

STATEMENT OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT REGARDING RECTIFICATION OF INTRA-CARRIER RATE INEQUITIES ON RAIL CARRIERS CONTROLLED BY NORFOLK SOUTHERN

The Brotherhood of Maintenance of Way Employees Division, International Brotherhood of Teamsters ("BMWED")¹ proposes a process to remedy the serious problem of intra-carrier rate inequity between comparable positions that currently exists on carriers controlled by Norfolk Southern ("NS"). Our proposal would establish an orderly process to bring all positions under various BMWED collective bargaining agreements ("CBA") to the highest negotiated rate paid to that position under any CBA applicable to an NS-controlled rail carrier. Such a result would put NS maintenance of way employees on an equal footing with employees at CSX and Burlington Northern Santa Fe ("BNSF"), which apply a single rate of pay to positions system-wide and eliminate internal rate inequities that can have employees literally working side by side in identical positions yet receive different rates of pay for their work.

BMWED's proposed resolution to this dispute is the following:

1. Within thirty (30) days of the effective date of the agreement, BMWED and NS shall meet and attempt to agree voluntarily on those positions which are identical and assign the highest negotiated rate to those positions regardless of which CBA the position works under.

¹ BMWED merged with the International Brotherhood of Teamsters on January 1, 2005. Prior to that, the union was called the Brotherhood of Maintenance of Way Employees ("BMWE"). References in this submission to "BMWE" refer to events prior to January 1, 2005.

2. If the parties cannot agree on a disposition of all the positions currently listed under each CBA within thirty (30) days of commencing negotiations under Paragraph (1) above, the BMWED may invoke binding arbitration to determine the rate of the remaining positions in dispute.
3. Arbitration will be conducted before an arbitration panel convened under Section 3 Second of the Railway Labor Act consisting of a Union member, a Carrier member and a third, Neutral member selected by alternate strike from a list provided by the National Mediation Board.
4. The arbitration panel will operate under the following rules:
 - (a)The panel shall hold hearings within thirty (30) days after its establishment.
 - (b)Parties may be represented by counsel and may present argument and evidence in written form through pre-hearing submissions to the panel.
 - (c) In determining whether or not a position is identical to another, the panel shall adopt the presumption that similarly titled positions are identical and entitled to the highest negotiated rate of pay for that position. This presumption is rebuttable by a showing of material differences between the positions established by a preponderance of the evidence.
 - (d)The panel's awards shall be in writing and shall be issued within thirty (30) days of the date of the hearing.

5. All wage adjustments made under this process shall be retroactive to the first general wage increase provided in the current agreement.

HISTORY OF THE DISPUTE

NS is the product of numerous railroad mergers beginning, for our purposes in the 1950's. Those mergers largely resulted in the preservation of rates of pay from the predecessor railroads which are now embedded in three collective bargaining agreements which apply to NS-controlled carriers. Those CBAs are the Norfolk & Western-BMWED ("N&W CBA"); Southern-BMWED ("Southern CBA") and Conrail-BMWED ("Conrail CBA").

In 1959, the N&W merged with the Virginian. The Virginian CBA no longer exists, but pay rates applicable to Virginian locations continue to be represented in the N&W CBA. In 1964, N&W acquired the operations of both the Nickel Plate and Wabash railroads. The Wabash and N&W CBAs were integrated, effective July 1, 1986. That integration provided for the preservation of "Wabash" rates of pay at certain locations, although the former N&W and Wabash territories would operate under a single collective agreement.

The Southern engaged in fewer mergers involving smaller carriers during the same period. The Interstate and Central of Georgia were acquired by the Southern and those roads were placed under the Southern CBA.

In 1982, the N&W and Southern merged. At that time, the carrier operated under four CBAs reflecting the pre-merger roads: BMW-E-Wabash; BMW-E-N&W; BMW-E-Nickel Plate and BMW-E-Southern. As will be noted below, the Nickel Plate CBA was integrated into the N&W CBA in 2000 and as noted previously, the Wabash CBA was integrated in 1986.

In 1998, NS and CSX applied for Surface Transportation Board approval of their joint acquisition, and subsequent division, of the railroad assets of Conrail. This transaction was complex, and from BMWED's perspective, created an acrimonious end to a rail carrier that had succeeded due to the financial sacrifices and productivity gains of its employees.

The Conrail transaction involved NS and CSX each obtaining a 50% voting interest in a holding company, CRR Holdings, they created to acquire Conrail. CSX—Control—Conrail, 3 S.T.B. 196, 220 (1998).² The CRR Holdings' assets were divided into two companies, New York Central Lines ("NYC") and Pennsylvania Lines LLC ("PRR"). NS had exclusive authority to appoint the officers and directors of PRR. Id. at 221. The PRR properties comprised about 58% of the pre-acquisition Conrail rail assets. Additionally, three "Shared Assets Areas" located in New Jersey and Michigan would continue to be operated by CRR Holdings. These areas are called the Conrail Shared Assets Areas ("CRSA"). The STB conditioned approval of

² Relevant excerpts from CSX—Control—Conrail are reproduced as Appendix "N" in the separately bound volume of BMWED Appendices.

the transaction by imposition of the standard New York Dock employee protective conditions.

BMWED, NS and CSX were unable to reach a voluntary implementing agreement under Article I, Section 4 of the New York Dock conditions. They presented their dispute to NMB-appointed Arbitrator William Fredenberger in a hearing conducted between December 15 and 18, 1998.³ On January 14, 1999, Arbitrator Fredenberger issued an award that both allocated existing Conrail maintenance of way forces to one of CSX, NS or CRSA and determined which CBA would apply to the former Conrail territories acquired and directly operated by NS and CSX. Pursuant to the terms of that Award, Conrail employees transferred to NS would be placed in a new "Northern Region" under the N&W CBA. Unlike prior integrations involving the Virginian and Wabash, the existing Conrail rates of pay would not be carried over to positions in the Northern Region. Award at 11- 14. Instead, rates of pay for those positions were the ones currently in place for employees working under the standard N&W CBA.⁴ While the CRSA remained

³ Also participating in the arbitration were the following unions: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; Brotherhood Railway Carmen Division - Transportation•Communications International Union; International Brotherhood of Electrical Workers; National Conference of Firemen and Oilers; International Association of Machinists and Aerospace Workers; and Sheet Metal Workers' International Association. Those unions were involved because some job classifications working under the BMWED-Conrail CBA were represented by them under the applicable NS and CSX CBAs.

⁴ As a result, most BMWED-represented former Conrail employees transferred to NS and placed under the N&W CBA became "displaced employees" under the New York Dock conditions. Those employees received displacement allowances from June 1, 1999 until May 31, 2005. Thereafter, the employees' rates of pay reverted to those applicable to the Northern Region under the N&W CBA.

under the Conrail CBA, the Arbitrator permitted NS and CSX production crews working under other CBAs to enter onto CRSA properties and perform production maintenance work and other projects the remnant CRSA workforce could not perform. Id. at 14.⁵ NS and CSX consummated the operational division of Conrail on June 1, 1999.

Subsequently, on February 21, 2000, NS entered into an implementing agreement under Article XI of the BMWED-NCCC Imposed Agreement of February 6, 1992, integrating the former Nickel Plate territories into the N&W. As a result of this implementing agreement the BMWED-Nickel Plate CBA was extinguished. However, Section V(A) of that agreement expressly preserved the Nickel Plate rates of pay for positions established on former Nickel Plate territory now under the N&W CBA. This agreement left the Conrail employees transferred to NS, the only group of employees who did not carry their rates of pay under their former agreement to positions established under the N&W agreement.

In 1999 and again in 2004, BMWED served notice on the carriers involved in national handling seeking to eliminate intra-carrier rate inequities created by the merger and consolidation process. In both rounds of bargaining, the BMWED proposal was withdrawn as part of the final settlement.

⁵ A copy of the Fredenberger Award is reproduced as Appendix "O" in the separately bound volume of BMWED Appendices.

BMWED'S PROPOSAL SEEKS EQUALITY OF TREATMENT FOR EMPLOYEES PERFORMING THE SAME WORK THROUGHOUT THE CARRIER

Section 10 of the Railway Labor Act charges this Board only with the duty to investigate and report on the dispute to the President. However, such reports historically have included suggested terms for a voluntary settlement based upon the parties' presentation of the issues in dispute to the Boards. Therefore, although the Board's report is not binding upon the parties, and indeed is not required to be distributed to the public, the conventional operation of an Emergency Board is that its report is made public and that report suggests what the Board believes is a fair resolution of the parties' dispute. In other words, a modern Board functions as a quasi-interest arbitration panel. BMWED submits that application of standard interest arbitration principles to its proposal and the evidence in support of it, fully justify this Board recommending the parties adopt BMWED's rate equity proposal. Moreover, the treatment of a similar issue by Presidential Emergency Board No. 229 ("PEB 229") provides additional support for BMWED's position and provides guidance to this Board on how to fashion an appropriate recommendation.

Today, the BMWED administers three CBAs on NS-operated or controlled rail lines: The N&W CBA; the Southern CBA and the Conrail CBA. Each agreement provides a separate rate of pay for job positions that are identical across the carrier's entire system. Indeed, the N&W CBA often contains multiple rates of pay for the same position, a distinction often made due to the "origin" of the position under prior CBAs and not based upon the position's current duties and responsibilities. The following discussion will focus on three common positions

within the Track Department: Section Foremen, Ballast Regulator Operators and Trackmen. Additionally, each discussion will include the CSX single rate paid to the position so the Board has a frame of reference regarding rates of pay on NS's major Eastern competitor.⁶

A Section Foreman is the individual who supervises and works with a "section" gang. Section gangs are small, usually containing between 2 and 4 additional employees. Section gangs are assigned to fixed headquarters and are responsible for the day to day maintenance and repair of an assigned "section" of the carrier's rail lines. Section gangs do not travel. Except in unusual situations, the gang reports to the same headquarters each working day and performs service on its assigned "section." These gangs differ substantially from the much larger, heavily mechanized and mobile gangs that perform capital maintenance or construction work. As these positions all work on carriers controlled by NS, the training of these employees follows a common standard and the positions also are subject to the minimum standards set forth at 49 C.F.R. 213.7. No credible argument can be made that a Section Foreman position under the Southern CBA is materially different from a Section Foreman position under either the N&W or Conrail CBAs.

Although the Section Foreman position may be identical across the railroad regarding matters of skill, training and responsibility, the rates of pay are not. The following table shows the variation in rates paid to section foremen:

⁶ The rates sheets for each CBA referenced herein are Exhibit 1 to this Statement.

JOB TITLE	AGREEMENT	RATE OF PAY
Foreman	BMWED-Southern	\$23.36
Foreman (Altavista, VA)	BMWED-N&W	\$23.36
Foreman (Bluefield, WV)	BMWED-N&W	\$23.51
Foreman (Payne, VA)	BMWED-N&W	\$23.73
Foreman (Adrian, MI)	BMWED-N&W	\$23.85
Foreman (Bloomington, IL)	BMWED-N&W	\$23.54
Foreman (Gibson City, IL)	BMWED-N&W	\$23.47
Foreman (Luther, MO)	BMWED-N&W	\$23.24
Foreman (Northern Region - ex-Conrail)	BMWED-N&W	\$23.36
Foreman (Ashtabula, OH)	BMWED-N&W	\$23.82
Foreman (Bellevue, OH)	BMWED-N&W	\$23.96
Foreman (Bluffton, IN)	BMWED-N&W	\$23.54
Foreman (Campbell Road, OH)	BMWED-N&W	\$23.67
Foreman	BMWED-Conrail	\$24.20
Basic Track Foreman	BMWED-CSX	\$24.33

The table demonstrates that the rate paid under the Southern CBA is up to 60 cents per hour less than that paid under the N&W CBA. Even more disparate is the rate paid in the Northern Region to ex-Conrail employees at former Conrail locations, such as Cleveland, Ohio that are 46 cents per hour less than their counterpart at Ashtabula working under the same CBA some 55 track miles away. Significantly, the rate of pay for a CSX Basic Track Foreman is 13 cents per hour *higher* than the highest negotiated NS rate under the Conrail CBA.

Our next table concerns a common piece of self-propelled on-track machinery – the ballast regulator. Essentially, the function of a ballast regulator is to shape and contour the rock ballast providing support and drainage to the rails and cross-ties. A ballast regulator usually works behind a tamper, shaping and cleaning up the ballast distribution after the tamper has properly placed ballast

around and under the cross-ties. As such, the ballast regulator is the quintessential workhorse machine that is part of any mechanized surfacing gang.

JOB TITLE	AGREEMENT	RATE OF PAY
Ballast Regulator	BMWED-Southern	\$22.79
Ballast Regulator (East)	BMWED-N&W	\$22.68
Ballast Regulator (West)	BMWED-N&W	\$23.53
Ballast Regulator (NKP)	BMWED-N&W	\$23.31
Ballast Regulator (North)	BMWED-N&W	\$22.68
Machine Operator Class 2	BMWED-Conrail	\$23.67
<i>Machine Operator "A"</i>	<i>BMWED-CSX</i>	<i>\$24.30</i>

Here we have identical machines receiving a difference in rate of almost \$1.00 per hour, or over \$2000 per year between the CRSA ballast regulator operator and a former Conrail employee now working in the Northern Region under the BMWED-N&W CBA. Indeed, there are four different rates paid to ballast regulator operators under the BMWED-N&W CBA based entirely on the accidental nature of the position's geographic location. Again, the CSX rate paid to this identical position is 63 cents per hour *higher* than the highest negotiated rate on the NS controlled properties.

The position of Trackman (sometimes called "Laborer") is the "entry level" position in the Track Department. The Trackman provides laboring assistance to the section gang and, if required, may perform the work of other positions, but in such instances is paid the rate of that position when performing the work.

JOB TITLE	AGREEMENT	RATE OF PAY
Laborer	BMWED-Southern	\$21.03
Trackman (Altavista, VA)	BMWED-N&W	\$21.16
Trackman (Bluefield, WV)	BMWED-N&W	\$21.30
Trackman (Buena Vista, VA)	BMWED-N&W	\$21.21
Laborer (Adrian, MI)	BMWED-N&W	\$21.30
Laborer (Bloomington, IL)	BMWED-N&W	\$21.36
Laborer (Decatur, IL – sec. 27)	BMWED-N&W	\$21.18
Laborer (Decatur, IL – sec. 24 & 67)	BMWED-N&W	\$21.30
Laborer (Fort Wayne, IN)	BMWED-N&W	\$21.74
Laborer (Kirksville, MO)	BMWED-N&W	\$21.16
Laborer (Campbell Road, OH)	BMWED-N&W	\$21.42
Trackman Section	BMWED-Conrail	\$20.82
Basic Trackman	BMWED-CSX	\$21.52

Again, we have a single agreement, the N&W CBA, which pays ten different hourly rates to a Trackman assigned to a section gang. On the NS owned or controlled property, a 71 cent per hour difference exists for the same position. In this case, the highest negotiated NS rate actually is 22 cents per hour *higher* than the CSX rate.

The foregoing tables show that rates paid to the same position vary widely across the NS system. Moreover, two of the three positions identified are paid less than the comparable position on CSX, NS's major competitor in the eastern half of the United States and would remain so even if BMWED's proposal was adopted. What has evolved through a series of mergers, consolidations and acquisitions since the 1960's is a rate structure on NS that makes no internal sense whatsoever.

Obviously, the most graphic evidence for this proposition lies within the N&W CBA where there are ten different rates of pay for both Section Foremen and Trackmen.

In Pan Am World Services, 93 Lab. Arb. (BNA) 348 (1989)⁷, the interest arbitrator was charged with determining the overall wage package for contractor employees working at a university facility. In that proceeding, the union challenged the continuing validity in differing rates of pay between “construction” and “maintenance” pipefitters. The arbitrator agreed with the union’s premise that the two positions were interchangeable and entitled to the same hourly rate of pay, observing:

The evidence in the record establishes that there is no basis in relative skill or ability, or in the types of tasks to be performed, to justify a real differential in compensation between the two groups. Also there is no significant difference in the stability of their employment and employees often move interchangeably between the two types of work. The facts therefore support a parity determination of the two wage levels.

We submit the same consideration applies here. The positions highlighted here: Section Foreman, ballast regulator operator and Trackman are, essentially, the same positions wherever they assigned. The Section Foreman is a first-level supervisor who must meet minimum federal requirements to hold the position; is required to supervise a small gang of employees; and is responsible for the basic maintenance of an assigned portion of the carrier’s track. The only differences, geography and the precise mix of the employees in the gang, are trivial and do not

⁷ Pan Am World Services is reproduced as Appendix “P” in the separately bound volume of BMWED Appendices.

support an argument that the position of Section Foreman is not identical across the system. A ballast regulator operator performs the same job function on the same piece of equipment throughout the carrier's system. A Trackman is the entry level position in the Track Department, whether located in Ohio or Alabama. Virtually every Section Foreman began his or her railroad career as a trackman and employees in those classifications sometimes bid back and forth between those positions. A similar analysis can be made for every position subject to the BMWED agreements across the NS property. We challenge the carrier to refute this proposition.

We submit the foregoing establishes an internal inequity at NS regarding rates of pay paid to positions because employees are performing the same work, yet receiving a different rate of pay for the work based upon the accident of geography. This situation is one that creates a "sense of grievance" among employees working for the same employer, yet receiving disparate treatment based largely on geography. See, County of Carlton, 104 Lab. Arb. (BNA) 773 (1995).⁸ The remaining question for this Board is fashioning a remedy for the inequity.

PEB 229 confronted a similar issue in 1996 involving BMWED and the NCCC. In that dispute, BMWED sought an equity wage adjustment for all rates of pay on all carriers. The essence of the BMWED's case was the following. The relative position of rates for positions in the maintenance of way department *vis-à-vis* other

⁸ County of Carlton is reproduced as Appendix "Q" in the separately bound volume of BMWED Appendices.

railroad crafts originally was the product of General Order No. 1 issued in 1918 by the Director General of U.S. Railroads. At the time, the maintenance of way crafts were “pick and shovel” operations where a large number of employees using hand tools performed the work of laying and maintaining the nation’s rail network. Indeed, as late as 1980, about seventy per cent of the maintenance of way occupations were Trackmen and other “entry level” positions. BMWED demonstrated that by 1994, the number of Trackmen and other entry level positions had fallen to less than forty per cent of the total maintenance of way group as skilled machine operator, welder, foreman and other jobs became a majority of positions worked in the maintenance of way department. Moreover, while those skilled positions paid higher rates than trackmen positions, the rates paid to the positions still reflected the general inequities of General Order No. 1. (*Wage Issues – Summary Statement Vol. I* at 22-32 (Employees’ Exhibit No. 4 to PEB 229)).⁹

BMWED’s proposed solution to the rate inequity issue was an across the board raise of \$1.07 in addition to any general wage increases to rectify this historical inequity. PEB 229 Report at 6. PEB 229 noted the NCCC opposed the request, arguing that the existing rate structure “has fully responded to the increased mechanization and skill required of maintenance of way employees...” *Id.* at 7.

⁹ The relevant portion of BMWED’s Statement to PEB 229 is reproduced as Appendix “R” in the separately bound volume of BMWED Appendices.

PEB 229 made several recommendations regarding the equity rate issue. Regarding BMWED's request for a blanket \$1.07 wage increase for all classifications, the Board found that BMWED's job study regarding classifications "did not establish its asserted purpose." However, the Board concluded that "from the total record before us that indeed seventy percent of the craft do presently work in skilled positions and that this 70 percent group is entitled to a \$.50 per hour skill differential." Report at 30. Moreover, the Board found two instances of inter-craft rate inequities where BMWED members performed identical work yet received lower pay. Those two positions "and other intercraft inequities that the parties can agree on should be corrected at the actual rate differential, if higher than the \$.50 per hour differential." *Id.* at 31.¹⁰

Subsequently, the parties agreed to provide all BMWED-represented classifications with a \$.35 per hour increase on the effective date of the agreement and another \$.21 per hour increase on January 1, 2000. September 26, 1996 National Agreement, Article III (a) and (b). Side Letter No. 5 to that Agreement obligated the BMWED to notify the carriers of any positions "in which an employee represented by the organization holds a position on a property that performs the same work as a member of another craft n the same property but is compensated at a rate of pay more than fifty (50) cents per hour lower." Such rate inequities were to be resolved by raising the BMWED rate to the other craft's rate or applying

¹⁰ Excerpts of the PEB 229 Report are Exhibit 2 to this Statement.

a \$.50 differential for all hours worked. If the parties could not agree on the identity of such positions, the matter was to be referred to a Public Law Board established under Section 3 of the Railway Labor Act.¹¹

We submit our proposal here is based on the framework established by PEB 229 and the parties' agreement in 1996. We seek an acknowledgement from the Board that the inequities in rates on NS-controlled properties should be resolved in a fashion favorable to the employees. If such acknowledgement is received, our proposal provides the means for implementing the Board's conclusion without involving the Board in the actual setting of any rate or resolution of disputes concerning whether or not the differences between positions are "material" to the extent they are not identical.

We use the term "identical" here because some although some positions use a different nomenclature based on historical bargaining to describe the position, the actual differences, if any, between the positions across CBAs is trivial. One example is an Assistant Foreman in the Bridge & Building Department. The majority of those positions are called "Assistant Foreman;" however, on the Western Region of the N&W CBA, the position is called a "Lead Carpenter." The job duties, skill set and responsibilities are the same, the title is the only difference.

However, we do not ask this Board to resolve such issues here. Instead, what we seek is the Board's finding that there is an intra-carrier rate inequity on NS

¹¹ The relevant portions of Article III and Side Letter No. 5 are Exhibit 3 to this Statement.

that should be remedied. We believe we have demonstrated the existence of that inequity. The remedy should be the application of the highest negotiated rate of pay for the position to all comparable positions system wide. The mechanics of that application and the determination of which positions are entitled to the highest negotiated rate is one left to the parties to determine in the first instance, and if the parties cannot resolve their dispute, a neutral will accomplish that task.