

STB    FD    32760    (Sub 25)    12-14-98    I    192699

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Mac A. Fleming  
President



William E. LaRue  
Secretary-Treasurer

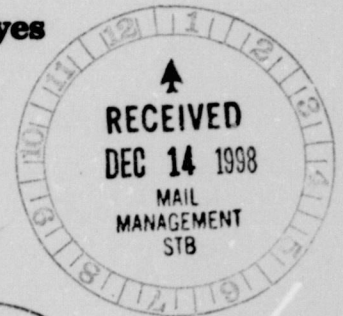
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Office of the Secretary

DEC 15 1998 Brotherhood of Maintenance of Way Employees

Affiliated with the A.F.L.-C.I.O. and C.L.C.

Part of  
Public Record

December 14, 1998



Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

Re: Finance Docket No. 32760 (Sub-No. 25)

Dear Secretary Williams:

On December 11, 1998, the Board served its decision granting the Brotherhood of Maintenance of Way Employees' ("BMWE") petition for an order of vacatur of the Arbitration Award in this proceeding. As part of that order, the Board directed BMWE to refile its motion for a protective order requesting that the exhibit to the petition for vacatur be placed under seal.

Please find enclosed the original and ten corrected copies of the motion for a protective order and accompanying redacted petition for vacatur for inclusion in the Board's public files. Also enclosed is a diskette with the corrected copies in WordPerfect 7.0 format.

Please call me if you have any questions. Thank you.

Very truly yours,

*Donald F. Griffin*  
Assistant General Counsel

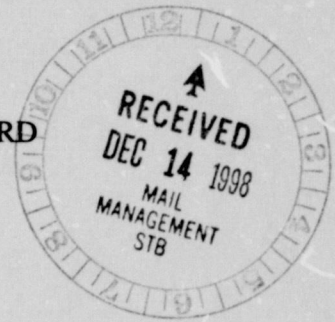
enclosures

cc: E. Langan  
R. Wehrli  
D. Tanner  
R. Ash  
W. Gulliford

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26555 Evergreen Rd., Suite 200  
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BEFORE THE SURFACE TRANSPORTATION BOARD



\_\_\_\_\_  
UNION PACIFIC CORP., et al.,--MERGER--  
SOUTHERN PACIFIC TRANS. CO., et al.  
\_\_\_\_\_

)  
) Finance Docket No. 32760  
) (Sub-No. 25)  
)

PETITION TO DISMISS APPEAL AS MOOT AND  
PETITION FOR AN ORDER OF *VACATUR* OF ARBITRAL AWARD

(Redacted Version)

Donald F. Griffin  
Assistant General Counsel  
Brotherhood of Maintenance of Way Employees  
10 G Street, N.E. - Suite 460  
Washington, DC 20002  
(202) 638-2135

Dated: August 7, 1998

Corrected Copy Dated: December 14, 1998

BEFORE THE SURFACE TRANSPORTATION BOARD

\_\_\_\_\_  
UNION PACIFIC CORP., et al.,--MERGER--  
SOUTHERN PACIFIC TRANS. CO., et al.  
\_\_\_\_\_

)  
) Finance Docket No. 32760  
) (Sub-No. 25)  
)

PETITION TO DISMISS APPEAL AS MOOT AND  
PETITION FOR AND ORDER OF *VACATUR* OF ARBITRAL AWARD

The Brotherhood of Maintenance of Way Employees ("BMWE") respectfully petitions this Board for dismissal of its petition to review the award of arbitrator Peter Meyers ("the Meyers Award") filed November 12, 1997. BMWE also requests the Board order *vacatur* of the Meyers Award.

STATEMENT OF FACTS

The Meyers Award was issued on October 15, 1997 under authority of Article I, Section 4 of the New York Dock conditions.<sup>1/</sup> The Award imposed the BMWE-Union Pacific Railroad Company ("UP") system maintenance of way gang rules on the territories of the former Southern Pacific Transportation Company (Pacific Lines)("SP"), the former Western Pacific Railroad Company ("WP") and the former Denver & Rio Grande Western Railroad Company ("DRGW"). The Award did not change rules contained in the current BMWE-SP and BMWE-DRGW collective bargaining agreements pertaining to non-system maintenance of way operations.<sup>2/</sup>

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<sup>1/</sup>The protective conditions set forth in New York Dock Ry.-Control-Brooklyn Eastern Dist. Term., 360 I.C.C. 60, aff'd sub nom., New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

<sup>2/</sup>The former WP territory was placed under the BMWE-SP agreement in a separate voluntary agreement.



BMWE filed a timely appeal of the Meyers Award on November 12, 1997 and the UP responded in opposition on December 5, 1997.<sup>3/</sup>

This Board served a decision and order on February 11, 1998 stating that upon a review of the evidence and arguments of the parties, "the record is insufficient to allow us to make a decision on the merits at this time." STB Finance Docket No. 32760 (Sub-No. 25), Union Pacific Corp., et al.-Control & Merger-Southern Pacific Rail Corp., et al., served February 11, 1998 at 2 (not published). Accordingly, the Board directed the UP to provide "whatever evidence exists that supports [its] assertion" that UP signed the Mediation Agreement in Case No. A-12718 (Sub-Nos. 1-8) "because a national strike was looming and with BMWE's knowledge that, after the merger, UP intended to conduct consolidated system-gang operations under a single system-gang agreement." Id. at 3. BMWE, in turn, was directed to "provide a copy of one of its coordination agreements for UP operations over [the former WP] and explain what type of system operations over the entire western part of UP's system is or may be possible under such an agreement." Id. Both parties were invited to provide additional briefing on the question as to what constitutes a fair and equitable implementing arrangement. Id. The Board granted the parties several time extension in which to provide the requested information; the current extension runs through August 5, 1998.

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<sup>3/</sup>BMWE also filed a petition to stay the effective date of the Award. The Board denied the petition based upon UP's assurances that no BMWE represented employees would lose their jobs or seniority rights or would have to relocate pending the Board's determination on the merits of the appeal. STB Finance Docket No. 32760 (Sub-No. 25), Union Pacific Corp., et al.-Control & Merger-Southern Pacific Rail Corp., et al., served December 30, 1997 (not published).

After the Board issued its decision, BMW and UP began negotiations to amend the Meyers Award and, possibly, to resolve other related New York Dock notices. In those negotiations, BMW agreed to discuss matters related to an earlier New York Dock notice served by the carrier on May 5, 1995. Letter from Vice President R. B. Wehrli to Director-Labor Relations W. Naro, dated April 2, 1998. (Exhibit 1)<sup>4/</sup> On July 29, 1998, BMW and UP reached a voluntary settlement of these issues in the attached Agreement. (Exhibit 3)

The July 29<sup>th</sup> Agreement recites that

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<sup>4/</sup>A copy of the May 5, 1995 New York Dock notice is attached as Exhibit 2.

ARGUMENT

I. BMW'S PETITION TO REVIEW THE MEYERS AWARD IS MOOT AS A RESULT OF THE JULY 29<sup>TH</sup> AGREEMENT

The July 29<sup>th</sup> Agreement expressly provides

Therefore, on

August 1, 1998, the Meyers Award ceased to have any continuing legal force and effect between the parties. BMW submits the effect of the July 29<sup>th</sup> Agreement makes moot the petition for review of the Meyers Award.

A matter becomes moot because there no longer exists a live controversy between the parties. Bhd. of Maintenance of Way Employees v. Atchison, T. & S. F. Ry., 153 L.R.R.M.(BNA) 2568, 2569 (D.D.C. 1996). The Meyers Award is now "canceled" and no longer orders the system gang operations over the merged UP. Accordingly, the Board's review of the Meyers Award "has become a matter of purely historical interest, with no present, real-world consequences; the dispute relating to [that Award] is therefore moot." Radiofone, Inc. v. F.C.C., 759 F.2d 936, 939 (D.C. Cir. 1985)(Scalia, concurring). Now, the Board's reversal or modification of the Meyers Award would be nothing more than an advisory opinion offered to resolve what has become a hypothetical dispute.

BMW acknowledges that the Board is not governed by the "case or controversy" jurisdictional limitations applicable to federal courts. Finance Docket No. 32619, Union Pacific Corp.-Request for Informal Opinion-Voting Trust Agreement, served August 30, 1995 (not published) 1995 ICC LEXIS 221 at \*5-6 ("UP Voting Trust"). However, there is no practical reason for this proceeding to continue. As the Board's order of February 11, 1998 shows, this



petition concerns an inquiry into whether the Meyers Award fashioned a "fair and equitable arrangement" for employees affected by the UP's extension of system operations. Additionally, the petition raised the issue of UP's "need" to abrogate collective bargaining agreements it only recently negotiated with BMW. Whatever arguments the parties might have brought to those issues have been made moot by the parties' voluntary agreement. Accordingly, there is no reason for this proceeding to continue. It would be a waste of the Board's resources to adjudicate what is now a hypothetical dispute between BMW and UP over the merits of the Meyers Award. Resolution of this appeal which involves the application of legal principles to the particular facts of the BMW-UP collective bargaining relationship would add nothing to body of law regarding the New York Dock conditions.

BMW submits its petition for review of the Meyers Award should be dismissed as moot. However, there is one other action the Board should take: order *vacatur* of the Meyers Award.

II. BECAUSE BMW'S PETITION FOR REVIEW IS MOOT, THE BOARD SHOULD ORDER *VACATUR* OF THE MEYERS AWARD

In U.S. v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950), the Court noted that when a civil case became moot during the pendency of an appeal, the general rule should be that the reviewing court would vacate the underlying decision so that it would have no preclusive effect on the parties to the litigation. This principle was extended to administrative orders that become moot before review in federal court in A.L. Mechling Barge Lines, Inc. v. U.S., 368 U.S. 324, 329 (1961).



However, as discussed in Part I above, the Munsingwear doctrine does not apply automatically to Board actions because it may decide questions in which no dispute exists. Finance Docket No. 31121, et al., P&LE Railco, Inc.-Exemption, Acquisition & Operation-Line of the Pittsburgh & L.E.R.R. & the Youngstown & S.Ry., dated July 25, 1989 (not published) 1989 ICC LEXIS 206 at \*6. In other words, the Board's decision in a moot proceeding can be used as an "interpretative rule" or general statement that can provide guidance to those persons coming within the Board's jurisdiction. UP Voting Trust, 1995 ICC LEXIS 221 at \*7-8. The Board's predecessor, the Interstate Commerce Commission, applied a rule that Board decisions in moot cases generally were vacated except when they were useful as interpretative rules or general statements. Id.; Finance Docket No. 31163, Winona Bridge Ry.-Trackage Rights-Burlington Northern R.R., dated March 17, 1989 (not published) 1989 ICC LEXIS 77 at \*4-5; Mendocino Coast Ry.-Discontinuance of Train Service in Mendocino County, CA, 4 C.C.2d 71 (1987). The Board has not specifically addressed this issue; however BMW submits there has been no change in administrative jurisprudence that questions the ICC's rule. Therefore, the Board, as successor to the ICC, has no reason to change its approach to the handling of moot disputes.

Under the foregoing rule, it is apparent that the Meyers Award meets none of the criteria that merit preservation of Board orders in moot cases.

The Meyers Award is not a final order of the full Board. Instead, it is only an initial decision rendered by a third party acting as the Board's delegate in the New York Dock proceedings. United Transportation Union v. Norfolk & W. Ry., 822 F.2d 1114, 1120 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988). The BMW invoked its right to appeal that decision

under 49 C.F.R. §1115.8, subject to the review standards contained in Chicago & N.W. Trans. Co.—Abandonment, 3 I.C.C.2d 729 (1987), aff'd sub nom., Int'l Bhd. of Electrical Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988). In that appeal, the Board may sustain, reverse or modify the Meyers Award. This appeal as of right means the Meyers Award cannot be considered a final order of the Board. The question at issue here is whether the Board's lack of appellate review of the Meyers Award affects its potential use as an interpretative rule or general policy statement. BMW submits the lack of appellate review of the Meyers Award is fatal to its preservation on the grounds that it has utility as an interpretative rule or general policy statement of the full Board.

The Board's use of unreviewed arbitral decisions in subsequent appeals cases demonstrates the Meyers Award cannot be used as a general policy statement or interpretative rule. The Board's use of arbitrators in New York Dock proceedings is discretionary. IBEW v. ICC, 862 F.2d at 336. The Board retains primary jurisdiction over disputes regarding the interpretation and application of New York Dock, indeed, Section 11326 of the Interstate Commerce Commission Termination Act ("ICCTA") requires the Board to impose fair and equitable conditions for the protection of employees affected by a merger of Class I carriers. Id. Under this statutory scheme, the Board "has the first responsibility to formulate and announce" the interpretation and application of its protective conditions. American Train Dispatchers Ass'n v. I.C.C., 54 F.3d 842, 848 (D.C. Cir. 1995). Accordingly, whenever the Board reviews New York Dock arbitral decisions, it only considers itself bound by its interpretations of the conditions. Prior arbitral decisions may be consulted, but are not binding in anyway upon the Board. See, Finance Docket No. 28676 (Sub-No. 4), Grand Trunk Western



R.R.-Control-Detroit, T. & I.R.R. (Arbitration Review), served August 6, 1998 (not published) at 4, n.11; Finance Docket No. 28905 (Sub-No. 28), CSX Corp.-Control-Chessie System, Inc. (Arbitration Review), served September 3, 1997 (not published) at 9. This course of action is consistent with the view that an arbitral decision is not a final decision of the Board because either party to an arbitration has an automatic right of appeal from the award. Therefore, the Board's own procedures relegate the unreviewed Meyers Award to a class of decisions that do not have binding effect and therefore, cannot be used as an interpretative rule or general policy statement of the full Board.<sup>5/</sup> Simply put, the Meyers Award cannot be considered to have received the Board's *imprimatur* as an "interpretative rule" or "general policy statement."

Indeed, the Board's handling of this appeal casts grave doubts on the utility of the Meyers Award as an interpretative rule or general policy statement in any event. The Board's February 11, 1998 order in this proceeding found "the record is insufficient to allow us to make a decision on the merits at this time." Accordingly, the Board directed the UP and BMW to supplement the record with additional evidence and provide additional briefing on the question as to what constitutes a fair and equitable implementing arrangement. Considering the BMW's appeal consumed the maximum of 30 pages of argument permitted by regulation and was accompanied by two volumes of exhibits and UP's reply consisted of 22 pages of argument in response and an

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<sup>5/</sup>The Board's treatment of arbitral awards as not binding upon it is consistent with standard labor arbitration precepts. See, Bhd. of Maintenance of Way Employees v. Burlington Northern R.R., 24 F.3d 937, 940 (7<sup>th</sup> Cir. 1994)("In the world of labor arbitration, the preclusive effect of the first arbitrator's decision is an issue for a later arbitrator to consider."), see also, Hill & Sinicropi, Evidence in Arbitration, 2<sup>nd</sup> Ed., at 386 (1987)("By its nature the arbitration process . . . allows much more latitude for equitable considerations that does the judicial process. As such, arbitration awards involving different parties but similar issues are not considered to have precedential force.")

additional volume of exhibits, it cannot reasonably be argued that the Board's conclusions regarding the record are based on the paucity of material submitted to it on appeal. Instead, the reasonable inference to be drawn from the Board's order is that the Meyers Award appeared flawed to the Board in some way and it needed additional information and argument to either confirm or reject its initial finding. This inference is inescapable because under Lace Curtain, the Board extends deference to the arbitrator's findings, especially those of a factual nature, yet the Board expressly directed the parties to provide additional facts. Certainly, an appealed award that becomes moot on appeal after the Board requested additional argument and evidence from the parties cannot credibly be held out as a decision meriting use an interpretative rule or general policy statement.

The UP may argue, however, that because the parties voluntarily settled their differences during the pendency of BMW's appeal, the Meyers Award should not be vacated. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, \_\_\_ U.S. \_\_\_, 115 S.Ct. 386, 393 (1995), the Court held that, absent exceptional circumstances, "that mootness by reason of settlement does not justify vacatur of a judgment under review." The Court reasoned in U.S. Bancorp that (115 S.Ct. at 392):

Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.

That decision does not apply here.



First, as demonstrated above, because the Meyers Award is an arbitral decision, it is not accorded a preclusive effect in any event. Therefore, the consideration in U.S. Bancorp that a party could settle to destroy the preclusive effect of a lower court judgment does not apply.

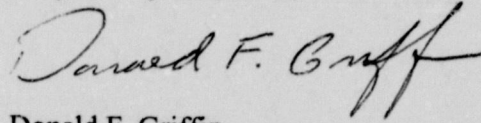
Second, within the Board's administration of New York Dock, arbitral decisions are not "presumptively correct" as binding interpretations of the Board's protective conditions. The Board has primary jurisdiction of the interpretation and application of the protective conditions and arbitral decisions, until reviewed, have no binding effect on the Board's interpretation and application of its protective conditions. Simply put, the policy considerations that motivated the Court in U.S. Bancorp do not apply to the case of an appealed arbitral decision which becomes moot by reason of a settlement while on appeal.

#### CONCLUSION

BMW submits the foregoing shows the Meyers Award possesses none of the characteristics of a Board decision that might avoid *vacatur* because it is otherwise useful as an interpretative rule or general policy statement. The appeal of the Meyers Award is moot, under the Board's longstanding practice, the decision itself should be vacated.

-11-

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Donald F. Griffin".

Donald F. Griffin  
Assistant General Counsel  
Brotherhood of Maintenance of Way Employes  
10 G Street, N.E., Suite 460  
Washington, DC 20002  
(202) 638-2135

Attorney for Brotherhood of Maintenance of Way  
Employes

Dated: August 7, 1998

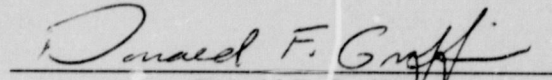
Corrected Copy Dated: December 14, 1998

Certificate of Service

I hereby certify that today I served a copy of the foregoing petition by first class mail  
delivery upon:

Eugenia Langan  
SHEA & GARDNER  
1800 Massachusetts Avenue, N.W.  
Washington, DC 20036

Dated: December 14, 1998

  
Donald F. Griffin



BEFORE THE SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORP., et al.,--MERGER--  
SOUTHERN PACIFIC TRANS. CO., et al.

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)  
) Finance Docket No. 32760  
) (Sub-No. 25)  
)

MOTION FOR PROTECTIVE ORDER  
(corrected copy)

Today, the Brotherhood of Maintenance of Way Employees ("BMWE") is filing a  
"Petition to Dismiss Appeal as Moot And Petition for an Order of *Vacatur* of Arbitral Award."

Attached as Exhibit 3 to BMWE's petition is an agreement between BMWE and the Union  
Pacific Railroad Company ("UP"). Section 14 of that Agreement provides in relevant part:

The parties will not refer to this Agreement or any part of it in any  
subsequent judicial or administrative proceedings, negotiations or any other forum  
other than those concerned with adjudicating disputes arising under this  
Agreement.

BMWE respectfully moves this Board for a protective order requiring the Secretary to file  
BMWE's petition under seal.

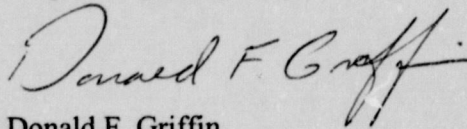
The Agreement represents a private resolution of a number of pending disputes. While  
the Agreement is of importance to the parties, Section 14 is evidence of the parties' intent that  
the Agreement was made on a non-referable basis. Accordingly, the dissemination of the  
Agreement by placing BMWE's petition on the public docket would render the parties' intent  
nugatory. The agreement is relevant only to the parties and to this Board which needs it in order



to rule on BMW's petition. There is no general public interest in the disclosure of implementing agreements that do not affect other groups of employees. Should the Board grant this motion, BMW will file a redacted version of its petition for inclusion into the public record in this proceeding.

WHEREFORE, based upon the foregoing, BMW requests the Board grant this Motion and order BMW's "Petition to Dismiss Appeal as Moot And Petition for an Order of *Vacatur* of Arbitral Award" to be filed under seal.

Respectfully submitted,



Donald F. Griffin  
Assistant General Counsel  
Brotherhood of Maintenance of Way Employees  
10 G Street, N.E., Suite 460  
Washington, DC 20002  
(202) 638-2135

Attorney for Brotherhood of Maintenance of Way  
Employees

Dated: August 7, 1998

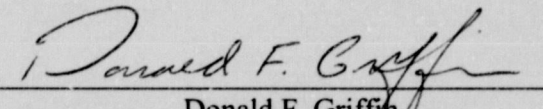
Corrected Copy Dated: December 14, 1998

Certificate of Service

I hereby certify that today I served a copy of the foregoing motion by hand delivery upon:

Eugenia Langan  
SHEA & GARDNER  
1800 Massachusetts Avenue, N.W.  
Washington, DC 20036

Dated: December 14, 1998

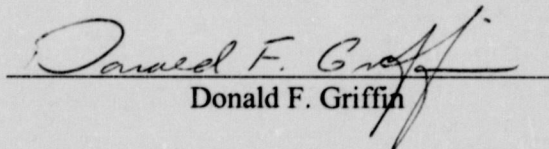
  
\_\_\_\_\_  
Donald F. Griffin

Certificate of Service

I hereby certify that today I served a copy of the foregoing motion by first class mail  
delivery upon:

Eugenia Langan  
SHEA & GARDNER  
1800 Massachusetts Avenue, N.W.  
Washington, DC 20036

Dated: December 14, 1998

  
Donald F. Griffin

STB FD 32760 (Sub 25) 12-19-97 I 184949



Mac A. Fleming  
President

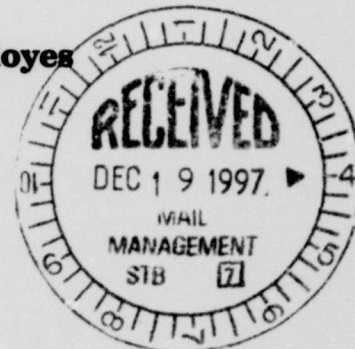


184949  
William E. LaRue  
Secretary-Treasurer

**Brotherhood of Maintenance of Way Employees**

*Affiliated with the A.F.L.-C.I.O. and C.L.C.*

December 19, 1997



via messenger

Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

Re: Finance Docket No. 32760 (Sub-No. 25), Union Pacific Corp.--Control & Merger--Southern Pacific Trans. Co.

Dear Mr. Williams:

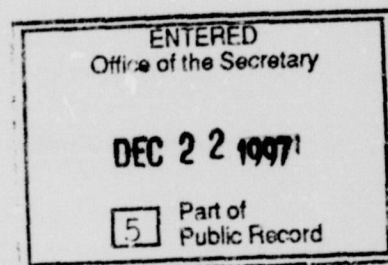
Enclosed for filing with the Board are the original and ten copies of the "Petition for Stay of Arbitral Award" submitted on behalf of the Brotherhood of Maintenance of Way Employees.

Please stamp the extra copy of each document as received so that the messenger can return it to me. Thank you for your cooperation.

Sincerely,

*Donald F. Griffin*  
Donald F. Griffin  
Assistant General Counsel

cc: E. Langan  
W. A. Bon  
R. Wehrli  
W. Gulliford  
D. McMahon  
C. Foose  
M. A. Fleming



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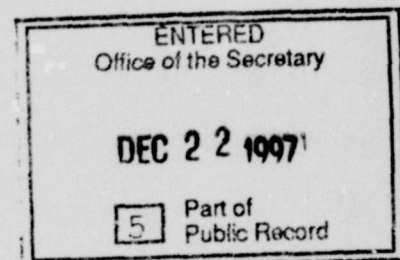
BEFORE THE SURFACE TRANSPORTATION BOARD



UNION PACIFIC CORP., et al.,--MERGER--  
SOUTHERN PACIFIC TRANS. CO., et al.

) Finance Docket No. 32760  
) (Sub-No. 25)

PETITION FOR STAY OF ARBITRAL AWARD



Donald F. Griffin  
Assistant General Counsel  
Brotherhood of Maintenance of Way Employees  
10 G Street, N.E., Suite 460  
Washington, DC 20002  
(202) 638-2135

Attorney for Brotherhood of Maintenance of W.  
Employees

Dated: December 19, 1997

## PETITION FOR STAY OF ARBITRAL AWARD

The Brotherhood of Maintenance of Way Employees ("BMWE") respectfully petitions this Board, pursuant to 49 C.F.R. §1115.5, for a stay of the effective date of the New York Dock arbitral award issued by Peter Meyers on September 15, 1997 ("the Meyers Award") that is the subject of BMWE's pending petition for review in this sub-numbered proceeding. The Meyers Award becomes effective January 1, 1998 and the Union Pacific Railroad Company ("UP") states that it intends to implement the Award on that date regardless of the status of BMWE's petition for review.

BMWE seeks a stay for two reasons. First, a stay pending resolution of BMWE's petition for review is required to ensure that BMWE-represented employees working on the UP, former Western Pacific Railroad ("WP"), Southern Pacific (Pacific Lines)("SP") and former Denver & Rio Grande Western Railroad ("DRGW") do not lose their jobs if they do not accept recall to system gangs created under the terms of the Meyers Award. Second, even if BMWE's petition for review is denied, the effective date of the Meyers Award should be stayed until the seniority rosters used to fill the system gangs created by the Award are complete and have been reviewed both by UP and BMWE. The lack of stay under either situation would result in irreparable harm to BMWE members subject to the terms of the Meyers Award.



## ARGUMENT

### I. The Standards Governing A Petition For Stay

"The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay."

Finance Docket No. 33429, Burlington Northern Santa Fe Ry. v. American Train Dispatchers Dept., Bhd. of Locomotive Engineers, slip. op. at 2, served July 18, 1997 (not published). In other words, "[a]n order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." Washington Metropolitan Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

BMWE's petition meets the Board's standards for issuance of a stay.

### II. BMWE's Petition For Review Raises Substantial Legal Questions

BMWE submits that its petition for review of the Meyers Award raises two substantial legal questions: (1) the arbitrator's application of the standard of "necessity" to override existing collective bargaining agreements; and (2) the arbitrator's failure to craft his award in a way that reconciled both the purpose of a New York Dock<sup>1/</sup> implementing arrangement and prior collective bargaining between BMWE and UP on the very same subject matter under the Railway Labor Act ("RLA"), 45 U.S.C. §151, et seq. We discussed these questions in depth at

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<sup>1/</sup>New York Dock Ry.-Control-Brooklyn Eastern Dist. Term., 360 I.C.C. 60, aff'd sub nom., New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979).

pages 14-29 of BMW's petition for review of the Meyers Award and will not burden the record by repeating them here. BMW does incorporate those arguments herein in support of its claim that it has a likelihood of success on the merits of its petition to review and that those arguments raise substantial legal questions.

III. Implementation Of The Meyers Award Will Irreparably Harm BMW-Represented Employees

Section 5 of the Meyers Award sets forth the manner in which positions in the newly created system gangs will be filled. The Section references Rules 20 through 23 of the UP-BMW collective bargaining agreement ("CBA"). Application of Rules 20 and 23 to the SP, WP and DRGW employees covered by the Award imposes new work rules that can result in those employees' loss of seniority, i.e., termination of employment. Declaration of Rick B. Wehrli at ¶3 (hereafter "Wehrli Decl. at ¶\_\_\_\_").<sup>2/</sup>

Under Rule 20, positions advertised in the system gangs will be assigned to applicants based upon a formula set forth in Rule 20. Wehrli Decl. at ¶3. If no employee applies for an advertised position in the system gangs, Rule 20 sets forth the following priority of recalls to the position: first to "the junior unassigned qualified employee of the class, who is furloughed"; second to "the junior qualified employee of the class who is regularly assigned in a lower class"; third to "the junior unassigned furloughed employee who applied for and accepted an identical assignment previously but did not have adequate time to qualify"; and fourth to "the junior employee regularly assigned in a lower class who applied for and accepted an identical assignment previously but did not have adequate time to qualify." Id. A furloughed employee

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<sup>2/</sup>Mr. Wehrli's declaration is attached as Exhibit 1.

who refuses a recall under Rule 20 loses all seniority, i.e., his or her employment relationship is terminated; while employees currently working in lower classes suffer a loss of seniority in the class to which recalled. Id.

The Meyers Award creates a unique situation on the property because system operations over the former UP, WP, SP and DRGW are to be governed by the UP System Gang rules. However, for non-system work, employees on the SP and WP are governed by the SP-BMWE CBA, pursuant to another New York Dock implementing agreement, and DRGW employees currently are governed by the DRGW-BMWE CBA. BMW E believes that UP will interpret the plain language of Rule 23(a) and the plain language of the Meyers Award, in a way that will result in the forfeiture of all SP or DRGW seniority, as well as all UP system gang seniority, for any SP or DRGW employee who refuses recall to a system gang. Wehrli Decl. at ¶4. Therefore, application of Rule 23(a) to SP, WP or DRGW employees while BMW E's appeal of the Meyers Award is pending could lead to employees' losing their jobs because they were recalled to jobs under the terms of an Award that may be set aside by the Board. Additionally, UP employees who refused recall to points outside the former UP territory also could suffer seniority termination. An employee's loss of his or her job under Rule 23(a) in those circumstances would irreparably harm the affected employee if the Meyers Award were set aside or modified by the Board. Id. at ¶5. This is so because when an employee's job ends, so does his or her compensation. Id. Bills and mortgage payments become due on a regular schedule and failure to meet those obligations can result in bad credit ratings and foreclosures. Id. In the event the Board set aside the Meyers Award, BMW E assumes that UP would immediately reinstate any employee who forfeited seniority under



Rule 23 for refusing recall to a system gang. However, even if UP reinstated any employee in that situation, this after that fact reinstatement, even with full compensation could not place the employee in the same situation he or she was in prior to termination of seniority. Id. BMW UP System Division General Chairman Rick Wehrli has witnessed similar occurrences when arbitrators hold that employees have been unjustly terminated or suspended. Id. Even though those arbitral awards often require full back pay to the employee, the economic harm caused by the lack of compensation during the appeal period creates harm that cannot be rectified by the payment of back wages. Id. Simply put, back pay does not put an employee in the same position he or she would have been had the improper Carrier action not occurred. Id.

There is a related area in the proposed implementation that both exacerbates the application of the Rule 23 and creates a stand alone problem that harms BMW members. Section 2(A) of the Meyers Award provides that "UPRR, WPRR, SPRR, and DRGW employees, who, prior to the effective date of this Agreement, had a right based on their seniority to work on system-type operations within their respective territories, will have their name and seniority dates dovetailed onto the UPRR System Gang seniority rosters" in ten classifications. SP, WP and DRGW employees all had rights to work on system-type operations prior to the effective date of the Meyers Award. Wehrli Decl. at ¶6. Therefore, this dovetailing will require placing all SP, WP and DRGW maintenance of way employees on ten UP System Gang rosters. The SP, WP and DRGW classifications are not identical to the ten UP System Gang classifications as each railroad handles seniority and classification distinctions in different ways. Id. For example, equipment operators on UP are classified as

either Track Machine Operators ("TMO") or Roadway Equipment Operators ("REO"). TMOs operate equipment such as tampers and ballast regulators while REOs operate burro cranes, graders and the like. Id. On UP when an employee is first assigned to a TMO classified piece of equipment, he or she obtains a seniority date in the TMO classification. The same principle is followed for REO seniority. Id. However, on the SP, each piece of equipment is separately classified and carries its own seniority date. Id. Dovetailing SP equipment operators into the respective TMO and RMO seniority rosters involves, at the very least, determining which pieces of SP equipment fit within the TMO and REO classifications and then determining the SP employee's earliest seniority date on a TMO and/or REO piece of equipment. Id. This process is not an easy task, especially because, to the best of BMW's knowledge, UP's Gang Management System ("GMS"), which is responsible for creating these rosters, is not staffed with any former SP employees who have some type of familiarity with SP's seniority systems and practices. Id.

Moreover, on December 16, 1997, BMW learned that GMS had not completed these dovetailed rosters. Wehrli Decl. at ¶7. Also, UP has not scheduled any meetings with BMW officers prior to January 1, 1998 to review the dovetailed rosters and attempt to reconcile any problems prior to implementation. Id. The ordinary course of action when new rosters are created is the following: the carrier prepares the rosters in consultation with BMW; the new rosters are reviewed by the carrier and BMW officers in a joint meeting where obvious errors are corrected; operations under the new rosters begin, subject to each employee's right to protest his or her placement on the roster. Id. The purpose of this bilateral creation of

new rosters is to minimize the number of administrative problems that will arise once the carrier begins its new operation. Id.

The administrative problems surrounding the creation and administration of seniority rosters also are not easily solved. Protests of slots on existing rosters, while straightforward, because they concern a single employee's claim that he was improperly placed or removed from a seniority roster, are difficult and time consuming to resolve. Wehrli Decl. at ¶8. Attempting to operate system gangs based upon these ten dovetailed rosters without reviewing them before implementation so that as many roster protests could be resolved before implementation likely will create adverse effects upon the involved employees. Id. Since UP will terminate employees for refusing recall based upon seniority preferences in Rule 20, the harm that may befall employees who lose seniority based upon an improper roster ranking is obvious. BMW submits that the "fair arrangement" required by Section 11326 requires a UP-BMW review of these rosters prior to implementation of the Meyers Award.

BMW submits the foregoing demonstrates that its members covered by the Meyers Award will be irreparably harmed in the absence of a stay. First, maintenance of way employees may lose their jobs as the result of the application of rules contained in an Award that is under appeal and any after the fact reinstatement made by UP if the Board overturns the Meyers Award could not make the affected employees whole. Second, UP's unilateral creation of the ten seniority rosters that will be used to staff the system gangs will lead to an administrative mess that can be avoided by this Board issuing a stay of the Meyers Award, regardless of the fate of BMW's appeal, until BMW has had a full opportunity to discuss and review the composition of the rosters with UP.



IV. Any Possible Harm To UP Flowing From A Stay Does Not Outweigh The Harms BMW Members Will Suffer In The Absence Of A Stay

UP undoubtedly will argue that any stay of the Meyers Award, regardless of duration, will work a substantial harm upon it. BMW submits that while UP may make such an argument, it cannot prove that any harm flowing from a stay, and BMW submits that UP will suffer no harm, outweighs the harm that BMW members will suffer in the absence of a stay.

UP has operated with separate "system" operations on the UP, DRGW and SP since September 12, 1996. A continuation of that status quo does not harm UP. It must be stressed that presently UP has the ability to operate "systems" the size of the former UP, the SP (including the WP) and DRGW. A stay will not prevent UP from continuing those operations.

Additionally, BMW is mindful of UP's day to day operational requirements and will seriously consider and attempt to accommodate all reasonable UP requests to operate SP, DRGW or UP system gangs on the other's properties for limited periods of time. Wehrli Decl. at ¶9. BMW's offer is not a hollow one for two reasons. First, from the time of the UP-WP merger in 1983 until the present, BMW regularly consented to the operation of UP system gangs on WP territory even though UP had no CBA right to do so. Id. Second, presently there are UP system gangs working on SP territory and those gangs have been working there since June of 1997. Id. BMW submits that the foregoing shows that UP will not suffer a substantial harm if the Board stays the effective date of the Meyers Award.

V. The Public Interest Favors Issuance Of A Stay

Finally, BMWWE submits that the public interest is better served by the Board issuing a stay. Section 11326, and its predecessor former Section 11347, require that any protective condition imposed by the Board upon a transaction must provide a "fair arrangement" to protect the interests of employees affected by an approved transaction. Certainly, it would not be "fair" to the employees for them to risk loss of their jobs pursuant to work rules imposed by an arbitral award that is the subject of a pending appeal before the Board. A "fair" result would require the Board to act on the appeal before those new rules were imposed.

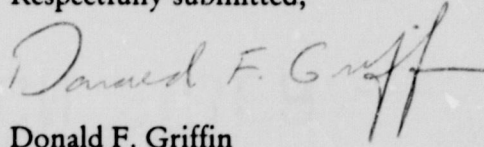
Additionally, BMWWE submits that even if the Board denies its appeal of the Meyers Award, implementation of that Award would not be "fair" until both the carrier and the union had the opportunity to review and revise the new seniority rosters that are to be created under the Award. Implementation of the Meyers Award will be disruptive anyway, there is no reason to compound that disruption through the use of possibly incorrect seniority rosters. The public's interest in efficient rail carrier operations would be served by ensuring that the implementation of the Meyers Award is conducted in a way designed to minimize any impacts upon service or employee morale.

Conclusion

BMWWE submits the foregoing demonstrates that a stay is necessary. BMWWE respectfully requests the Board issue a stay of the Meyers Award pending resolution of BMWWE's appeal. Additionally, BMWWE requests the Board, in any event, stay effectiveness of the Meyers Award until BMWWE and UP have had the opportunity to review and revise the ten seniority rosters being created to staff the system gangs created by the Meyers Award.

-10-

Respectfully submitted,

A handwritten signature in cursive script, reading "Donald F. Griffin". The signature is written in dark ink and is positioned above the typed name.

Donald F. Griffin  
Assistant General Counsel  
Brotherhood of Maintenance of Way Employees  
10 G Street, N.E. -- Suite 460  
Washington, DC 20002  
(202) 638-2135

Attorney for BMWE

Dated: December 19, 1997

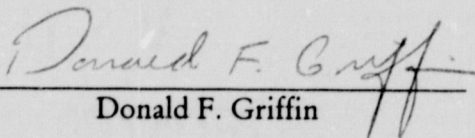


CERTIFICATE OF SERVICE

I hereby certify that today I served a copy of the foregoing Petition for Stay of Arbitra

Award by messenger upon:

Eugenia Langan, Esq.  
SHEA & GARDNER  
1800 Massachusetts Avenue, N.W.  
Washington, DC 20036

  
Donald F. Griffin

Dated: December 19, 1997

# EXHIBIT ONE

BEFORE THE SURFACE TRANSPORTATION BOARD

|  |   |                          |
|--|---|--------------------------|
| _____                                      | ) |                          |
| UNION PACIFIC CORP., et al.--MERGER--      | ) | Finance Docket No. 32760 |
| SOUTHERN PACIFIC TRANS. CO., <u>et al.</u> | ) | (Sub-No. 25)             |
| _____                                      | ) |                          |

DECLARATION OF RICK B. WEHRLI

1. I currently hold the position of General Chairman of the Union Pacific System Division ("UP System Division"), Brotherhood of Maintenance of Way Employees ("BMWE"). The UP System Division is the subordinate unit of the Grand Lodge of the BMWE responsible for the negotiation and administration of collective bargaining agreements applicable to that part of the Union Pacific Railroad Company ("UP") comprising the UP territory as it existed prior to the merger with the Western Pacific Railroad and Missouri Pacific Railroad. Effective January 1, 1998, I will relinquish the position of General Chairman to become a Vice President of the BMWE. As Vice President, I will have oversight of BMWE operations on the UP System Division as well as those BMWE committees having jurisdiction of the former Western Pacific Railroad ("WP"), Southern Pacific (Pacific Lines)("SP") and the former Denver & Rio Grande Western Railroad ("DRGW"). This declaration is offered in support of BMWE's Petition to Stay the effectiveness of the New York Dock arbitration award issued by Peter Meyers on October 15, 1997 ("the Meyers Award") that is the subject matter of this sub-numbers docket.



2. I have had several discussions with UP's Director - Labor Relations, Wayne E. Naro, regarding the Meyers Award. Mr. Naro told me on December 12, 1997 that UP intends to implement the award on its effective date, January 1, 1998. Implementation of the Award, while BMW's appeal is pending would, in my opinion, impose a severe, irremediable hardship on UP, SP, VVP and DRGW employees covered by the Award. Specifically, these hardships are the following:

3. Section 5 of the Award sets forth the manner in which positions in the newly created system gangs will be filled. The Section references Rules 20 through 23 of the UP-BMW collective bargaining agreement ("CBA"). Application of Rules 20 and 23 to the SP, WP and DRGW employees covered by the Award imposes new work rules that can result in those employees' loss of seniority, i.e., termination of employment. (Copies of Rules 20 through 23 are attached as Exhibit 1.)

a. The advertisement and assignment of positions in UP system gangs follow this arrangement:

- i. positions are advertised per Rule 20(a);
- ii. if bids for the positions are received from employees possessing seniority in the class advertised, the position is awarded to the senior bidder per Rule 20(d);
- iii. if no bids are received from employees possessing seniority in the class advertised, assignments are made per Rule 20(e) and if Rule 20(e)(l) is inapplicable, employees are recalled according to

the following formula;

- (1) first to "the junior unassigned qualified employee of the class, who is furloughed" (Rule 20(e)(2));
- (2) second to "the junior qualified employee of the class who is regularly assigned in a lower class" (Rule 20(e)(3)),
- (3) third to "the junior unassigned furloughed employee who applied for and accepted an identical assignment previously but did not have adequate time to qualify" (Rule 20(e)(4)); and
- (4) fourth to "the junior employee regularly assigned in a lower class who applied for and accepted an identical assignment previously but did not have adequate time to qualify" (Rule 20(e)(5)).

b. An employee who refuses a recall under Rule 20(e)(2)-(5) suffers a forfeiture of seniority assessed in varying degrees as follows:

- i. failure to accept a recall under Rule 20(e)(2) or (4) - loss of all maintenance of way seniority, i.e., termination of the employment relationship (Rule 23(a));
- ii. failure to accept a recall under rule 20(e)(3) or (4) - loss of seniority in the class to which recalled only (Rule 23(b)).

4. The Meyers Award creates a unique situation on the property because system operations over the former UP, WP, SP and DRGW are to be

governed by the UP System Gang rules. However, for non-system work, employees on the SP and WP are governed by the SP-BMWE CBA, pursuant to another New York Dock implementing agreement, and DRGW employees currently are governed by the DRGW-BMWE CBA. It is my belief that, based upon the plain language of Rule 23(a) and the plain language of the Meyers Award, UP will apply Rule 23(a) in a way that will result in the forfeiture of all SP or DRGW seniority for a furloughed employee who refuses recall to a system gang.

5. Application of Rule 23(a) to SP, WP or DRGW employees while BMW's appeal of the Meyers Award is pending could lead to employees' losing their jobs because they were recalled to jobs under the terms of an Award that ultimately is set aside by the Board. Additionally, UP employees who refuse recall to points outside the former UP territory also could suffer seniority termination. An employee's loss of his or her job under Rule 23(a) in those circumstances would irreparably harm the affected employee if the Meyers Award was set aside or modified by the Board. This is so because when an employee's job ends, so does his or her compensation. Bills and mortgage payments become due on a regular schedule and failure to meet those obligations can result in bad credit ratings and foreclosures. In the event the Board set aside the Meyers Award, I assume that UP would immediately reinstate any employee who forfeited seniority under Rule 23 for refusing recall to a system gang. However, even if UP reinstated any employee in that situation, this after that fact reinstatement, even with full compensation



could not place the employee in the same situation he or she was in prior to termination of seniority. As General Chairman I have witnessed similar occurrences when arbitrators hold that employees have been unjustly terminated or suspended. Even though those arbitral awards often require full back pay to the employee, the economic harm caused by the lack of compensation during the appeal period creates harm that cannot be rectified by the payment of back wages. Simply put, back pay does not put an employee in the same position he or she would have been had the improper Carrier action not occurred.

6. There is a related area in the proposed implementation of the Meyers Award that may exacerbate the application of Rule 23 as discussed above. Section 2(A) of the Meyers Award provides that "UPRR, WPRR, SPRR, and DRGW employees, who, prior to the effective date of this Agreement, had a right based on their seniority to work on system-type operations within their respective territories, will have their name and seniority dates dovetailed onto the UPRR System Gang Seniority rosters" in ten classifications. SP, WP and DRGW employees all had rights to work on system-type operations prior to the effective date of the Meyers Award. Therefore, this dovetailing will require placing all SP, WP and DRGW maintenance of way employees on ten UP System Gang rosters. The SP, WP and DRGW classifications are not identical to the ten UP System Gang classifications as each railroad handles seniority and classification distinctions in different ways. For example, equipment operators on

UP are classified as either Track Machine Operators ("TMO") or Roadway Equipment Operators ("REO"). TMOs operate equipment such as tampers and ballast regulators while REOs operate burro cranes, graders and the like. On UP when an employee is first assigned to a TMO classified piece of equipment, he or she obtains a seniority date in the TMO classification. The same principle is followed for REO seniority. However, on the SP, each piece of equipment is separately classified and carries its own seniority date. Dovetailing SP equipment operators into the respective TMO and REO seniority rosters involves, at the very least, determining which pieces of SP equipment fit within the TMO and REO classifications and then determining the SP employee's earliest seniority date on a TMO and/or REO piece of equipment. This process is not an easy task, especially because, to the best of my knowledge, UP's Gang Management System ("GMS"), which is responsible for creating these rosters, is not staffed with any former SP employees who have some type of familiarity with SP's seniority systems and practices.

7. On December 16, 1997, I spoke with Mr. Naro who told me that GMS had not completed these dovetailed rosters. Also, UP has not scheduled any meetings with BMWF officers prior to January 1, 1998 to review the dovetailed rosters and attempt to reconcile any problems prior to implementation. The ordinary course of action when new rosters are created is the following: the carrier prepares the rosters in consultation with BMWF; the new rosters are reviewed by the carrier and BMWF officers in a joint meeting where obvious errors are corrected; operations under the new rosters

begin subject to each employee's right to protest his or her placement on the roster. The purpose of this bilateral creation of new rosters is to minimize the number of administrative problems that will arise once the carrier begins its new operation.

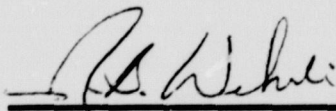
8. As General Chairman I have been responsible for handling and resolving roster protests with the UP. These types of protests are straightforward in that they concern a single employee's claim that he was improperly placed or removed from a seniority roster. While these protests are straightforward, they are difficult and time consuming to resolve. The thought of dovetailing literally thousands of employees onto ten rosters in the course of a few weeks is mind-boggling. The only thing worse than the dovetailing would be attempting to operate with such rosters without reviewing them before implementation so that as many roster protests could be resolved before errors made in creating the rosters have adverse effects on the employees. Since UP will terminate employees' seniority for refusing recall based upon seniority preferences in Rule 20, it stands to reason that all reasonable efforts should be made to ensure that the rosters are correct. In my opinion, the "fair and equitable arrangement" required by Section 11326 requires no less.
9. Finally, I want to stress that BMW's concerns here are legitimate and not intended to delay implementation of an "inevitable" award. We believe the Meyers Award is flawed and, we exercised our rights under the Board's regulations to appeal his decision. We also are concerned with how a



January 1, 1998 implementation of the Meyers Award could needlessly harm BMWWE members. Nevertheless, we are also mindful of UP's occasional need for "flexibility" in maintenance of way operations. I want to state for the record that if the Board grants our stay, BMWWE will seriously consider and attempt to accommodate all reasonable UP requests to operate SP, DRGW or UP system gangs on the others' properties for limited periods of time while the Board considers our appeal of the Meyers Award. Should the Board think BMWWE's offer is a hollow one, it should keep in mind that from the time of the UP-WP merger in 1983 until the present, BMWWE and UP consistently reached local agreements permitting UP to operate system gangs on WP territory even though UP had no CBA right to do so. (See, Exhibit 1 in BMWWE's "Appendix to Petition for Review of Arbitral Award" at 4-5.) In fact, there are UP system gangs working on SP territory now and these gangs have been working there since June, 1997.

I, Rick B. Wehrli, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this declaration.

Executed on December 18, 1997.

  
\_\_\_\_\_  
Rick B. Wehrli

# EXHIBIT ONE

①

## RULE 20

## RULE 20 - BULLETINING POSITIONS - VACANCIES \*

X (a) All new positions or vacancies that are to be filled, including temporary vacancies of thirty (30) calendar days or more duration created by a medical leave of absence of the regular occupant of a position and temporary positions connected thereto, shall be bulletined to all employees holding seniority on the district in the class in which the new position is created or vacancy occurs.

New positions shall be bulletined as much in advance of their establishment as possible but in no event later than seven (7) calendar days after they are established.

Vacancies, including temporary vacancies as defined above, shall be bulletined as promptly as possible but in no event later than seven (7) days after they occur; provided, however, that temporary vacancies, which start out on an indefinite basis, will be bulletined as soon as it is known they will exist for thirty (30) calendar days or more.

Positions will not be bulletined in connection with changing of payroll classifications, rates of pay, gang numbers, or changes involving section headquarters within the established section limits.

Vacancies due to vacations shall not be bulletined. If the Company elects to fill a vacancy it shall be filled pursuant to Section (k).

(b) Advertisement and/or assignment bulletins will be issued via a telephonic recording system utilizing toll free telephone numbers provided at the expense of the Carrier. Bulletins will provide descriptive title, rate of pay and location. \*\*

(c) Employees, whether furloughed or actively employed, desiring bulletined positions shall submit their application through the telephonic recording system during the advertisement period which will be open continuously effective at 9:00 a.m. Central Time each Thursday and closing at 7:00 a.m. Central Time on the following Monday. When more than one vacancy or new position is bulletined at the same time, employees shall have the right to bid on any or all of the positions bulletined, stating their order of preference. Once the advertisement period has closed, employees will not be allowed to withdraw their applications.

Assignments will be issued through the telephonic recording system no later than 9:00 a.m. Central Time on the following Thursday. Assignment information will be available through the telephonic recording system until 7:00 a.m. Central Time on the following Monday.

\* See Appendixes "M", "N", "P" and "Q"

\*\* See Appendix "U"



## RULE 20

②

X (d) Except as otherwise provided in this Agreement, the senior applicant retaining seniority in the applicable class will be assigned to bulletined positions. If no qualifications for the position have been previously established, the employees assigned will be given full cooperation and assistance of supervisors and others in their efforts to qualify. Employees who are disqualified within the first thirty (30) working days, shall vacate the position on which disqualified and return to their former position provided it has not been acquired by a senior employee or abolished, in which event the disqualified employee may exercise seniority pursuant to Rule 21.

(Effective 6-1-97) An employee who accepts another assignment pursuant to this Rule 20(d) or Rule 20(e) will not be eligible for assignment to the bulletined vacancy created thereby.

X (e) When no bids are received from employees retaining seniority in the class, the vacancy or new position will be filled in the following order:

- X
- (1) In accordance with the provisions of Rule 19(b);
  - (2) The junior unassigned qualified employee of the class, who is furloughed;
  - ~~(3) The junior qualified employee of the class, who is regularly assigned in a lower class;~~
  - (4) The junior unassigned furloughed employee who applied for and accepted an identical assignment previously but did not have adequate time to qualify;
  - ~~(5) The junior employee regularly assigned in a lower class who applied for and accepted an identical assignment previously but did not have adequate time to qualify.~~

(f) Successful applicant will be released and permitted to move to the new assignment on the following Monday or as soon as provisions can be made for the employee's release, but, in no event, shall such employee be held on the former position for more than ten (10) calendar days from the date of assignment. Furloughed employees making application for an advertised position and who are assigned, will be required to report and protect their new assignment no later than the following Monday, unless an extension of time has been granted by the local supervisor involved.

(g) A written outline of all advertisement, assignment and cancellation bulletins will be promptly issued to the General Chairman, Vice General Chairman or Assistant Chairman and Local Chairman involved, in an agreed to format. In the event an advertised vacancy is cancelled before an assignment is made, a cancellation bulletin will be issued.

(h) When an employee has been granted an annuity under the provisions of the Railroad Retirement Act account of physical disability, such employee's position shall be bulletined as permanent. If the physical disability improves to such an extent the employee can return to work, the individual shall be permitted, upon thirty (30) days' notice, to exercise seniority pursuant to Rule 21.

(i) Positions vacated by employees temporarily promoted to official or supervisory position with the Company or temporarily appointed to a full-time position with the Brotherhood will be considered as temporary and bulletined accordingly. When the employee has been permanently appointed to such position, the position formerly held will be declared vacant and if to be filled, bulletined in accordance with the provisions of this rule.

(3)

## RULE 20

(j) When employees have been regularly assigned by bulletin as operators of machines listed in Groups 10, 11, 12 and 19, or are otherwise operating machines temporarily pursuant to Rule 20(k), and the machines are not needed for periods of less than seven (7) working days, the employees so assigned will be allowed the applicable operator's rate and required to perform work of a lower class. If machines are not to be used for periods in excess of seven (7) working days, any bulletined positions must be abolished.

(k)\* Positions undergoing the advertisement and assignment process, or vacancies of less than thirty (30) days' duration shall be filled in the following sequential order:

- (1) The senior employe of the group and class in the gang or at the location who is working in a lower class; or,
- (2) By advancing the senior available employe of the group and class actually working in a lower class in the nearest gang or at the nearest location within a distance of forty (40) rail miles from the gang or location where the vacancy occurs; or,
- (3) By examining and promoting an employe of a lower class capable of performing the work who is either working in the gang or at the location nearest where the vacancy occurs. Employes so utilized will not establish seniority as a result thereof.

Employes who, under (1) and (2) above, fail to report for such service after having been notified will forfeit seniority in the class unless satisfactory reason for not reporting in a timely manner is given. Satisfactory reason for failing to report has reference to sickness or other reasons over which the employe has no control. The employe affected, the General Chairman, and the Vice Chairman or Assistant Chairman involved will be notified in writing of the loss of seniority.

Upon completion of temporary service pursuant to Options (1), (2) or (3) above, employes will revert to their former status unless it has been changed under other provisions of this Agreement.

(1) Management shall retain the right to select employes for service in Classes (a) and (b) of Group <sup>2019</sup>19, and employes so selected shall establish a seniority date in Class (a) or (b) of the group. In the recall of system gang foremen when gangs are established, the senior system gang foreman with maximum experience and specialization in the type of work involved may be recalled for such service even though senior foremen with experience on other gangs remain off in force reduction. In the event senior foremen are off in force reduction they shall be concurrently recalled as system extra gang foremen.

\* See Appendixes "P" and "Q"



⑥

## RULE 21

## RULE 21 - REDUCTION IN FORCE

(a) Except as provided in Sections (b) and (c) of this rule force reductions shall not be made nor will positions be abolished until the employees affected have been given five (5) working days advance notice. Such notices may only be given by an appropriate Company manager and, if given orally, written confirmation of same will be promptly furnished and, in any event, before the employees are released. Abolishment notices will show name, social security number, gang number and classification of the employees affected and copy of same shall be forwarded immediately to the Brotherhood's General Chairman as well as System Officers and Local Chairmen involved.

(b) Information concerning abolishments, which will include gang number as well as number of positions in each classification involved, will be issued via telephonic recording systems designed for bulletining purposes during the applicable assignment/advertisement period.

(c) Rules, agreements or practices, however established, that require advance notice before positions are temporarily abolished or forces are temporarily reduced are hereby modified so as not to require advance notice where a suspension of an individual carrier's operations in whole or in part is due to a labor dispute between such carrier and any of its employees.

(d) Except as provided in paragraph (c) hereof, rules, agreements or practices, however established, that require advance notice to employees before temporarily abolishing positions or making temporary force reductions are hereby modified to eliminate any requirement for such notice under emergency conditions, such as flood, snowstorm, hurricane, tornado, earthquake, fire, or a labor dispute other than as defined in paragraph (b) hereof, provided that such conditions result in suspension of a carrier's operations in whole or in part. It is understood and agreed that such temporary force reduction will be confined solely to those work locations directly affected by any suspension of operations. It is further understood and agreed that notwithstanding the foregoing, any employee who is affected by such an emergency force reduction and reports for work for his position without having been previously notified not to report, shall receive four hours' pay at the applicable rate for his position. If an employee works any portion of the day, he will be paid in accordance with existing rules.

(e) When forces are reduced or positions are abolished, seniority will govern, and employees affected thereby may displace junior employees in any seniority class in which seniority and qualifications are held. Employees must exercise seniority within ten (10) calendar days from date of displacement unless extension of time is agreed to by the Director of Labor Relations and General Chairman. Identification of the position to which the displaced employee intends to exercise displacement rights must also be given by phone to the appropriate company representative in Non-Op Personnel Services.

X



## RULE 22

## RULE 22 - RETENTION OF SENIORITY

(a) \* Unless otherwise agreed by the appropriate Labor Officer and General Chairman, an employee who applies for and accepts a bulletined assignment in another class to establish seniority and/or qualifications will remain in the assignment involved for a period of not less than thirty (30) working days except in those instances where the employee is disqualified; recalled to a higher class; or the position is abolished or acquired by a senior employee in the exercise of displacement rights in which event the employee may exercise seniority pursuant to Rule 21.

*(Effective 6-1-97)*

(b) *Unless otherwise agreed by the Director of Labor Relations officer and General Chairman, an employee assigned to a Group 6, 20, 21, 26 or 27 position pursuant to Rule 20(d) or (e) will forfeit seniority in the classification of that position if, within ninety (90) calendar days of the assignment, he voluntarily vacates the position to accept an assignment in a lower class.*

*Employees who apply for and accept bulletined assignments in the Foreman and Assistant Chairman classifications will be excluded from the forfeiture of seniority provisions of this section.*

(c)\*\* Employees promoted to official, supervisory or excepted positions, whether with the Company or the Brotherhood, shall retain and continue to accumulate seniority rights, except as hereinafter provided:

- (1) Employees promoted to such positions with the Company prior to October 17, 1986, shall retain their current seniority, but shall be required to pay an appropriate monthly fee, as designated by the Brotherhood, not to exceed monthly union dues, in order to continue to accumulate seniority. Such personnel who elect not to pay the monthly fee shall have their seniority frozen as of October 31, 1986. Promoted personnel who elect to pay the monthly fee whose payments become delinquent shall be given written notice by the General Chairman of the amount due and ninety (90) calendar days from the date of receipt of such notice to eliminate the delinquency in order to avoid having their seniority frozen.
- (2) Employees promoted to such positions with the Company on or subsequent to October 31, 1986, shall be required to pay an appropriate monthly fee, as designated by the Brotherhood, not to exceed the monthly union dues, in order to retain and continue to accumulate seniority. Such promoted personnel whose payments become delinquent shall be given written notice by the General Chairman of the amount due and ninety (90) calendar days from the date of receipt of such notice to eliminate the delinquency in order to avoid the forfeiture of seniority.

\* See Appendix "V"

\*\* See Appendix "I"

\*\* See Appendix "S"

⑧

## RULE 22

Employees retaining seniority who vacate an official, supervisory or excepted position for any reason, whether with the Company or the Brotherhood, may return to their former position or may exercise rights over any junior employee who is holding a position that has been bulletined during their absence, except that if the employee's former position has been abolished or has been acquired by a senior employee through the exercise of displacement rights, the returning employee may then exercise seniority rights over junior employees as provided in Rule 21. Employees desiring to return from official, supervisory or excepted positions must give management and the General Chairman five (5) calendar days' advance written notice before returning. The seniority status and ranking of promoted personnel whose seniority has been frozen shall be adjusted immediately prior to their exercise of seniority rights by the parties hereto.

Unless agreed to otherwise by Management and the General Chairman, the returning employee shall have no more than sixty (60) calendar days after being released to get affairs in order and return as specified herein. Returning employees who fail to return to service within said time limit or who are unable to do so, shall be considered furloughed.

(d) Employees assigned to temporary service will, when released, return to their former positions provided they have not been acquired by senior employees in the exercise of displacement rights or abolished in which event the employee may exercise seniority pursuant to Rule 21.

(e) Employees who relinquish their seniority in the class in which working will be considered furloughed with no displacement rights and eligible to return to service in other classes in which seniority is held at the first opportunity pursuant to Rules 20 and 23.

(f) An employee accepting a position in construction gangs, system rail, tie and ballast gangs, engaged in new construction or special projects under the supervision of the Chief Engineer will retain and accumulate seniority in seniority classes and groups in which he holds seniority.

(g) Employees holding seniority under this agreement who are temporarily employed in other positions in the service of the railroad company not included within the scope of this agreement, may with the approval of the Director of Labor Relations and General Chairman, retain and accumulate seniority in their seniority group and district.



(9)

## RULE 22

*(Effective 6-1-97)*

*(h) An employee returning to service from vacation or leave of absence will be permitted to displace an employee who established seniority during the returning employee's absence provided the returning employee would have been considered to be the senior applicant with sufficient abilities and qualifications pursuant to Rule 19(b) at the time the new seniority date was established. Such displacement must be exercised within five (5) working days of the employee's return to service. Such employee will be awarded an identical seniority date and a ranking position on the roster immediately senior to that held by the employee he/she displaces.*

(i) Employees who have been disqualified by written notice from a position (other than medical disqualification) may accept furlough in accordance with Rule 21(f); or, may exercise any seniority rights in the class or succeeding lower classes in which seniority and qualifications are held.

Employees thus affected will retain their name and seniority date on the applicable seniority rosters with the appropriate comment "disqualified" until such time as the disqualification may be revoked. An employee who is disqualified may request a conference in accordance with Rule 48(n).

(j) Except as otherwise provided in this Agreement, an employee may establish and retain seniority in all subdepartments covered under this Agreement.

(k) \*Except as otherwise provided in this Agreement, the seniority rights an employee may retain will be confined to one seniority division and/or district.


(l) The seniority of any employee whose seniority is established after October 17, 1986 and who is furloughed for 365 consecutive days will be terminated if such employee has less than three (3) years of seniority.


The "365 consecutive days" shall exclude any period during which a furloughed employee receives compensation pursuant to an I.C.C. employee protection order or an employee protection agreement or arrangement.

\* See 4-14-92 letter of understanding



**(5)****RULE 23****RULE 23 - RESTORATION OF FORCE**

 (a) Furloughed employees must return to service in the seniority class in which recalled within seven (7) calendar days after receiving a recall notice in writing by certified mail at the last address of record. Provided no extension of time is agreed to by the Director of Labor Relations and General Chairman, an employee's failure to report within these time limits will result in the forfeiture of all seniority in the Maintenance of Way Department, unless satisfactory reason for not reporting in a timely fashion is given. Satisfactory reason for failing to report has reference to sickness or other reasons over which the employee has no control.

 (b) Employees regularly assigned to a lower class who are recalled to a higher seniority class must return to such higher class at the first opportunity or forfeit seniority therein. Such employees will be released to report to the higher class position on the first day of the assignment's regular work week or as soon as provisions can be made, but, in no event, shall the employee be held on the former position for more than ten (10) calendar days from date of assignment. \*

\* See Appendix "T"

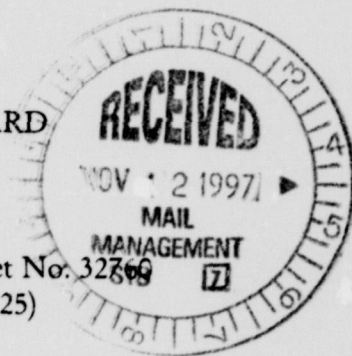
STB FD 32760 (Sub 25) 11-12-97 I 183841

183841

BEFORE THE SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORP., et al.,--MERGER--  
SOUTHERN PACIFIC TRANS. CO., et al.

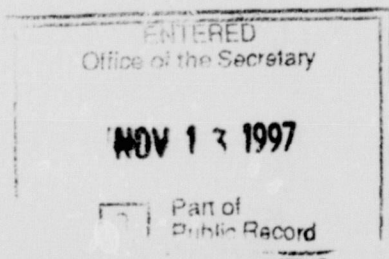
) Finance Docket No. 32869  
) (Sub-No. 25)



MOTION TO EXCEED PAGE LIMITS

The Brotherhood of Maintenance of Way Employees ("BMWE") respectfully moves the Board for leave to file a petition for review of an arbitral award that exceeds the 30 page limit set forth at 49 C.F.R. §1115.8. BMWE's petition is oversize only because, under Board rules, the arbitral award also is counted toward the 30 page limit and must be attached as an appendix to the petition. The text of BMWE's petition only is 30 pages long; therefore the excess page limits do not constitute additional argument on behalf of BMWE's position.

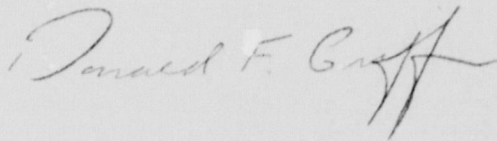
Additionally, BMWE seeks leave to file a two volume appendix with this petition. The appendices contain copies of BMWE's and the carrier's brief to the arbitrator as well as selected materials submitted by both parties to the arbitration. BMWE proffers these volumes because the Board does not have copies of the record below and BMWE believes that a review of the material in the appendices may help the Board in responding to this petition.





WHEREFORE, based upon the foregoing, BMW E respectfully requests that the Board grant BMW E leave to file a petition for review of an arbitral award in excess of 30 pages and also grant BMW E leave to file two volumes of appendices related to the proceeding under appeal.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Donald F. Griffin".

Donald F. Griffin  
Asst. General Counsel  
Brotherhood of Maintenance of Way Employes  
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Washington, DC 20002  
(202) 638-2135

Dated: November 12, 1997