agree that these gangs could be established as Section 11 gangs, so this matter now is being heard for binding arbitration under Section 9 of the Arbitrated Agreement.

As developed in the various agreements, both imposed and arbitrated, and in prior arbitration decisions between the parties, the Carrier bears the burden of establishing that the proposed gangs qualify as Section 11 production gangs.

Statement of the Issue

Whether the five types of gangs described in the Carrier's July 21, 1992, notice -- surfacing gangs, rail transposing gangs, tie patch gangs, gauging gangs, and bush hog gangs -- qualify as regional or system-wide production gangs under Section VI.J.11 of the Report of the Presidential Emergency Board Number 219, dated January 15, 1991, as implemented in the Imposed Agreement Pursuant To Pub. L. 102-29, Feb. 6, 1992, and in the Arbitrated Agreement Between N & W and BMWE, dated June 12, 1992?

Relevant Contract Provisions

IMPOSED AGREEMENT PURSUANT TO PUB. L. 102-29, FEB. 6, 1992

[Implementing the report and recommendations of Presidential Emergency Board No. 219, dated January 15, 1991, specifically Section VI.J.11 thereof.]

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 proposes to apply.

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

(c) All subject matters contained in a carrier's proposal to establish regional or system-wide gangs, including the issue of how seniority rights of affected employees will be established, are subject to the expedited arbitration procedures 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 Procedures - Starting Times, Combining or Realigning Seniority Districts, and Regional and System Wide Gangs

Section 1 - Selection of Neutral Arbitrator

Should the parties fail to agree on selection of a neutral arbitrator within five (5) calendar days from the submission to arbitration, either party may request the National Mediation Board to supply a list of at least five (5) potential arbitrators, from which the parties shall choose the arbitrator by alternately striking names form 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.

ARBITRATED AGREEMENT BETWEEN N & W AND BMWE
DATED JUNE 12, 1992

. . .

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).

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.

. . .

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.

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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.

The Carrier's Position

The Carrier proposes the creation of five new types of Section 11 production gangs: tie patch gangs; rail transposing gangs; gauging gangs; bush hog gangs; and surfacing gangs. The Carrier seeks to establish these gangs under Section 11's terms so that the gangs can work across existing seniority boundaries; the Carrier asserts that the gangs therefore can work together longer, promoting safety and operational efficiency. Under the terms currently governing these gangs, each such gang must be rebulletined every time it crosses the boundary of a seniority

district, and then staffed with employees based in the seniority district where the work will continue.

The Carrier asserts that the Fletcher Award establishes two criteria for determining whether a gang qualifies as a production gang envisioned by PEB 219. The Carrier argues that each of the five types of gangs at issue satisfies these two criteria and therefore should be established as Section 11 production gangs. The Carrier contends that the work performed by these gangs definitely is "specifically programmed in advance of the production season," one of the Fletcher Award's criteria. The work of the five gangs at issue is planned in advance of the production season; work locations, gang consist, equipment, and starting and completion dates all are programmed before the start of the production season. Each of these gangs, in addition, is organized and equipped to perform a specialized task over defined track segments. The Carrier argues that based on these factors, the work performed by the five gangs at issue is programmed in advance in precisely the way set forth in the Fletcher Arbitration. Moreover, the schedules for these gangs are essentially the same as for rail gangs and T&S gangs, which are already recognized as Section 11 gangs.

The Carrier goes on to argue that these five gangs satisfy the other criterion set forth in the Fletcher Award: these gangs are "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

lines." The Carrier argues that PEB 219 intended to relieve the railroads of the significant operational hardships associated with the need to rebulletin gangs at seniority borders. PEB 219 recognized that the size and mechanization of a gang affect the extent of the operational hardship caused by rebulletining.

The Carrier asserts that this criterion attempts to distinguish between the large, mechanized gangs that, when rebulletined, lead to significant hardship and those gangs that are so small and unmechanized that such problems do not occur when they are rebulletined. The Carrier argues that PEB 219 meant to redress the operational hardships that occur when large, mechanized gangs are rebulletined. The Carrier therefore suggests that the criterion in the Fletcher Award discussing size and mechanization bears only on the hardship associated with the need to rebulletin. The Carrier argues that the Fletcher Award rejects the Union's contention that production gangs should be defined by numerical benchmarks.

The Carrier nevertheless argues that all five gangs at issue are large enough and mechanized enough to satisfy this criterion in the Fletcher Award. Aside from rail gangs and T&S gangs, these are the largest and most mechanized of the Carrier's production gangs. The Carrier points out that all of these gangs have six or more employees and operate three or more machines; in addition, machine operation accounts for a range of more than half to all of the positions on each of the gangs.

The Carrier further contends that each of the five gangs are so large and mechanized that they are vulnerable to the very

operational hardships associated with rebulletining that PEB 219 and the Fletcher Award meant to redress. These operational hardships derive from the fact that the work performed by each gang is organized around the sophisticated machinery that they operate; the tasks require interdependent, coordinated, sequential operation of the machinery, in the fashion of a moving assembly line. Much of the machinery used by these gangs is large, complex, and highly technical; much of the work is made more complicated because these gangs frequently operate on curved track, which requires greater technical skill than does work on straight track. These gangs, therefore, must be staffed with proficient machine operators.

The Carrier then argues that the requisite proficiency in machine operation ordinarily comes only through experience and after operating a machine for an extended time period. The Carrier similarly contends that the safety and productivity of a gang is enhanced by stability in gang membership. The reverse also is true; high turnover rates in gang membership tends to cause safety and productivity problems. The Carrier argues that if it must comply with the restrictions of the existing seniority territories in connection with the five gangs at issue, then gang continuity and cohesiveness would be undermined, leading to these operational hardships. The Carrier maintains that these problems are compounded by the fact that under the parties' agreement, an employee who establishes general machine operator seniority may be awarded a bulletined machine operator position even though the

employee has no experience operating that particular machine.

The Carrier then points out that as to surfacing gangs specifically, the parties essentially have agreed that this type of gang is a production gang that satisfies the requirements of Section 11. Pointing to both the PEB Report and the Imposed Agreement, the Carrier asserts that as to the issue of entry level pay rates, the parties have agreed that certain members of surfacing gangs are entitled to a higher rate of pay because they operate heavy self-propelled equipment requiring skill and experience. The Carrier therefore contends that the parties have effectively agreed that a surfacing gang is a production gang as envisioned by PEB 219. The Carrier further asserts that the Union has changed position on the question of whether surfacing gangs are production gangs; in addressing procedural questions before Arbitrator Fletcher, the Union acknowledged that they were, but then completely changed its position by the time of the hearing on the merits. The Carrier argues that the Union should acknowledge that it knows that surfacing gangs are production gangs.

The Carrier therefore contends that the Arbitrator should find that the five types of gangs designated in Carrier's July 21 1992, notice all are production gangs that may operate under the terms of the Arbitrated Agreement.

The Union's Position

The Union argues that the entire record precisely clarifies what a "production gang" is for purposes of PEB 219's recommendations and Section 11. Summarizing the record, and

especially looking to PEB 219's report, the records and modifications established by the Special Board, and the decisions in prior arbitrations, the Union contends that a Section 11 production gang is characterized by the following factors: the number of employees assigned to the gang; the gang's degree of mechanization; the nature or character of the gang's work; and the significance of the hardship associated with rebulletining such a gang.

Looking at each of the factors in turn, the Union argues that throughout the proceedings before PEB 219, the Carrier consistently referred to production gangs as having at least 20 members; the vast majority of references were to much larger gangs. The Union points out that in each of the subsequent interpretive awards on the production gang issue, production gangs have been described as having a "substantial number" of employees or, correspondingly, a "relatively large" complement of employees. The Union asserts that Arbitrator Sickles, in a case between the Union and Burlington Northern that arose from the same PEB 219 Report, quantified "substantial number" as no fewer than twenty employees. The Union contends that because nothing in the PEB record or subsequent interpretive awards refers to a production gang as having less than twenty employees, it strains credulity for the Carrier to argue that PEB 219 envisioned production gangs as having fewer than twenty employees.

As for the degree of mechanization associated with Section 11 production gangs, the Union maintains that the PEB record

shows that the Carrier never referred to a production gang with less than ten machines and pointed out some that have as many as thirty-three machines. The minimum number of machines necessary to satisfy the mechanization requirement for a production gang has not been specifically defined in any of the subsequent interpretive awards; instead, production gangs generally have been described as "heavily" or "highly mechanized" with sophisticated machinery. The Union submits that based on the PEB record, PEB 219 could not have envisioned a production gang with fewer than ten sophisticated machines.

Moving to the type of work performed, the Union contends that the record shows that production gangs are mobile and perform major rail, tie, and surfacing repair and replacement work that is programmed in advance of the production season. In the prior arbitration proceedings on the issue of production gangs, the Carrier has referred to production gangs as performing major repair and replacement work. The Union points out that all track gangs surface track and replace rails and ties; the Union contends that the magnitude of work, described as "major," distinguishes production gangs from all other track gangs. The Union argues that crew size and level of mechanization most appropriately distinguishes "major" work from all other magnitudes of work. The Union therefore argues that if a gang of more than twenty members, and using ten or more large, sophisticated machines, is performing rail, tie, or surfacing work, then such work is "major" work of the type performed by production gangs.

As for the final factor used to define production gangs, the significance of the hardship associated with rebulletining the gangs, the Union asserts that before PEB 219, the Carrier focussed on the productivity losses associated with re-manning large, highly mechanized gangs; the Carrier emphasized the losses that occur when large numbers of employees must be trained to operated sophisticated machinery. The Union asserts that this retraining problem does not exist to a significant degree in connection with small gangs that have fewer employees and less sophisticated equipment. The Union points out that Arbitrator Fletcher found that the Carrier, to establish that a proposed gang qualifies as a production gang, must prove that a significant hardship would result if it were required to rebulletin the gang when it crossed seniority district lines.

The Union goes on to argue that to establish that a significant hardship exists, the Carrier must show that the gang is relatively large so that it would be required to retrain a significant number of employees when the gang crosses seniority lines; that the gang is relatively highly mechanized, with a significant number of highly sophisticated machines that require significant training time; that the gang will cross multiple seniority boundaries, more than one or two, necessitating a significant amount of rebulletining during a production season; and that the Carrier does not have sufficient numbers of trained employees in each seniority district where the gang is scheduled to operate so that retraining is necessary in association with

rebulletining.

The Union then points out that because a member of PEB 219 subsequently was appointed to the Contract Interpretation Committee (CIC), which was established to resolve disputes concerning the interpretation and application of PEB 219's recommendations, the CIC's decisions must be afforded great deference. The Union therefore contends that the "significant hardship" test propounded by Arbitrator Fletcher must be interpreted so as not to diminish the size and mechanization characteristics set forth by the CIC. Instead, the Union asserts, the hardship test must be viewed as an adjunct to these characteristics.

The Union then argues that none of the proposed gangs at issue in this proceeding meet the requirements of a production gang that have been established by PEB 219 and the subsequent interpretive decisions. The Union contends that none of the gangs at issue have been specifically programmed in advance of the production season. Instead, all of the gangs referred to in the Carrier's July 21, 1992, notice appear to be hypothetical gangs rather than actual gangs that the Carrier has programmed for operation during the 1993 production season. The Union argues that the Carrier has alleged that these gangs will be programmed, but this does not satisfy the specific advance programming requirement. The Carrier failed to indicate in its notice the nature of the work to be done by each gang, the geographic limits of the work of each gang, and the projected duration of each gang.

The Union argues that the Carrier's failure to provide this information in their notice and during subsequent negotiations makes it impossible to determine whether a significant hardship would exist if these gangs must be rebulletined. The Union goes on to argue, however, that even if these gangs had been programmed in advance, each gang fails to meet the other requirements and therefore are not production gangs.

Analyzing the surfacing gang(s) described in the Carrier's notice, the Union contends that the Carrier has failed to meet its burden of proving that these gangs are production gangs as envisioned by PEB 219. These gangs consist of only eight employees and are not heavily mechanized in that they will not operate at least ten sophisticated machines; moreover, there is no evidence that these gangs will perform major repair and maintenance work. The Union compares these gangs with a production surfacing gang that the Carrier described during the proceedings before PEB 219; this gang consisted of thirty-six employees and ten machines. The Union asserts that because of these gangs' small size and limited level of mechanization, the Carrier has not and cannot demonstrate that a significant hardship would be associated with rebulletining these surfacing gangs if they cross seniority lines.

The Union similarly argues that the rail transposing gang(s) each have a total of only eight employees and are not highly mechanized; because they operate only six machines, the mechanization of these gangs does not meet the standard in terms

of either number or sophistication of machinery. The Union compares these gangs to a true production rail gang that the Carrier described before PEB 219, which had more than 100 employees and thirty-three machines. The Union further contends that by the Carrier's own definition, these gangs do not perform major maintenance and repair work; the Carrier describes these gangs as performing work on a scale that does not warrant the use of a rail gang, which has been established as a production gang. Based on these factors, the Union asserts that the Carrier has not and cannot demonstrate any significant hardship that would occur if these rail transposing gangs were rebulletined when and if they cross seniority lines.

Turning to the tie patch gang(s) described in the Carrier's notice, the Union again argues that these gangs are small and not highly mechanized; they each consist of seven employees and fewer than ten machines that the Carrier has not shown are either large or sophisticated. The Union compares these gangs to a production tie gang, consisting of fifty-six employees and twenty-one machines, that the Carrier described before PEB 219. The Carrier's own description of these gangs in its notice establishes that they will not perform major maintenance and repair work; the Carrier indicates that these gangs will perform work in circumstances that do not justify the use of a T&S gang, which has been established as a production gang. These factors show that the Carrier has not and cannot demonstrate that a significant hardship would result if these tie patch gangs are rebulletined when and if they cross seniority lines.

Moving to the gauging gang(s) described in the Carrier's notice, the Union again points out that they are small and not highly mechanized; these gangs consist of only seven employees and will operate only four machines, as to which the Carrier has not presented any evidence of size or sophistication. The Union further argues that the Carrier did not present any examples of gauging gangs to PEB 219, so the work performed by these gangs cannot be the type of work that PEB 219 envisioned would be performed by production gangs; in addition, the small size and limited mechanization of these gangs indicates that they will not be performing major repair or replacement work and that there will not be any significant hardship associated with rebulletining these gauging gangs if they cross seniority lines.

As for the last of the gangs described in the Carrier's notice, bush hog gangs, the Union stresses that they are small and not highly mechanized; these gangs consist of only six employees and will operate only three machines. The Union further argues that the Carrier did not present any examples of bush hog gangs to PEB 219, so the work performed by these gangs cannot be the type of work that PEB 219 envisioned would be performed by production gangs; in addition, cutting brush cannot be considered major repair or replacement work. The record also shows that there will not be any significant hardship associated with rebulletining these bush hog gangs if they cross seniority lines.

The Union therefore argues that none of the gangs proposed

by the Carrier are Section 11 production gangs.

Decision

The parties in this matter have developed a very extensive record and have presented equally extensive arguments in favor of their respective positions. Indeed, because of the long history associated with the matter at issue here, such a record is absolutely essential; the parties' arguments, moreover, have clearly defined their positions and the evidence they cite in support. This Arbitrator has carefully reviewed the entire record and the parties' arguments, bearing in mind the importance and potential impact of the issues to be decided herein.

The basic issue to be resolved is deceptively simple on its face: do the five types of gangs proposed by the Carrier qualify as "production gangs," as that term has been developed by PEB 219 and in subsequent interpretive decisions. Any discussion of this question, however, immediately reveals the true complexity of the matter and all of the underlying and related issues that must be part of the ultimate resolution of this dispute.

The first issue that must be confronted, and it is a crucial one, is how to define "production gang." For very cogent reasons, none of the decision-makers who previously have addressed the production-gang issue promulgated a specific definition of the term. This makes sense, in part, because a precise definition would severely limit the parties' flexibility and ability to effectively respond to changes in, for example, technology and financial conditions. The lack of a precise definition of "production gangs," of course, means that

determining whether certain proposed gangs qualify as Section 11 gangs must be decided virtually on a case-by-case basis, with all of the associated difficulties of proof and evidence.

Each of the five types of gangs proposed here must be evaluated individually and measured against the general standards developed by PEB 219 and in the subsequent interpretive decisions. Although the terminology used in each of the previous decisions varied somewhat, each of these decisions contributed important guidelines and considerations to the ultimate problem of determining whether a particular gang qualifies as a production gang. All of the terminology, reasoning, guidelines, and other features of the previous decisions must be welded into a usable framework that can be applied to the five types of gangs at issue.

The Union suggests an analysis that relies heavily on the raw number of employees and machines that will be assigned to each of the gangs. The Carrier argues against, and indeed urges a rejection of, the strict application of a simple, bright-line number test. The appropriate analysis falls, not surprisingly, in between these two points. The standards developed in the previous decisions include consideration of both concrete numbers and more abstract factors; the number of employees and machines is not only helpful, but necessary to the understanding and application of the more abstract factors, particularly the determination of whether a significant operational hardship would occur if the Carrier were required to rebulletin these gangs when

and if they cross seniority lines. The number of employees and machines alone, however, is not enough to define whether a gang qualifies as a production gang. This Arbitrator therefore declines to adopt a strict minimum number of employees and/or machines to define a production gang. Although Arbitrator Sickles was able to do so in a production-gang case that arose between the Union and the Burlington Northern Railroad Company, the state of the record in this matter makes such a determination here impossible and undesirable; in addition, the contractual and operational imperatives that apply in a case involving the Burlington Northern are not necessarily relevant to this Carrier. Arbitrator Sickles' decision, although of help here, cannot be given precedential weight.

However, this Arbitrator must give significant weight to the oral testimony presented by the carriers to the PEB concerning regional and system production gangs. The carriers were seeking the rule changes relative to production gangs and presented, as their witness, the Union Pacific Railroad's Vice President of Engineering, Stan McLaughlin, as their chief spokesman on production gangs. McLaughlin, in defining production gangs, testified as follows:

> When we talk about system gangs, we are talking about our large mechanized gangs. These are gangs that have employees in number varying from 20 to 25 up to as many as 150 employees, with a large amount of highly sophisticated equipment. This work is typically planned and scheduled far in advance, and works over large areas of our railroad.
>
> Some examples of our system gangs would be like our rail and curve gangs, our wood and concrete tie gangs, surfacing and lining gangs, bridge

construction gangs, and signal construction gangs.

The Union correctly lists the primary factors, based on Arbitrator Fletcher's adoption of general concepts that apply to production gangs, that must be considered in determining whether any or all of the proposed gangs qualify as production gangs: number of employees assigned to the gang; number and sophistication of machinery used by the gang to perform its work; the nature and type of work to be performed by the gang; and the extent of the operational impact, or hardship, if the Carrier is required to rebulletin the gang when and if it crosses seniority lines. These factors together incorporate a number of secondary factors, such as the amount of training necessary to qualify to operate the machinery used by the gang, whether already-qualified machine operators are present in some or all of the seniority districts in which the gang will operate, and the number of times the gang will cross seniority lines. All of these factors go toward establishing whether proposed gangs meet Arbitrator Fletcher's general concepts relating to significant operational hardships and specific advance programming of gangs.

There is no question that all of the proposed gangs are significantly smaller than the rail gangs and T&S gangs that are definitively established as Section 11 production gangs in, for example, the Arbitrated Agreement. They are all much smaller than the twenty to twenty-five member gangs described by the carriers' witness who testified at the PEB. All of the gangs so far recognized as production gangs have a far greater number of employees and machines than do the proposed gangs. The fact that

none of the proposed gangs likely will consist of more than eight to ten employees and that each of the gangs will operate less than ten machines are strong indications that these gangs probably do not rise to the level of production gangs. As Arbitrator Fletcher noted in his decision, the carriers considered size and degree of mechanization to be the major factors supporting their argument before PEB 219. As explained above, however, these numbers alone are not enough to determine whether the proposed gangs qualify as production gangs, but they are significant factors, particularly in light of the PEB testimony of the carriers' witness.

All of the past decisions on the production-gang issue emphasize that the significance of the operational hardships associated with rebulletining a production gang is one of the most critical defining characteristics, and perhaps the most important one, of a production gang. In some sense, all of the other factors, such as size, number of machines, and type and location of work, serve as illustrations of the significance of the hardships associated with rebulletining a gang. It is evident that the larger the gang, and the more pieces of complicated equipment that are used by that gang, the more difficult and costly it will be to rebulletin the gang when it reaches the border of a seniority district.

The Carrier argues that the same type of operational hardships apply to the rebulletining of the proposed gangs as to the rebulletining of the gangs that the Carrier discussed before

PEB 219 and that ultimately were found to be production gangs. There is nothing in the record to contradict this assertion; in fact, logic suggests that the same type of problems will be associated with every instance of rebulletining a gang. Whether the same type of operational hardships exists, however, is not the key question as to this particular factor. What is important is the scale and magnitude of the operational hardships. Indeed, the record in this matter suggests that magnitude and scale -- of number of employees, of number of machines, of type of machines, of type and nature of work, of geographic extent of work, and several other factors -- generally are key distinguishing features between production and other types of gangs.

Although it probably is true that operational factors such as productivity, efficiency, and even safety will suffer each time the members of a gang are changed, it is not necessarily true that these effects represent "significant operational hardships," as that term was used by PEB 219 and in subsequent interpretive decisions. The key is the scale of the effects. Before PEB 219, the Carrier made its points about operational hardships based on much larger gangs than are at issue here. Arbitrator Fletcher also mentioned that size and mechanization were of primary importance to the carriers' arguments before PEB 219. There can be no serious question that the operational hardships associated with rebulletining a gang of thirty, fifty, or one hundred fifty members, and a correspondingly large number of sophisticated machines, are far greater and have a more significant impact than do the operational hardships that come

with rebulletining a gang of ten or fewer employees. Although the nature of the operational hardships may be the same, the significance of their impact is vastly greater when a larger gang is rebulletined.

Although the Carrier argues convincingly that it would be inappropriate to simply establish a minimum number of employees and machines necessary for a gang to qualify as a Section 11 production gang, it is evident that the number of employees and machines assigned to a gang is a very important indicator as to the magnitude and significance of the hardships associated with rebulletining. When considered in conjunction with the other factors that must be analyzed to determine whether the gangs at issue qualify as production gangs, the record convincingly shows that the five proposed types of gangs are not production gangs for purposes of Section 11. They simply do not share the same elements, nor do they present the same magnitude of problems for the Carrier. Therefore, this Arbitrator must find that none of the five types of gangs proposed in the Carrier's July 21, 1992, notice qualify as regional or systemwide production gangs.

The proposed tie patch gangs and rail transposing gangs present the closest cases. These two types of gangs perform work that is quite similar to the work performed by T&S gangs and rail gangs, both of which have been firmly recognized as production gangs. In addition, although the record is not extensive on this particular issue, it appears that the work to be done by these two types of gangs has been "programmed in advance of the

production season" in the sense that the work has been described in advance, then has been scheduled as to general time and location of performance. These two proposed gangs are so much smaller than T&S and rail gangs, however, that it is evident that they do not exhibit the other characteristics necessarily associated with a production gang. The Carrier itself describes these two proposed types of gangs as performing work where rail gangs or T&S gangs cannot reasonably or efficiently be used; this underlines the much smaller scale of both these gangs and the much simpler problems that are associated with rebulletining them. The small number of machines that would be assigned to these two types of gangs indicates that any training of new members would be neither as time-consuming nor as onerous as would be expected with a much larger gang. In addition, the evidence in the record simply does not establish that the machinery to be used by the proposed gangs is as sophisticated as that used by rail gangs and T&S gangs. It also must be noted that the relatively small number of machines to be used by these two proposed gangs increases the likelihood that already-qualified operators may be more easily found in sufficient numbers within each of the seniority districts in which these two gangs will work.

The proposed rail transposing and tie patch gangs also fail to demonstrate any of the other factors that might qualify them as production gangs. There is no showing in the record that these two proposed gangs will excessively cross seniority district lines, that an especially large amount of training is

necessary to operate the machinery that will be assigned to the gangs, or that the nature of the work these two gangs will perform is so sophisticated that rebulletining will have a great detrimental impact on productivity and safety. All of these factors indicate that the operational hardships associated with rebulletining these two types of gangs, each of which will consist of less than ten employees and machines, are not of a scale that can be called "significant." The proposed tie patch gangs and rail transposing gangs therefore do not qualify as production gangs.

All of this analysis applies with at least equal, and probably greater, force to the other three types of proposed gangs. The remaining three types of gangs are described as performing work that is less sophisticated in nature than the first two gangs; the proposed bush hog gangs, in particular, will be performing work that does not seem to require much in the way of sophisticated training and machinery. In addition, the proposed gauging gangs, bush hog gangs, and surfacing gangs all are quite small in number of employees and machines. There is no showing that the training required to operate the machinery that will be assigned to these three proposed types of gangs is either lengthy or particularly rugged. In short, the record does not establish that any significant operational hardships will ensue if the Carrier is required to rebulletin these three types of gangs when they cross seniority district lines. Like the rail transposing and tie patch gangs, the proposed gauging, bush hog,

and surfacing gangs do not qualify as Section 11 production gangs.

It should be noted that although the record does not support a finding that the proposed gangs at issue here qualify as Section 11 production gangs, the Carrier has successfully shown that being required to rebulletin such gangs whenever they cross seniority lines does carry a degree of hardship and expense, as well as a loss of efficiency and productivity, to merit some change in the overall system in the future. The Organization also successfully made its point very clear how difficult it is for the employees to be forced to cross seniority districts and work far away from home with no ability to return home on weekends or for long periods of time. As the parties move into the next century of railroading, they both must realize that compromise on these issues will be essential to keep both the industry strong and successful economically and the working conditions and morale of the work force in good shape. This is not the appropriate ultimate forum to develop the final solution that is clearly necessary to deal with the problems raised by the Carrier in this case. Neither is the strike picket line or a lockout a realistic solution. The answer will eventually ultimately have to be reached in collective bargaining where the parties present their respective positions and listen carefully to the other side's position before they reach a joint solution. It became very apparent to this Arbitrator during the hearing and while reviewing the extensive submissions that the rules of the current gang situation were developed many years ago when there

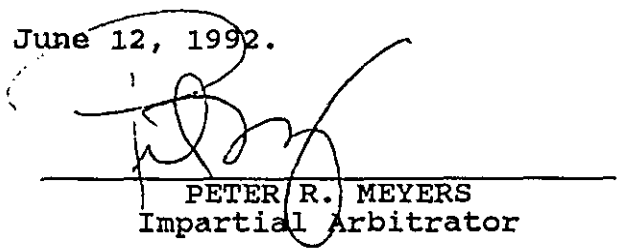
were very different conditions in the industry. Although some of the same problems and inconveniences for the railroad workers still exist, today's different economic climate and competitive industries require a new solution; and both parties will have to seriously address those new conditions in a collective fashion with the goal of reaching a mutual agreement on those issues. Such a mutual agreement will undoubtedly require significant compromises on both sides. Both parties will be unable to continue to hold onto absolute ideologies and archaic concepts which have limited value in today's new world.

This Arbitrator's sole charge in this proceeding is to determine whether or not the five gangs proposed in the Carrier's July 21, 1992, notice qualify as regional or systemwide production gangs under Section VI.J.11 of the Report of the Presidential Emergency Board Number 219, dated January 15, 1991, as implemented in the Imposed Agreement Pursuant to Pub. L. 102-29, Feb. 6, 1992, and in the Arbitrated Agreement Between N & W and BMWE, dated June 12, 1992. On that narrow question, for the reasons stated above, I find that none of the five types of gangs proposed by the Carrier qualify under the language that currently exists. I recognize, and I urge the parties to recognize, hard as it might be to do so, that the decision contained herein is not the final solution to these ongoing problems. I am convinced that no imposed agreement, no Presidential Emergency Board, and no arbitration award can be as effective for the long term in resolving these issues as the old-fashioned bargaining table and

two parties who are willing to recognize that they must reach an agreement for both of their best interests for the future.

Award

None of the five types of gangs proposed in the Carrier's July 21, 1992, notice qualify as regional or system-wide production gangs under Section VI.J.11 of the Report of the Presidential Emergency Board Number 219, dated January 15, 1991, as implemented in the Imposed Agreement Pursuant to Pub. L. 102-29, Feb. 6, 1992, and in the Arbitrated Agreement Between N & W and BMWE, dated June 12, 1992.



PETER R. MEYERS
Impartial Arbitrator

Dated this 4th day of December
1992 at Chicago, Illinois.