IN THE MATTER OF ARBITRATION
PURSUANT TO SECTION 11 OF THE
RECOMMENDATIONS OF PRESIDENTIAL EMERGENCY
BOARD NUMBER 219

as imposed by

PUBLIC LAW 102-29

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

RE: Regional and System gangs

DECISION ON THE MERITS

Joseph A. Sickles
Arbitrator

APPEARANCES

FOR THE EMPLOYER:

JOHN STARKOVICH
ASST. VICE PRESIDENT
SCOTT KRUSE
GIBSON, DUNN & CRUTCHER

FOR THE UNION:

STEVEN V. POWERS
ASST. TO THE PRESIDENT

Dates of Hearing: May 4, 5, 21 and 22, 1992

Date of Award: June 15, 1992

IN THE MATTER OF
ARBITRATION

pursuant to

SECTION 11 OF THE RECOMMENDATIONS OF
PRESIDENTIAL EMERGENCY BOARD NO. 219

as imposed upon the Parties by

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BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

REGIONAL AND SYSTEM-WIDE GANGS

DECISION ON THE MERITS

Joseph A. Sickles, Arbitrator

Appearances:

For the Carrier: John Starkovich
Scott Kruse

For the Union: Steven V. Powers

June 15, 1992

BACKGROUND OF DISPUTE

Subsequent to unsuccessful Railroad industry collective bargaining negotiations on a number of items, various issues were submitted to Presidential Emergency Board No. 219 (herein "PEB 219") which was charged with the task of making recommendations to settle the disputes. One of the items at issue before PEB 219 was the demand of the Carriers for the establishment of **system and regional gangs.**

On January 15, 1991 PEB issued its findings and recommendations. Section 11 recommended contractual changes that would allow system and regional gangs to operate over specified territory of the carrier to perform work that is programmed during any work season for more than one seniority district.[1]

In addition to the expedited arbitration provisions (See footnote 1) the PEB recommended the creation of a Contract Interpretation Committee (herein "CIC") to resolve disputes over the application or interpretation of the pertinent recommendations.

Negotiations continued after the issuance of the PEB 219 report, to no avail, and ultimately there was a one (1) day strike which was settled on April 17, 1991 by a congressionally imposed settlement in Public Law 102-29.

The Statute provided for a Special Board to make

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[1] After a required notice is served upon the Union of intention to establish the gangs, if the parties are unable to negotiate an implementing agreement, the parties must engage in final and binding arbitration of the dispute.

clarifications and modifications to the PEB 219 recommendations, and if the parties could not reach a voluntarily agreement, the PEB 219 recommendations (as clarified and modified) would **assume the status of an agreement between the parties as though reached through negotiations under the Railway Labor Act.**

The parties were not able to reach a voluntary agreement and the "imposed agreement" became binding.

An initial Burlington Northern Railroad Company (herein "BN" or "Carrier") proposal was presented on October 11, 1991 stating an intent to establish regional and system production gangs pursuant to Section 11, PEB 219. The Brotherhood of Maintenance of Way Employes (herein "BMWE" or "Organization") advised the Carrier that the notice was premature and improper for a number of reasons[2] but BMWE (while preserving its positions) did present counterproposals and met with the Carrier. No implementing agreement was reached. A January 29, 1992 "supplemental" notice by BN, meetings and correspondence also transpired, without successful conclusion.

Thereafter, the parties selected the undersigned Arbitrator to serve pursuant to Section 11, PEB 219.

Subsequent to conference telephone call and correspondence between this Arbitrator and the Parties, a procedural hearing was conducted in Chicago, Illinois on April 9 and 10, 1992 and a "**DECISION ON PROCEDURAL ISSUES** was issued on April 20, 1992 which determined that (1) a definition of a regional production gang (and

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[2] a) jurisdiction of the Arbitrator was still unresolved, b) the notice did not contain sufficient identifying information, c) "production gang" was undefined, etc.

related questions) "...does not present a procedural question and will not be addressed in this Award" and (2) the undersigned found jurisdiction to consider BMWE proposals raised during the thirty (30) day period if they are reasonably related to BN's proposals under the "broad jurisdiction" granted to me.

The Parties submitted further Briefs, argumentation and documents. Hearings on the Merits of the dispute were conducted on May 4 and 5, 1992 in Fort Worth, Texas, and on May 21 and 22, 1992 in Denver Colorado, at which time all parties were present and represented and were afforded full opportunity to present their respective positions.[3]

The parties have referred to a CSX/BMWE January 6, 1992 Award (and an accompanying agreement) issued pursuant to Section 11 of the PEB 219 Recommendations.

The parties have characterized the CSX Award in various manners as it affects the resolution of this dispute. However, our perusal of the Award shows that: "For the most part, the parties' proposals are in substantive accord, and the resulting Agreement is consistent therewith" (Page 5). The Award does not extensively describe the basis for resolution of the remaining contested matters. I do not, in any manner, criticize the Award, or the parties' efforts to settle many of the matters without recourse to a third party, but at the same time, the precedential value of the

[3] For reasons stated in Footnote # 13, no transcription of the proceedings were taken, and the Undersigned was specifically precluded from permitting oral evidence.

Award to this case is quite questionable.[4]

QUESTIONS AT ISSUE

In its most basic terms this dispute presents the question of (1) a definition of a regional production gang if, in fact, such a definition is necessary, and (2) the terms and conditions which should be imposed upon the parties.

DEFINITION OF REGIONAL PRODUCTION GANG

During the procedural aspect of this dispute I considered various aspects of the parties contentions in this regard, and I noted at page 8 of the Procedural Decision that:

> ...there seems to be no question that I have the authority to define the term 'production gang(s)' if the parties decline to do so...

However, the Carrier suggests to me that there is absolutely no necessity to issue a definition since Article XIII (a) negates any such a requirement. That section mandates a ninety (90) day written notice of intention to establish regional or system-wide gangs for the purpose of working over specified territory:

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

The Carrier points out that it is unquestioned that the work

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[4] There is a strong indication that most of the agreement provisions are the result of "give and take" negotiations between those parties, and inclusions here of certain items may very well ignore "quid pro quo" considerations which are pertinent to the provisions.

to be performed by the gangs discussed in its October 11, 1991 notice is programmed, and will encompass more than one seniority district. Thus, those two ingredients automatically constitute the gangs as "regional or system-wide gangs for the purpose of working over specified territory of the carrier or throughout its territory..."

The Carrier's above stated position is interesting to consider as an isolated concept of language interpretation, but such an exercise would be purely academic in this dispute since it ignores the existence of the Contract Interpretation Committee which was established by PEB 219 (and imposed upon the parties) to resolve disputes over the application and interpretation of the pertinent Board 219 recommendations. The CIC has issued Answers to specific questions posed to it concerning these gangs.

At Page 6 of the **Decision on Procedural Issues,** I cited the Organization's Issue No. 1, as follows:

BMWE PROCEDURAL ISSUE #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. In order to properly apply Article VI-J-Section 11 on the Burlington Northern Railroad Company, the Brotherhood of Maintenance of Way Employes 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 the Burlington Northern's notices dated October 11, 1991 and January 29, 1992 regional production gangs as contemplated by Section 11 of PCB No. 219?

Thereafter, I cited the CIC's November 6, 1991 Answer to Issue No. 2, which advised:

> The term "production gang" or "production crew" is a 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 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 PCB 219, without, apparently, finding it necessary to define that term for the Board. It is true, as the Organization points out, that the Carriers' primary witness, who testified regarding the industry's 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"** (Emphasis supplied)

Moreover, in its Answer to Issue No. 7, the CIC noted that it had been "...provided some additional detail..." regarding the gangs specified in the Burlington Northern Railroad's notice of October 11, 1991. Nonetheless:

> ...it is the opinion of the Neutral Member of this Committee that **specific factual disputes** are more properly resolved, at this time, by the parties or by a Section 11 arbitrator if the parties are unable to reach full agreement regarding the institution and establishment of regional and system gangs.(Emphasis supplied)

If the Carrier(s) argued to the CIC the very limited definition of a production gang, or the total lack of any need to issue a definition, the Answers cited above certainly do not convey any CIC agreement with the concept.

The Chairman of the CIC was a member of the PEB 219 that authored Article XIII (a). If it were the intention of the PEB to permit a regional or system-wide gang to do any work which is programmed and transcends seniority districts, it would have been a very simple task for the CIC Chairman to have so stated, rather than to issue the cited Answers which defer a definition to ultimate arbitration. Accordingly, it is necessary for me to explore the record to ascertain a reasonable definition, taking into account the positions and contentions presented to me,as well as to the various authoritative bodies which have taken testimony and evidence prior to the creation of this particular arbitral authority.[5]

When the Organization sought a definition as a "procedural matter" it suggested certain material to assist me in issuing a definition, such as the language of Section 11, PEB 219 itself,

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[5] As I read the pertinent CIC authority, I find an "affirmative mandate" to resolve the question of a definition, or at least to determine if the gangs in question are, or are not, production gangs. The Organization has a right to such a conclusion, and this is the "forum" designated to act.

statements made by Board members, correspondence from the Carrier, testimony before the Special Board created to review the Board 219 recommendations, asserted Carrier testimony regarding numbers of employees and type of equipment as well as the size of the project, track area to be serviced, etc. It has also cited a July 26, 1989 New York Dock Award in a dispute between the Norfolk and Western and the BMWE, a Trade Publication[6] and humanitarian concerns.

The Carrier disputes that these presentations have a reasonable bearing upon the ultimate definition, and stresses that it was granted the rights to establish and effectively use the gangs, at an economic penalty, and it is imperative that there be a continuity of gangs with attendant flexibility. Thus, any definition must not hinder its operation as authorized by PEB 219.

The Organization has agreed that twenty (20) of the forty-two (42) gangs established in the Carrier's notification are production gangs, since they also fall within the Organization's definition of a production gang. The remaining twenty-two (22) gangs are in a "limbo" status between the parties, whose contentions are polarized to be the lowest possible denominator to the highest restrictive definition. (See Pages 46-48, BMWE's 4/1/92 Procedural Brief).

To state a definition one needs only to refer to CIC Answers. The Carriers' presentation to PEB 219 stressed that the industry needed to establish **production gangs, regional gangs and system-wide gangs**, and the primary witness:

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[6] "Production tie renewal vs. quick-removal operations" October, 1991, **Railway Track and Structures Magazine.**

> ...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.

Recognizing that the above cited illustrations would, apparently, meet the definition of "production gang", the CIC refused the invitation to fashion a hypothetical definition in the absence of specific facts. (See Answer to Issue No. 2). See also Answer to No. 7.[7]

Based upon the evidence before me, I conclude that Board 219 intended a definition within the framework of the CIC answer to Issue No. 2, which incorporated Carrier testimony. Thus I determine that a production gang is:

> **Heavily mechanized and mobile continuously performing specific programmed, major repair and replacement work utilizing a substantial number of employees.**

But, having stated the general definition does not resolve the dispute presented to me in this case since it merely perpetuates the disagreement between the parties as to what may be included

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[7] The Carrier insists that the testimony before PEB 219 and the conclusions of the CIC, especially with regards to "numbers of employees" on gangs, are/were merely "examples" and "illustrative", but certainly were not "definitional". It also points out that the record is replete with references to the fact that the term "production gang" and related components, are well known in the industry and thus there is no need to define the term(s). I disagree. The evidence may be "illustrative" but it is pertinent to consider same in an effort to ascertain the intention of PEB 219 when it authored language specifically permitting extensive use of gangs across seniority districts. If, as BN states, "production gangs" are well known in the industry, it may not now argue that Carrier witnesses misstated the basic ingredients of such gangs in their testimony.

therein and could compel recourse to even another forum for a more definitive ruling.

As a result, certain of the terms included within the definition must be further refined.

> Work that is considered to be **specifically programmed** is the work identified **as such** in a Carrier's Article XIII (a) notification to the representative of the employees. In this regard, the intention of the parties is invited to CIC Answers to Issue Nos. 11 and 13 as it requires "...identifying data regarding the nature and operation of the gangs sought to be established..." as well as the discussion on Pages 13 through 18 of the Decision on Procedural Issues.[8]
>
> The question of what constitutes a **substantial number of employees** has indeed caused the parties and the undersigned considerable unrest since the term "substantial" may be the topic of extended debate even absent an arena of advocacy. It is with great reluctance that I approach the topic with a view toward establishing a mathematical number of employees since such a solution may not, in the long run, be beneficial to the parties. But, in order to resolve **this** particular dispute I find no alternative. Consistent with the testimony presented to PEB 219 and related presentations, I find that a production gang shall consist of no fewer than 20 employees.

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[8] Also pertinent to this refinement is the concept expressed in items 2 and 3 on Page 19 of the April 6, 1992 Award on Procedural Issues, N&W and BMWE (Fletcher) that an Article XIII (a) notification must include (a) the geographic limits of the work to be performed by each gang, and (b) the projected duration of the gang. In any event, the Carrier recognizes that work is programmed when it is "planned in advance".

A refinement of the "heavily mechanized" and "mobile" concept as well as "major repair" and "replacement" work must also be considered in light of the parties assertions here, and to other forums.

> **major repair and replacement work** should be easily understood by these parties. It is work which is not day to day, routine, regular maintenance which is easily performed locally without reference to a pre-planned program encompassing a larger geographic area.
>
> The terms **Heavily Mechanized and Mobile**, on the other and, may be a cause of greater consternation. It is intended by the undersigned to encompass the type of machinery reasonably anticipated and required for use in performing programmed major repair and replacement work on a normal basis by a crew of the size contemplated. Mobility is generally self defining within the other components of the definition.

It is also intended that crews which have an actual and continuing reasonably related working interrelationship with the main production crew, throughout the term of the programmed work, and for the duration of the program, are also considered to fall within the definition as long as they are programmed for that purpose, and do perform that pre-programmed work rather than strictly "local" work.

In its October 11, 1991 notification letter, BN stresses that:

> In light of the fact that these plans for regional and system-wide gangs for the 1992 work season cover work that will actually be performed from 6 months to more than a year in future, the attached detailed plans may be

> affected by 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. Therefore, prior to the actual start of the work season and throughout the work season the anticipated time schedules of the work may need to be shortened or lengthened, certain planned work locations may have to be deleted and others substituted or added, the amount of work planned at certain locations may be changed, and the indicated sequence of the work may be altered. It should also be noted that the manpower requirements indicated on the attached gang charts are for a typical gang of the type involved, but that such requirements may vary depending upon the nature of the individual work projects, the types of equipment available for the gang and other factors not predictable at this time.

During the Hearings, Carrier reiterated the above cited potentials. I do not find these types of deviations fatal to the Carrier's creation of the gangs as long as there is a reasonable basis for the deviation and/or alteration.

The degree of cooperation between these parties has not been exactly ideal in all aspects of this dispute, and if the parties are not able to agree upon certain Carrier alterations, then of course, there is available action to redress any asserted wrong concerning the changes, and the Carrier shall have certain burdens to show the basis for the change(s). I can presume a good faith effort to comply, but I certainly can not insure such a result, any more than I can decide disputes that are not factually before me for resolution.

It is now incumbent upon the Carrier to establish its PEB 219 production gangs within the parameters of the definition and

refinements discussed above, and if, in doing so, it violates this Award within the Organization's view, BMWE can then test BN's actions by seeking appropriate redress in the appropriate forum.[9]

TERMS AND CONDITIONS

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...either party may submit the matter to final and binding arbitration.

(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

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[9] A significant amount of time has been devoted to this case by the undersigned, but nowhere near as much as the time, efforts and expenses extended by the parties. I urge the parties to take every reasonable effort, and to show reasonable patience, to permit the rules an opportunity to work to everyone's benefit and advantage. In this regard, I have hesitated to mandate a continuing "working committee" to explore enforcement on a continuing basis since the parties have stated a reluctance to have an internal dispute resolution provision. However, I urge the parties to establish such a committee on a voluntary and continuing basis.

arbitration procedures provided for in Article XVI....

BN argued in the procedural portion of the case that BMWE's counterproposals are **not** subject matter related because PEB 219 **has already considered and foreclosed and/or precluded further consideration** and jurisdiction of those subjects in this arbitration. Further, such proposals are barred by the moratorium provisions of PEB 219 and PL 102-29.[10]

PEB 219 chose to recommend, and thereby create, the CIC and vested in it "final and binding disposition."

The CIC, on November 6, 1991, decided that the arbitrator's jurisdiction is **not** limited to seniority questions, but in fact is much broader, i.e. "...**all** subject matters contained in a carrier's proposal to establish regional or system-wide gangs...are subject to the *expedited arbitration procedure in Section* 11. BMWE counterproposals, **that are subject matter related** to a carrier's proposals...would also, logically, fall within a Section 11 arbitrator's jurisdiction." (Answer to Issue No. 1. Sub-question No. 5). Interestingly, that same answer refers to:

> ...the broad scope of arbitration contemplated by Sections 11(a) and 11 (b).

I concluded, in the Decision on Procedural Issues:

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[10] ...CIC's elimination of PEB 219'2 confinement of the jurisdiction of the Section 11 arbitration to a determination of seniority rights." (See Page 16, BN's Submission)

> **As it pertains to my jurisdiction in the expedited Arbitration under Article 11, in answer to the Carrier's question, this arbitrator does have jurisdiction to consider BMWE proposals raised during the thirty (30) day period if they are reasonably subject matter related to BN's proposals (as that term has been defined herein) under the "broad jurisdiction granted to me, even though they contain subjects which were resolved by the now imposed recommendations of PEB 219 and even though the BN considers them to be the subject of the moratorium provisions of PEB 219 and PL 102-29.**

I also noted that:

> While I may have jurisdiction to consider matters that are "precluded" according to the BN, it should be understood that the BMWE shoulders a **very stringent burden** to show a basis for affording any further relief than imposed by PEB 219. (Emphasis supplied)

There are certain matters concerning terms and conditions which must be addressed by me such as seniority, bulletins, bids, etc, as well as duration of this Award, identity of the controlling work contract, etc.

In addition, there is the very broad concept of matters urged by the BMWE which seek to obtain better working conditions for its members.

Considering the final matter first, I am disinclined to expand upon the basic contractual benefits granted to BMWE by PEB 219.

Indeed, I question the very basis for the request to do so. The Organization raised numerous requests for increased benefits to PEB 219; it sought better conditions at all stages of the lengthy procedures which finally culminated in this Arbitration proceeding. **At all levels** it has sought increased pay and overtime rates, additional considerations concerning show up pay and starting points, relief concerning work weeks and work days, meal periods, increased expenses when working away-from-home, as well as prohibitions concerning subcontracting, reduction in force, better stabilization benefits and the like.[11]

IF PEB 219 had granted various benefit increases in the void, without consideration of extended use of employees on regional and system-wide gangs [with the attendant potential of additional time away from home, possible increased expenses, etc] then one could possibly consider the various equitable arguments advanced by the employees. But that is far from the case. One needs only to review the January 15, 1991 Report To President By Emergency Board No. 219. At Page 29, et seq. we note that the BMWE sought increased wages and Away-From-Home Expenses, among other things. At Page 94 of the Report, PEB 219 noted that:

The Carriers made several specific proposals

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[11] For instance, in this dispute, the Organization has continuously sought to obtain benefits under 7F of the BN agreement rather than the refined Board 298 benefits. To be sure, there may be certain 7F benefits being extended at this time [as the Carrier awaits this Award] under interim authority granted by the CIC, but, as I read the extensive record, I must concur with the Carrier that under the authority of PEB 219, 7F ceases as a viable provision when a Carrier opts to create production gangs under Section 11, PEB recommendations.

> to change the work rules involving BMWE. They wish to: (1) eliminate restrictions on the establishment of regional and system-wide production gangs which could work over the entire territory of the carrier; (2) realign or combine seniority districts; (3) change the reporting of the employees working away from home for pay purposes from their lodging site to their work site; (4) allow adjustments in starting times without restriction to be announced at the end of the previous day's work; (5) allow the carrier to designate any two consecutive days as the rest days and to use a compressed work week of four days; and (6) allow the individual carrier to determine the timing of meal periods.

Thus, while recognizing the regional and system-wide gang concept, on the very next page of the Report, PEB 219 made its recommendations which, in effect, denied many of the very benefit increases sought herein. At Pages 95 and 96 the PEB recommended increases in expense payments when away from home by adding to those contained in Arbitration Board 298. It also dealt with Rates Progression, Starting times, Meal Periods, Alternative Work Weeks and Rest Days, Subcontracting, Work Site Reporting, etc. See Pages 95-99 of the PEB 219 Report).

If anything was crystal clear in the proceedings which have led to this Award, the BMWE has doggedly and persistently raised and pursued its various contentions to the PEB, and in subsequent forums. For me to grant the various extensions of benefits to the employees here it would be necessary for me to, in essence, override PEB 219 in its basic benefit package and for me to decide that it did not fully contemplate or understand the needs of the employees. I have neither the inclination nor, in all probability, the jurisdiction to enter into such a field of endeavor.

It is well to recall that the language of PEB 219's recommendation # 11 (b) (5) restricted the Article XIII Arbitrator:

> 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. (See Page 101 of Report)

To be sure, on November 6, 1991 the CIC broadened the scope to subject matter related proposals and discussed **broad** scope of arbitration, but I do not read the record as extending to me the powers to override PEB 219 to the extent requested by the BMWE.

Finally, it should also be noted that, as a practical matter, an Arbitrator under this abbreviated type of proceeding is, or should be, wary of ignoring, and/or expanding upon, the previously granted increased benefits. PEB 219 and the related forums had literally months to take and consider evidence and verbatim testimony.[12] To the contrary, Article XIII arbitrators work under a very limited time frame, with certain procedural impediments.[13] Thus, it is hardly likely that the same Board that created an Arbitration process with those impediments could have contemplated the authority to expand upon the basic benefits granted by it in

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[12] Executive Order 12714 established the Emergency Board pursuant to Section 10 of the Railway Labor Act, as amended, on May 3, 1990. The PEB 219 Report was not submitted until January 15, 1991.

[13] Under Paragraph #11 (b) (4) [Page 101 of Report] the arbitrator must render a written decision, which shall be final and binding, within **thirty (30) calendar days** from the date of the hearing, and pursuant to #11 (b) (3):

> The arbitrator **may not accept oral testimony at the hearing, and no transcript of the hearing shall be made.** (Emphasis supplied)

the first place. In short, I have not been appointed to serve as a substitute Presidential Emergency Board. Whether or not I serve as an "interest" arbitrator as that term is normally employed, and whatever "equitable" authority I may have, I simply cannot substitute my judgment for that of PEB 219 in the manner and to the degree requested by BMWE.[14]

On the afternoon of May 21, 1992 the Carrier made the following two offers:

> TRAVEL ALLOWANCE
>
> Regional/System Production Gang employees will be provided a travel allowance of $20.00 for each week worked, except that if the employee elects to remain at their lodging facility during their rest days, the employee will be ineligible for the end of work week travel allowance.
>
> LODGING
>
> Employees assigned to Region/System Production Gangs will be provided lodging by the Carrier, either motels or outfit cars. When lodged in motels, it will be in double occupancy room with two beds which, will be paid for by the Carrier. Employees electing not to return to their residences to observe their rest days shall be allowed to remain at their lodging

[14] The Organization has made references to "prevailing" conditions. But I find a true lack of a showing that such a concept exists at this time. As noted in Footnote # 11, 7F of the BN agreement has been eliminated by PEB 219 for gangs created under its authority. Whether or not that determination was proper, equitable, just or appropriate when one considers the possibility of extended travel [and away from home living] by the employees may certainly be a subject of continuing debate. But, as noted above, I am not empowered to overrule PEB 219 in its basic concepts. For the reasons stated in this Award, the CSX agreement is a basically negotiated agreement considering concepts not present here, or at least, not obvious from the Award before me. Under those circumstances, I do not, at this time, construe the CSX agreement to be part of a "prevailing" condition.

> facility without lodging expense to the employee; however, by exercising this election, the employee involved will forfeit any claim to his end of work week travel allowance as hereinafter provided.

If the BMWE desires to avail itself of the two (2) above quoted provisions, it shall so advise the Carrier within fifteen (15) calendar days from the effective date of this Award.

There are some matters however which must be decide by this Award. As they are considered below, nothing stated therein should be construed as negating the refusal to expand the PEB 219 benefits as described above.

BULLETIN AND BID

The Carrier has stressed throughout these proceedings that the rights granted to it by PEB 219 may not be considered in a vacuum and one of the basic ingredients it must have is a "continuity" of the work force on the production gangs with attendant stability, predictability, harmony, etc. so that employees should not be permitted to come and go on the gangs during their programmed duration. The BMWE argues that PEB 219 was not as concerned with "continuity", etc. as BN would have me believe. But, I find a basic merit to BN's assertion. For instance, PEB 219 stated in Section # 11, at Page 100 of its Report that:

> The Carriers have indicated that **greater operational efficiencies** can be attained if **production gangs can continue working together for longer periods of time.** The BMWE has been concerned with maintaining **job opportunities for its members.** The Board recommends the following changes in present practices:
> (Emphasis supplied)

Immediately thereafter, PEB 219 stated the procedures for

Regional and System-wide gangs.

This decision should be read in harmony with BN's continuity concept.

In its October 11, 1991 notification, the Carrier proposed methods of Bulletins and Assignments consistent with its above stated goals for the gangs which must be provided at least six (6) months' work in the calendar year. (See Section 13, Page 103, PEB 219 Report). The Organization has objected to what it perceives to be an unreasonable "locking in" of employees for the duration of the gang each season, the concept of "preference" for subsequent work seasons, disregard for "normal and usual" seniority concepts, among other items and raises certain jurisdictional questions concerning my authority vs. the "Select Committee". No purpose is served by a detailed recitation of all of the varying contentions and arguments advanced by the parties in their written presentations and oral arguments. Suffice it to say that all of the contentions have been weighed, and certain deserve some comment.

At Pages 3 and 4 of the Carrier's October 11, 1991 notification, it set forth proposed rules for Bulletins and Assignments plus certain other conditions. In its Exhibit # 14, BN made comparisons with BMWE proposals. For ease of comprehension, I will address the October 11, 1991 proposals. I find that they are calculated to establish the manning of the gangs, and this Award hereby adopts the wording of items (1) "Bulletins", (2) "Assignments" and (3) "Other conditions" except as modified herein.

1(a) add: The General Chairman may timely notify the Carrier of any seniority districts to which any particular gang shall not be bulletined due to the short time which the gang is scheduled to work on the territory of that seniority district.

1(c) add: To the extent possible, the bulletin shall identify machine numbers, so as to afford employees the opportunity to bid on particular machines. However, a subsequent need to substitute machines due to breakage, damage, and other valid reason shall not void the bulletin or bid.

1(d) add: To the extent possible, these assignments shall be identified on the bulletins.

2 (a) **NOTE:** The parties agree that BN Rules 22 and 23 shall apply, although they disagree as to the operation of those Rules. However, that disagreement pre-dates this dispute, and must be resolved in normal fashion.

3 (a) add: The additional concepts expressed in Carrier's Exhibit # 14, (4) (c), Pages 12 through 14.[15]

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[15] The BMWE has raised a jurisdictional contention concerning the carrier's proposal to require an employee to remain on the gang except as specified to the contrary. In essence, BMWE urges that an employee should have the right to exercise a seniority bid off of the gang even if it does not involve a **higher** rank on the home district, i.e. the right to bid off the gang onto other bulletined *regional gang positions (if such region gang is programmed to work* over the home district), or the home seniority district. BMWE asserts that I do not have the right to make the determination, since that is preempted to the "Select Committee" established to consider the "Work Force Stabilization" portion of the PEB 219 Recommendations (See Pages 102- 105). The PEB stated that there are "...a number of obvious issues and concerns in developing and implementing the 'guarantee' program and probably many more that are not obvious to this Board and ...by the parties". Accordingly, the PEB established a Select Committee of the parties at the national level to identify and resolve issues directly or by final and binding decisions by the neutral chairman on such matters as:

> **whether there should be some commitment by the employee to remain on a covered crew for the duration of the production season.**

3 (b) Deleted. There shall be no "preference"

3 (c) Deleted. See below.

Just as PEB 219 felt that "Perhaps the most difficult issue presented is that of work force stabilization, and particularly how that relates to the Carriers' desire to establish efficient system-wide production gangs", I feel that the topic of the manning and rights of the employees on the gangs is of paramount importance. The limited time frames available, and the inability to take oral testimony on various of the contentions has, in my view, operated as a significant disservice to both the undersigned and the parties in this area. Thus, if they do not do so in any other area, I **urge** that the parties establish forthwith, a joint committee [with provision for a neutral party to make binding decisions] on this topic and to establish more definitive rules prior to the start of the next production season.

APPLICABLE COLLECTIVE BARGAINING AGREEMENT

In its October 31, 1991 notification to the Organization, BN stated:

> Except as provided above, gangs created under these provisions shall be subject to the general schedule rules applicable on the territory on which the gang is working.

Certainly the "Select Committee" (Section 14) has been granted certain jurisdiction, and my authority does not come from that portion of the Recommendation. #13 does not make an authoritative ruling on the question; but rather, leaves that matter to another forum for consideration. Thus, I find that the BMWE proposal shall not be incorporated herein, with the understanding that the "Select Committee" may make that ultimate determination, and nothing contained herein is meant to, in any manner, attempt to interfere with that Committee's jurisdiction.

The record discloses that there are six (6) separate schedule rules, but the BN schedule covers 80% of the existing employees and 77% of the trackage. Short of creating a "new agreement" incorporating the best of all agreements (and expanding upon the PEB 219 wages, benefits, etc) obviously the employees would prefer to work under the BN schedule so as to provide some monetary increase to at least some of the employees. While my Award does accomplish that result, that is not the basis for the decision. BN has stressed a need for consistency and uniformity of rules applicable to all employees. A periodic change in rules as seniority districts lines are crossed does not, in my view, accomplish that result, but rather, can be counter productive to such desired harmony. Employees on production gangs shall be subject to the BN general schedule rules except of course as modified by PEB 219 concerning the creation and operation of production gangs, and as modified herein.

DURATION OF THIS AWARD

The Organization requests that this Award be limited to one (1) year, and the Carrier desires an Award that will be effective for as long a period of time as possible.

The BMWE request is premised upon the assertion that it should have a continuing opportunity to present basic rationale for changes to this Award should its provisions prove to be non-responsive to the particular problems posed by the PEB 219 gang

concept. On the other hand, BN suggests that it requires a basic continuity and flexibility under established rules, and that continued alterations and changes brought about by annual "interest" arbitration is not only highly expensive, but basically unsettling and does not afford it the predictability it sought and obtained under PEB 219.

Certainly there is merit in both contentions. I am reluctant, however, to attempt to issue an Award of lengthy duration in this dispute since the very limited time frames under which we have operated suggest that some period of review of the effect of this Award is necessary under actual operation to assure that it is responsive to the needs, and the parties should have the opportunity to refine and alter the provisions as experience dictates, which opportunity would not be present if a long term Award were to be imposed. Ideally, this Award should be effective for the remainder of 1992 and all of the 1993 season, unless amended or extended by the parties before that time.

However, the Undersigned notes a jurisdictional matter under the imposed agreement. Article XIII (a) advises that a Carrier shall give at least ninety (90) days written notice of intention to establish regional or system-wide gangs to perform work **that is programmed during <u>any work season</u> for more than one seniority district.** The notice <u>must</u> specify the terms and conditions the carrier proposes to apply. The Carrier's October 11, 1991 Article XIII's letter and subsequent correspondence, referred to work that is **programmed during the 1992 work season.** The gangs were

programmed from six (6) months to more than one (1) year, and indeed, my April 20, 1992 Decision on Procedural Issues adopted the language of Page 19 of the April 6, 1992 N&W/BMWE Award on Procedural Issues which mandated that an Article XIII (a) notification contain the geographical limits of the work to be performed by each gang as well as the **projected duration of the gang.**

If the Carrier gives an Article XIII notification for the 1993 season, and the parties are unable to reach agreement under Article XIII (b), **"...either party may submit the matter to final and binding arbitration ..."** under that section and Article XIII (c). Thus, I am unable, in this Award, to preclude either party from submitting matters to Arbitration concerning 1993 season notification(s).

> This Award shall be in full force and effect through and including the 1993 season, unless amended or extended by the parties. This duration does not attempt to preclude any of the *rights of the parties for future* arbitration as authorized by "Article XIII-Regional and System-wide gangs."[16]

ENFORCEMENT AND INTERPRETATION

(a). Enforcement

The parties have resisted any attempt to include in this Award procedures to resolve claims, grievances and disputes which may arise under this Award, preferring instead to utilize already

[16] Section 23 of the "Arbitrated Agreement between CSX and BMWE" is not persuasive to me for the reasons stated previously.

existing forums and procedures thereunder. Accordingly, this Award does not contain provision for any specific and individual procedures to resolve future disputes.

(b). Interpretation

Either party to this dispute may request an INTERPRETATION of any of the provisions contained in this Award by giving notice of the request to the undersigned Arbitrator (with a copy to the opposing party) no later than thirty (30) days after receipt of the Award. In the event of a request for interpretation, the opposing party shall be offered an opportunity to present its contention(s) on the matter(s) to be interpreted. The Arbitrator may issue an Interpretation based upon the request and the comments of the other party, or may request additional documentation or information. Further hearings will be held only if both parties request same. In any event, the Arbitrator will issue the interpretation at the earliest practical time.

AWARD

I

A Production Gang is Heavily Mechanized and mobile, continuously performing specific programmed, major repair and replacement work utilizing a substantial number of employees.

NOTE

See pages 11 through 14 for discussion of substantial number of employees, major repair and replacement work, Heavily Mechanized and Mobile, interrelating crews, alterations, etc.

II

No benefit increases beyond those granted by PEB 219 are awarded herein except those specifically noted. See, for example, Page 20.

III

The Bulletins, Assignments, and "Other conditions" contained in BN's October 11, 1991 notification are incorporated herein except as specifically modified. See Pages 22 through 24.

NOTE

This Award does not attempt to interfere with the jurisdiction of the "select Committee in any manner.

IV

Employees on Production gangs shall be subject to the BN general schedule rules except, of course, as modified by PEB 219 concerning the creation and operation of production gangs, and as modified herein.

V

This Award shall be in full force and effect through and including the 1993 season, unless amended or extended by the parties. This duration does not attempt to preclude any of the rights of the parties for future arbitration as authorized by "Article XIII-Regional and System-wide gangs.

VI

Either party may request an INTERPRETATION of any of the provisions contained in this Award by giving notice to the Arbitrator no later than thirty (30) days after receipt of this Award.See the procedures set forth at page 28.

Joseph A. Sickles

Signed at Bethesda, Maryland this 15th day of June, 1992

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IN THE MATTER OF ARBITRATION
PURSUANT TO SECTION 11 OF THE
RECOMMENDATIONS OF PRESIDENTIAL EMERGENCY
BOARD NUMBER 219

as imposed by

PUBLIC LAW 102-29

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

RE: Regional and System gangs

INTERPRETATIONS

Joseph A. Sickles
Arbitrator

APPEARANCES

FOR THE EMPLOYER:

JOHN STARKOVICH
ASST. VICE PRESIDENT
RICHARD C. SCOTT
DIRECTOR, LABOR RELATIONS

FOR THE UNION:

STEVEN V. POWERS
ASST. TO THE PRESIDENT

Dates of Requests: July 13, 15 and 16, 1992
Dates of Responses: July 31 and August 11, 1992

Date of Interpretation: September 19, 1992

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IN THE MATTER OF
ARBITRATION

pursuant to

SECTION 11 OF THE RECOMMENDATIONS OF
PRESIDENTIAL EMERGENCY BOARD NO. 219

as imposed upon the Parties by

PUBLIC LAW 102-29

BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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REGIONAL AND SYSTEM-WIDE GANGS

INTERPRETATIONS

Joseph A. Sickles, Arbitrator

Appearances:

For the Carrier: John Starkovich
Richard C. Scott

For the Union: Steven V. Powers

September 19, 1992

Interpretation

I

BACKGROUND

On April 20, 1992 a Decision on Procedural Issues was published, and subsequent to additional Hearings and argument, a **DECISION ON THE MERITS** was issued on June 15, 1992.

The **DECISION ON THE MERITS** advised:

> Either party to this dispute may request an INTERPRETATION of any of the provisions contained in this Award by giving notice of the request to the undersigned Arbitrator (with a copy to the opposing party) no later than thirty (30) days after receipt of the Award. In the event of a request for interpretation, the opposing party shall be offered an opportunity to present its contention(s) on the matter(s) to be interpreted. The Arbitrator may issue an Interpretation based upon the request and the comments of the other party, or may request additional documentation or information. Further hearings will be held only if both parties request same. In any event, the Arbitrator will issue the interpretation at the earliest practical time.

Award # VI stated:

> **Either party may request an INTERPRETATION of any of the provisions contained in this Award by giving notice to the Arbitrator no later than thirty (30) days after receipt of this Award. See the procedures set forth at page 28.**

Both Parties made timely requests for Interpretations of portions of the **DECISION ON THE MERITS**. The Parties agreed to a schedule for submission of contentions and opposition, and it was agreed that no additional hearing was necessary.

Interpretation

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II

REQUESTS FOR INTERPRETATION

BMWE REQUESTS

#1. Was it the Arbitrator's intention that Item (1), Section (d) would expand the carrier's latitude to assign employees to perform work outside their classifications and bulletined assignments above and beyond the basic contractual latitude granted by PEB No. 219, section 8?

2. A request to resolve the issue of whether the ultimate determination to apply the type of seniority provisions embodied in the BMWE proposal (i.e. Sections 16 and 17 of the BMWE's November 8, 1991 proposal) or BN's proposal [i.e. Item (3), Section (a) of the BN's October 11, 1991 proposal, as modified] or some alternative provisions shall be made by the Select Committee.

#3. Resolve the issue of whether it was the Arbitrator's intention that regional production gangs could be unilaterally assigned to work on seniority districts other than those to which they were programmed and bulletined at the beginning of the production season.

#4. Was it the Arbitrator's intention that if the carrier intends to establish regional or system-wide production gangs under Article XIII for the 1993 season and either party proposes to adopt provisions of the Merits Award dated June 15, 1992, each provision of the Merits Award would continue in effect for the 1993 season only if one party or the other did not elect to submit that provision to final and binding arbitration pursuant to Articles XIII and XVI?

#5. Is the programming and establishment of a "main production crew" pursuant to Section 11 of PEB No. 219 a necessary condition that must be satisfied before the Carrier may program and establish, pursuant to Section 11, a crew

with an interrelationship to the main production crew to work with the main production crew as it performs its programmed work across seniority district lines?

BN REQUESTS

#1. Interpretation of actual and continuing reasonably related working interrelationship with the main production crew.

#2. Interpretation relating to the manner in which the machine operator positions are posted.

 # 3. Interpretation concerning positions bulletined on the same or different bulletins.

#4. Interpretation concerning postings regarding Group 1 and 2 Machine Operators.

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III

INTERPRETATIONS

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BMWE REQUEST # 1

The language of Item (1) Bulletins, Section (d) of the October 11, 1991 proposal, which was adopted in the **DECISION ON THE MERITS** is not considered to be in conflict with PEB 219, Section 8 [Intra-craft Work Jurisdiction].

It was not the intention of this author to alter the content of the PEB recommendation.

This author may not issue a binding determination upon hypothetical possible violations. Any such dispute will have to be, by necessity, resolved in an appropriate dispute resolution forum.

BMWE REQUEST # 2

Footnote 15 [Page 23] of the **DECISION ON THE**

MERITS recognizes BMWE's objection to Carrier's right to restrict employees' rights to exercise seniority to bid off of gangs. The **DECISION ON THE MERITS** found that the BMWE proposal "...shall not be incorporated herein". Thus, the Carrier's more restrictive provision shall apply **unless and until** the Select Committee rules to the contrary. My Award specifically stated "...nothing contained herein is meant to, in any manner, attempt to interfere with that Committee's jurisdiction." The Award, however, did not leave the matter in limbo until the Select Committee issues a contrary determination.

BMWE REQUEST # 3

In its July 31, 1992 response to BMWE's Interpretation request, BN states:

> BMWE claims as an ambiguity the potential for working this gang at a location other than its programmed work and on another seniority district of which it was not programmed to work during the production year. This is clearly not an ambiguity;it is clearly permitted and contemplated by the Arbitrator. (Emphasis supplied)

The entire concept of regional production gangs presented to me as a result of PEB 219's treatment of the subject dealt with work:

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

Notices and bulletins recognize that concept.

To be sure, the **DECISION ON THE MERITS** permits certain deviations and/or alterations to the schedules brought about by a variety of specified reasons [See Pages 12 and 13 of the **DECISION ON THE MERITS**] but it is not the intention of that Award to permit BN to substitute work in seniority districts other than where the work was programmed and bulletined.

Interpretation

A reference to a potential of working more than 20 consecutive days on a seniority district not included in the bulletin schedule (in another context) was not taken to suggest to the contrary since **all** discussions and documents of the parties, the PEB and the CIC were interpreted as requiring a strict compliance with the integrity of the programming for work in specified seniority districts.

In short, the deviations/alterations permitted by the **DECISION ON THE MERITS** contemplated alterations of a rigid scheduling, but did not contemplate working in seniority district(s) which was(were) not programmed.

BMWE REQUEST # 4

The June 15, 1992 **DECISION ON THE MERITS** is clear. That Award covers the 1992 and 1993 seasons. However, if the Carrier gives an Article XIII notification for the 1993 season and the parties are unable to reach agreement under Article XIII (b), matters may be submitted to final and binding arbitration, not under the authority of the **DECISION ON THE MERITS,** but **under the authority of the imposed agreement.**

All provisions of the **Decision on the Merits** remain in effect through the 1993 season except any provision which is raised by a new notification, which may be submitted to subsequent Arbitration under the provisions of Article XIII.

Any specific dispute (not now apparent) over the authority and jurisdiction of a subsequent Arbitrator must, of necessity, be decided in a forum other than this one. My intention, however, is clearly stated above.

BMWE REQUEST # 5

The **DECISION ON THE MERITS** dealt solely with Gangs authorized by PEB 219. The " "ancillary" or "interrelated" crews described at Page 12 of that Award contemplate crews that do not

satisfy all of the ingredients of the definition of a main production crew, but have an actual and continuing reasonably related working interrelationship with the main production crew as defined by the Award under the imposed agreement. Thus, an "interrelated" crew may not exist in the void.

Whatever side agreements and understandings the parties may have reached in an effort to resolve certain immediate problems are not now before me for review or interpretation.

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BN REQUEST # 1

If a crew has an actual and continuing reasonably related working interrelationship with the main production crew, throughout the term of the programmed work, and for the duration of the program, the "ancillary" or "interrelated" crew does not have to, itself satisfy the full definition of a Regional Production crew, i.e. it need not have 20 or more employees or meet the other aspect of the definition of a production crew. Otherwise, the language dealing with the "ancillary" or "interrelated" crews would be totally superfluous.[1]

Because of the limited time and capabilities preceding the **DECISION ON THE MERITS** I was reasonably precluded from amassing the facts necessary to answer specific items of dispute. Thus, I am unable to state, in this "INTERPRETATION", if the 13 crews listed by BN in its Request "fall within the definition of interrelated crews."

The undersigned was not involved in, or privy

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[1] The BMWE is in apparent agreement with the Carrier's assertion. See Page 2 of BMWE's July 31, 1992 Response to BN Interpretation Request No. 1.

to, the May 7, 1992 implementing agreement. Thus, I may not comment upon its requirements, nor am I authorized by the parties to interpret same in this limited Interpretation proceeding.

BN REQUEST # 2.

The Carrier's proposal identifies Positions and vacancies for machine operators **only** by the type of machine, etc. BMWE objected to the inclusion of the word **only**. Carrier has agreed to delete that word. Thus, there is no need for an Interpretation concerning BN's Request # 2.

BN REQUEST # 3

I do not find this to be an appropriate request for Interpretation.

The **DECISION ON THE MERITS** outlined broad parameters concerning Regional Production Gangs, and certain procedures to be utilized. The manner of complying with the Award is initially the Carrier's determination, and if it allegedly violates that Award, or any obligation it may have with the BMWE, then that dispute must be addressed in another forum based upon specific facts of record to be developed for that particular asserted violation.

BN REQUEST # 4

I do not find this to be an appropriate request for Interpretation.

The parties assert certain factual matters and alleged agreements concerning this topic, which were not raised in any significant manner in the proceedings which preceded the **DECISION ON THE MERITS.**

As is the case concerning BN Request # 3, a dispute between these parties concerning this topic must be addressed in another forum based upon specific facts of record to be developed for that particular asserted violation.

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IV

GENERAL

In the text on page 19 of the **DECISION ON THE MERITS**, as well as in Footnote # 13, the Undersigned pointed out that "PEB 219 and the related forums had literally months to take and consider evidence and verbatim testimony" whereas Article XIII arbitrators "...work under a very limited time frame, with certain procedural impediments." Specifically, I cited #11 (b) (4) [Page 101 of Report] which requires a written decision within thirty (30) calendar days, as well as #11 (b) (3) which precluded both oral testimony and a transcript of the hearings.

In the recent requests for Interpretation, the Parties have made certain factual allegations as part of the requests. For the reasons stated in the **DECISION ON THE MERITS**, and repeated immediately above, in most part this Arbitrator does not have the basis to resolve factual questions.

In the event the Parties hereto desire jointly to seek any further clarifications of the Interpretations contained herein, and there are any factual disputes surrounding the clarification(s), it will be necessary to conduct additional hearings with procedures established for taking appropriate evidence and testimony.

Joseph A. Sickles

Signed at Bethesda, Maryland this 19th day of September, 1992