

ARBITRATION PURSUANT TO SECTION 11 OF THE  
RECOMMENDATIONS OF PRESIDENTIAL EMERGENCY BOARD NO.  
219 AS IMPOSED BY PUBLIC LAW 102-29

---

In the Matter of the Arbitration Between

BURLINGTON NORTHERN RAILROAD - OPINION  
AND  
AWARD  
AND (1995 Regional and  
Systemwide Gangs)

BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES -

---

The hearing in the above matter, upon due notice, was held on January 10, 1995, at the offices of the National Mediation Board in Washington D.C. before Irwin M. Lieberman serving as sole impartial arbitrator by selection of the parties in accordance with Article VI - J, Section 11, of the Presidential Emergency Board No. 219 (as imposed by Public Law 102-29).

The case for Burlington Northern Railroad, hereinafter referred to as the "BN" was presented by John M. Starkovich, Assistant Vice President, Labor Relations and Richard C. Scott, Director of Labor Relations. The case for the Brotherhood of Maintenance of Way Employees, hereinafter referred to as "BMWE", was presented by Stephen V. Powers, Assistant to the President. At the hearing, the parties were afforded full opportunity to offer argument and evidence and to examine and cross-examine the witnesses. Both parties

presented pre-hearing submissions as well as other evidentiary data in the course of the hearing. The parties requested, and the Arbitrator agreed, to render an oral award consisting of his basic opinion on or about January 30, 1995, to be followed by the written Award.

### THE ISSUE

At the hearing, the parties agreed that the issue to be dealt with by this arbitration would be as follows:

Are the undercutter gangs, which were included in the Burlington Northern's 1995 Regional Gang Work Program, considered to be regional production gangs under the terms and conditions of the Sickles Award of June 15, 1992 and the Lieberman Award of January 14, 1994?

Neither party raised any procedural questions.

### DISCUSSION

The genesis of this dispute goes back to not only PEB 219, but clearly the Sickles and the Lieberman Awards together with interpretations from the Contract Interpretation Committee. It is not intended that this lengthy and complex history be detailed in this Arbitration Award. However, certain key elements in the history must be reiterated in order to effectively deal with the problems presented by the parties in this matter.

From the standpoint of sequence of events, the particular dispute here originated after a preliminary document was furnished to the BMWE by the BN dated November 2, 1994. In that document, the Carrier informally provided the General Chairmen of BMWE, with the preliminary work schedule for the 1995 regional and/or systemwide gangs. This document was followed by a letter dated November 14, 1994, in which BN indicated that it intended to establish certain regional or systemwide gangs for purpose of working throughout the territory of the Carrier. Of particular relevance in this regard were the consists indicated in Carrier's correspondence dealing with the four undercutter gangs, which are involved in this dispute, namely: UC01, UC02, UC03, and UC04. In this regard, the Carrier indicated the production undercutter gang consist for the combined double gang (UC01 and UC02) as follows:

2	Foremen
2	Assistant Foremen
2	Group 2 Machine Operators - Backhoes
2	Group 3 Machine Operators - Shoulder Jack Tamers
2	Group 3 Machine Operators - Ballast Regulators
2	Group 3 Machine Operators - Plasser Stabilizers
2	Fuel Truck Drivers +16,000 GVW
2	Bus Drivers
14	Laborers

For a total consist of 30 employees. In addition, the document included a consist for each of the other two gangs (UC03 and UC04), which in each instance was as follows:

1	Foreman
1	Assistant Foreman
1	Group 2 Machine Operator - Backhoe
1	Group 3 Machine Operator - Shoulder Jack Tamper
1	Group 3 Machine Operator - Ballast Regulator
1	Group 3 Machine Operator - Plasser Stabilizer
1	Fuel Truck Driver +16,000 GVW
1	Bus Driver
12	Laborers

For a total consist of 20 employees.

It must be noted that this indication of the personnel and equipment needed differed substantially from that utilized in previous years. As an example of that difference, information was provided with the respect to the consist supplied to the Organization in November of 1991, with respect to an undercutter gang, as well as a surfacing gang working in conjunction with that undercutter gang.

That consist in 1991 (for the 1992 season) was as follows:

For the undercutter gang:

1	Mark I or II Tamper and Operator
1	Regulator
1	Jackson 6700
1	Jackson Pup Tamper
1	Regulator
1	Foreman
1	Assistant Foreman
7	Laborers

For a total of 14 men. In addition, there was a surfacing gang working in conjunction with the undercutter gang, which had the following consist at that time:

1	Jackson 6700
1	Jackson Pup Tamper
1	Regulator
1	Broom (Double)
1	Stabilizer
1	Foreman

For a total consist of 6 employees for the equipment indicated.

It also must be noted that the equipment, which was basic to the undercutter operation, the undercutter itself, a highly sophisticated piece of equipment, was contracted for with an outside vendor. In addition, it was the vendor's crew, which operated this piece of equipment in all the years involved, including that contemplated for 1995. It also must be noted that in terms of the consist for 1995, the BN did not combine with the undercutter gang, with the surfacing gang which, of necessity in terms of the process, followed the activity of the undercutter gang. These surfacing gangs were intended to be local district gangs rather than systemwide or regional gangs.

The basic position of the BMWE is that the proposed undercutter gangs do not qualify as systemwide or regional gangs under the definition set forth by Arbitrator Sickles and elaborated on in the Lieberman Award (as well as in the CIC interpretations).

Without reiterating the lengthy arguments and documentation provided, essentially it was the BMWE's position that the proposed undercutter gangs on a systemwide basis do not qualify under the earlier Awards and definitions. Specifically, there is no learning curve or retraining required for the undercutter gangs and the requirements should be to bulletin the undercutting gangs based on seniority districts. The BMWE charges that the undercutter gangs are not heavily mechanized. The Organization charges that the undercutter gang as proposed have a total of three machines (without counting the basic undercutter manned by the contractor). The Organization insists that these gangs cannot be found to be production gangs, which previously had been defined by the earlier Arbitration Awards to consist of 17 to 47 machines. Furthermore, the Organization maintains that no such undercutter gangs are considered regional gangs on any other Carrier. As an additional fact, the Organization insists that the work involved by the undercutter gangs is not major repair or replacement work, but is merely routine work which can easily be performed locally. The BMWE defines the work as rudimentary and basic track surfacing work using

identical equipment to that used by surfacing gangs throughout the Carrier's system. As a further point, the BMWE argues that there are not a substantial number of employees used by the undercutter gangs as set forth by Carrier, and the numbers involved here of 20 or more are highly questionable from the standpoint of the Organization. Furthermore, the Organization notes that the substantial number of employees criteria is only one of the five necessary conditions for the establishment of a production gang. The Organization also charges that the Carrier has artificially contrived to establish the consist for the undercutter gangs based on prior history and the numbers which speak for themselves. For example, the Organization notes that the typical system production gangs presented by the Carrier in 1933 indicate nine track laborers, whereas the undercutter gangs UC01 and UC02 each have only six track laborers assigned. Never before, according to the Organization, have undercutter gangs have 13 track laborers assigned, as is indicated by Carrier for 1995. The Organization also argues that the use of undercutter gangs as regional production gangs had been rejected in the past by Arbitrator Sickles in his award, as well as in the Lieberman Award in 1994. The only difference here is the artificial inflation of the number of laborers on the gangs, according to BMWE. Thus, the Organization concludes that the gangs are not heavily mechanized, do not have a substantial number of employees, and do not perform major repair and replacement work. Furthermore, the level of retraining required is minimal in this instance and, as a matter of fact, from the standpoint of the Organization,

no retraining would be required so that there are more than ample numbers of qualified employees in every seniority district to operate tampers, ballast regulators, and backhoes.

The Carrier notes that its clear intent and factual material indicates that the undercutter gangs are obviously operable as regional and systemwide gangs in terms of the criteria established by both the Sickles and Lieberman Awards. The BN indicates with respect to the three undercutter gangs, two of the gangs operate separately, each having an undercutter, a backhoe, a production tamper, a ballast regulator, a dynamic ballast stabilizer, a ballast train, a bus, a combination tool and fuel truck, and a crew cab truck. In addition, BN indicates that a surfacing crew would be assigned to work with the gang in each district, since the track must be surfaced before revenue trains can run on it at full track speed. Local forces were intended to perform the function of the surfacing gangs. The typical surfacing crew has a production tamper, a pup or chase tamper, a ballast regulator, and a double broom, as well as a crew cab truck. Carrier indicates that the third undercutter gang, which is indeed a double gang, has two of each of the types or equipment indicated supra. Assigned to the double gang are one exempt roadmaster, 30 BMWE represented employees and six operating craft employees on the ballast trains. In addition, seven employees of the contractor owners of the undercutters, are assigned to those machines on the double gang. Local forces will be utilized to perform the task of surfacing.

following the undercutting operation. In each instance, the surfacing gang consists of a foreman and three or four machine operators, and also a local mechanic is assigned to the surfacing crew.

The BN indicates that the undercutting operation constitutes major repair and replacement work. It is not day-to-day routine or regular maintenance easily performed locally without a preplanned program encompassing a large geographic area. The Carrier indicates that the undercutter gangs are sophisticated operations which literally remove all of the ballast, make the track impassable, screen out the dirt, replace the cleaned ballast, add significant amounts of new ballast, and tamp the ballast into place followed by surfacing the track and stabilizing the track. Obviously, those gangs are mobile due to the nature of the operations as well. With respect to the question of the highly mechanized aspect of the activity, Carrier notes that it would take many, many employees to replace and accomplish what the undercutter gang does by machine. It is highly sophisticated and highly mechanized indeed from the Carrier's standpoint. With respect to the criteria indicating the number of employees, Carrier sets forth that the numbers include 20 assigned to the single undercutter gang, and 30 employees to the double undercutter gang, which does not include the district surfacing crews or the personnel from the contractors. Carrier argues that the undercutter gangs are clearly main production crews performing primary functions, meeting the definition of program size, mobility,

and mechanization established for regional production gangs by Arbitrator Sickles. Carrier also notes that with respect to 1993, the BMWE did not challenge or question the operation of undercutter gangs as regional gangs. For this reason, the Carrier believes that the current objections are untimely and the Organization should be estopped from its current position.

Carrier notes that the double undercutter gangs are most efficient because twice as much track may be undercut within the same track window. This creates a single, slow order for the area where the workers perform rather than two. There are significant savings for Carrier by this type of operation. Carrier notes that there is significant financial impact because of train delays, and it has set forth savings per day, which are important, by the use of the double gangs. Customer service is also a factor in the Carrier's decision to use double gangs where appropriate, operating in tandem.

Carrier concludes that neither of the prior regional gang awards (Sickles and Lieberman) restrict the Carrier's right to organize these gangs in order to operate its business effectively. Production gangs are heavily mechanized, mobile, continuously performing specific programs involving major repair and replacement work, and uses a substantial number of employees (no fewer than 20). The undercutter gangs involved in the 1995 Regional Gang Work Program, which had previously been included in the 1993 regional gang notice, are

appropriate under the Awards that have been prepared and the criteria established. In fact, PEB 219's recommendations, which are at the root of this entire matter, were an attempt to provide significant work rule flexibility for Carrier, which this is just one example of, and should be permitted.

\* \* \*

It must be noted initially that the Arbitrator herein does not intend to change the criteria established by the prior awards and the CIC interpretations. All that is intended is to determine whether the proposed undercutter gangs fall within the definitions of systemwide or regional gangs previously established. After careful analysis and evaluation, this Arbitrator concludes that the undercutter gang identified as UC01 and UC02, operating together, can be operated regionally. The gangs identified separately as independent gangs UC03 and UC04 cannot be so operated in 1995, based upon the facts and evidence presented to me. My decision was not an easy one. It is principally based upon my previous determination that it is inappropriate and a disservice to both parties to play ping pong with issues as important as these. The application and interpretation of all aspects of the definition of a regional production gang cannot be so rigid as to eliminate the relief of PEB 219, or discourage the industry from utilizing new generations of machines.

This dispute presents a number of factual questions. First, it must be made clear that the number and types of equipment, which have been indicated as being part of the consist, is ambiguous, as well as the number of employees assigned to a single undercutter gang. For example, for the single undercutter gang for 1995, the equipment indicated in Carrier's memo to BMWE indicates a backhoe, a shoulder jack tamper, ballast regulator, and a plasser stabilizer, in addition to a fuel truck and a bus. It also indicates 12 laborers (in addition to the machine operators and supervisory personnel). By the same token, Carrier's January 6, 1995 internal document labelled as Carrier exhibit "B", provides as standard for an undercutter gang a backhoe, a contract undercutter, a shoulder jack tamper, a ballast regulator small, a production switch tamper, a pup chase tamper, a large ballast regulator, a double broom, and a dynamic track stabilizer. This is a significant difference, as presented by Carrier. In addition, the consist for the double undercutter gang (UC01 and UC02) indicates 14 laborers for the double gang, which is not consistent with 12 laborers for each of the single gangs. As a result of these numbers, the Arbitrator has come to certain conclusions. It is apparent that there is some confusion as to whether the surfacing gang and its equipment has been included in Carrier's standard BN undercutter gang machine types specified in its exhibit "B". It is also quite clear that the surfacing gang equipment may have been included in the standard undercutter gang consist of equipment specified.

As I view the evidence presented, there was little doubt that the overall process or work involved in undercutting is major repair and replacement work. It is also clear that it is mobile in performing certain programmed work. The two problematic areas relevant to this dispute are whether the gangs are sufficiently "heavily mechanized" and whether the number of employees involved is "substantial" or meets the 20 person criterion of the Sickles Award. With respect to the heavily mechanized portion, the overall process involved for all the disputed gangs does meet this requirement. In reaching this conclusion, the Arbitrator has rejected both the BMWEs and the UBM's analysis as being too narrow. Contrary to the BN's position the number of machines on a given gang is an important factor based on the testimony before PEB 219. Similarly, BMWE's position that only the number of machines should govern is not appropriate and ignores the reality of the work place.

There is no explanation of the inconsistent number of laborers included in the double gang, as compared to those in the single gangs. With the respect to the heavily mechanized aspect of the definition, the Arbitrator is uncertain with the respect to the sophistication and nature of the equipment used by a single undercutter gang. A backhoe, for example, is clearly a common piece of equipment, which cannot itself be considered to be part of "heavily mechanized". On the other hand, the tamper, ballast regulator and the stabilizer are indeed

sophisticated pieces of equipment. At best, with respect to this aspect of the criteria, the question of heavy mechanization is marginal concerning the single undercutter gang. Twice the number of equipment, however, for the double gang does not present a problem. In addition, with respect to the numbers, the number of employees required on the single undercutter gang does not appear to the Arbitrator to be consistent with respect to the past history, as well as the numbers presented by Carrier. There is no rationale for as many as 12 laborers for a single undercutter gang. In this specific factual circumstance, the Carrier created its own dilemma by not sufficiently explaining why it had consistently used fewer employees on the undercutters in the past. While there may be a legitimate reason that could have changed my determination, I am unwilling, based on the record and these unique facts, to permit UCO3 and UC04 to operate on a regional basis.

In the future, should Carrier decide to include the surfacing gangs with the undercutter gangs as one group, which indeed it may, based on the method of operation, this might change the entire consideration which is involved. Clearly, addition of more mechanized equipment and more employees would change the consist for a single undercutter gang materially. How this would be considered in the future is speculative, but it would be different, clearly, than the current situation.

The Arbitrator is concerned that the parties are under the misapprehension that the number 20 established by Arbitrator Sickles for a minimum number of employees is fixed and must remain as such for the indefinite future. This clearly would not be consistent with the intent of both the Sickles Award as well as PEB 219. It is apparent that as new technology is developed, it may very well supplant laborers as such, at least in part. Such new technology should not make it necessary to reconsider the nature of a regional gang and place it in the category of a district gang, merely because the number of employees is reduced. So such considerations must be kept in mind for future determinations.

It is also apparent that the question of "heavily mechanized" is a largely subjective definition, since the question of training and retraining is not necessarily a concomitant of that concept.

It must be observed again that there is some significant question with respect to the number of employees, which may be required for a single undercutter gang under the current programs. However, as part of that concern, it must be made absolutely, unequivocally clear, that no one, neither the Arbitrator nor the Organization, can dictate what the manpower requirements are for particular operations. That is a management prerogative which cannot be tampered with. In this instance, however, given management's determinations, the Arbitrator is not convinced that the numbers indicated are clear and unequivocal, as indicated

by Carrier and, in some instances, appear to be confused by the addition of surfacing gang equipment and personnel, and thus, the single undercutter gang cannot meet the criteria established.

In conclusion, I have one final observation that has already been included in this decision and my previous Award. The parties need to find a way to resolve their differences voluntarily without always resorting to Arbitration. If they do not, then they will forever be subject to results and Awards which I am certain neither party will be happy or satisfied with.

For the reasons indicated heretofore, the Award is as follows.

AWARD

Gangs UC01 and UC02, as a double gang, are to be considered regional production gangs under the terms and conditions of the Sickles and Lieberman awards. Undercutter gangs UC03 and UC04 are not to be considered regional production gangs under those Awards.



---

I. M. Lieberman

Stamford, Connecticut  
February 3, 1995