

REPORT  
TO  
THE PRESIDENT  
BY  
EMERGENCY BOARD  
NO. 221

Submitted Pursuant to Executive Order No. 12795  
Dated March 31, 1992  
and Section 10 of  
The Railway Labor Act, as Amended

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Investigation of dispute between the Consolidated Rail Corporation  
and its employees represented by the Brotherhood of Maintenance of  
Way Employees.

(National Mediation Board Case No. A-12260)

Washington, D.C.

May 28, 1992

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The President  
The White House  
Washington, D.C.

Dear Mr. President:

On March 31, 1992, pursuant to Section 10 of the Railway Labor Act, as amended, and by Executive Order 12795, you established an Emergency Board to investigate a dispute between the Consolidated Rail Corporation and its employees represented by the Brotherhood of Maintenance of Way Employees.

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.

Respectfully,

  
Benjamin Aaron, Chairman

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## I. CREATION OF THE EMERGENCY BOARD

Emergency Board No. 221 (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 No. 12795. The Board was ordered to investigate and report its findings and recommendations regarding an unadjusted dispute between the Consolidated Rail Corporation and its employees represented by the Brotherhood of Maintenance of Way Employees (BMWE). A copy of the Executive Order is attached as Appendix "A."

On April 3, 1992, the President appointed Benjamin Aaron of Santa Monica, California, as Chairman of the Board. Preston J. Moore of Oklahoma City, Oklahoma, Eric J. Schmertz of Riverdale, New York, David P. Twomey of Quincy, Massachusetts, and Arnold M. Zack of Boston, Massachusetts, were appointed as Members. The National Mediation Board appointed Roland Watkins, Esq., as Special Assistant to the Board.

## II. PARTIES TO THE DISPUTE

### A. The Consolidated Rail Corporation

The Consolidated Rail Corporation (Conrail) is the fifth largest freight railroad in the country in terms of revenue ton-miles and miles operated. The carrier is the largest railroad system in the Northeast-Midwest quadrant of the United States, operating over a network of approximately 13,400 route miles serving the areas east of the Mississippi River and north of a line running from Washington, D.C., to St. Louis, Missouri. In 1990, the railroad handled 84.1 billion revenue ton-miles generating revenues of \$3.3 billion. Conrail carries approximately 3.6 million carloads per year, about one-eighth of the national total.

Conrail is an important connection for most of the other large railroads in the nation. In addition, Conrail connects with 158 shortline railroads.

#### B. The Brotherhood of Maintenance of Way Employees

The Brotherhood of Maintenance of Way Employees (BMWE) represents approximately 5,200 employees who principally perform track laying and surfacing work, roadway maintenance, and certain bridge, building and structural work.

### III. ACTIVITIES OF THE EMERGENCY BOARD

The parties to the disputes met with the Emergency Board in Washington, D.C., on April 6, 1992, to discuss procedural matters.

On April 13-15, 1992, the Board conducted hearings regarding the issues in Washington, D.C. 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.

The parties agreed to and the President approved an extension of the time that the Emergency Board had to report its recommendations until May 28, 1992.

The BMWE presented its position through written statements and oral testimony by Mac A. Fleming, President, BMWE; Jed Dodd, General Chairman, BMWE; Thomas R. Roth, President of the Labor Bureau, Inc.; Ivy Silver, Principal at Leshner, Silver & Associates; Joel Myron, BMWE; James Cassese, BMWE; and John Davidson, General Chairman, BMWE. The organization was represented by William A. Bon, Jr., Esq., General Counsel of the BMWE.

Conrail presented its position through written statements and oral testimony by James A. Hagen, Chairman, President and Chief Executive Officer of Conrail; Robert W. Anestis, President of Anestis & Company; Charles I. Hopkins, Jr., Chairman, National Carriers' Conference Committee; Charles H. Fay, Ph.D., Associate Professor of Industrial Relations and Human Resources, Institute of Management and Labor Relations, Rutgers University; Seymore Burchman, Principal with Simpson and Company; Richard Pyson, Vice President - Transportation, Conrail; G. Raymond Weaver, Assistant Vice President - Labor Relations, Conrail; John B. Rossi, Jr., General Counsel - Labor, Conrail; Jeffrey Burton, Senior Director - Labor Relations, Conrail; Bob Dawson, General Superintendent - Safety, Conrail; and Robert E. Swert, Vice President - Labor Relations, Conrail. Conrail was represented by Ralph J. Moore, Jr., Esq., of Shea and Gardner.

Pursuant to the request of the Board, on April 27, 1992, the parties presented written lists of the issues they deemed still in dispute before the Board.

After the close of the hearings, the Board met in executive session to prepare its Report and Recommendations. The entire record considered by the Board consists of approximately four hundred and seventy (470) pages of transcript and sixteen hundred (1,600) pages of exhibits.

#### IV. HISTORY OF THE DISPUTE

On or about June 10, 1988, the BMWE, in accordance with Section 6 of the Railway Labor Act, served notice on Conrail of its demands for changes in the provisions of the existing collective

bargaining agreement. The BMWE, on May 19, 1989, applied to the National Mediation Board (NMB) for its mediatory service. The application was docketed as NMB Case No. A-12260.

Mediation was undertaken by Mediators Robert J. Cerjan and Thomas R. Green. These efforts were unsuccessful.

On March 2, 1992, the NMB, in accordance with Section 5, First, of the Railway Labor Act, offered the BMWE and Conrail the opportunity to submit their controversy to arbitration. Conrail declined the proffer of arbitration. Accordingly, on March 4, 1992, the NMB notified the parties that it was terminating its mediatory efforts.

On March 5, 1992, pursuant to Section 10 of the Railway Labor Act, the NMB advised the President of the United States that, in its judgment, the dispute threatened to substantially interrupt interstate commerce to a degree such as to deprive various sections of the country of essential transportation service.

The President, in his discretion, issued Executive Order 12795 on March 31, 1992, to create, effective April 3, 1992, this Board to investigate and report concerning the dispute.

## V. INTRODUCTION

The threshold question before us concerns the impact on this Presidential Emergency Board 221 of the recommendations of PEB 219, as enacted by Congress, and as reviewed by the Special Board.

Most of the nation's Class I line haul railroads, including Conrail, and their labor organizations, including the Brotherhood of Maintenance of Way Employees (BMWE), except their Conrail Federations, were involved in the proceedings before PEB 219. The BMWE Federations representing maintenance of way employees of Conrail, however, elected not to participate in the national bargaining and were not party to the proceedings before PEB 219.

The unresolved contract issues before us between Conrail and the BMWE cover some of the same subjects as those considered by PEB 219. The recommendations of PEB 219, as reviewed by the Special Board, are in effect between the carriers and their organizations, either as the basis of settlements or as enacted by Congress. They cover such matters as wages, health benefits, skill differentials, incidental work rule, subcontracting, moratorium, and successorship.

Conrail's position is that the findings and recommendations of PEB 219 constitute a pattern; it offered to settle on that basis with the BMWE. More favorable recommendations to the BMWE would in its view be unfair to the vast majority of employees working under the PEB 219 recommendations, would seriously disturb morale and orderly labor relations by establishing materially different conditions of employment among employees similarly situated, cause "leapfrogging, me-tooism, and whipsawing" by other labor



organizations as they competed with each other for superior benefits, and inevitably result in destabilization of parity arrangements, historical differentials, and established relationships.

Conrail claims that there is a history of so-called pattern bargaining in the railroad industry pursuant to which substantive agreements covering significant groups of employees have been replicated for other employees similarly situated. Additionally, Conrail argues that on the merits, there is no justification for recommendations favorable to the BMWWE that exceed those proposed by PEB 219 on the same issues.

The BMWWE views this proceeding differently. It rejects the pattern theory and asserts that it is entitled to a de novo inquiry and a new set of recommendations by this Board on the merits of each of the issues in dispute. It emphasizes its lawful right to sever its bargaining from other rail labor organizations. It disagrees with the view that it is bound by the recommendations of PEB 219, in whose proceedings it did not participate.

In short, the BMWWE disputes the alleged history of pattern applications in the railroad industry and rejects the claim that the recommendations of PEB 219 themselves constitute a pattern. It argues that a pattern does not emerge from terms and conditions which, rather than being voluntarily negotiated, were imposed by legislative fiat on a majority of the affected work force. Instead, it claims that based on their job duties, skills and hazards, as well as on relevant economic data and occupational comparisons, the employees it represents are entitled to the benefits and conditions sought irrespective of what PEB 219

recommended as the basis of settlement for others. Finally, the BMWWE denies, for the previously stated reasons, that any such results on the merits would be destabilizing.

That the BMWWE employees on Conrail were not party to the proceedings before PEB 219 is reason enough to conclude that the recommendations of that Board do not constitute an automatically binding pattern on them. As a present reality, however, effective for a substantial majority of the industry's employees, those recommendations cannot be ignored in deciding the issues affecting the BMWWE and Conrail.

The economic bargaining relationships between Conrail and the BMWWE, between Conrail and the other rail labor organizations, and the hierarchical structure among the members of all the organizations make the recommendations of PEB 219 relevant and material. Certainly, the BMWWE was aware, when it elected to stay out of the PEB 219 proceedings, that specific findings of fact and recommendations would be made that dealt with the identical issues now in dispute between Conrail and the BMWWE, and that those recommendations would apply to the majority of the unionized work force.

We consider it critical to the public interest that labor relations and collective bargaining on the nation's railroads be fair, stable, and reasonably consistent. Conversely, we believe that political competition between and among unions for supremacy of benefits, with its ineluctably destabilizing consequences, is damaging to the public interest.

Therefore, because the recommendations of PEB 219 are now in effect for most of the unionized employees in the railroad industry, we conclude that significant variations for the BMWWE-

represented employees on Conrail that change previously linked or stabilized economic and work relationships with other rail employees would produce the destabilization that we think must be avoided. We recognize, however, that exceptions may be made in special, compelling circumstances.

The foregoing reasons justify, in our opinion, treating the recommendations of PEB 219 as presumptively applicable to the BMW and Conrail in this case, whether or not they are characterized as a pattern. The presumption, however, is a rebuttable one. We shall weigh all the factors in each issue before us, including persuasive reasons, if any, why a given PEB 219 recommendation should not be made applicable to BMW-represented employees on Conrail. Ultimately, we must make each decision on the basis of the total record before us.

## VI. ISSUES, POSITIONS OF THE PARTIES AND RECOMMENDATIONS

### A. WAGES

PEB 219 made the following general wage recommendations:

1. A lump-sum payment of \$2000 to each employee upon the signing of the agreement.
2. A 3-percent lump-sum payment effective July 1, 1991.
3. A 3-percent lump-sum payment effective July 1, 1992, which is to be considered as a cost-of-living adjustment and not part of the wage base.
4. A 3-percent lump-sum payment effective January 1, 1993, which is to be considered as a cost-of-living adjustment and not part of the wage base.
5. A 3-percent general wage increase effective July 1, 1993.

6. A 3-percent lump-sum payment effective January 1, 1994, which is to be considered as a cost-of-living adjustment and not part of the wage base.
7. A 4-percent general wage increase effective July 1, 1994.
8. A 2-percent lump-sum payment effective January 1, 1995, which is to be considered as a cost-of-living adjustment and not part of the wage base.
9. A cost-of-living adjustment for each 6-month period, beginning July 1, 1995, based upon the COLA formula which has previously been utilized by the parties.

The BMW E wage proposal is as follows:

1. General increases in all basic rates of pay in accordance with the following schedule:

July 1, 1988	4 percent
July 1, 1989	4 percent
July 1, 1990	4 percent
July 1, 1991	3 percent
July 1, 1992	3 percent
July 1, 1993	3 percent
2. Additional quarterly adjustments in all rates of pay commencing January, 1992, by application of an automatic cost-of-living escalator clause based on a formula providing a 1-cent increase in hourly rates for each .3-point rise in the CPI-W (1967 = 100).
3. Elimination of reduced entry rates.
4. A one-time adjustment for MW repairmen to bring their rates up to that for a Class I Machine Operator.

Conrail offers the same increases recommended by PEB 219, except that it proposes that the first three-percent general increase not be effective until the date of its new agreement with the BMW E.

### BMWE Position

The BMWE contends that its wage proposal is designed primarily to recover the loss in real wages the Conrail employees it represents have consistently sustained since 1978. The BMWE also points out that the Consumer Price Index (CPI) varies by region, and that in the northeast region, the center of Conrail's operations, the cost of living is higher than the average for the country. According to the BMWE, pay rates for key maintenance of way positions are now substantially below going rates for comparable and often identical jobs in other industries. Thus, in a comparison with 14 selected outside industry agreements, the BMWE found that the average increase in those industries between July 1, 1988, and January 1, 1992, was 14 percent, whereas Conrail employees, including those represented by the BMWE, received nothing. Similarly, the BMWE asserts that in respect of both current wage rates and past wage progress, Conrail workers are substantially below their commuter rail and urban transit rail counterparts.

Far from being in economic distress, the BMWE asserts, Conrail has led the financial recovery of Class I railroads during the 1980s, and particularly since 1988, when the carriers and the major organizations last reached a contract through direct negotiations. According to the BMWE, moderate increases in labor costs coupled with historic productivity increases have caused unit labor costs on Conrail to drop precipitously since 1980. The BMWE contends that unit cost control affected price competition and freight rate compression, and produced a stable operating revenue trend over the past 10 years. The consequent increase in net income lifted Conrail's profitability to record levels and turned it into one of the nation's most profitable railroads.

### Conrail Position

Conrail declares that the BMWWE wage proposal is unacceptable for two basic reasons. First, it would place a tremendous financial burden on Conrail (approximately \$52 million in wages and payroll taxes over the entire contract period) in excess of the cost of the PEB 219 recommendations, assuming that there will be no change in present manning levels. Second, Conrail contends that applying the PEB 219 wage recommendations to its employees represented by the BMWWE is fair; it preserves equity between those employees and other Conrail employees and between its maintenance of way employees and their counterparts on other rail carriers.

Conrail asserts that its financial condition is not as strong as the BMWWE represents. It points out that it is not a big coal or grain hauler, but tends to haul more truck-competitive freight. According to Conrail, it is still not earning the cost of capital; unless it can manage to do so, it will continue to shrink as it liquidates assets. For example, from 1980 to the present, its mileage has been reduced from 18,000 to 12,000 miles and its work force from 80,000 to 12,000 employees.

The consequences of granting the BMWWE's wage proposal, Conrail alleges, would be to give a substantial advantage to its major rail competitors, CSX Transportation Company and the Norfolk Southern Corporation. Moreover, its ability to reduce prices so as to attract traffic away from trucks would be seriously impaired.

### Recommendation

As is apparent from our comments in the introduction to this Report, we think it inappropriate to treat this case as if it existed in a vacuum. We cannot ignore the fact that labor organizations representing a majority of the employees in the railroad industry recently participated in proceedings before PEB

219, asked for general wage increases approximating what the BMWWE is proposing, sought to justify such increases with arguments quite similar to those advanced by the BMWWE in this case, and ultimately accepted, or were statutorily bound by, the recommendations of PEB 219. However compelling the evidence adduced by the BMWWE in support of its position may seem, if considered without regard to what has occurred in the railroad industry in the past year, we are bound to conclude that endorsement of its wage proposal would be profoundly destabilizing to the present wage structure of the railroad industry. We therefore decline to recommend it.

In keeping with the general approach we have taken in respect of the wage issue in this case, we recommend that the parties adopt the general wage and cost-of-living increases and time schedule for such wage adjustments recommended by PEB 219. Achievement of the wage stability the carriers advocate can be attained only by making the first three-percent general increase effective on the same date (July 1, 1991) as that applicable to the organizations covered by the PEB 219 recommendations. We see no reason why the BMWWE should suffer any loss of retroactivity simply because it declined to participate in the proceedings before PEB 219, which it had the legal right to do.

#### B. ENTRY RATES

##### BMWWE Position

The BMWWE seeks the elimination of entry rates. It asserts that the current five-year progression from 75 percent of the top rates is not justified, that it establishes a two-tier compensation system victimizing those who suffer the worst seasonality of employment, and that it subsidizes Conrail through inadequate wages.

### Conrail Position

Conrail argues that the recommendations of PEB 219 on this issue should be followed. PEB 219 recommended an exclusion from this rule for foreman, mechanics, and production gang members operating heavy, self-propelled equipment requiring skill and experience. Conrail points out that that recommendation was incorporated into the national BMWWE settlement, which also provided that any questions of coverage should be submitted to the Contract Interpretation Committee.

### Recommendation

BMWWE employees in the highest-rated positions who work for freight carriers other than Conrail have already been granted the exclusion from wage progression sought by the organization in this case. There is some merit, however, in applying lower entry rates and wage progression to those working in lower-paying positions, in as much as they are likely to be less productive until they master the full range of their job duties. Nevertheless, we find a five-year progression based upon a 75 percent hiring rate to be inequitable in the light of both the lesser-skilled nature of the work involved and the greater burdens seasonality of employment imposes upon them. Accordingly, we recommend that the exclusion from rate progression accorded by PEB 219 be extended to BMWWE employees of Conrail, and that those not covered by that exclusion be granted a two-year rate progression commencing at 90 percent and advancing to 95 percent at the end of the first year and to full rate at the end of the second year.

## C. RATE OF PAY FOR MAINTENANCE OF WAY REPAIRMAN

### BMWWE Position

The BMWWE proposes raising the hourly rate of the Maintenance of Way Repairman (\$13.63) to that of Class One Operator (\$14.06).



It asserts that the increase is justified by the increasing complexity of the machinery for which these employees are responsible. It argues that they must be qualified in skilled repairing and welding, file hazardous material reports for the Department of Transportation, make highway rail inspections, repair and maintain company trucks, and the like. It notes that they work adjacent to IAM mechanics who do the same work at \$14.29 per hour, and that granting this proposal would help to reduce the disparity in compensation between the crafts for performing the same tasks.

In its oral presentation before this Board, the BMWWE further proposed the introduction of a standard tool list, and that Maintenance of Way Repairmen be compensated for the purchase of such tools, and for their repair or replacement if they are broken or stolen while being used for the carrier. The BMWWE asserts that these tools are extremely expensive and that the present requirement that Repairmen purchase them at their own cost constitutes a subsidy to the employer of thousands of dollars and is an unfair condition of continued employment.

#### Conrail Position

Conrail denies any justification for a rate increase for the Maintenance of Way Repairman, contending that there is no correlation between the skill requirement of repairing equipment and the skill and dexterity requirements for operating the complex units. It notes that the Repairman, unlike the Class One Operator, need not know track geometry or other technical aspects associated with the operation of the machine, and argues that because the two classifications are not comparable, the proposal should be denied.

On the issue of tool allowance, Conrail asserts that mechanic purchase and ownership of tools is a universally accepted practice, that the carrier supplies all specialized tools, and that adoption

of the BMWWE proposal would not only be costly, but would also be subject to great abuse, because of unsupported claims of theft or loss, and the additional temptation of using such carrier-supplied tools for the employees private business use.

#### Recommendation

The BMWWE proposal to increase the rate of Maintenance of Way Repairman to that of Machine Operator Class One fails to recognize the differences in level of skill and responsibility for the respective classifications. That a comparable classification in the IAM unit is compensated at a higher rate does not justify the BMWWE's claim in this case. Its proposal should be withdrawn.

On the issue of tool allowance, the widely-prevailing practice among mechanics regardless of industry is that they purchase their own tools. Only by adherence to that practice is it possible to assure that mechanics exercise due care in using and protecting the tools. In the absence of persuasive evidence in this case to support the organization's claim that Conrail should depart from that prevailing practice, we recommend that the BMWWE proposal be withdrawn.

#### D. HEALTH AND WELFARE

##### BMWWE Position

BMWWE proposes that there be a plan solely for BMWWE-represented employees of Conrail and their dependents, separate and apart from the National Plan, and funded entirely by Conrail. Alternatively, it seeks creation of a subgroup consisting of BMWWE-represented employees and their dependents maintained within the National Plan for separate experience-rating purposes, again funded by Conrail. It rejects employee sharing of any increases in Plan costs.

### Conrail Position

Conrail asserts that the National Plan, as changed pursuant to the national BMWWE settlement based on the recommendations of PEB 219, including the recommendation that the Plan continue to be experience-rated as a whole, should apply to Conrail employees represented by the BMWWE. It argues that based on the recommendations of PEB 219 and the national BMWWE settlement, Conrail employees represented by BMWWE should share in increases in Plan costs, in an amount equal to the lesser of 25 percent of year-to-year increases or 50 percent of applicable COLAs (after crediting employees with the cash reserves used to pay current benefits in 1993 and 1994).

### Recommendation

This is an issue that should be resolved on the basis of the recommendation of PEB 219, as clarified by the Special Board, with the changes applicable to the other organizations. To do otherwise would create different health and welfare plans among the employees of Conrail, with different cost contributions. The disaffiliation of the BMWWE-represented employees could detract from the fiscal vitality of the National Plan, with the attendant risk that benefits, experience-ratings, and costs may differ. We think this would be destabilizing both to the relationship among those employees and their representative organizations and to labor relations between Conrail and those organizations.

The BMWWE proposal should be withdrawn, and the Conrail proposal, based on the PEB 219 recommendation, including the sharing of cost increases, should be adopted.

## E. SUBCONTRACTING

### BMW Position

The BMW proposes that subcontracting be barred without the written concurrence of the General Chairman. It asserts that the current provision for providing notice to the organization, with recommendation thereafter, has not resulted in Conrail's rescinding its commitment to subcontract. It argues that maintenance of way employees have the skills to do roofing, blacktopping, and culvert cleaning, and that even if Conrail currently lacks the necessary equipment for completing such tasks, bargaining-unit employees could do the work on either rented or purchased equipment.

### Conrail Position

Conrail contends it is essential that it continue to retain control over subcontracting without being subject to a BMW veto. It asserts that contracting out work utilizing highly technological equipment and skills is the most cost-efficient method of handling such complex, capital-intensive tasks; that the owners of such equipment require its operation by their own personnel; and that purchase of such equipment by Conrail would entail an enormous capital investment while precluding access to ever more technologically advanced equipment. It urges the Board to follow the precedent of PEB 219 and permit continuation of the current arrangements governing subcontracting.

### Recommendation

The existing practice of subcontracting provides the employer with access to the latest technological equipment without the need to expend substantial capital funds. Although some of the tasks currently being subcontracted might fall within the competence of bargaining-unit personnel, the present procedures would appear better suited to determine the appropriateness of such

subcontracting than would the requirement of General Chairman concurrence for any subcontracting. The BMW proposal should be withdrawn.

#### F. SUCCESSORSHIP

##### BMW Position

The BMW proposes a rule requiring Conrail to condition any sale or lease of any portion of the railroad upon provision for successorship by the organization as bargaining representative, and continuation of collective bargaining agreements for the benefit of employees who are employed by such successor. It would provide lifetime compensation protection to affected employees if the acquirer does not comply with the foregoing. It asserts that such benefit protection has been an accepted condition of such transactions since the Washington Job Protection Act of 1936, and that it is essential to protect employees against efforts to undermine unionization and union benefits through the creation of wholly-owned subsidiaries that secure trackage without labor protection and then transfer the same to nonunion entities. It asserts that the implementation of this kind of rule with Conrail is the only viable protection against the ICC's standards, which would permit such undermining of traditional union rights and protections.

##### Conrail Position

Conrail contends that the BMW position is not bargainable because the ICC has jurisdiction to approve line sales and leases if it believes them to be in the public interest. The ICC position, it continues, is that it will enforce such protection agreements as are voluntarily reached through collective bargaining. It urges this Board to follow the precedent of PEB 219 in declining to impose such an agreement on the parties. It argues

that Conrail, like other carriers, must be free to transfer and sell its property without the imposition of job protection impediments that would bar such transfers and sales while increasing property abandonments. The NMB, it asserts, provides the appropriate procedures for employees on such successor properties to determine their choice, if any, of bargaining representative, and that the BMW proposal contravenes the accepted principles of the Railway Labor Act.

#### Recommendation

We find that this issue is properly subject to collective bargaining. However, as virtually no other carrier has a successorship protective clause in its agreements, we find that it would be profoundly destabilizing to recommend such a clause to the organization requesting it.

#### G. MINIMUM WORKFORCE

##### BMW Position

The BMW proposes that each seniority district, subdepartment, and classification be manned by a minimum complement of maintenance of way employees; that such employees be provided 12 months' pay; that a 30 percent cap be placed on the portion of the force used in production units; and that there be no reduction of minimum forces through attrition or abandonment or line sales except through a buyout of \$100,000 per employee. It argues that there is clear evidence of the need for Conrail to devote greater attention to maintenance and upkeep of its right of way; that the BMW has lost 5,000 jobs on Conrail since 1982; that maintenance of way employees suffer more from seasonal layoffs than do other crafts, with only 50 percent of them working year-round and 20 percent working less than six months, and that there is a clear tradition and recognition of the importance of job protection for displaced or

dismissed railroad employees. It contends that the current procedure for partial compensation through supplemental unemployment benefits creates an undue hardship on workers and their families, placing some among those eligible for food stamps, and that Conrail has the need and ability to fund the retention of a permanent workforce.

#### Conrail Position

Conrail contends that the BMW E workforce stabilization proposal would double its annual wage and fringe benefit cost; that the minimum workforce assignments prescribed by the BMW E would necessitate hiring 3,989 more employees than it has at present; that work requirements, system seniority restrictions, and seasonality impediments would force it to compensate idle employees; and that conformity to the PEB 219 recommendations would provide a reasonable level of protection for employees without threatening the carrier's survival.

#### Recommendation

Although the evidence shows that Conrail can make more effective use of its workforce by devoting more manpower to both maintenance and production work and can place its seasonal employees on a more secure economic footing by endeavoring to lengthen their annual periods of production, we do not agree that the solution to those problems rests in providing guaranteed year-round employment to its workforce at present, let alone increased levels of staffing.

The seasonal nature of maintenance of way work cannot be denied. Although half the workforce is employed on a year-round basis, the other half suffers not only reduced periods of annual employment, but also resultant economic hardship for themselves and their families. As many of these drift into other employment,

Conrail reduces its pool of qualified employees. Inasmuch as the evidence shows that the average workyear for Conrail's maintenance of way employees is 9.6 months, we believe it appropriate to minimize the extent to which shorter-term employees are employed.

This issue was addressed by PEB 219 for the BMW and the other freight carriers. We believe it would be destabilizing to depart from the recommendation for a guarantee of six months' work and the supplemental unemployment benefit referred to therein.

#### H. PRODUCTION UNITS

##### BMW Position

The BMW proposes that employees assigned to production units engaged in tie renewal, rail renewal, surfacing, and undercutting be afforded meals and lodging during the workweek. It asserts that Conrail has relied on the technicality of production jobs being assigned to a fixed headquarters to avoid the payment of away-from-home expenses to employees who are, in fact, working remote distances from their homes. The BMW would bar the designation of a fictional headquarters point to avoid such payments.

##### Conrail Position

Conrail asserts that under Rule 24(a), employees housed in camp cars or company-provided lodging facilities are furnished three meals per day, and that under Rule 18, Sec. 2, employees taken off assigned territory to work elsewhere will also be provided meals and lodging. However, such benefits are not provided to employees who customarily carry midday lunch and are not held away from their assigned territory for an unreasonable time beyond the evening meal hour. It argues that the only production unit with employees who are not entitled to meals and lodging during the workweek is one with a fixed headquarters, a



situation that occurred only twice in more than three months in 1991. It asserts that employees who work such units do so of their own volition. It represents that the daily cost for such housing and feeding would be approximately \$35 per employee, and points out that it could arguably be applied as well to support forces normally assigned to the territory in which a production unit is working. It urges that the proposal be denied.

#### Recommendation

The evidence shows that employees who are in production units are provided lodging and meals in most cases. However, the evidence also shows a practice of the carrier assigning employees to headquarters which are moved from time to time, resulting in the production units assigned to those transitory headquarters being forced to stay away from home in order to meet their employment responsibilities. We believe that assigning them as crews based at fixed headquarters ignores the reality of the extended periods of their being required by the distance of work sites to stay away from home, and incurring the costs associated therewith.

In the light of these occurrences, and the evidence that production crews do, in fact, remain away from home under such circumstances, we recommend the payment of a \$35-per day allowance to production crews in cases in which the location of their headquarters changes from that in effect at the time of bidding.

## I. COMBINING AND REALIGNING SENIORITY DISTRICTS

### Conrail Position

Conrail proposes that the Board adopt the recommendations of PEB 219 in giving the carrier the option to realign and combine seniority districts. It asserts that the present districts are too many in number and do not match the management territories used to operate the system. It contends that the districts must be changed to conform to the lines of the predecessor railroads now encompassed within its larger transportation system.

### BMWE Position

The BMWE contends that the present system of districts was agreed upon in 1982; that there is no justification for adopting the recommendation of PEB 219; that there has been no demonstration that the Conrail proposal would result in cost savings; and that any problem of imbalance between work and number of employees in seniority districts can be addressed by allowing voluntary transfer of employees. It objects to Conrail's plan to establish a company-wide seniority system under which employees would be forced to compete on a system-wide basis to maintain and hold jobs. Such a practice, it continues, would reduce the value of seniority accumulated on smaller rosters of individual seniority districts, dislocate employees, uproot families, and move homes. It urges that the proposal be denied.

### Recommendation

After reviewing the evidence on this issue, the Board concludes that we lack sufficient information to redraw regional or district lines. Accordingly, we recommend that the parties develop a procedure for dealing with this issue similar to that recommended by PEB 219, namely, that if Conrail desires to combine or realign seniority districts, it should give 30 days' written notice to the

affected employees and the BMW. If the parties are unable to reach agreement within 90 days of serving that notice, the matter may be submitted to arbitration in accordance with a procedure mutually agreeable to them.

## J. REGIONAL AND SYSTEM-WIDE GANGS

### Conrail Position

Conrail asserts its need for relief on regional gangs to permit it fully to utilize expensive and specialized rail production machinery over an extended production season. It argues that continuity of gang consists would enhance gang productivity. It states that artificial territorial barriers slow work and increase cost by reducing employee productivity, create manpower shortages and duplications and disrupt employment and program continuity.

### BMW Position

The BMW claims that the carrier proposal would require employees to work the entire length of the Eastern and Western halves of the Conrail territory in order to hold a production job, and that the need to travel such great distances would curtail the employees' ability to return home on a rest day. It would, it continues, also reduce the likelihood of successful bids on positions near home. In the absence of any persuasive showing of operational need, the BMW urges that the proposal be denied.

### Recommendation

Regional and system-wide gangs are justified on highly technical and expensive equipment being operated by a large number of skilled employees. We therefore recommend that these gangs be used regionally and system-wide. We expect the carrier to share the work among all qualified employees.

## K. WORKWEEK AND REST DAYS

### Conrail Position

Conrail requests authorization to designate any two days in a seven-day week as rest days; to schedule work on the basis of four 10-hour days per seven-day week or other compressed schedule; and to extend the number of days that may be worked consecutively during which period employees would accumulate rest days. It asserts that the national BMWWE settlement gives carriers greater flexibility to schedule weekend work and that it should be permitted comparable relief.

### BMWWE Position

The BMWWE argues that many factors of the national settlement are already included in the parties' present agreement. It contends that the concessionary rules recommended by PEB 219 grant the carriers freedom to vary workweeks without a showing of operational need and constitute an erosion of the basic principles which govern present agreements of all nonoperating crafts. It concludes that abandonment of the current Monday-Friday workweek except in cases of operational need would destroy the forty-hour work rule granted by PEB 66 in 1949.

### Recommendation

Four 10-hour work days would permit the carrier more fully to utilize some gangs. Therefore, we recommend that Conrail's proposal be adopted, with the understanding that at least one rest day be on a Saturday or Sunday. The normal workweek should be five consecutive days, with Saturday or Sunday off. The carrier cannot satisfactorily perform necessary work with all employees having Saturday and Sunday off.

## L. STARTING TIME

### Conrail Position

Conrail seeks the PEB 219 standard in starting times for production crews between 4:00 a.m. and 11:00 a.m., with 36 hour notice of changes and without changes for five consecutive days. PEB 219 did not permit production crews or regular assignments to have a midnight to 4:00 a.m. starting time. It contends that comparative service requirements make it increasingly critical that maintenance of way work be performed at times that do not disrupt train schedules, so that the carrier can perform up to shippers' standards for on-time delivery in the highly competitive transportation industry. It asserts that it has sophisticated computer programs to schedule efficient interfacing of train operations and maintenance work if allowed effectively to coordinate maintenance schedules without penalties when rail traffic is light. The present starting time window of 6:00 a.m. to 8:00 a.m. does not allow the carrier the necessary flexibility to accomplish its goals with the requisite large blocks of uninterrupted time relief granted to other carriers by PEB 219.

### BMWE Position

The BMWE seeks to retain the 6:00 a.m. to 8:00 a.m starting time (5:00 a.m. to 8:00 a.m. from May 1-September 30) or otherwise by agreement. It notes that it has agreed to many adaptations, that the proposed expansion of starting times is onerous; that it would constitute a substantial decline in working conditions, restricting employees time to travel home and increasing risks of injury and accident at night. It urges that because the Conrail proposal has no demonstrable need and destroys negotiated conditions it should be denied.

### Recommendation

The intensity of traffic results in the work of gangs being interrupted and a resultant loss of substantial working time. Maintenance of Conrail's competitive position requires that it have greater flexibility in fixing starting times. Therefore, the Board recommends adherence to the recommendations of PEB 219 and the interpretations thereunder as necessary for the carrier to operate in an efficient and economic manner.

## M. WORKSITE REPORTING

### Conrail Position

Conrail contends that pay time for BMW employees working at any jobsite away from their assigned headquarters, or for those who have no assigned headquarters, should begin and end at the worksite instead of when reporting to headquarters or camp unit, as at present. The carrier points out that unlike virtually all other employees, BMW production employees away from home are paid for nonproductive time spent commuting between the worksite and their lodgings each day. Conrail proposes to end this category of pay for time not worked.

The carrier notes that PEB 219 recommended modification of the rule so that pay time commences at the worksite or the designated reporting site, provided there is adequate off-highway parking at the site. Conrail also notes that the recommendation further provides compensation for commuting time over 15 minutes both to and from the worksite on the first day of change in its location.

### BMW Position

The BMW alleges that Conrail informed it that time paid for traveling to the jobsite currently averages about two hours per day. The organization contends this claim is incredible because

the carrier has the flexibility provided in the 1982 Rules Agreement substantially to reduce any travel time. The BMWWE further points out that there are 10 additional locations which are adequate for maintenance gang headquarters. The Union points out that Management production has the flexibility in the New Jersey seniority district to have camp car employees no further than approximately six miles from the jobsite.

The BMWWE asserts that, from time to time, maintenance of way employees have to travel a long distance from their homes to a motel or a camp car, and then they must deadhead from that temporary lodging to the jobsite. It argues that the proposed changes would eliminate the incentive to keep camp cars close to the work site, and that because employees come to work clean they should be paid until they have cleaned up at the end of their shifts at headquarters or camp cars.

#### Recommendation

The Board has reviewed the findings of PEB 219 and all the evidence submitted by Conrail and the BMWWE. It recommends that the BMWWE production gangs be paid travel time from camp cars and motels to and from the worksite except for 15 minutes going and 15 minutes returning. This should induce the carrier to designate worksite reporting locations which are more convenient to the place of work.

#### N. VACATION RULE

##### BMWWE Position

The BMWWE proposes that full-time union officials be allowed to accrue service for vacation eligibility, rather than having vacation entitlement frozen at the levels in effect when they went to work for the organization. It would make the benefit applicable to any employee who has been on union leave of absence since July

1, 1988, retroactive to the date such leave began. It argues that the current practice imposes an unfair financial impediment on those opting to work for the BMW, and discourages such activity. It notes that the employees affected would still be required to achieve eligibility for vacation on their return to regular employment, and that the proposal would affect only the quantum of vacation entitlement.

The BMW further proposes that employees be entitled to take their vacations in one-day increments. It declares that such a benefit is desirable for employees who need to attend to personal affairs from time to time, noting that the benefit is currently provided to employees on commuter lines.

#### Conrail Position

Conrail objects to both proposals. It argues that the union-business credit would force Conrail to reward an employee with vacation credits even though it gains no benefits from the employee's labor. It asserts the proposal is for a gratuitous advantage and would urge its denial, as well as the denial of the claim for retroactivity.

On the issue of the daily vacation increments, Conrail asserts that the December 17, 1941, National Vacation Agreement does not contemplate taking vacation in less than weekly increments, and this is essential to facilitate the carrier's scheduling of work with expectation of full crews being available for the full workweek.

#### Recommendation

The BMW proposal for continued accumulation of vacation credit while on leave of absence for union business would provide appropriate recognition of the employees' seniority with the



carrier and place them on a vacation level approximating that of their peers who did not go on union leaves of absence. Because Conrail has recognized the continued seniority and employment status of employees on union leave of absence, and because entitlement to such vacation in any particular year is dependent on the employee's fulfillment of the work requirements for eligibility that year, we recommend that the benefit be adopted, but without the retroactivity proposed by the BMWWE.

On the issue of single-day vacation increments, we do not believe the BMWWE has presented a persuasive case. Vacation, particularly for those who spend such extended periods away from home, should be taken for its avowed purpose: to provide extended periods of rest and rehabilitation with families, at home, and away from work. Employees currently have available two personal days for purposes addressed in the BMWWE proposal. Vacation periods, we believe, should be confined to five-day increments. The BMWWE proposal on this issue should be withdrawn.

#### O. WORKING FOREMEN

##### BMWWE Position

The BMWWE urges restriction of foremen to supervisory duties and elimination of that part of the scope rule which states that the "foreman works with employees assigned under his supervision." The BMWWE takes the position that Conrail has stretched the flexibility in the scope rule far beyond the intentions of the parties when they negotiated the rule. The organization accuses Conrail of undermining the seniority system by transferring job duties to the foreman classification.

### Conrail Position

Conrail contends that if the BMWWE proposal were adopted, it would be forced to add a variety of employees, such as vehicle operators, machine operators, and trackman. Conrail estimates the cost would be approximately \$30 million.

### Recommendation

The Board has reviewed the testimony and evidence submitted by the BMWWE and finds no basis for altering the traditional concept of foremen as working formen. To do so would restrict the number of employees in the classification, as well as access of bargaining unit employees to the greater authority and better wages that the present foreman classification provides. The proposal should be withdrawn.

## P. SAFETY

### BMWWE Position

The BMWWE proposes that Conrail enter into an agreement with it concerning workplace safety. The proposal includes creation of a joint labor-management health and safety committee, which would meet monthly and make inspections of the railroad each month. Under the proposal, Conrail would pay BMWWE-represented employees for their committee work.

### Conrail Position

Conrail contends that the BMWWE proposal is a more detailed version of the safety program that the national BMWWE proposed to PEB 219. On that basis Conrail urges that this Board should recommend that Conrail and the BMWWE adopt a national settlement in all respects, including a moratorium on proposals regarding safety programs. Further, Conrail points to the fact that in mid-1988 it introduced a new safety program, based on joint labor/management

participation and cooperation involving all crafts. Conrail states that this program has produced measurable increases in employee safety, particularly for BMWWE employees, whose injury rate is only about 25 percent of what it was in 1988.

#### Recommendation

The Board has studied and considered all of the evidence submitted by both parties. We are of the opinion that the evidence is insufficient to justify recommending any modification of the present safety program. Therefore, we recommend that the BMWWE proposal be withdrawn.

#### Q. SAFETY SHOES

#### BMWWE Position

The BMWWE proposes the payment of \$200 in January of each year to reimburse the employees for the cost of safety shoes for the year. It asserts that the figure represents the true cost of such shoes and that the \$30 per year currently provided for the purchase of two pairs of shoes is inadequate.

#### Conrail Position

Conrail objects to the BMWWE proposal on the grounds that it is merely a cash advance, with no correlation to the cost of the shoes, and that it constitutes an increase of well over 500 percent beyond the present allowance.

### Recommendation

We believe the present allowance of \$30 for two pairs of safety shoes is inadequate in light of cost increases since that figure was agreed upon. An increase in the allowance to \$60 per year for the purchase of two pairs of safety shoes is more reasonable. We recommend accordingly.

### R. MEAL PERIODS

#### BMWE Position

The BMWE proposes a first meal period between the fourth and fifth hour of the advertised tour of duty to stabilize and regularize the employees' workday by providing a regular meal period without an inordinately long unbroken period of work. It also seeks a second meal period in conjunction with overtime work at such time as would prevent the carrier from manipulating overtime work for its avoidance. The BMWE asserts that a regularized meal period at the fourth hour of work is reasonable in light of the physical exertion and exposure to the elements which characterizes maintenance of way work. It argues that employees are entitled to a reasonable break for rest as well as eating, and that the three-hour window between the fourth and seventh hours set forth in the PEB 219 recommendations is an unfair deprivation of such a break.

#### Conrail Position

Conrail asserts that the existing meal period between the fourth and sixth hours should be retained; that the one-hour window proposed by the BMWE is extremely small and disruptive to its work and scheduling demands.

### Recommendation

The BMWWE proposal for a lunch period between the fourth and fifth hour of the advertised tour of duty is, we believe, unreasonably short to accommodate the scheduling of work so that all employees are able to benefit from it. We believe that the scheduling of meals between the fourth and sixth hour of the tour is a more reasonable time period to schedule employees so that they can benefit from it. We recommend that an additional meal period be provided for those on overtime assignment five hours after their lunch meal.

### S. TRAVEL ALLOWANCE

#### BMWWE Position

The BMWWE proposes an increase in the weekend travel allowance from the current \$6.00 per trip for Division Units and \$7.50 per trip for Inter Regional Units to \$25 per trip for Division Units and \$40 per trip for Inter Regional Units. It asserts that its proposal would more fully compensate the actual out of pocket expense incurred by employees who must travel far from home to work such jobs.

#### Conrail Position

Conrail asserts that the present level of allowance is adequate; that the proposed increases of 316.6 percent and 433.3 percent are not justified by cost of living increases; and that the payment of allowances is a benefit extended by Conrail to maintenance of way employees provided under the agreements in effect on the other railroads.

### Recommendation

Although there have been increases in the cost of travel since the existing Rule-23 allowances were agreed upon, those increases have not been sufficiently great to justify fully the augmented allowances here sought by the BMWÉ. We recommend an increase in the allowance to \$10 per trip for Division Units and \$12 per trip for Inter Regional Units. These adjustments would make up for any increased travel costs since the existing figures were negotiated.

### T. CAMP CAR

#### BMWÉ Position

The BMWÉ proposed an amendment to Rule 38 of the collective bargaining agreement which would eliminate the top bunk in all camp cars, and limit to a maximum of five the number of employees housed in any single camp car, with penalties for violations. The BMWÉ contends that at present 10 employees are required to live in a total space of 9 feet 10 inches by 42 feet, or an approximate total of 420 square feet. Further, it points out that such space is not unencumbered, but includes bunks, toilets, sinks, showers, furnace, etc. The organization urges this Board to recommend a standard that would provide 30 square feet of unencumbered space for each employee.

#### Conrail Position

Conrail advises that the Federal Railway Administration (FRA) is directly responsible for the enforcement of the Hours of Service Act, which provides, among other things, that it is unlawful for a railroad to house its employees in sleeping quarters which are not safe, sanitary, and clean. Conrail states that the FRA has issued an interpretation statement and guidelines, effective January 1, 1994, which include specific space requirements for each person,

i.e., a minimum of 90 square feet in a facility where workers cook, live, and sleep, 48 square feet of floor space for each occupant of sleeping quarters, and window space equal to not less than 10 percent of the floor space for living quarters; also, there must be at least 36 inches laterally and 30 inches end to end between each bed or bunk. Conrail states that it is already in full compliance with the above standards, as well as with the FRA standards requiring all sleeper cars to be equipped with climate control systems. Conrail adds that if the proposed amendment went into effect, it would be compelled to acquire 23 new camp cars, at a cost of approximately \$1.5 million. Finally, the carrier points out that Rule 38(d) of the collective bargaining agreement provides for joint inspection of the camp cars to correct any improper conditions prior to the start of the production season.

#### Recommendation

The Board finds the evidence is insufficient to require standards in excess of those set by the FRA, but does recommend that if all the FRA's standards are not now in place, they should be effectuated by January 1, 1993.

#### U. MORATORIUM

We recommend a moratorium period for all matters on which notices might properly have been served when the last moratorium ended on July 1, 1988, to be in effect through January 1, 1995. Notices for changes under Section 6 of the Railway Labor Act accordingly may be served by any of the parties or another party no earlier than November 1, 1994.

## VII. ISSUES NOT DEALT WITH

Any and all issues in dispute before this Emergency Board on which there are no recommendations, or which are not mentioned in this Report, shall be deemed withdrawn.

## VIII. CONCLUSION


These recommendations represent our best judgement on the merits and equities of the issues in dispute. They also represent our estimate of a fair and realistic package of conditions, benefits, and benefit changes that, as a totality, should provide a basis for an acceptable, overall settlement.

We think it would be unrealistic and a costly exercise in futility for all concerned if our total recommendations did not take into consideration, as a critical ingredient, their acceptability by the parties. Nevertheless, we think it impracticable to ask that the parties adopt these recommendations unconditionally and without modification. As the Railway Labor Act does not make them binding, we expect that the parties will make adjustments as needed, or if necessary, subject them to major revision. In any case, we hope that we have provided a well-marked road map for good faith use by the parties in completing their contracts through the process of free collective bargaining. We express to the parties our profound thanks for the intelligent, comprehensive, and professional presentation of their cases and for their patience and cooperation with our procedures. We also



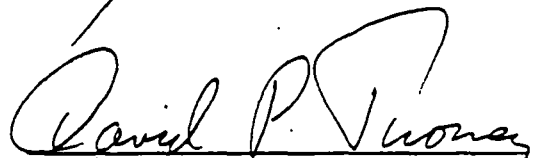
acknowledge with thanks the assistance of Roland Watkins, the  
Special Assistant to the Board.


Respectfully,

  
Benjamin Aaron, Chairman

  
Preston J. Moore, Member

  
Eric S. Schmertz, Member

  
David P. Twomey, Member

  
Arnold M. Zack, Member

## EXECUTIVE ORDER

- 12795 -

ESTABLISHING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE  
BETWEEN THE CONSOLIDATED RAIL CORPORATION AND ITS EMPLOYEES  
REPRESENTED BY THE BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES

A dispute (NMB Case No. A-12260) exists between the Consolidated Rail Corporation and its employees represented by the Brotherhood of Maintenance of Way Employees.

This dispute has not been adjusted under the provisions of the Railway Labor Act, as amended (45 U.S.C. 151-188) ("the Act").

In the judgment of the National Mediation Board, this dispute threatens substantially to interrupt interstate commerce to a degree that would deprive various sections of the country of essential transportation service.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States, including section 10 of the Act, it is hereby ordered as follows:

Section 1. Creation of Emergency Board. There is created, effective April 3, 1992, a board of five members to be appointed by the President to investigate this dispute. No member shall be pecuniarily or otherwise interested in any organization of railroad employees or any railroad carrier. The board shall perform its functions subject to the availability of funds.

Sec. 2. Report. The board shall report to the President on May 3, 1992, with respect to this dispute.

Sec. 3. Maintaining Conditions. As provided by section 10 of the Act, from the date of the creation of the board and for 30 days after the board has submitted its report to the President, no change in the conditions out of which the dispute arose shall be made by the railroads or the employees, except by agreement of these parties.

Sec. 4. Expiration. The board shall terminate upon the submission of the report provided for in section 2 of this order.

THE WHITE HOUSE,

March 31, 1992.

A handwritten signature in dark ink, appearing to read "G. Bush", is positioned to the right of the typed text.