REPORT

TO

THE PRESIDENT

BY

EMERGENCY BOARD

NO. 213

Submitted Pursuant to Executive Order 12636,
Dated April 20, 1988,
And Section 10 of
The Railway Labor Act, as Amended

Investigation of a dispute between the Chicago and North Western Transportation Company and certain of its employees represented by the United Transportation Union.

(National Mediation Board Case No. A-11913)

Washington, D.C.

July 1, 1988

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The President
The White House
Washington, D.C.

Dear Mr. President:

On April 20, 1988, pursuant to Section 10 of the Railway Labor Act, as amended, and by Executive Order 12636, you established an Emergency Board to investigate a dispute between the Chicago and North Western Transportation Company and certain of its employees represented by the United Transportation Union.

The Board now has the honor to submit its Report and Recommendations to you concerning an appropriate resolution of the dispute between the above named parties.

The Board acknowledges the assistance of Roland Watkins of the National Mediation Board's staff, who rendered valuable assistance and counsel to the Board during the proceedings and in preparation of this Report.

Respectfully,

Robert O. Harris, Chairman

Richard R. Kasher, Member

Robert E. Peterson, Member

TABLE OF CONTENTS

I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 213 (the Board) was established by the President pursuant to Section 10 of the Railway Labor Act, as amended, 45 U.S.C. §160, and by Executive Order 12636. The Board was ordered to investigate and report its findings and recommendations regarding unadjusted disputes, primarily involving the "crew consist" or crew size issue, between the Chicago and North Western Transportation Company (hereinafter the Carrier) and certain of its employees represented by the United Transportation Union (hereinafter the Organization or the UTU). A copy of the Executive Order is attached as Appendix "A".

On April 26, 1988, the President appointed Robert O. Harris, of Washington, DC, as Chairman of the Board. Richard R. Kasher, of Bryn Mawr, Pennsylvania, and Robert E. Peterson, of Briarcliff Manor, New York, were appointed as Members of the Board. The National Mediation Board (the NMB) assigned Roland Watkins as Special Assistant to the Board.

II. PARTIES TO THE DISPUTE

A. The Carrier

The Chicago and North Western Transportation Company is a Class I line haul rail carrier and a carrier within the meaning of the Railway Labor Act. Although primarily engaged in hauling freight traffic, it also operates, under contract, a suburban commuter passenger service in Chicago, Illinois.

The Carrier has been operating under its current name since June 1, 1972, when the then current employees of the Carrier purchased the transportation assets and assumed the transportation obligations of the former Chicago and North Western Railway from Northwest Industries and formed the Chicago and North Western Transportation Company. At present, approximately 13 percent of the outstanding shares of Carrier stock are owned by its employees.

In terms of total operating revenues, $957.1 million for the year 1987, the Carrier ranks as the eighth largest railroad operation in the United States. Such operating revenue represents approximately one-quarter the average operating revenues of the larger rail carriers, i.e., $824 million for the Carrier as compared with a $3.2 billion average total operating revenues of the seven larger Class I carriers.

The Carrier is the nation's ninth largest railroad in terms of miles of road operated. It operates approximately 6,400 miles of railroad lines in the ten states of Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, South Dakota, Wisconsin, and Wyoming. In most of the states named, it principally handles grain, intermodal traffic, motor vehicles, chemicals, and allied products. In Wyoming and Nebraska the Carrier primarily hauls coal.

Most of the freight traffic handled by the Carrier is between Chicago, Illinois and the Omaha/Fremont Gateway in Nebraska, connecting and interchanging in the west principally with the Union Pacific Railroad, and in the east with the lines of the major eastern railroads, i.e., Conrail, CSX and Norfolk Southern. A north-south route of lesser traffic density operates between Kansas City, Kansas and Minneapolis/St. Paul, Minnesota. Other routes operate between St. Louis, Missouri through Chicago to Minneapolis/St. Paul; to Duluth/Superior, Wisconsin, and to Green Bay, Wisconsin.

The Carrier has a high proportion of branch line miles which causes traffic patterns of shorter hauls and lighter density than are experienced by most other Class I railroads. The Carrier's average length of haul in 1986 was 312 miles as compared with 664 average haul miles of other Class I railroads.

Since 1968, a total of 6,680 miles of the railroad have been abandoned or sold by the Carrier; and the Carrier is presently negotiating the sale of additional segments of its railroad to regional carriers. In this respect, the Carrier reports that it considers the sale of lines to regional carriers a preferable alternative to abandonment.

Since July 1, 1975, the Carrier has operated its Chicago suburban commuter service under a purchase of service agreement with the commuter Rail Division of the Regional Transportation Authority, commonly known as "Merta". The Carrier is reimbursed for the costs of suburban operations which exceed revenue fares collected, and receives a return for operating this service. In 1987, Carrier suburban operating revenues were reported to have amounted to $74.0 million dollars. In addition, the Carrier received $5.0 million from Merta during 1987 for the authority's share of track improvements in suburban operations territory.

In October 1984 the Carrier established a coal hauling rail subsidiary, the Western Railroad Properties (hereinafter the WRPI) to transport low-sulfur coal from the Powder River Basin coal mines along a 210-mile track which extends from eastern Wyoming to western Nebraska. Employees represented by the Organization work on the WRPI and on other rail lines of the Carrier.

As a percentage of total gross freight revenues, coal (excluding coke) represented 25.1 percent of principal product groupings hauled by the Carrier in 1987. This compared to 11.0 percent in 1983, or the year prior to formation of the WRPI subsidiary, and 7.5 percent in 1978. In 1987, the WRPI had a pretax income of $39.8 million. This was 42 percent over pretax income in 1986.

On June 21, 1985 the Chicago North Western Corporation was incorporated as a holding company for the Carrier.

In addition to the Carrier, which is the principal subsidiary of the CNW Corporation, and the WRPI subsidiary, another major business unit of the CNW Corporation is Douglas Dynamics, Inc.

Douglas Dynamics, Inc. is reported by the CNW Corporation to be the nation's largest manufacturer of medium-size snowplows. It was acquired by the CNW Corporation on May 22, 1986. It has approximately 300 non-unionized employees who work at plants located in Milwaukee, Wisconsin and Rockland, Maine. In 1987 it had a pretax income of $17.0 million on sales of $57.9 million. The CNW Corporation has indicated to stockholders that it is exploring possibilities of selling this subsidiary.

Other subsidiaries of the CNW Corporation include a freight broker and a trucking company, which began operations in late 1985 and 1987, respectively. In late 1986 the CNW Corporation

also formed a subsidiary to market computer software packages, and, in 1987, another subsidiary to market training and implementation materials for what it described as quality improvement programs in the transportation industry.

B. The Organization

The United Transportation Union (UTU) is a labor organization national in scope. Through two separate General Grievance Committees of Adjustment, the UTU is the collective bargaining representative under the Railway Labor Act regarding the rates of pay, rules and working conditions for employees of the Carrier engaged in train and yard ground service operations. These employees are classified as road and yard conductors or foremen, road and yard brakemen, switchmen, locomotive firemen, and hostlers of engines. The UTU and its local General Grievance Committees of Adjustment represent 2,148 of the Carrier's 8,464 employees, or approximately 25% of the total number of employees.

Since 1972, the year in which employees purchased the Carrier, there has been a 34% decline in the number of UTU-represented ground service employees on the property of the Carrier.

III. ACTIVITIES OF THE EMERGENCY BOARD

On April 28, 1988, the parties, as requested by the Emergency Board, submitted pre-hearing written statements regarding the collective bargaining issues in dispute.

Thereafter, on May 5, 6 and 10, 1988, the Board conducted hearings on the issues in dispute in Chicago, Illinois. The parties were given full and adequate opportunity to present oral testimony, documentary evidence and argument in support of their respective positions. A formal record was made of the proceedings. They were also provided opportunity to offer post-hearing statements, which were received by the Board on May 13, 1988. The Board also afforded the parties the opportunity to meet with it privately.

After the close of public hearings, the Board met informally with the parties in an effort to secure agreement through mediation. As a result of these meetings, the parties and the President agreed to an extension of the time that the Emergency Board had to report its recommendations until July 4, 1988. This extended the period during which the parties could not resort to self-help through August 3, 1988. During this extension of time the Board continued to meet with the parties on an informal basis in an attempt to get them to resolve the dispute. These efforts were unavailing. The Board then went into executive session to prepare this report and recommendations.

The Carrier presented its position through a written statement of James R. Wolfe, Chairman, President and Chief Executive Officer, and written and oral testimony of James A. Zito, Senior Vice President--Operations; Robert W. Schmiege, Senior Vice President--Administration; Ronald J. Cuchna, Vice President--Labor Relations; John M. Butler, Senior Vice President--Finance and Accounting, all officers of the Carrier; Charles I. Hopkins, Jr., Chairman, National Railway Labor Conference and Chairman, National Carriers' Conference Committee, of Washington, DC; and, Robert W. Anestis, President, Anestis & Company, an investment banking and financial consulting firm in Westport, Connecticut.

The Organization made its presentation through an ex parte submission and oral testimony of Gerald R. Maloney, International Vice President of the UTU, Donald F. Markgraf, General Chairman, and Paul H. Bauch, General Chairman of the General Committees of Adjustment. Also appearing on behalf of the Organization was David R. Haack, Vice General Chairman.

The Carrier was represented by counsel, Ralph J. Moore, Jr., Esq., and Nancy C. Shea, Esq., both of Shea & Gardner of Washington, D.C.

IV. HISTORY OF THE DISPUTE

There is both a long term and a more recent history to the dispute.

The short term history concerns those events evolving from the current contract negotiations and creation of this Board.

The long term history concerns the manner in which the issue of crew consist or manning levels was given review and study in the past; and focuses particularly upon the manning disputes addressed by the parties over the last several years.

A. The Short Term Dispute

On May 15, 1987, the Carrier, pursuant to Section 6 of the Railway Labor Act, served notice on the Organization of its intent to revise schedule rules and agreements to permit it the unrestricted right, under any and all circumstances, to determine when and if any ground service employees shall be used on each crew employed in all classes of road freight and yard service, including all miscellaneous and unclassified services.

In its notice the Carrier offered employees adversely affected by implementation of rule changes concerning manning levels the option of a one-time severance allowance of $25,000 or, in the alternative, a supplemental unemployment allowance for a year.

The Organization rejected the Carrier's notice, and, on June 29, 1987, served a counterproposal upon the Carrier. The proposal consisted of 26-page draft agreement, with 11 side letters and 25 questions and answers clarifying and interpreting the language of the draft agreement. Briefly stated, the counterproposal contained the following items:

1. The standard crew would consist of not less than one conductor/foreman and two brakemen/helpers.

2. Reduction of the size of train crews would be made solely on an attrition basis.

3. The minimum crew size would consist of not less than one conductor/foreman and one brakeman/helper.

4. All road and yard crews must be regularly assigned.

5. The Carrier could only operate trains of 72 cars or less with a reduced crew; all other trains would need additional agreement from the Organization to operate with a reduced crew or must be operated with a standard crew if over 122 cars.

6. Each protected employee (defined as any employee on road/passenger service and/or yard service seniority rosters as of the date of the proposed agreement) would receive a monthly earnings allowance, or what amounts to a lifetime earnings guarantee.

7. All ground service employees working on reduced crews would receive a special allowance of $7.72, adjusted for future wage increases and cost of living adjustments subsequent to the date the agreement would take effect, for each tour of duty worked.

8. For each tour of duty worked by a reduced crew, the Carrier would pay $48.25 into a trust fund which will be distributed to ground service employees at the end of the year.

9. All protected employees would be entitled to 11 personal leave days [floating holidays] each year even if this required the Carrier to recall furloughed employees and/or hire new employees.

10. All protected employees in active service in the year following the first year the Carrier operates 75% of its engineer trips with reduced crews would receive a one time lump sum payment or signing bonus.

11. Six months after the effective date of the agreement, the Carrier would pay to each employee each month for 10 years, a productivity arbitrary.

After several months of negotiations failed to bring about agreement, the parties, by separate notices dated July 8, 1987, applied to the NMB for mediation. The application was docketed by the NMB as Case No. A-11913.

Mediation was undertaken by NMB Regional Head Mediator E. B. Meredith, who met with the parties beginning on August 25, 1987 and thereafter on various dates through December 2, 1987.

The NMB brought the parties to Washington, DC, for further mediatory sessions on December 17, 1987, and again on various dates in January 1988. A final mediatory meeting was held on March 2, 1988. NMB Member Walter C. Wallace participated with Mediator Meredith in the Washington sessions.

On March 15, 1988, the NMB, in accordance with Section 5, First, of the Railway Labor Act, offered the parties the opportunity to submit their controversy to arbitration. The Carrier accepted the proffer of arbitration contingent upon the parties executing a mutually satisfactory arbitration agreement prior to the close of business at 5:00 P.M. on March 18, 1988. However, when that time passed, and the UTU had not indicated an intention to accept the proffer, the Carrier, on March 21, 1988,

declined the proffer of arbitration. Accordingly, on March 22, 1988, the NMB notified the parties that it was terminating its mediatory efforts.

On March 23, 1988, the Carrier wrote the Organization, making reference to the NMB notice of March 22, 1988, and suggested that it was still willing to have the dispute resolved through arbitration.

The NMB made another attempt to compose the parties' differences at meetings in Washington, DC on March 29 and 30, 1988.

On April 12, 1988, the Carrier advised the Organization that it was going to promulgate the rule changes set forth in the Section 6 Notice which it had served on the Organization to be effective at 12:01 A.M. on May 15, 1987.

The Organization subsequently announced that its members would withdraw their service from the Carrier and conduct a strike on April 20, 1988.

On April 18, 1988 the NMB, pursuant to Section 10 of the Railway Labor Act, advised the President that, in its judgment, the dispute between the parties threatened substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service.

The President issued Executive Order 12636 on April 20, 1988, to create this Board to investigate and report concerning the dispute.

B. The Long Term Dispute

Disputes involving manning levels for both engine and train service crews, as with pay rules, have long been at issue between virtually all the nation's carriers and the operating craft labor organizations for a number of years.

In 1959 the railroads served Section 6 notices on a national basis proposing that management have the unrestricted right to determine the size of crews to be used in any and all classes of train service.

Eventually, the dispute was investigated by a fifteen-member commission appointed by President Eisenhower. The Presidential Railroad Commission (PRC) determined that trains were overmanned. It also determined that there should be changes in various pay and work rule issues.

When the recommendations of the PRC did not form the basis for final agreement, Congress enacted Public Law 88-108, 45 U.S.C. §157, which required arbitration of the crew consist dispute and a related dispute concerning the need for locomotive firemen. President Kennedy appointed Arbitration Board 282 to conduct the arbitration.

The Award of Arbitration Board 282 became effective June 24, 1964, for a period of two years. The Award prohibited changes in main line crews consisting of a conductor and two trainmen in road service, and authorized changes in main line crews consisting of a conductor and either more than two or less than two trainmen. The Award also authorized changes in branch line and yard crews irrespective of the number of persons theretofore employed in such crews. It also provided for the arbitration of disputes not resolved by agreement regarding the number of persons to be employed in crews in which changes were authorized in accordance with certain specified guidelines, one of which was practices regarding the consist of crews in comparable situations where such practices are not in dispute. It also provided for protection of the employment of certain persons.

After the expiration of P.L. 88-108 a new emergency board had to be appointed to issue recommendations to settle the regenerated crew consist disputes. In its Report to the President, dated December 13, 1968, Emergency Board No. 172 said:

> "These proposals are practically identical with those served in 1959 and 1960, which were before the Presidential Railroad Commission. The issue is precisely the same. Neither party to the dispute professes to want crews undermanned or overmanned, but therein, of course, lies the core of the dispute.
>
> The dimension of the problem before this Board cannot be measured in terms of the number of railroads and employees involved. The dispute can only be properly judged in the context of its history.
>
> This same dispute has been in one or more stages of handling for more than 9 years without any lasting results. Three Presidents, the Congress, the Courts, a Presidential Railroad Commission, various Boards, and other Tribunals have been drawn into the controversy. All have made lasting contributions. However, at the end of their productive and painstaking labors, all of our predecessors were agreed that the matter can best be resolved with finality through the conscientious collective bargaining efforts of the directly interested parties.

The Presidential Railroad Commission found that a negotiated rule, as opposed to managerial discretion, was desirable; but, that the negotiated rule should allow for either party to propose changes in crew consists after conducting a survey to support its proposed changes; and, upon the parties' failure to agree, that the dispute should be submitted to a tribunal which, in turn, would decide the dispute on the basis of:

(1) The adequacy or necessity of the proposed crew consists in terms of the safety of operations; and,

(2) Whether the proposed crew consist would impose an unreasonably burdensome or onerous workload on the members of the crew or would be necessary to avoid such workload.

The Commission further recognized that the consist of train crews in road and yard service would have to be updated (not more than once a year) to keep pace with the changing times.

The operating crafts, in train service, rejected then, as now, the idea of surrendering their statutory powers to negotiate and make agreements, and the vesting of that power and final authority in some tribunal, permanent or temporary. The President and the Congress reluctantly forced such a temporary measure upon them in 1963 [Public Law 88-108, August 28, 1963] but only in the face of compelling evidence that the peace and tranquility of the Nation were threatened because the carriers and the duly constituted representatives of their employees, bargaining nationally, could not settle the crew consist issue, among others in controversy, without a test of their economic strength.

On November 26, 1963, Arbitration Board No. 282 submitted its Award to the President and the parties. The Award became effective on January 25, 1964, 60 days after it had been filed in the District Court, District of Columbia.

The Presidential Railroad Commission's report and recommendations had emphasized the 'safety' and 'workload' concepts for measuring crew size. The Award of Arbitration Board No. 282 supplemented and enlarged upon those concepts by the enumeration of 'guidelines,' all but one of them already agreed upon by the parties, to assist them in resolving questions of proper crew size on different properties -- the issue which is in dispute here.

> Arbitration Board 282 also concluded that the crew size in yard and road service (other than engine service) which was needed to assure 'safety' and prevent 'undue burden' should be determined primarily in conformity with local conditions and demands of the service on each property. The Board then remanded the dispute to the individual properties for resolution by collective bargaining if possible.
>
> In any case, where the parties could not agree, the dispute was to be arbitrated by a special tribunal using the 'guidelines' as the test for deciding 'safety' and 'workload' on a crew-by-crew basis. The Award also established procedures for creating Special Boards of Adjustment, on individual properties, to settle unresolved crew consist disputes."

Under the various awards issued pursuant to the established guide lines of Arbitration Board 282, about 8,000 ground service positions were reportedly eliminated on the nation's railroads. The Award of Arbitration Board 282 remained in effect only two years, however, from January 25, 1964 to January 25, 1966. At the expiration of such period of time, as result of court actions and agreements reached by 1970 the industry was back where it had started a decade before with a conductor and two brakemen on every crew.

Under the procedures of Arbitration Board 282, the CNW obtained authority to employ a conductor and less than two trainmen in 72 out of a total of 113 branch line or way-freight and local assignments that were subject to review by a local arbitration board. It also was given authority to reduce to a foreman and less than two helpers, 143 out of a total of 296 yard crews then subject to review by the local arbitration board.

Between 1965 and 1973, the parties were engaged in negotiation and litigation regarding the crew consist issue. On September 26, 1973, the parties reached agreement to permit a reduction of crews on an attrition-type basis through the free exercise of seniority to jobs that might otherwise be blanked on certain branch line and yard assignments.

The issue again came to be a dominant dispute when the Carrier sought, commencing in June 1986, to amend existing agreements so as to expedite crew reductions by elimination of the attrition factor and by offers of protective severance benefits. These efforts at voluntary resolution not being successful, the Carrier served formal notice for changes on May 15, 1987.

V. The Position of the Parties

A. The Carrier's Position

The Carrier submits that its operations are subject to intense competition for freight traffic from other rail, motor, water, and pipeline carriers. It says that deregulation under the Staggers Rail Act of 1980 has enhanced the ability of railroads to compete with other modes of transportation. However, the Carrier suggests that the most significant immediate effect of deregulation has been increased intensity of rate competition with other railroads and with motor carriers, putting downward pressure on traffic rates and thereby lower revenues per unit of traffic. The Carrier says that, while business is up, rates are down. It therefore maintains that it has an urgent need to extend cost reductions to the elimination of unproductive work rules which among other things essentially require the same basic ground service crew that has been required since the early 1900's.

The Carrier says that although current collectively bargained agreement rules require its road freight trains be crewed by an engineer, a conductor, two brakemen and sometimes a fireman, that virtually every train it operates can function with only an engineer and one other employee. The Carrier's Section 6 Notice would give it the unrestricted right to determine the size of crews in all classes of road freight and yard service.

The Carrier estimates that savings from the elimination of some 1,400 train service positions, which it maintains perform no productive function, would be $55 million annually.

The Carrier says that support for its contention that virtually all trains can be operated with a crew consist of an engineer and one other employee is to be recognized from the fact that Arbitration Board 282 had concluded that an engineer and one ground service employee would be sufficient at the head end of a train; there are conductor-only operations on all through freight trains on seven unionized regional lines and on eight non-union regional lines; and, on some through freight trains on four unionized and one non-union regional line.

The Carrier also cites the Florida East Coast Railway as having conductor-only operations and also cites a number of Class 1 Railroads that have agreements for conductor-only operations with train length limits for expeditor trains.

The Carrier also urges that a video tape demonstration which it had presented to the Board shows that an engineer and conductor, working alone without the assistance of other crew members as at present, could safely and efficiently perform all road and yard service duties assigned to engine and train service employees.

At present, the Carrier says that under its September 26, 1973 Agreement with the Organization that it is still required to operate 514 trains with a second brakeman -- 282 in through freight service; 61 in way-freight service; and, 171 in yard service.

The Carrier submits that on an attrition-basis, or free exercise of seniority basis, crew reduction program as at present, and as continually being proposed by the Organization, it would take three attritions to yield one blank position. Thus, it says that to blank 303 positions under the Organization's proposal, with retirement at age 62, that the 909 attritions needed to blank 303 positions would not occur until the year 2007.

The Carrier questions the Organization's request to increase the price the Carrier now pays for operating reduced crews from a basic daily differential of $10.75 to each crewman on each reduced crew, to a payment of $48.25 per crew into the trust fund plus a basic $7.87 individual arbitrary for the remaining employees that would automatically be adjusted upwards in future years. It urges that there is simply no justification for what it terms the large and misnamed "productivity" payments set forth in agreements and that it is questionable whether any sort of extra payment to remining ground service employees can be justified on the basis that the jobs of other employees have been eliminated because there was no work for them to do.

The Carrier argues that new enormously efficient motor carrier operations with much lower labor costs threaten to capture significant additional railroad traffic and revenues unless something is done to remedy problems associated with rule requirements that continue non-productive positions, and in particular the overmanning of trains. It submits that as a result of current competitive pressures, the return on investment of major railroads, including its own, is virtually the lowest of any major American industry. It suggests that the Class I part of the industry is simply not earning enough to avoid further disinvestment and the eventual disappearance of much of the industry that remains if it does nothing about excess labor costs.

The Carrier says that since it is the smallest of the seven dominant Class I Railroads, its average density is lower and its fixed costs and switching costs must be spread over a shorter average length of rail. Further, it suggests that it is faced with unique competitive pressures, because its main lines are paralleled not only by the larger railroads, but also by regional railroads not saddled with onerous crew consist agreement costs and major interstate truck corridors

For those reasons, the Carrier maintains that its situation is far more perilous than that of the larger members of the industry. It says that it has taken every other step possible to

reduce costs and increase revenues. It submits that since it was purchased by its employees in 1972, it has never paid a dividend. Instead, it says it has invested heavily in rebuilding its main east-west line, constructing its Global One container facility, and constructing the western coal project. These investments, the Carrier says, have made it possible for it to become a major coal railroad in the west and to become the UP's principal link with Chicago in transportation in the highly competitive east-west corridor.

The Carrier contends that without the new traffic it has attracted that it would probably not survive, but that competitive pressures on rates leave the railroad with a rate of return well below that of the larger railroads.

The Carrier notes that in recent years, its basic railroad, other than the new western coal line, has operated at a loss; its cash flow has been extremely limited, requiring the railroad to borrow heavily with a resulting debt of approximately $800 million.

The Carrier says that even if it were in robust economic health, there is no justification for continuing to saddle it with large numbers of unproductive jobs. It says: "If a railroad can provide the same service at lower cost, it can reduce its rates, attract more business, provide more job opportunities, and provide a secure future on an economically sound basis for the people it does need to employ. Everyone is better off: employees, shippers, and the U.S. economy as a whole, in its world-wide competition with foreign suppliers."

The Carrier maintains that it was for these reasons that it served its notice proposing that the Carrier be given the right to determine the size of its train crews. In this respect, it asserts that while it sought the right to eliminate unneeded jobs at once, it has offered what it would term generous severance pay to the employees it would no longer need. It says that it has been willing to bargain on the issue, but that the only counter-offer it has received from the Organization would actually increase its crew costs and that no net cumulative savings would accrue under that proposal until the next century.

B. The Organization's Position

The Organization says that the gravaman of the current dispute is that the Carrier is seeking to eliminate all operating ground service employees.

It contends that an existing agreement, which had been entered into on September 26, 1973, permits the Carrier opportunity to reduce crews on various road and yard assignments

to a complement of a conductor and brakeman in road freight service and a foreman and yard helper in yard service. It estimates that approximately 35 per cent of the assignments have been reduced in such a manner.

While it recognizes that main line road freight assignments may not be blanked under the present agreement, and that jobs may be blanked on the covered ass ignments only on an attrition-basis arrangement, the Organization says that this method of blanking jobs has nonetheless "saved millions and millions of dollars for the Carrier."

The Organization places great emphasis on the history of crew consist disputes in the industry and, in particular, on this Carrier. The Organization maintains that this history and its resulting precedents are important to a proper consideration of the issue. In this respect, it related to the Board various aspects of negotiations and litigation which have taken place since 1964 regarding the subject matter of crew consist.

The Organization does not deny that at meetings on the property, officers from the Carrier's financial, government affairs, and labor relations departments had discussed and reviewed the company's financial condition, its shortfall and cash flow problems, its marketing situation, the impact of deregulation under the Staggers Act, and the impact of competition being experience from regional and short line rail carriers as well as by trucks. However, the Organization says that just because the Carrier could show that it was in dire straights financially, and that various portions of the Carrier were up for sale, that the employees it represents should not be required to bear the burden for all such problems. In this same regard, the Organization suggested that certain of the Carrier's financial problems are the result of business decisions that the Organization characterized as "very inept".

The Carrier's financial presentations notwithstanding, the Organization says that it has attempted to be reasonable with the Carrier in "expediting" trains on the property. It points to an agreement which it entered into with the Carrier on October 12, 1983 for the operation of trains on the Carrier's coal hauling rail subsidiary, WRPI, with a road crew consist of one conductor and one brakeman. It also cites a special agreement, dated February 12, 1974, which had provided for the movement of iron ore with a crew of one conductor and one brakeman, albeit this agreement was effective for only the 1974 Adams-Waukegan ore hauling season.

The Organization contends that the Carrier has refused to consummate a mutually acceptable agreement on terms comparable to those which exist in agreements which have been entered into with representatives of train service employees on other carriers. In this connection, the Organization directed the Board's attention to some 16 separate agreements, dating from March 17, 1978

(Chicago, Milwaukee, St. Paul and Pacific Railroad) to December 1, 1987 (Union Pacific Railroad - Former Chicago & Eastern Illinois Railroad), whereby it was mutually agreed that under specified conditions, in return for certain employee considerations, that the basic crew consist could be reduced to one conductor and one brakeman in road service and one conductor (yard foreman) and one helper in yard service.

The Organization submits that all of the agreements which it cites are "attrition type" agreements, with reduction to one conductor and one brakeman or to one foreman and one yard helper on covered assignments from "full crews" of at least one road conductor and two brakemen or one foreman and two yard helpers.

The Organization concedes that while the Carrier has some large railroad competitors, it disagrees with the Carrier concerning short line rail carriers being the Carrier's greatest competitors. It argues that the short line railroads mentioned by the Carrier as competitors operate over light density lines and handle very few freight trains. Further, the Organization offers that the short line railroads mentioned by the Carrier are in bankruptcy proceedings.

In addressing those duties which are now being or remain to be performed by conductors and brakemen in road service and by foremen and helpers in yard service, the Organization submitted a job analysis summary setting forth the responsibilities of such employees.

Accordingly, on the basis of the above arguments and other various contentions, the Organization urges that the Carrier be required to enter into an agreement governing crew manning levels consistent with what it refers to as "national pattern agreements".

VI. Findings and Recommendations

"Crew consist", manning of engines and trains, has been the subject matter for review by numerous Emergency Boards in the past. We find no real necessity to detail the chronology of those Boards' activities and recommendations. It is sufficient, in our view, to quote certain findings made by one of those Emergency Boards, Emergency Board 172, which we find have some relevance to the dispute under consideration. That Board was convinced, as is this Board, that the process of good faith collective bargaining should be the mechanism that provides for the resolution of this dispute. That Board, like this Board, did not view itself as the final arbiter of issues as important as what the manning levels should be on the nation's railroads.

> "The bargained solution may not be, in fact probably will not be, a perfect solution from the point of view of either party. As the Presidential Railroad Commission observed in 1962, 'Inescapably we find ourselves in an area where the best must yield to the better.' Of course there is a public interest in the terms of a collectively bargained agreement. But under the particular facts and circumstances of this case, the primary public interest here would appear to be not so much in the terms of the agreement, as such, as in the final resolution of this prolonged dispute through free collective bargaining."

The Board has had the opportunity to consult with the parties since they agreed to an extension of the 30-day period for the issuance of this Board's report which is established by the statute. Throughout this dispute, the Organization has taken the position that no change is necessary while the Carrier has indicated its desire for radical change in the present work rules. While the general outline of the Carrier desires is apparent from its submission, it is impossible in a proceeding such as this to enquire into all of the fine details and ultimate ramifications of the proposals which have been made. The Board cannot examine the way any particular train will operate and cannot do more than indicate the general guidelines which it believes to be appropriate to resolve the dispute. It will, therefore, attempt to recommend resolution of this dispute by dividing the issues to be resolved into two main parts: the first is the issue of crew size and the second is the manner in which affected employees are to be treated.

A. Crew Consist Manning Levels

The Carrier has suggested that the model which the Board should follow in recommending appropriate crew size is the crew consist utilized for the operations on the Florida East Coast

Railway Company; that is, operation of trains in through service with only a conductor and in yard service with only a conductor unless the Carrier believes that operational efficiency makes it desirable for a brakeman to be added to the crew. While yard trainmen are often referred to as "Yard Foremen" and "Yard Helpers", for simplicity throughout these recommendations all individuals will be referred to as conductor and brakeman regardless of whether they are in road or yard service.

The Carrier points out that the new regional railroads which have been formed since deregulation also have used a crew consist of a conductor only and/or that of a conductor and one brakeman. The Carrier notes that at least two of these regional railroads, which are its direct competitors and were formed from the sale of trackage by existing Class I railroads, have collective bargaining agreements with the United Transportation Union.

The Organization does not wish the Board to consider these railroads as models, but insists that only Class I, organized railroads should be considered as models for crew consist on the Carrier. While the Organization has indicated that it was willing, under very limited conditions, to consider crew consist reductions, it would only do so provided its members receive a substantial portion of the resultant savings.

While neither of the Parties stressed it, the Class I, organized, railroad with the crew consist arrangement closest to that desired by the Carrier is the Consolidated Rail Corporation (Conrail). Conrail has a general consist of one conductor and one trainman on virtually all of its trains without any limit on train length. This consist is less than that agreed to on a system-wide basis on any other organized Class I railroads which have local agreements which, if considered in toto, have the effect of creating a crew consist very similar to that on Conrail. Conrail's crew consist arrangement is not the product of pure collective bargaining, but rather is the result of Congressional action.

In 1981, Congress passed legislation which transferred Conrail's freight properties to a railroad owned by individual investors. It also transferred Conrail's passenger service responsibilities to several local public commuter authorities. As noted in the Senate Committee Report (1981 U.S. Code Congressional Service 620), section 413-1 of P.L. 97-35 contains:

> A "Special termination allowance" allowing Conrail to "blank" the positions (eliminate the job with the man) vacated under the program. Separation would be limited to the numbers of excess . . . second and third brakemen . . . presently employed by Conrail (but not necessarily the individuals occupying those positions if more senior personnel wish to be separated). . . .

The program would operate at the discretion of Conrail but mandatorily as to affected employees (after voluntary separations were taken). The section provides for payments at the rate of $200 per month of active service with Conrail or a predecessor, with a cap of $25,000 (i.e., 4 years, 2 months service).

Provision was also made in the legislation for new career training assistance, continued medical insurance coverage for 6 months from the date of separation and moving expenses for employees forced to move to obtain employment on another railroad. There also was a provision for binding arbitration of any disputes involving the interpretation or implementation of the legislation. The Board understands that as Conrail actually implemented the legislation it was unnecessary to utilize those provisions which permitted force or involuntary separations as sufficient employees accepted the separation offer so as to reduce the work force to the required level on a voluntary basis.

There is no question that the situation on this Carrier is different from that which was present in 1981 on Conrail. There are no third brakemen on this Carrier; however, the agreement between the parties does allow for second brakemen where senior employees in the exercise of free choice select such positions. In fact, such selections are usually made. There also have been additional technological changes in the railroad industry since 1981. In 1986, in a national agreement, the UTU and the railroads contracted for the elimination of cabooses and it appears that the Carrier operates about sixty percent of its trains without a caboose.

In 1981 Conrail was being transferred from public ownership and the Congressional settlement, even if agreed to by the unions involved, was agreed to under the threat of action without the concurrence of the unions. Here the parties are not changing their relationship, nor is the Carrier undergoing a reorganization. Rather it is because the Carrier finds it needs increased efficiency in its operation of the railroad if it is to survive as a competitive force that it has served the section 6 notices requesting changes in crew consist.

As part of its presentation to the Board the Carrier utilized as an expert witness Robert W. Anestis. In his cogent presentation, Mr. Anestis made the following points: (1) Return on investment of the basic railroad (excluding WRPI) as computed by the ICC is the second lowest in the industry, with only the Southern Pacific (SP) being lower, and the return is half of that of the third lowest return on a railroad; (2) Chicago & North Western has a debt equity ratio twice that of the railroad industry average; (3) the operating ratio of the carrier is also the second highest in the industry, to sp; (4) the direct train crew labor costs as a percentage of freight related revenue is the second highest, again to SP; (5) the Carrier is the second most capital intensive railroad, to Conrail, yet it has the

lowest debt rating in the industry as calculated by both Moodys and Standard & Poor; and, (6) the Carrier's profit was just barely in excess of the cash needed to pay the interest on its outstanding bonds, because of this, it was required to pay the highest rate of interest in the industry on its borrowing.

Mr. Anestis noted that while the Carrier estimated that if its proposal for crew consist changes were to be adopted it would save approximately $55 million, that amount would not of itself be enough to meet all of its needs. He concluded his comments:

> In order to cope with these disadvantages, North Western must deal with its cost structure in a meaningful way. Crew consist savings of the magnitude proposed by North Western will serve to bring North Western's Basic Railroad closer to the point where it can carry its interest charges, but it can only bring down its indebtedness if it restructures the railroad by "disinvesting" poorly-performing segments. Recognizing the inherent problems in the Basic Railroad, North Western's management team successfully executed an extremely complex and critical strategic initiative by planning, financing and implementing WRPI. That effort saved the North Western. It has coped in the interim by "cross-subsidizing" the Basic Railroad with enormous infusions of cash from WRPI and from non-rail operations. Although this cross-subsidy may be justified in the short-term, it cannot continue indefinitely because the shareholders will not permit it. Moreover, even with WRPI included and with crew consist obtained, North Western will still not be revenue adequate -- it will not earn its cost of capital.

On the basis of the presentations before it, the Board concludes that the Carrier, unlike many of the other railroads in the industry, has an economic need for relief from its present crew consist rules. Without such relief it will be forced to take more drastic economic action which could jeopardize the livelihood of all of its employees. This is not to say that the employees alone should be expected to bear the burden of the structural problems of the railroad. Rather, they, like the shareholders, have to make some sacrifice in order to ensure the continued viability of the railroad.

As noted earlier, various railroads and the UTU have entered into local agreements which allow for the elimination of second brakemen. The Organization in this case has not been able to seriously contest the practicality of utilizing a crew consist of a conductor and one brakemen. It has rather indicated that its members should receive additional benefits for agreeing to this change in the manning of the trains if the change is to be accomplished in any way other than through attrition.

Congress mandated elimination of all but one brakeman on Conrail. That change was effectuated without serious disruption of the Conrail operating work force. A similar solution in this case would result in almost half of the savings that the Carrier has requested. Accordingly, we recommend that the parties agree that no train will have a crew consist greater than a conductor and one brakeman unless the Carrier in its discretion so desires.

Additionally, the Board notes that the UTU and various railroads have entered into agreements for through-freights, which do not make a switching stop, to operate with only a conductor (in addition to the engineer). The Organization has offered to allow a conductor-only consist on through-freights which are utilized for new business and which have a train length of no more than 35 cars. The Carrier in this case desires conductor-only crews but is not willing to limit train length below 120 cars. Were the Carrier's proposal implemented, the resultant savings would be approximately $28 million of the $53 million requested.

This Board has not had the time necessary to analyze the operation of any particular train. This Board, therefore, cannot determine whether it would be appropriate to allow a through-freight which does not make any stops to operate with only a conductor. Nor can it determine whether train length should be limited. However, it appears that there may be circumstances, in non-stop through-freight service, where "conductor only" operations will be appropriate. Therefore, the Board recommends, under the procedure to be set forth more fully below, that either party will have the right to request a change from the crew consist which it had previously determined to be appropriate. If such a request is made, the party making the request shall have the burden of proving that such a change does not diminish safety or efficiency, is consistent with industry practice, and will not increase the costs of operations substantially. If the parties cannot agree to such a change, the party requesting the change shall have the right to request binding arbitration of the matter in a fashion to be described below. Arbitration shall be conducted on a train by train basis, if either party so desires, and the arbitration board shall have the power to recompense employees whose jobs are made redundant by their award in the same manner as this Board will hereinafter recommend in regard to the second brakemen's job which it has recommended be eliminated. The arbitration board will also have the power to settle any disputes arising out of the implementation of these recommendations. *

The Board recommends that in order to settle the outstanding crew consist issues, if the parties cannot mutally agree upon a solution, an arbitration board composed of three neutral members, experienced in the resolution of railroad disputes be established. This board shall operate in the same manner as *

boards created under the provisions of Section 8 of the Railway Labor Act (45 USC 158), but without the partisan members and shall be compensated by the National Mediation Board in accordance with the same section.

B. Separation Allowances

A great deal of this entire dispute has been about the price to be paid by the Carrier to its employees for the elimination of certain jobs. In this regard the Organization has taken the position that the employees who continue to work should have the right to receive a portion of the savings which result from the elimination of the second brakeman's job in perpetuity. The Carrier on the other hand has indicated a willingness to compensate the individuals whose jobs are being eliminated, but has been unwilling to compensate the remaining employees for work which it considers unnecessary if not non-existent.

A second point in dispute is how the jobs which are scheduled for elimination should be eliminated. It is the Organization's view that the elimination should occur by attrition; that is, by the passage of time. The Carrier on the other hand, believes that the jobs should be eliminated at one time and that time should be immediately. The Carrier offered convincing evidence before the Board that if the crew size reduction were implemented by natural attrition it would not result in financial savings to the Carrier in the reasonably foreseeable future.

This Board is of the view that while work force changes in the railroad industry have frequently been affected through attrition, that policy is not viable in the instant case in view of this Carrier's financial situation. We believe that the Carrier has made a creditable presentation that without immediate savings its future ability to continue to operate as a successful enterprise will be endangered.

The railroad industry has historically offered job protection to its employees which has been in excess of that offered to employees in other industries. Some fifty years ago the railroad industry and the organizations representing its employees entered into the Washington Job Protection Agreement which has formed the basis for the orders of the Interstate Commerce Commission regarding the rights of employees whose jobs have been eliminated by ICC action ever since. The protection required by the ICC includes displacement or dismissal allowance for six years; moving expenses if moving is required as a result of the job elimination; continuation of fringe benefits, including free transportation, medical benefits and pension benefits, for the protected period; and payment of any losses which may be suffered by the forced sale of a home below its fair market value by reason of a displacement or dismissal.

On the other hand, Congress in passing the Conrail legislation determined that a maximum of $30,000 was allowable as a separation allowance for individuals who have "invested significant periods in service to Conrail and its predecessors." Congress also allowed a retraining allowance of $5,000 per employee.

Information furnished to the Board by the Carrier indicates that the median yearly income for train service employees varies widely by years of service. For employees with less than eleven years of service it is $23,964.00; for employees with more than forty years of service it is $41,428.00; and for all employees it is $35,554.50.

The record reflects that all potentially affected employees have had at least eight years of service with the Carrier, and therefore they may have had lifetime employment expectations. In these circumstances, the Board does not believe that the "junior" employees should be treated differently from those employees who are close to retirement age and who on a voluntary basis, are willing to terminate their careers. Accordingly, it is our recommendation that the separation payment not be varied on the basis of length of service, but should be $50,000 for any employee whose service is voluntarily terminated as the result of the elimination of his or her job in accordance with this recommendation. This amount will allow separated employees who are not at or near retirement age to pay for the retraining which they individually believe they need to find new jobs, and also will cover moving expenses associated with obtaining meaningful future employment. If individuals are required by these recommendations to be involuntarily separated from the Carrier's service, the allowance will be $45,000. It is the Board's view that implementation of these recommendations on a voluntary basis will be beneficial to all concerned. Therefore, the Board has concluded that voluntary withdrawal from service by individual employees should be encouraged by the use of this $5,000 incentive.

C. Other Issues

The parties addressed a number of ancillary issues as part of their direct negotiations and during their conferences with the representatives of the National Mediation Board in the session in March of 1988.

It has been the position of the Organization that the employees who continue in the employ of the Carrier should receive additional compensation if jobs are eliminated. This Board does not believe that the compensation should be tied to job losses by fellow employees. Rather the compensation of employees should be determined in accordance with normal wage considerations, including productivity, and the ability of the

employer to pay the wages requested. If employees are more productive, they should be rewarded. However, the rewards should be in the regular wage rates and not a special fund which over the course of time loses all relationship to the reason for its creation. For this reason, as well as the fact that it believes that it is the employees who will be suffering the loss of their employment and who need the maximum protection that can be afforded, the Board is not recommending that there be any change in the productivity payment which is presently being made by the Carrier. We, therefore, leave to the wage negotiations which the parties, as well as other railroads and organizations, will be entering into to reward the employees for any additional productivity which may result from this recommended settlement. *

Another significant ancillary issue, tied to the question of the Carrier's right to establish various standard crew sizes, was the Organization's consistent contention that in order for employees to be properly treated under the terms of a crew consist agreement they must retain their right to a "free exercise of seniority". Implicit in the Organization's "free exercise of seniority" argument was its contention that any reduction of forces should be accomplished through "attrition". In the Organization's view, positions identified for abolishment would not be instantaneously abolished, even when the incumbents of those positions voluntarily elected to take separation pay, if other members of the craft or class determined that the positions being vacated by the recipients of the severance pay were positions that they wished to occupy.

While the Board recognizes the Organization's institutional and philosophical points of view, that is, employees who have "waited" for some period of time to occupy certain positions should not be restricted from exercising their seniority merely because of an agreement which recognizes that there will be a reduction in standard crew sizes, this Board concludes that to permit a "free exercise of seniority" in the context of the instant dispute is inappropriate and inconsistent with the thrust, if not the essence, of the relief sought by the Carrier. As noted in our finding above, this Board has concluded that certain reductions in crew sizes may be made. In the Board's opinion, to postpone these reductions to some uncertain time, in what may be the far distant future, is not justified. While the Organization has "assured" the Board that the remaining employees would seek the jobs where the "money was", that is, they would gravitate to the crews that were operating with reduced ground service employees because they would benefit by the additional compensation (the "productivity" pay attached to those reduced crew jobs), there is no basis for this Board to conclude, with any certainty, that the Organization's prediction would come true. If we recommended that the employees retain the right of "free exercise of seniority" to second brakemen positions that were abolished, and if, in fact, a substantial number of employees exercised their seniority to those positions, any significant savings contemplated by the Carrier might be postponed indefinitely.

In light of the substantial and convincing evidence presented to us, regarding this Carrier's tenuous financial condition, the Board finds that the savings contemplated by the crew size reductions, which we have recommended, should be realized within a reasonably short period of time. The Organization's proposal that its members be entitled to a "free exercise of seniority" and that the positions identified for abolishment should only "disappear" through the process of "attrition" is inconsistent with the underlying basis for our recommendations. Therefore, we conclude that there should be no free exercise of seniority permitted for the positions identified for abolishment.

During negotiations, the Organization also raised the question of the date upon which employees would be considered as being "protected". As a practical matter, since the "junior" employees represented by the Organization on the Carrier's system have eight years of seniority, the date of protection does not appear to be a critical issue in dispute. Nevertheless, in order that the Organization be assured that any "present" employee, as of the date of the agreement or resolution, be protected, we recommend that the date for conferring protection be the date the parties reach agreement directly as a result of these recommendations or as of the day that these recommendations form the basis of a final resolution of this dispute.

During negotiations with the Carrier and in discussions with the Board an issue was raised by the Organization regarding the propriety of establishing guaranteed extra boards. Due to the uncertainty of the extent to which there will be remaining work on certain divisions and for certain crews and for certain assignments as a result of the impact of the reductions in crew size, the Organization proposed that the Carrier "guarantee" extra board work; using a minimum number of days per month for yard extra board work and a minimum number of miles per month for road extra boards. This Board concludes that there is substantial merit to the Organization's proposal. This Board also recognizes that the parties have, in the past, established guaranteed extra boards and established a minimum number of days and/or miles that should be guaranteed; while giving the Carrier the unilateral right to "cut" or "regulate" those guaranteed extra boards.

Accordingly, this Board recommends that the parties incorporate in this crew consist agreement a provision [illegible] arrangments be incorporated in any new guaranteed extra board arrangments.

During their negotiations the parties also addressed the question of whether employees should receive "personal leave days". It appears that during their negotiations, the parties were in agreement that at least ten personal leave days would be

established. At one time, the Carrier proposed that half of the personal leave days be established upon the date of the agreement and that the other half of the personal leave days be implemented "when the railroad is operating one and one". The Board finds, in the context of our recommendation above regarding the establishment of an abolishment/separation pay program, which does not rely upon natural attrition, that it would be appropriate to grant the employees the full complement of personal leave days upon the effective date of an agreement and/or resolution which essentially embodies our recommendations.

In addition, the parties, in their direct negotiations prior to the serving of the Section 6 notice, had identified a number of items which would be the subject of side letters of agreement. For example, the parties had discussed and apparently agreed on certain items not being "held against" merger guarantees and that car retarder operators at Proviso receive certain additional payments. The Board believes that these items and any other "side letter proposals" that were agreed to and which have not been specifically addressed by our recommendations, should be incorporated in any agreement or resolution of the instant dispute.

D. Moratorium

It should also be noted that while neither of the parties has mentioned this point in their submissions to this Board, the request for changes which were made by the Carrier do not include a moratorium period; that is, a period during which changes in the collective bargaining agreement could not be requested.

The Board is of the opinion that its recommendations, if they are to form the basis for a collectively bargained settlement, cannot effect all of the changes which are desired by the Carrier at one time. It is true that such a result might be imposed if the parties were free to resort to self-help and if the Carrier were to successfully impose its view. However, as we see our role it is to make recommendations which, if not desired by either of the parties, are at least sufficiently palatable to allow the unhappy party to consider that it is not engaging in organizational suicide if it agrees to the recommendations. It is also the Board's view that the changes that it recommends should be allowed to be in place for a period of time without additional changes being considered. Accordingly, the Board recommends that no section six notices regarding the issues here in dispute be allowed, without mutual consent, for a period of three years from the date that these recommendations go into effect.

In conclusion, this Board must observe that the dispute before us represents an issue of critical importance to these parties. We are not unmindful of the significant adverse impact

which may result for a substantial number of employees in view of the significant number of job abolishments which may occur. We are also concerned because the demographic data we received indicated that there are few employees at the low end and the high end of the age curve on this Carrier. In these circumstances, it is likely that in effecting the job abolishments employees with substantial railroad service, who do not contemplate retirement in the near future, will find themselves deprived of employment in their chosen career. Therefore, this Board recommends that the Carrier, in effecting the job abolishments, agree with the Organization and establish a methodology that: (1) Affords the entire craft or class an opportunity to choose the voluntary separation option; (2) canvasses the employees over a reasonable period of time, not less than six (6) months, in order to elicit as many voluntary separations as possible; (3) considers affording employees found to be surplus in one seniority district, who may desire transfer to another seniority district where vacancies could exist because there were more "volunteers" for separation pay in that district than redundant positons identified by the Carrier, the opportunity to transfer to that other seniority district, dependent upon appropriate relocation expense provisions and transfer and seniority revision procedures consistent in principle with the methodology agreed to by the parties under the so-called "Coal Line Agreement"; and, (4) affords the employees who become surplus the opportunity to elect a voluntary furlough at their home seniority districts awaiting the availability of a vacancy and deferring their option for separation pay for, at least, one year.

Respectfully submitted.

Robert O. Harris, Chairman

Richard R. Kasher, Member

Robert E. Peterson, Member

ARBITRATION BOARD NO. 490

In the Matter of Arbitration Between CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY and UNITED TRANSPORTATION UNION	NOV 3 1988 OPINION AND AWARD

BACKGROUND

This is an arbitration proceeding between Chicago & Northwestern Transportation Company (hereinafter "Carrier") and United Transportation Union (hereinafter "Organization"). This Arbitration Board was appointed by the National Mediation Board on September 19, 1988 pursuant to Senate Joint Resolution No. 374, signed by President Reagan on September 9, 1988 (Appendix A). That statute provided that "the report and recommendations of the [Presidential] Emergency Board 213 ["PEB"] shall be binding on the parties upon the enactment of this joint resolution and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act...", and authorized binding arbitration if requested by either party. Such request was made by the Organization.

This Board is mandated by the statute to determine "any unresolved issues as to the initial implementation of the Report and Recommenda-

tions..." of the PEB, and that such determination shall be final and binding on the parties.

While the statute provided that this Board's determination was to be made within 30 days from September 9, 1988, the statute further provided that the parties could mutually agree, in effect, to extend the time.

Hearing was held in Washington, DC, on September 23, 1988, at which time the Board heard oral argument and considered previously submitted written briefs by the representatives of the parties. During the course of the hearing, a number of previously unresolved issues were agreed upon. The unresolved issues, discussed below, are the subject of this Award. The hearing was stenographically reported, and a transcript of the proceedings (numbering 148 pages) was made available to the Board on September 26, 1988. At the conclusion of the hearing, the parties mutually agreed that the time within which the Board should render its Award be extended to and including November 1, 1988.

BOARD MEMBERS: Eugene T. Herbert, Esquire
Eckehard Muessig
Nicholas H. Zumas, Esquire, Chairman

APPEARANCES: For the Carrier: Ralph J. Moore, Jr., Esquire
Eugenia Langan, Esquire
Ronald J. Cuchna
Paul A. Lundberg

For the Organization: Clinton J. Miller III, Esquire
Donald F. Markgraf
Gerald R. Maloney
Paul H. Bauch

BRIEF HISTORY OF THE DISPUTE AND PEB RECOMMENDATIONS

On May 15, 1987, Carrier, pursuant to Section 6 of the Railway Labor Act, served notice on the Organization of its intent to revise existing schedule rules and agreements to permit the unrestricted right to determine when, and if, any ground service employees shall be used on each crew employed in all classes of road freight and yard service, including all miscellaneous and unclassified services. In its Section 6 Notice, Carrier offered adversely affected employees the option of a one-time separation allowance of $25,000 or, in the alternative, a supplemental unemployment allowance for one year.

The Organization rejected Carrier's proposal, and served a counter-proposal on June 29, 1987, which included 11 primary items that were not acceptable to the Carrier.

Both parties applied to the National Mediation Board for mediation. Such mediation was conducted, unsuccessfully, until early March 1988. On March 15, 1988, the National Mediation Board proffered arbitration to the parties. Efforts to arbitrate were ultimately unsuccessful, and on April 12, 1988, Carrier advised the Organization that it was going to promulgate the rules changes set forth in its Section 6 Notice to be effective on May 15, 1987. Three days later, the Organization announced that its members would withdraw their service from the Carrier and conduct a strike on April 20, 1988. The National Mediation Board advised President Reagan that, in its judgement, the dispute between the parties threatened substantially to

interrupt interstate commerce, depriving a section of the country of essential transportation service. The President issued an Executive Order creating Presidential Emergency Board 213 to make an investigation and submit a report concerning the dispute.

Thereafter, the PEB conducted formal hearings, and informally met with the parties subsequently in an effort to secure agreement through mediation. The mediatory efforts were unsuccessful, and the PEB issued its Report to the President on July 1, 1988 (Appendix B).

The PEB recommended resolution of the dispute by dividing the issues to be resolved into two primary categories: the crew size, and the manner in which affected employees are to be treated. The recommendations of the PEB may be summarized as follows:

1. That "no train will have a crew consist greater than a conductor and one brakeman unless the Carrier, in its discretion, so desires."

2. That an Arbitration Board, composed of three neutral referees, be established to determine whether on a train-by-train basis, "conductor only" operations in through freight train service would appropriate.

3. That Carrier pay $50,000 to any employee whose service is voluntarily separated as a result of the elimination of his or her position; and a payment of $45,000 to employees who are involuntarily separated from

Carrier service. Such involuntary payment to be made in reverse order of seniority.

3. That the position of the Organization that employees who continue in Carrier's employ should receive additional compensation if jobs are eliminated be rejected; and that compensation of such employees should be determined "in accordance with normal wage considerations, including productivity, and the ability of the employer to pay the wages requested." In this connection, the PEB recommended that there not be any change in the productivity payment, which is presently being made by the Carrier, leaving to wage negotiations any additional productivity rewards.

4. That the savings contemplated by the crew size reductions "should be realized within a reasonably short period of time"; and that the Organization's proposal that its members be entitled to a "free exercise of seniority" and that the second brakeman's positions should be abolished only by "attrition" be rejected as inconsistent with the PEB recommendations.

5. That employees who were employed as of "the day these recommendations form the basis of a final resolution of this dispute" should be "protected" for purposes of the separation allowance requirements, noting that, "as a practical matter, since the junior employees represented...have eight years of seniority, the date of protection does not appear to be a critical issue in the dispute."

6. That there be a provision for guaranteed extra boards, and that the "limitations that exist in the current extra board arrangements be incorporated in any new guaranteed extra board arrangements."

7. Consistent with the agreement between the parties, that personal leave days be established; and that "in the context of our recommendation above regarding the establishment of an abolishment/separation pay program, which does not rely upon natural attrition, that it would be appropriate to grant the employees the full complement of personal leave days upon the effective date of an agreement and/or resolution which essentially embodies our recommendations."

8. That the side letters agreed to by the parties and not the subject of other PEB recommendations "be incorporated in any agreement or resolution of the instant dispute."

9. That no Section 6 Notices regarding the issues in dispute be allowed, without mutual consent, for a period of three years from the date that the recommendations go into effect.

PEB concluded its Report by stating:

> In conclusion, this Board must observe that the dispute before us represents an issue of critical importance to these parties. We are not unmindful of the significant adverse impact which may result for a substantial number of employees in view of the significant number of job abolishments which may occur. We are also concerned because the demographic data we received indicated that there are few employees at the low end and the high end of the age curve on this Carrier. In these circumstances, it is

likely that in effecting the job abolishments, employees with substantial railroad service, who do not contemplate retirement in the near future, will find themselves deprived of employment in their chosen career. Therefore, this Board recommends that the Carrier, in effecting the job abolishments, agree with the Organization and establish a methodology that: (1) affords the entire craft or class an opportunity to choose the voluntary separation option; (2) canvasses the employees over a reasonable period of time, not less than six (6) months, in order to elicit as many voluntary separations as possible; (3) considers affording employees found to be surplus in one seniority district, who may desire transfer to another seniority district where vacancies could exist because there were more 'volunteers' for separation pay in that district than redundant positions identified by the Carrier, the opportunity to transfer to that other seniority district, dependant upon appropriate relocation expense provisions and transfer and seniority revision procedures consistent in principle with the methodology agreed to by the parties under the so-called 'Coal Line Agreement'; and (4) affords the employees who become surplus the opportunity to elect a voluntary furlough at their home seniority districts awaiting the availability of a vacancy and deferring their option for separation pay for, at least, one year.

During the 30-day "cooling-off" period following the Report of the PEB, the parties were unable to reach agreement. On August 4, 1988, the Organization went on strike. On the same day, the Congress extended the "cooling-off" period until midnight on September 8, 1988. The parties were still unable to reach agreement and, on September 9, 1988, Carrier issued new Crew Consist Rules reducing the size of its train crews. The Organization again went on strike, shutting down the entire railroad.

On September 9, 1988, Congress concluded its deliberations and passed Joint Resolution 374, which became Public Law 100-429 after being signed by the President the same day.

Despite the fact that the Congress empowered this Board, through final and binding arbitration, to consider unresolved issues as to "the initial

implementation of the report and recommendations" of the PEB, the parties agreed with the Board that it had jurisdiction to consider all unresolved issues presented to the Board at the hearing; and that, in this context, the parties further agreed to extend the time within which this Board could render its Award.

As indicated above, the parties reached agreement on some of the previously unresolved issues at the hearing before this Board. Those agreed upon issues are incorporated and made part of the Crew Consist Rules, as amended, imposed on the parties by this Board as a result of this interest arbitration. The amended Crew Consist Rules are attached hereto as Appendix C. Language inconsistent with this Award is bracketed and deleted; language consistent with this Award is double underscored and added.

UNRESOLVED ISSUES

The issues remaining for resolution may be stated as follows:

1. Under the PEB recommendations, is the Carrier entitled to blank (leave unfilled) second brakeman positions prior to the expiration of the six-month canvassing period as recommended by the PEB?

2. Is the Carrier obligated to "buy out" all of the second brakeman positions to be abolished?

3. In what manner shall the Carrier proceed to abolish second brakeman positions? Must it offer voluntary separation to employees on a system-wide seniority basis or merely on a district seniority basis?

4. Are probationary, or temporary, employees entitled to buyouts under the recommendations of the PEB?

5. Who are "protected employees" under the PEB recommendations?

6. When does the personal leave day entitlement commence?

7. Is the differential of $10.75 a part of the "basic day" rate for "guarantee" purposes?

8. If the parties are unable to reach agreement with respect to the crew size of trains operating in non-stop through freight service, what is the appropriate interval between the time of Carrier's notice of its intent to reduce such crew size and the time that the matter may be referred to a Board of Arbitration for final and binding resolution?

9. May Carrier invoke arbitration to seek further crew reductions during the six-month canvassing period?

FINDINGS AND CONCLUSIONS

After review of the record, this Board makes the following findings and conclusions with respect to the unresolved issues presented:

Issue 1 - Does the Carrier have the right to blank (leave unfilled) second brakeman positions prior to the expiration of the six-month canvassing period as recommended by the PEB?

Carrier has taken the position that it has the right, since September 9, 1988, to blank (leave unfilled) second brakeman positions on certain of its lines. Carrier contends that where such positions are not necessary to its operations, economy dictates that those positions need not be filled. Indeed, it appears that Carrier seeks to implement this policy with a view to reducing not only its current operating costs but also the number of separation payments that it will be required to make when the six-month canvassing period has expired. As support for this view, Carrier argues that the basic intention of the PEB was to provide the Carrier with

financial relief by allowing it to reduce its workforce and thereby to remain viable as a rail carrier.

The Organization strongly disagrees with Carrier's interpretation of the PEB recommendations in this regard and alleges that Carrier has, in fact, implemented this policy since September 9, 1988 to the detriment of its member/employees by blanking second brakeman positions and failing and refusing to fill these positions with either employees from the extra boards or new-hires. The Organization contends that nothing in the PEB recommendations authorizes Carrier to blank or abolish any position prior to the expiration of the six-month period referred to in the PEB Report.

This Board agrees with the Organization. It is clear that the intention of the PEB was that Carrier be allowed to abolish up to 514 second brakeman positions involved in return for a separation payment for each such position abolished. It prescribed a period of "not less than six months" during which employees in the entire class or craft would be canvassed to determine those who would volunteer for separation. Implementation of a policy of blanking prior to the expiration of that six-month period could effectively deprive some or all of the employees of a right to separation payment at the end of the period. Nothing in the PEB's recommendations, elevated to the force of law on September 9, 1988, gave Carrier any blanking rights which it did not have under the September 26, 1973 Crew Consist Agreement between these parties. Carrier has, as it has always had, the right to abolish positions through attrition. It is not compelled to hire "off the street" when an employee dies or resigns or is terminated for

just cause. But such-natural attrition is the only means by which Carrier may presently reduce its workforce other than those provided in the aforesaid agreement and those recommended by the PEB. This Board has decided to set an implementation date six months from the date of this Award in order to permit the parties to revise their procedures to comply with this Board's interpretation of the PEB recommendations. In this regard, it should be noted that the PEB recommended a period of "not less than six (6) months" for canvassing employees in the manner set forth below.

Issue 2 - Is the Carrier obligated to "buy out" all of the second brakeman positions to be abolished?

Carrier is authorized by the PEB, on a one-time basis, to abolish up to 514 second brakeman positions effective May 1, 1989. The separation payments, or "buyouts", are inextricably linked to the abolishment of positions. There can be no buyout without the permanent abolishment of a second brakeman position and there can be no abolishment of a second brakeman position without a buyout or as the result of attrition. In the manner prescribed below, qualified employees who are voluntarily separated shall be paid $50,000. Those employees who are involuntarily separated shall be paid $45,000. In every case, Carrier must provide a full and fair opportunity for voluntary separation.

Issue 3 - In what manner shall the Carrier proceed to abolish second brakeman positions? Must it offer voluntary separation to employees on a system-wide seniority basis or merely on a district seniority basis?

Carrier contends that offering voluntary separation on a system-wide basis could, and most likely would, result in an over-reduction of its work force in certain seniority districts, thus compelling it, for example, to engage in new hiring to fill those vacancies where there are more volunteers than surplus positions. At the same time, Carrier maintains that in seniority districts where volunteers fall short of the number of second brakeman positions determined to be abolished, the intent of the PEB recommendation to permit all such positions to be abolished in exchange for a buyout could not be achieved. Carrier points out that in either case it does not have the power to compel a transfer of any employee from one seniority district to another. Carrier also notes that the PEB concluded that "there should be no free exercise of seniority permitted for positions identified for abolishment."

The Organization claims that the PEB's intention was to afford 514 employees, selected in strict order of seniority, on a system-wide basis, the opportunity to tender their resignation in exchange for a separation payment of $50,000. In support of its view, the Organization points to the language of the PEB concluding statement:

> ...This Board recommends that the Carrier, in effecting the job abolishments...establish a methodology that...(1) affords the entire craft or class an opportunity to choose the voluntary separation option...

The Organization contends that the "entire craft or class" means all of its members without distinction as to the district in which they hold seniority.

This board finds that the PEB's substantive recommendations were largely based on its findings with respect to the Carrier's financial condition. Among them was a conclusion that savings resulting from the reduction in the size of crews should be immediate and that buyouts should go to those persons whose service is voluntarily terminated in exchange for the elimination of a surplus position in accordance with the PEB's crew reduction recommendation. It is clear that the PEB expected that the Carrier was to be able to accomplish the totality of the desired reductions in second brakeman positions in an economical and expeditious manner, but that the buyouts would provide a measure of protection to affected employees.

The Board further finds that the PEB restricted the exercise of seniority to the extent that it held that "...there should be no free exercise of seniority permitted for the positions identified for abolishment." While we understand and appreciate the Organization's position, which focuses on the PEB suggestion that a methodology be developed which "affords the entire craft or class an opportunity to choose the voluntary

separation option" and the Organization's opinion that this imposes upon the Carrier a requirement to offer buyouts on a system-wide basis regardless of the number of jobs to be eliminated by seniority district, we find that the Carrier's position is more compatible with the objectives and intent of the PEB report. Under this interpretation, the Carrier would canvass the entire class and restrict the number of buyout offers in each seniority district to the number of surplus jobs within each district.

In our view, the PEB could not have intended that the selection of those to be offered voluntary separation would be on a system-wide basis. The PEB attempted to deal with a problem in part (3) of its concluding statement that could only arise from utilization of a methodology that involved district, as opposed to system-wide, selection of those to be separated. The relief that the PEB sought to confer on Carrier cannot otherwise be achieved than by permitting it to identify redundant second brakeman positions in each of its six districts and to abolish all of those particular positions.

As we have earlier stated, the requirements of reasonable notice to all affected employees suggest that the date when the full implementation of the relief granted Carrier by the PEB be six months from the date of this Award, i.e., May 1, 1989. For a period of three years thereafter, the PEB has decreed, and we affirm, that a moratorium on Section 6 Notices will be in effect.

Issue 4 - Are probationary or temporary employees entitled to buyouts under the recommendations of the PEB?

In the months preceding the enactment of the Joint Resolution, Carrier had hired a number of temporary employees who were terminated prior to September 9, 1988. These employees had signed hiring agreements which set forth that employment would be less than 60 days.

The issue here is whether Carrier has properly applied the terms of Section 1, Article VII of the parties' August 25, 1978 National Agreement which states:

> Applications for employment will be rejected within sixty (60) calendar days after seniority date is established, or applicant shall be considered accepted. Applications rejected by the Carrier must be declined in writing to the applicant.

The PEB did not specifically address the issue at hand. However, it did state that protected employees are those who were employed on the date "that these recommendations form the basis of a final resolution of this dispute." As September 9, 1988 was the date on which the Joint Resolution imposed the PEB recommendations, we agree with Carrier that probationary and temporary employees are not entitled to buyouts. Moreover, we note that authorities in the past have construed the aforementioned Article VII that Carrier may arbitrarily terminate employment within 60 days without violating the Agreement.

Issue 5 - Who are "protected employees" under the PEB recommendations?

The cornerstone of the Organization's position is its contention that all employees listed on ground service seniority rosters are "protected employees." It contends that seniority will prevail as to who will be afforded the opportunity to receive a voluntary separation allowance, irrespective of seniority districts and whether or not the employee is in an active or inactive work status. In this respect, it mainly relies upon the PEB recommendation appearing in its Report to establish a method for dealing with this issue as set forth above. In essence, the Organization submits that all employees who retain seniority either are basically eligible to apply for the $50,000 separation allowance, or are subject to being involuntarily separated and eligible for the $45,000 payment, regardless of their current employment status. Additionally, the Organization asserts that the employees should be able to apply after the six-month canvassing period if they are currently on some type of inactive status.

The Carrier, for its part, agrees with the Organization, but only to the extent that all employees on seniority rosters are afforded protection. However, it draws an important distinction: only those employees whose service is voluntarily terminated as a result of the elimination of his or her job would receive a $50,000 buyout. Accordingly, if an employee is not actively employed, but is on sick leave or other approved and recognized absence from the workplace, this employee will not be eligible for a buyout of $50,000 because this would not result in the elimination of a second

brakeman job. On the other hand, if that employee returned at some point to active service after the six-month canvassing period and if there still remained second brakeman positions to be eliminated after the employee's return, that employee would receive $45,000 if he were involuntarily terminated.

This Board agrees with Carrier and finds that employees who are not holding an active job (for example, those on sick leave) and who do not return to active duty during the six-month canvassing period are not eligible for a buyout. However, if such employees return to active service after the six-month canvassing period, and if second brakeman positions still remain to be abolished, then such employees would be eligible either for the $50,000 voluntary buyout or be subject to involuntary separation and the resulting $45,000 payment. In any event, returning employees would be afforded the normal protective benefits under the parties' collective bargaining agreement.

Issue 6 - When does the personal leave day entitlement commence?

During negotiations on Carrier's Section 6 Notice, the Organization proposed that the parties adopt the personal leave day rule applicable on other Class I railroads with respect to attrition-based crew consist agreements. Under this rule, employees accrue entitlement to personal leave, usually up to ten days on the basis of entitlement. The ten days, on a graduated scale, was agreed to by the parties.

As the PEB pointed out, Carrier proposed that half the personal leave days "be established upon the date of the agreement and the other half" be implemented "when Carrier" is operating "one and one."

In its Report, the PEB stated:

> The Board finds, in the context of our recommendation above regarding the establishment of an abolishment/separation pay program, which does not rely upon natural attrition, that it would be appropriate to grant the employees the full complement of personal leave days upon the effective date of an agreement and/or resolution which essentially embodies our recommendations.

In Article VI of its Crew Consist Rules, Carrier makes provision for personal leave days, essentially as outlined during negotiations, effective January 1, 1989, and applying the benefit only to train service employees not covered by the National Paid Holiday Rule.

The Organization argues that the January 1, 1989 effective date was in contravention of the recommendation of the PEB that the "full complement" of personal leave days be granted on the "effective date of an agreement and/or resolution which essentially embodies our recommendations."

Carrier takes the position that: (1) the PEB did not intend that the personal leave entitlement go into effect before Carrier became entitled to the full benefit of the elimination of second brakemen, and Carrier must wait at least six months to realize those benefits; and (2) personal leave days are a calendar year benefit, and the date of entitlement consistent

with the pattern of other railroad labor agreements executed near the close of a calendar year providing for vacation and leave benefits become effective on January 1 of the following year.

Otherwise, Carrier asserts, if employees were entitled to ten leave days during the remainder of this year, it would necessitate new hires to cover the leave days.

Alternatively, Carrier argues that even if the PEB intended personal leave entitlement to commence immediately, employees should not be entitled to a full year's worth of personal leave during the remainder of 1988.

With respect to this question, the Board finds that January 1, 1989 is an equitable and practical date. The Board agrees with Carrier that the PEB considered the personal leave day benefit (which these employees did not have before) as a partial quid pro quo for the abolishment of second brakemen positions. It is reasonable to assume that the PEB, when it issued its Report on July 1, 1988, anticipated that the parties would reach agreement soon thereafter. It is also reasonable to assume that the PEB did not foresee that there would be not one, but two cooling-off periods, or the enactment of emergency legislation creating a new Board of Arbitration empowered to arbitrate unresolved issues. Moreover, the "resolution of the instant dispute" did not become final and binding until November 1, 1988--the date of this Board's Award--only two months away from the new year. The

Board, finally, is also persuaded by the fact that leave and vacation days in the railroad industry are calendar year benefits effective on January 1 of the following year.

Issue 7 - Is the differential of $10.75 a part of the "basic day" rate for "guarantee" purposes?

This issue arose mainly because the Organization contends that the Carrier, in its proposed Article I concerning the makeup of train crews, has changed the composition of what it has traditionally regarded as being a "standard" or "full" crew, i.e. a conductor and two brakemen or a foreman and two helpers. The Organization argues that because Article I is entitled "Standard Crew" and because such a "standard" road freight and yard crew is defined in proposed Article I as consisting "...of not more than one conductor/foreman and one brakeman/helper," it is clear that the Carrier now considers a "standard" or "full" crew as being only one employee from each classification, rather than one conductor and two brakemen. Since this appears to be the case, the definitional change in effect legitimizes the notion that the "reduced" crew (one foreman and one helper) is, in fact, the "standard" or "full" crew. Accordingly, the Organization argues that the "basic day" rate should now be $126.14 (the "guaranteed" rate) rather than $115.39.

At the hearing, the Carrier agreed that it would continue to pay the $10.75 differential for a total day rate of $126.14 to all employees, new and protected, when they work as a member of a "reduced" crew. Indeed,

Article IV - Differential clearly so states. However, Carrier does not agree that the $10.75 be considered a part of the "basic day" rate to be applied for "guarantee" purposes, asserting that the PEB, in its Report, did not change the "basic day" rate. The PEB, in part, addressed this issue as follows:

> The Carrier questions the Organization's request to increase the price the Carrier now pays for operating reduced crews from a basic daily differential of $10.75 to each crewman on each reduced crew, to a payment of $48.25 per crew into the trust fund plus a basic $7.87 individual arbitrary for the remaining employees that would automatically be adjusted upwards in future years. It urges that there is simply no justification for what it terms the large and misnamed "productivity" payments set forth in agreements and that it is questionable whether any sort of extra payment to remaining ground service employees can be justified on the basis that the jobs of other employees have been eliminated because there was no work for them to do.

Moreover, the PEB stated:

> It has been the position of the Organization that the employees who continue in the employ of the Carrier should receive additional compensation if jobs are eliminated. This Board does not believe that the compensation should be tied to job losses by fellow employees. Rather the compensation of employees should be determined in accordance with normal wage consideration, <u>including productivity</u>, and the ability of the employer to pay the wages requested. If employees are more productive, they should be rewarded. However, the rewards should be in the regular wage rates and not a special fund which over the course of time loses all relationship to the reason for its creation. For this reason, as well as the fact that it believes that it is the employees who will be suffering the loss of their employment and who need the maximum protection that can be afforded, the Board is not recommending that there be any change in the productivity payment which is presently being made by the Carrier. We, therefore, leave to the wage negotiations which the parties, as well as other railroads and organizations, will be entering into to reward the employees for any additional productivity which may result from this recommended settlement.

This Board agrees with Carrier on this issue. The language used by the PEB clearly shows that it did not intend to change the $10.75 differential,

which, according to testimony, has remained the same since 1973. Additionally, the PEB also did not recommend a change in the "basic day" rate of $115.39, a rate which does not include the $10.75 differential. In effect, the Organization's argument is largely based on semantics and arguably could cause problems of interpretation at a later date. In this regard, the current heading of proposed Article I shall be changed from "Standard Crew" to "Road Freight and Yard Crews" because this title would more accurately describe the question covered by Article I. However, with respect to Section B of proposed Article IV, we agree with the Organization, consistent with the recommendation of the PEB, that productivity payment be left to wage negotiations. Accordingly, Section B of proposed Article IV - Differential is deleted.

> Issue 8 - If the parties are unable to reach agreement with respect to the crew size of trains operating in non-stop through freight service, what is the appropriate interval between the time of Carrier's notice of its intent to reduce such crew size and the time that the matter may be referred to a Board of Arbitration for final and binding resolution?

In its September 9, 1988 Crew Consist Rules (Article III, Section B.1), Carrier provided:

> The Carrier shall give written notice to the Organization of its desire to operate trains with less than a standard crew as described in Section A. The notice shall be specific by train and territory of operation, and will propose the reasonable and practical conditions governing its operation. If the parties fail to agree upon these terms and conditions within thirty (30) days of the notice, the matter may be referred to a Board of Arbitration for final and binding resolution.

52

The Organization, in its submission and argument before this Board, took the position that the 15-day period between the time of Carrier's notice to the Organization and the time for referral to arbitration in the event the parties could not agree was insufficient and that more time was necessary.

During discussion of this matter, the Board requested that the parties attempt to negotiate an acceptable date; and to advise the Board if there was no agreement. The parties advised the Board that they were not able to reach agreement.

In the correspondence submitted to the Board by the parties, their respective positions are summarized as follows:

Carrier takes the position that a 20-day notice and negotiation period is sufficient, pointing out that this was the same period that is provided in the 1985 UTU National Agreement for notice and negotiation of Carrier's proposals for interdivisional service prior to invocation of arbitration. Carrier further points out that proposals for interdivisional runs raise issues comparable to proposals to reduce train crews; and that 20 days is more than enough time for the Organization to decide whether it will agree to Carrier proposals to reduce crews on particular trains.

The Organization initially suggests that this Board has no authority to set time limits under its mandate to consider "unresolved issues as to the

initial implementation" of the PEB recommendations. Assuming that this Board did have authority, the Organization submits that the 90-day period specified in Article I, Section 4 of the New York Dock II Conditions prior to the implementation of a transaction "presents a more appropriate analogy than the 20-day period contained in the 1985 Agreement on interdivisional runs."

This Board is satisfied that it has authority to consider this issue by virtue of the mutual agreement by the parties authorizing this Board to go beyond issues relating to the "initial implementation" of the PEB Report and to consider any and all unresolved issues that have arisen in connection with the PEB Report.

This Board further finds that a period of 45 days is a sufficient period between Carrier's notice and referral to arbitration if the parties fail to agree. Such period gives the Organization adequate opportunity to consider the Carrier's notice and to negotiate without unduly delaying the process.

Issue 9 - May Carrier invoke arbitration to seek further crew reduction during the six-month canvassing period?

In its Report, the PEB stated:

> Additionally, the Board notes that the UTU and various railroads have entered into agreements for through-freights, which do not make a switching stop, to operate with only a conductor (in addition to the engineer). The Organization has offered to allow

a conductor-only consist on through-freights which are utilized for new business and which have a train length of no more than 35 cars. The Carrier in this case desires conductor-only crews but is not willing to limit train length below 120 cars. Were the Carrier's proposal implemented, the resultant savings would be approximately $28 million of the $53 million requested.

This Board has not had the time necessary to analyze the operation of any particular train. This Board, therefore, cannot determine whether it would be appropriate to allow a through-freight which does not make any stops to operate with only a conductor. Nor can it determine whether train length should be limited. However, it appears that there may be circumstances, in non-stop through-freight service, where "conductor only" operations will be appropriate. Therefore, the Board recommends, under the procedure to be set forth more fully below, that either party will have the right to request a change from the crew consist which it had previously determined to be appropriate. If such a request is made, the party making the request shall have the burden of proving that such a change does not diminish safety or efficiency, is consistent with industry practice, and will not increase the costs of operations substantially. If the parties cannot agree to such a change, the party requesting the change shall have the right to request binding arbitration of the matter in a fashion to be described below. Arbitration shall be conducted on a train by train basis, if either party so desires, and the arbitration board shall have the power to recompense employees whose jobs are made redundant by their award in the same manner as this Board will hereinafter recommend in regard to the second brakeman's job which it has recommended be eliminated. The arbitration board will also have the power to settle any disputes arising out of the implementation of these recommendations.

The Board recommends that in order to settle the outstanding crew consist issues, if the parties cannot mutually agree upon a solution, an arbitration board composed of three neutral members, experienced in the resolution of railroad disputes be established. This board shall operate in the same manner as boards created under the provisions of Section 8 of the Railway Labor Act (45 USC 158), but without the partisan members and shall be compensated by the National Mediation Board in accordance with the same section.

Thus, the PEB, in addition to addressing the abolishment of up to 514

second brakeman positions, recommended the creation of a Board of Arbitration to resolve questions relating to the operation of non-stop through freight trains utilizing only a conductor (in addition to an engineer).

Under Article III of Carrier's September 9, 1988 Crew Consist Rules, there is provision for allowing Carrier, by agreement, to operate non-stop through freight trains with a conductor only; and if agreement cannot be reached, there are procedures for arbitration as recommended by the PEB.

The Organization takes the position that, in the event the parties are unable to agree, Carrier may not invoke arbitration during the six-month canvassing period recommended by the PEB.

The Board agrees with Carrier that there is nothing in the PEB Report that imposes a six-month moratorium before the arbitration process may be commenced with respect to non-stop through freight trains, provided that no protected employee may be furloughed and no position may be abolished until the conclusion of the six-month canvassing period.

* * *

We wish to reiterate, however, that nothing in the PEB recommendation, the Joint Resolution of the Congress or this Board's Award prevents or inhibits the full and complete right of the parties to mutually agree to any change, modification or amendment of the foregoing. The principle of

collective bargaining remains undiminished and the parties are free to conclude whatever arrangement or agreement they mutually determine to be in their own self-interest notwithstanding this Award.

This Board will retain jurisdiction as to these matters in the event that further clarification of this Award or the recommendations of the PEB is required.

Eugene T. Herbert, Member

Eckehard Muessig, Member

Nicholas H. Zumas, Chairman

Date: November 1, 1988

APPENDIX C

CREW CONSIST RULES

BETWEEN

THE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

AND

THE UNITED TRANSPORTATION UNION

Unless otherwise provided herein, these Rules are effective this 9th day of September, 1988 between the Chicago and North Western Transportation Company and its ground service employees represented by the United Transportation Union, pursuant to Senate Joint Resolution 374 which was signed into law today by President Reagan and states as follows:

ARTICLE I - [STANDARD CREW] ROAD FREIGHT AND YARD CREWS

Section A

Effective May 1, 1989, all road freight and yard crews shall consist of not more than one conductor/foreman and one brakeman/helper.

Section B

Nothing in these rules shall prohibit the Carrier from electing to use a ground service employee in addition to the conductor/foreman and one brakeman/helper on a crew in road freight or yard service. Any

position established pursuant to this Section may be discontinued at the Carrier's discretion. The assignment of employees, and the exercise of seniority shall be in accordance with schedule rules and agreements, except as otherwise provided in these Rules.

Section C

Effective May 1, 1989, all prior agreements, rules, regulations, interpretations, or practices, however established, applicable to any road freight or yard service, which require the employment or use of any ground service employees in addition to that provided in Section A of this Article, are cancelled and eliminated.

ARTICLE II - FORCE REDUCTION

Section A

Conductors, foremen, brakemen, and helpers holding seniority in those crafts on September 9, 1988, shall be known and designated for the purpose of this Article as "protected employees."

Section B

Pursuant to the provisions of Article I hereof, the number of existing positions which are surplus positions in each Consolidated Seniority

District and the number of surplus protected employees on the District will be determined. For purposes of this Article II, surplus positions are second brakeman/helper positions in road freight and yard service, and any extra board positions necessary to fill vacancies on those positions.

Prior to the abolishment of those positions and the furloughing of employees as a direct result of the abolishment of those positions, the Carrier shall offer, to all protected employees in active service on the Consolidated Seniority District in seniority order, the right to resign from the service of the Carrier, to relinquish any and all seniority rights with the Carrier and to receive a gross lump sum payment of $50,000. This offer shall be made in the following manner:

1. The number of surplus positions and the number of surplus protected employees in active service on each seniority district shall be posted in a bulletin which will describe the method by which employees shall make their request to accept the resignation offer.

2. One hundred and eighty (180) calendar days after the posting of the bulletin, the request period will be closed. If the number of requests is less than or equal to the number of surplus protected employees in active service on the District, all requests will be accepted and the employees' resignations will become effective immediately. If the number of requests is greater than the number

of surplus protected employees in active service on the District, [an equivalent] a number of requests equivalent to the number of such surplus protected employees will be accepted in seniority order, and employees' resignations in that number will become effective immediately.

3. All employees submitting requests will be notified immediately after the one hundred and eighty (180) day period by telephone, and by letter, of the disposition of their request. For those employees whose request is accepted, a check for the gross amount of $50,000, less appropriate withholding taxes and other appropriate deductions, will be mailed to the employee as soon as possible, but in no event later than their pay check for their final pay period.

Section C

1. Immediately after the closing of the bulletin an the acceptance of voluntary resignations in accordance with Section B, the Carrier shall proceed to abolish all surplus positions described in Section B of this Article. A surplus protected employee furloughed as a direct result of the Carrier abolishing a position pursuant to the provisions of Article I shall be entitled to promptly elect on the of the following options: *

a. Resign from the service of the Carrier, relinquish all

seniority rights in any and all crafts with the Carrier and receive a gross lump sum payment of $45,000 less appropriate withholding taxes and other appropriate reductions, or

b. Accept a transfer to another seniority district (in accordance with Section D of this Article) if the number of resignation requests made under Section B2 exceeds the number of surplus positions in that particular seniority district, or

c. Remain on the seniority roster and accept a voluntary furlough at his or her home seniority district awaiting the availability of a vacancy and deferring his or her option for separation pay of $45,000 for one year from the date furloughed.

Section D

1. Employees who are furloughed in accordance with Section C1 of this Article shall be offered the opportunity to transfer to another seniority district if the number of resignation requests under section B2 of this Article exceeds the number of surplus positions on that particular district. Transfer requests will be accepted up to the number of excess voluntary applications on the particular district. If surplus employees transfer to that district, then an equivalent number of employees making voluntary applica-

tion for resignation will be accepted.

2. Employees transferring shall be ranked on the new seniority roster in the relative order of their ground service seniority date following employees already holding seniority on the new roster, shall lose their seniority on their former district after six (6) months from the date of transfer, and if the transfer requires that the employee change his or her place of residence, shall be entitled to (a) moving expenses for moving the employee's household goods and other personal effects, (b) a maximum of three day's lodging costs en route, and (c) a moving allowance of $250.

3. For purposes of this Section, an employee shall be considered as furloughed if the employee cannot, in the exercise of seniority, obtain a position on a regular assignment, pool or on an extra board in the Consolidated Seniority District as a direct result of the abolishment of a position pursuant to Article I hereof.

[Section E]

[Any second brakeman/helper positions for which there are an insufficient number of protected employees may be blanked during the one hundred and eighty (180) day bulletin period described in Section B of this Article. If there are first brakeman/helper or conductor/foreman positions, or positions on an extra board which are vacant during the one hundred and eighty (180) day period because of employees exercising

seniority to second brakeman/helper positions, the junior qualified protected employee occupying a second brakeman/helper position first within the Working District, and then throughout the Consolidated Seniority District will be assigned to the vacancy.]

Section [F] E

Nothing in this Article shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangement provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this Article, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

ARTICLE III - OPERATION WITH LESS THAN A TWO MEMBER [STANDARD] CREW

Section A - Manning

Trains in a non-stop through freight service may be operated with less than a two member [standard] crew as defined in Article I, Section A by agreement between the Carrier and the Organization as to the reasonable and practical conditions governing the operation of such trains. Those conditions should not diminish safety or efficiency, should be

6f

consistent with industry practice, and should not increase the costs of operations substantially. If the parties cannot agree, they may refer the matter to binding arbitration, in accordance with Section B of this Article.

Section B

1. The Carrier shall give written notice to the Organization of its desire to operate trains with less than a two member [standard] crew as described in Section A. The notice shall be specific by train and territory of operation, and will propose the reasonable and practical conditions governing its operation. If the parties fail to agree upon these terms and conditions within forty-five (45) [fifteen (15)] days of the notice, the matter may be referred to a Board of Arbitration for final and binding resolution.

2. The Board of Arbitration shall be established in accordance with Sections 7, 8 and 9 of the Railway Labor Act, except that the Board shall consist of three (3) neutral members and shall have no partisan members. If the parties cannot agree to the neutral members within five (5) days, either party can request the appointment of three (3) neutral members, experienced in the resolution of railroad disputes, by the National Mediation Board. The Board shall commence hearings within thirty (30) days after the selection of the neutral members. A written decision will be

issued within sixty (60) [thirty (30)] days of the conclusion of the hearings.

3. The Board shall consider and rule upon the proposed reasonable and practical conditions under which the Carrier may operate a train with less than a two member [the standard] crew. The Carrier shall have the burden of proving that those conditions do not diminish safety or efficiency, are consistent with industry practice, and do not increase the cost of operations substantially. Protected employees whose positions are eliminated as a result of an award from the Board of Arbitration will be entitled to be recompensed in accordance with Article II of these Rules.

4. If by agreement, or by award of the Board of Arbitration, a train is being operated with less than a two member [standard] crew, and the Organization feels the changes in conditions have occurred so as to require the reestablishment of positions up to the two member [standard] crew on a particular train, it may serve a notice on the Carrier and proceed as described in Sections 1, 2 and 3 above. The Organization shall have the burden of proving that such change in conditions has diminished safety or efficiency, is not consistent with industry practice and that reestablishing a two member [standard] crew will not increase the cost of operation substantially.

ARTICLE IV - DIFFERENTIAL

[Section A]

Each ground crew member on a road or yard crew operated with a crew consist of less than one (1) conductor and two (2) brakemen or one (1) foreman and two (2) helpers will be allowed a differential or $10.75 per basic day in freight and yard service and 10.75 cents per mile for miles in excess of the basic day in freight service.

[Section B]

The differential established in this Article will be maintained in all future wage increases.

ARTICLE V - GUARANTEED EXTRA BOARDS

Section A - Extra Boards

The Carrier shall maintain a sufficient number of employees to permit reasonable lay off privileges and to protect the service including vacations and other extended vacancies. The Carrier will regulate the number of positions on the guaranteed extra boards established pursuant to this Article in such a manner to ensure that there is sufficient number of employees available to protect all vacancies and extra service. [except as provided in Article II, Section E.]

Section B - Extra Board Guarantees

1. An employee working on a freight and/or yard extra board will be provided a semi-monthly compensation guarantee or a prorated portion thereof based on the number of days on the board.

2. When the Carrier places an employee on the extra board before noon or cuts an employee off the extra board after noon, such day will be counted in the computation of the amount of the employee's semi-monthly compensation guarantee. When an employee places himself on the extra board or exercises his seniority to leave the extra board in conformity with existing rules, only those full calendar days when the employee was listed on the extra board will be counted in the computation of the amount of the employee's semi-monthly compensation guarantee. For each calendar day not on and protecting the extra board as provided herein in each semi-monthly payroll period, the amount of the employee's semi-monthly compensation guarantee will be prorated or reduced on the basis of 1/15 or 1/16 (or depending on the number of days in the payroll period for each calendar so absent. The proration provided for herein will apply in instances where an employee otherwise eligible for this guarantee lays off.

3. The semi-monthly compensation guarantee, subject to proration as described above, shall be an amount equal to the monetary

equivalent of:

a. On extra boards protecting only yard service, ten (10) basic days at yard helper's basic daily five day pro rata rate.

b. On extra boards protecting only road service, 1,500 miles at brakeman's basic daily local freight rate.

c. On extra boards protecting both road and yard service, a simple average of ten (10) basic days at yard helper's five day pro rata and 1,500 miles at brakeman's local freight rate.

4. If an employee's semi-monthly compensation guarantee computed pursuant to the provisions of this Section exceeds such employee's actual compensation for that semi-monthly pay period (including but not limited to earnings earned under Article IV of these Rules, or any benefits payable under any federal or state unemployment insurance program), he shall be paid the difference.

Section C - No Duplication of Benefits

There shall be no duplication of pyramiding of benefits to any employees under these Rules and/or other agreements or rules.

Section D - Current Payment of Guarantee

Employees subject to an allowance established in this Article who reasonably expect their earnings to be seriously low in a pay period may assure current payment of the allowance by submitting a form showing their work record and status during the pay period. These employees should submit this form prior to midnight on the last day of that pay period. It is recognized that the Carrier when utilizing this expedited procedure will sometimes determine such allowances on the basis of estimates, and that payroll adjustments in subsequent pay period may be necessary as actual amounts become known.

Section E - Adjusting Size of Extra Board

The parties hereunder recognize that the Carrier has the unilateral right to adjust the number of employees on extra boards by reducing the board (i.e., cutting off the most junior employee or employees) or by increasing the board. Employees cut off from an extra board for reasons other than described in Articles II and III shall not be considered furloughed in accordance with Article II hereof. Carrier recognizes that present or future adjustments will be effected in a reasonable manner consistent with past practice and the limitations that exist in the current guaranteed extra board arrangements.

ARTICLE VI - PERSONAL LEAVE DAYS

Section A - Personal Leave Day Entitlement

Effective January 1, 1989, all train service employees in road freight service not covered by the National Paid Holiday Rule will be entitled to personal leave days subject to the limitations contained in this Article [Section 2] on the following graduated basis:

Years of Service	Personal Leave Days
Less than 5 years	2 days
5 years and less than 10 years	4 days
10 years and less than 15 years	6 days
15 years and less than 20 years	8 days
20 years or more	10 days

Section B - Personal Leave Day Offset

1. The number of personal leave days in any calendar year each road freight service employee is entitled to shall be reduced by the number of paid holidays (or pay in lieu thereof) received in covered road service or in the exercise of dual road and yard seniority rights. If an employee takes any of his personal leave

days before his service anniversary date in a year in which his entitlement will increase, he may take up to the number of leave days he is entitled to prior to his anniversary date, and then take the additional days newly entitled to after his service anniversary date.

2. Employees covered by the National Paid Holiday rule (employees in yard or covered road service) who because of illness are unable to work the appropriate qualifying days for a particular holiday, and thus do not receive holiday pay for a particular holiday, will be entitled to a personal leave day in lieu thereof, subject to the maximum number of days of entitlement listed in Section A and the offset in Section B(1) above.

Section C - Scheduling Personal Leave Days

1. Personal leave days may be taken upon 24-hours' advance request to an appropriate Carrier officer and shall be granted consistent with the requirements of the service. The Carrier has the option of granting personal leave days with less than 24 hours' notice. The employee will be paid one basic day at the rate of the last service performed for each personal leave day or days. Should the Carrier refuse an employee's request for personal leave day or days, those leave days will be carried over, but must be requested and granted prior to May 1 of the following year. Any personal

leave days not taken by the employee during the calendar year because of failure of the employee to make timely request therefore shall not be carried over.

2. Personal leave day or days will not be scheduled on other than a work day of the employee's position. Personal leave days for extra board employees and those in pool freight service will begin when they otherwise would have been called. Personal leave days paid for will be counted as qualifying days for vacation purposes.

ARTICLE VII - GENERAL ARBITRARY

Six (6) months subsequent to the effective date of these Rules, the Carrier will pay each active protected employee an arbitrary of $20 (Twenty Dollars) per month. This payment to active protected employees will not be subject to general wage increases and will continue until September 9, 1998 [1991], subject to the provisions of Article VIII, Section C of these Rules.

ARTICLE VIII - EFFECT OF THE AGREEMENT

Section A

Effective May 1, 1989, these Rules cancel and supersede the Crew

Consist Agreement between the Chicago and North Western Transportation Company and the United Transportation Union dated September 26, 1973, and shall constitute the sole rules between the parties pertaining to the manning of road freight and yard crews with ground service employees. Effective May 1, 1989, all other agreements, rules, regulations, interpretations, or practices previously in effect between the parties which pertain to the manning of road freight and yard crews, and to the number of employees required on those crews, including but not limited to Article VII - Manning Requirements of the Working Conditions Memorandum Agreement dated October 12, 1983, are superseded and cancelled. In all other respects, provisions of the aforementioned agreements not specifically cancelled or superceded hereby will remain in full force and effect.

Section B

Unless otherwise provided herein, these Rules are effective September 9, 1988. Without prejudice to the position of the parties as to such notice, these Rules are in settlement of the dispute growing out of the notice served by the Carrier on May 15, 1987 under Section 6 of the Railway Labor Act and the proposal served by the Organization on June 29, 1987, known as National Mediation Board Case No. A-11913.

Section C

The parties governed by these Rules shall not serve nor progress, prior

to May 1, 1992 [September 9, 1991], any notice or proposal (except as provided in Article III of these Rules) for changing any matter contained in these Rules.

[Effective this 9th day of September, 1988.]

ARBITRATION BOARD NO. 490

In the Matter of Arbitration Between CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and UNITED TRANSPORTATION UNION	INTERPRETATION AND CLARIFICATION

BACKGROUND

Pursuant to order of the National Mediation Board, based on the request of the United Transportation Union (hereinafter "Organization"), this Arbitration Board reconvened to consider two issues involving the interpretation of our Opinion and Award dated November 1, 1988.

Hearing on these issues was held on December 19, 1988, at which time the Board heard oral argument and considered written briefs submitted by representatives of the parties. The hearing was stenographically reported, and a transcript of the proceedings (numbering 93 pages) was received by the Board on December 28, 1988.

BOARD MEMBERS: Eugene T. Herbert, Esq.
Eckehard Muessig
Nicholas H. Zumas, Esq., Chairman

APPEARANCES: For the Carrier: Ralph J. Moore, Jr., Esq.
Eugenia Langan, Esq.
Ronald J. Cuchna
Paul A. Lundberg

For the Organization: Clinton J. Miller III, Esq.
Donald R. Markgraf
David R. Haack
Gerald R. Maloney

ISSUES

The issues presented for interpretation and clarification to this reconvened Board are as follows:

1. Does the Chicago & North Western Transportation Company (hereinafter "Carrier") have the right to blank (leave unfilled) second brakeman positions prior to the expiration of the six-month canvassing period as recommended by the Presidential Emergency Board (hereinafter "PEB")?

2. Is the Carrier obligated to "buy out" all the second brakeman positions to be abolished?

FINDINGS AND CONCLUSIONS

With respect to Issue No. 1, as stated in our original Opinion and Award, nothing "in the PEB's recommendations, elevated to the force of law on September 9, 1988, gave Carrier any blanking rights which it did not have under the September 26, 1973 Crew Consist Agreement between these parties."

77

This Board found in its original Opinion and Award that "implementation of a policy of blanking prior to the expiration of [the] six-month period could effectively deprive some or all of the employees of a right to separation payment at the end of the period."

We further stated that Carrier has the right "as it has always had" to abolish positions through attrition. Such right, however, was limited under the September 26, 1973 Crew Consist agreement between the parties. It was not our intention to expand that right beyond what it was on September 8, 1988.

To the limited extent that Carrier had, prior to September 9, 1988, the right, if any, to abolish positions through attrition resulting solely from death, voluntary resignation or termination for just cause, we earlier held and now reaffirm that it is not compelled to re-establish such positions or hire new employees to fill them. That is the only right to abolish through attrition allowable to Carrier.

Neither the PEB nor this Board expanded or intended to expand the respective rights of the parties as they existed under their collective bargaining agreements on September 8, 1988 with respect to the subjects of blanking or attrition.

* * *

With respect to Issue No. 2, this Board reiterates its conclusion that Carrier is indeed obligated to "buy out" all the second brakeman positions to be abolished.

It is clear from the proceedings that Carrier represented to the PEB that no second brakeman positions were needed. The PEB agreed, and its recommendations were predicated on the abolishment of all second brakeman positions in existence at the time of its report, determined to be 514 in number. In consideration for this right to abolish, the PEB recommended that Carrier offer to "the entire craft or class [including conductors, first brakemen and second brakemen] the opportunity to choose 'the voluntary separation option" of $50,000, or pay $45,000 to those whom Carrier decides to involuntarily terminate should there be fewer volunteers than positions to be abolished. That recommendation now has the force of law.

Carrier argues that it is obligated to buy out only the second brakeman positions that are occupied by an equivalent number of "surplus protected employees" as distinguished from the number of "surplus positions," and points to language in the PEB Report and this Board's revised Crew Consist Rules (Appendix C to this Board's original Opinion and Award) in support of its contention.

In its findings, the PEB on page 13 of its July 1, 1988 Report stated as follows:

> At present, the Carrier says that under its September 26, 1973 Agreement with the Organization that it is still required to operate 514 trains with a second brakeman....

Based on that finding, this Board assumed, as did the PEB, that as of July 1, 1988, there were 514 incumbents of second brakeman positions to be abolished and that there were, correspondingly, 514 surplus protected employees. It is for this reason that this Board let stand the references to "surplus protected employees" in Article II, Section B of the revised Crew Consist Rules.

It is apparent that the PEB made the same assumption when it stated on page 23 of its Report that the "separation payment...should be $50,000 for any employee whose service is voluntarily terminated as the result of the elimination of his or her job...."

This Board concludes that Carrier must, if it wishes to abolish all second brakeman positions on May 22, 1989, offer a separation payment of $50,000 to up to 514 of the entire craft or class of protected employees who volunteer their resignations less only that number, if any, that results from such allowable attrition, as described earlier herein, occurring since July 1, 1988. Carrier's position that it is obligated to pay a "buy out" only to those employees who are considered "surplus protected employees" at the end of the canvassing period is clearly erroneous.

In order to resolve any ambiguity and to clarify this Board's intention in this regard, we are attaching hereto an amended version of Article II, Section B, of the revised Crew Consist Rules between the parties that shall replace that Section of those Rules as presently written.

Eugene T. Herbert, Member

Eckehard Muessig, Member

Nicholas H. Zumas, Chairman

Date: January 19, 1989

ATTACHMENT.

Article II

Section B

Pursuant to the provisions of Article I hereof, the number of existing positions which are surplus positions in each Consolidated Seniority District will be determined. For purposes of this Article II, surplus positions are second brakeman/helper positions in road freight and yard service, and any extra board positions necessary to fill vacancies on those positions.

Prior to the abolishment of those positions and the furloughing of employees as a direct result of the abolishment of those positions, the Carrier shall offer, to all protected employees in active service on the Consolidated Seniority District in seniority order, the right to resign from the service of the Carrier, to relinquish any and all seniority rights with the Carrier and to receive a gross lump sum payment of $50,000. This offer shall be made in the following manner:

1. The number of surplus positions in each seniority district shall be posted in a bulletin which will describe the method by which employees shall make their request to accept the resignation offer.

2. One hundred and eighty (180) calendar days after the posting of the bulletin, the request period will be closed. If the number of requests is less than or equal to the number of surplus protected positions in the District, all requests will be accepted and the employees' resignations will become effective immediately. If the number of requests is greater than the number of surplus positions in the District, a number of requests equivalent to the number of such surplus positions will be accepted in seniority order, and employees' resignations in that number will become effective immediately.

3. All employees submitting requests will be notified immediately after the one hundred and eighty (180) day period by telephone, and by letter, of the disposition of their request. For those employees whose request is accepted, a check for the gross amount of $50,000, less appropriate withholding taxes and other appropriate deductions, will be mailed to the employee as soon as possible, but in no event later than their pay check for their final pay period.

ARBITRATION BOARD NO. 490

In the Matter of Arbitration Between CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY and UNITED TRANSPORTATION UNION	SECOND INTERPRETATION AND CLARIFICATION

BACKGROUND

This Arbitration Board was appointed by the National Mediation Board on September 19, 1988 pursuant to Senate Joint Resolution No. 374, signed by President Reagan on September 9, 1988, to resolve certain issues remaining as a result of recommendations of Presidential Emergency Board 213 ("PEB"). The PEB had been established to settle a major dispute over train crew consist between the Chicago & North Western Transportation Company ("C&NW") and the United Transportation Union ("UTU").

This Board's initial hearing was held on September 23, 1988, and its Award was rendered on November 1, 1988. Because the Parties were unable to agree on how the Board's initial Award was to be implemented, the Board was reconvened on December 19, 1988 to consider the following two issues:

1. Does the Chicago & North Western Transportation Company have the right to blank (leave unfilled) second brakeman positions prior to the expiration of the six-month

canvassing period as recommended by the Presidential Emergency Board?

2. Is the Carrier obligated to "buy out" all the second brakeman positions to be abolished?

On January 19, 1989, the Board issued its "Interpretation and Clarification" with respect to the two issues. However, because the C&NW believed that the Board had exceeded its authority, it commenced impeachment proceedings in the United States District Court for the Northern District of Illinois, Eastern Division. In late May 1989, while the impeachment petition was pending, the C&NW proceeded with its "buy out" based on its interpretation of this Board's initial Award dated November 1, 1988.

On March 29, 1990, the District Court entered an Order (without opinion) upholding this Board's "Interpretation and Clarification" of January 19, 1989. The C&NW then filed an appeal with the United States Court of Appeals for the Seventh Circuit. However, after the District Court issued its Opinion on April 10, 1990, the C&NW withdrew its appeal to the Circuit Court and informed the UTU that it would comply with this Board's ruling of January 19, 1990. Nonetheless, the parties continued to have substantive differences with respect to the number of "buy outs" required by our Award and Interpretation. Because these differences could not be resolved, the C&NW requested that this Board again be reconvened to address the "meaning and application" of this Board's Award, "with respect to the buy outs." On June 4, 1990, the National Mediation Board, pursuant to Section 7, Third (c) of the Railway Labor Act (45 U.S.C. 157, Third (c)) issued a Notice to Reconvene this Board. It directed that the matters

85

before the reconvened Board be limited to those issues identified by the C&NW in its request to the National Mediation Board dated April 16, 1990. Therefore, on September 7, 1990, this Board was reconvened to address the following issue:

> Under the Board 490's ruling that C&NW should "canvass the entire class and restrict the number of buyout offers in each seniority district to the number of surplus jobs within each district," is C&NW required to buy out more employees than have volunteered for buyouts or to offer buyouts in excess of the number of second brakeman jobs in any seniority district?

At this hearing, the Board heard arguments by the following:

On behalf of the C&NW

Ralph J. Moore, Jr., Esq.
D. Eugenia Langan, Esq.
Paul A. Lundberg
John M. Raaz
Robert C. Madsen

On behalf of the Organization

Clinton J. Miller, III, Esq.
Donald F. Markgraf
David Haack

The Board also considered written briefs submitted by the parties. The hearing was stenographically reported and a transcript of the proceedings (consisting of 107 pages) was made available to the Board. The record was closed after receipt of the Union's letter dated November 19, 1990.

FINDINGS AND CONCLUSIONS

In an Opinion and Award dated November 1, 1988, this Board stated as follows:

> "This Board has decided to set an implementation date six months from the date of this Award in order to permit the parties to revise their procedures to comply with this Board's interpretation of the PEB recommendation."

In fact, Carrier extended the implementation date by some three weeks to May 22, 1989. This Board does not regard that extension as unreasonable given the necessity of making appropriate preparations for notification, etc., preliminary to commencing the six-months' canvassing period.

However, Carrier concedes that while it "blanked," i.e., abolished, 513 second brakeman positions on May 22, 1989, it offered buyouts to only 147 employees of the Organization notwithstanding the fact that it had by then identified 307 additional volunteers in Districts where positions were to be abolished. Some 55 of this group of 307 later withdrew their offers of separation, possibly because of the absence of any "buy-out" payment by Carrier as required by this Board and by Article II, Section B of the revised Crew Consist Rules agreed to by the parties.

In its Opinion and Award, above cited, this Board stated that:

> "Carrier is authorized by the PEB, on a one-time basis, to abolish up to 514 second brakeman positions effective May 1, 1989. The separation payments, or 'buyouts,' are inextricably linked to

the abolishment of positions. There can be no buyout without the permanent abolishment of a second brakeman position and there can be no abolishment of a second brakeman position without a buyout or as the result of attrition."

Further, in our Interpretation and Clarification of January 19, 1989, this Board concluded that ". . . Carrier must, if it wishes to abolish all second brakeman positions on May 22, 1989, offer a separation payment of $50,000 to up to 514 of the entire craft or class of protected employees who volunteer their resignations. . ." Should the number be less than 514, it was contemplated by both this Board and the PEB that the Carrier would then resort to involuntary separation (with payments of $45,000) to achieve a number of buyouts equivalent to the number of positions abolished in each seniority district.

Commencing sometime after April 18, 1990, Carrier resumed making buyout payments and to the date of the current Hearing had made a total of some 423 such payments out of an apparent required total of 517 (the discrepancy apparently resulting from certain procedural errors in payment by Carrier.) The number of remaining positions is reached by subtracting 423 from the original 517.

Thus, Carrier has finally succeeded in making buyout payments to all those in each District who have volunteered to accept such payment up to the number of second brakeman positions abolished in each such District.

This Board is, accordingly, presented with two questions: whether Carrier is "required to buy out more employees than have volunteered

88

for buyouts" and whether Carrier is required to "offer buyouts in excess of the number of second brakeman jobs in any seniority district."

In our Opinion and Award, we concluded that it could not have been the intention of the Presidential Emergency Board that the "selection of those to be offered voluntary separation would be on a system-wide basis." We remain of that view for the reasons originally expressed in that document. However, the initial selection has now been accomplished and Carrier has fully achieved its objective of abolishing "up to 514 second brakeman positions" (it chose to abolish 513) without having to hire new employees to replace those unnecessarily terminated. Thus Carrier's objective has been fully achieved. In effect, it now seeks instructions as to the manner in which it should proceed to fulfill its obligation to make separation payments with respect to the additional 94 positions that it abolished on May 22, 1989.

The originally contemplated method of involuntarily separating employees once the pool of volunteers has been exhausted in any given seniority district would accomplish no useful result at this stage, and is opposed by both Carrier and the Organization. Accordingly, we conclude that the Carrier should now offer to employees of the "craft or class" on a system-wide seniority basis the opportunity to volunteer for separation in consideration of a $50,000 payment.

A basis for resolution of the problem in this manner can be found in the Report of the PEB. Its recommendation that a methodology be agreed upon which ". . . (3) considers affording employees found to be surplus in one seniority district, who may desire transfer to another seniority district where vacancies could exist because there were more 'volunteers' for separation pay in that district than redundant positions identified by the Carrier, the opportunity to transfer to that other seniority district,. . ." (emphasis added), indicates that the PEB contemplated a situation such as is now presented in which volunteers in a particular district would receive buy-outs even though their positions had not been identified as redundant.

Earlier, the Organization argued strenously that that provision reflected the PEB's intention that the selection of volunteers for buy-out payment should be on a seniority-wide basis. This Board rejected that notion as it would have defeated the purpose of permitting Carrier "to accomplish the totality of the desired reductions in second brakeman positions in an economical and expeditious manner . . ."*/ That purpose now having been accomplished, there can be no objection to reverting to a system-wide seniority basis for determining the recipients of the payments it remains obligated to make. Other possible "solutions," such as re-canvassing for volunteers in each seniority district, would be cumbersome, time-consuming and uncertain as to result.

*/ P. 13, Opinion and Award

This Board therefore concludes, in answer to the questions presented by Carrier, that while Carrier is not required to buy out more employees than have volunteered for buyouts, it is required to offer buyouts in excess of the number of second brakeman jobs in any seniority district. That is, Carrier is now required to buy-out 94 additional employees (for a total of 517 employees) on a system-wide seniority basis which means that Carrier will be required to offer buyouts in excess of the number of second brakeman jobs in certain of the seniority districts.

Accordingly, Carrier should proceed forthwith to offer $50,000 separation payments to its most senior employees, determined on a system-wide basis, until 94 such additional payments have been made. All such payments should be made no later than 90 days from the date of this second Interpretation and Clarification.

As to Carrier's failure to adhere to this Board's Opinion and Award by withholding separation payments in an amount of approximately $20 million for a year and more after having received the clear economic benefit of having abolished 513 second brakeman positions, this Board does not have the power to provide a remedy to the Organization.

Eugene T. Herbert, Member

Eckehard Muessig, Member

Nicholas H. Zumas, Chairman

Date: January 2, 1991

91