

SPECIAL BOARD OF ADJUSTMENT NO. 1105

In the matter of arbitration between:

BURLINGTON NORTHERN SANTA FE RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Grievance: Article XVI of the September 26, 1996
BMW National Agreement

STATEMENT OF THE DISPUTE

This arbitration concerns a contract interpretation dispute between the Brotherhood of Maintenance of Way Employees (hereinafter referred to as the BMW or the Organization) and the Burlington Northern Santa Fe Railroad Company (hereinafter referred to as BNSF or the Carrier) concerning the operation of regional or system production gangs on the BNSF. BNSF was created by the consolidation of the Burlington Northern Railroad (hereinafter referred to as BN) and the Atchison Topeka and Santa Fe Railroad (hereinafter referred to as ATSF) in 1995. If the Carrier intends to operate regional or system production gangs, it is required to provide the BMW General Chairmen with advance written notice of its intention to establish such gangs which operate over more than one seniority district. These advance notices are required by Article XVI of the September 26, 1996 National Agreement between the BMW and the National Carriers' Conference Committee.

The central question to be resolved in this arbitration is whether BNSF may deviate from the information set forth in its notice to establish regional or system

production gangs or whether the Carrier must honor that information once the production gangs are established. The parties have stated their respective Questions at Issue in the agreement creating this System Board of Adjustment (hereinafter referred to as the Board) as follows:

BMW's Statement of the Question At Issue

If BNSF serves notice of its intention to operate regional or system-wide gangs pursuant to Article XVI, Section 3(a) of the September 26, 1996 National Agreement, may BNSF disregard the information in the notice and unilaterally operate a gang: (1) with a lesser number of employees; (2) with different staffing; (3) at different locations; (4) at different beginning and ending mileposts; (5) on different starting and ending dates; and, (6) on different seniority districts?

BNSF's Statement Of The Question At Issue

The Sickles and Lieberman awards on BNSF provide that the Carrier may make changes to the schedules of Region or System-Wide Gangs before and during the work season for specified operational and other reasons. Did Article XVI of the 1996 BMW National Agreement, in light of its Section 5, abrogate the provisions of the Sickles and Lieberman Awards on BNSF and eliminate the right of the Carrier to make schedule changes due to changes in levels of business, changes in train schedules to meet customer needs, weather conditions, equipment failure or other production problems, emergencies, acts of God, as well as other unexpected factors?

HISTORY AND BACKGROUND OF THE DISPUTE

The dispute which is the subject of this arbitration has its genesis in the Report of Presidential Emergency Board No. 219 (PEB 219) dated January 15, 1991. One of the issues discussed by PEB 219 was the carriers' proposal to be allowed to establish regional and system production gangs. On January 15, 1991, PEB 219 issued its Report to the President. Article VI-J – Section 11 (hereinafter referred to as Section 11) of that Report provided as follows:

11. Regional and System-wide Gangs

- The Carriers have indicated that greater operational efficiencies can be attained if production gangs can continue working together for longer periods of time. The BMW has been concerned with maintaining job opportunities for its members. The Board recommends the following changes in present practices:
 - (a) A carrier should give at least ninety (90) days written notice to the appropriate employee representative 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). These gangs will perform work that is programmed during any work season for more than one seniority district. The notice should 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 matters set forth above to final and binding arbitration, in accordance with the following procedures. . .
 - (c) The arbitrator must render a written decision, which shall be final and binding, within thirty (30) calendar days from the date of the hearing. . . .

Section 11 of the Report of PEB 219 required a carrier to give at least ninety days' written notice to the appropriate employee representative of its intention to establish regional or system-wide production gangs. This notice was to specify the terms and conditions the carrier proposed to apply to these gangs. If the parties were 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 was allowed to submit the dispute to final and binding arbitration, so-called "Section 11 arbitration."

On February 6, 1992, the BMW and the National Carriers' Conference Committee drafted a document to implement the 1991 Imposed Agreement. That document addressed regional and system production gangs in Article XIII which is set forth below.

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. BMW counterproposals, 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. . . .

On August 19, 1993, the Burlington Northern Railroad served a notice on the BMWE of its intention to establish regional and system production gangs for the 1994 work season. The parties were unable to agree on the terms and conditions that would apply to the proposed regional and system production gangs for the 1994 work season. Therefore, the dispute was submitted to Arbitrator Irwin M. Lieberman pursuant to Section 11 of the Report of PEB 219.

On January 14, 1994, Arbitrator Lieberman issued his Section 11 arbitration Award. In his Award, Arbitrator Lieberman made the following observation:

"An additional comment is in order. In [this] October 11, 1991 notification, BN expressed the fact that there could indeed be many changes in gang activities because of reasons which would be unforeseen at the outset of the season. Those covered matters ranging from changes in the levels of business, acts of God, equipment failure, or other production problems, and similar matters. Based on these potential events, Carrier indicated that deviations and additions to the basic plan of activity for the Production Gangs would be inevitable. This was supported by Arbitrator Sickles who indicated that he did not find those types of deviations fatal to the creation of the gangs as long as there was a reasonable basis for the deviation. *It should be made absolutely clear that this Arbitrator concurs, with respect to the coming Production season, that similar types of changes are in order, and as long as they are reasonable, they may not be foreclosed by virtue of the original proposals for the season, or because of this Arbitration Award*" (emphasis added).

The Lieberman Award applied to BN regional production gangs for the 1994, 1995 and 1996 work seasons.

On November 15, 1996, BMWE and the BNSF entered into a Letter of Agreement which allowed the Carrier to establish and work regional or system-wide

production gangs on the combined BN and ATSF properties. Such gangs work under the BN regional and system terms and conditions.

On October 29, 1996, the Carrier served the Organization notice of its intention to establish regional and system production gangs for the 1997 work season. That notice contained the same language that was in the 1991 and 1993 notices regarding unanticipated factors that may cause the Carrier to deviate from its planned production work schedule during the work season. The BMW promptly protested that under Article XVI, Section 3(a) of the September 26, 1996 National Agreement the notice was improper. The parties established this System Board of Adjustment to resolve the dispute. Both parties submitted extensive Submissions and Rebuttal Submissions. They also introduced over fifty (50) exhibits. The Board convened in Kansas City, Missouri on September 10, 1998, to hear oral arguments from the BMW and the BNSF. Based on this extensive documentary and oral record this Board hereby renders the following decision.

FINDINGS AND OPINION

Article XVI, Section 3(a), of the September 26, 1996 National Agreement does not expressly abrogate the deviation clause in the Carrier's production gang notices found permissible by Arbitrator Lieberman. Nor does the bargaining history, including the Recommendations of Presidential Emergency Board No. 229, persuade this Board that the parties mutually agreed to change the deviation clause found permissible by the Lieberman Award and therefore that clause is still in effect on this property.

AWARD

Article XVI of the September 26, 1996 BMW National Agreement did not abrogate the deviation clause found permissible by the Lieberman Award on the Burlington Northern Santa Fe Railroad Company. Therefore, BNSF may deviate from a notice proposing the establishment of regional and system-wide production gangs if there is a reasonable basis for the deviation.

Robert M. O'Brien
Robert M. O'Brien, Neutral Member

Steven V. Powers
Steven V. Powers, Employee Member

Dennis J. Merrell
Dennis Merrell, Carrier Member

Dated: March 11, 1999