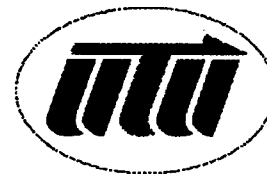


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# **united transportation union**



GENERAL COMMITTEE of ADJUSTMENT GO-386  
*Burlington Northern Santa Fe Railroad and Montana Western Railroad*

Of Counsel  
M. M. WINTER

April 27, 1999

All Local Chairpersons  
UTU General Committee GO-386  
Burlington Northern Railroad

Re: Road Switcher  
Arbitration Board 567

Dear Gentlemen:

In regards to the above reference, please note the enclosed award as rendered by Neutral Charles P. Fischbach.

The award and included arbitrated agreement become effective May 1, 1999. The award follows the language and contents of the agreement ratified by former Great Northern Conductors. The award includes all attendant side letters including side letter 3 which sets a minimum daily rate higher than five (5) day yard rate.

The undersigned, with the assistance of Vice President R.L. Marceau, sought to improve the proposed brakemans rule to a least the conditions proposed by the Organization at the initial conference. The assigned Neutral, however, determined the rules of both Conductors and Brakemen should be compatible and so found.

The enclosed award thus completes the process as initiated by Carrier under Article VII, of the October 31, 1985 National Agreement.

The enclosed award should be maintained in your files and posted for your members. Further, it should be anticipated Carrier will move to establish road switcher assignments under both the agreed to and arbitrated provisions.

With best wishes, I am,

Yours truly,-

  
J.D. Fitzgerald  
General Chairman

JDF/aas

Enclosure

BEFORE ARBITRATION BOARD NO. 567

\_\_\_\_\_  
IN THE MATTER OF THE ARBITRATION BETWEEN: )

BURLINGTON NORTHERN SANTA FE )  
RAILWAY COMPANY )

and )

UNITED TRANSPORTATION UNION )  
\_\_\_\_\_ )

) PURSUANT TO  
) ARTICLE VII, SECTION 2  
) OF THE OCTOBER 31, 1985  
) NATIONAL AGREEMENT  
)  
) OPINION AND AWARD

Pursuant to the terms and procedures of Article VII, Section 2 of the October 31, 1985 National Agreement, the Burlington Northern Santa Fe Railway Company (hereinafter "Carrier" or "BNSF") and the United Transportation Union (hereinafter "Organization") selected Charles P. Fischbach as Arbitrator of Arbitration Board No. 567 to resolve a dispute between the parties over the establishment and implementation of a Road Switcher Agreement governing the working conditions for brakemen employed in road switcher service on the former Great Northern territory of the merged BNSF system.

At the direction of the Arbitrator, the parties filed their respective Submissions and exhibits prior to the hearing. The arbitration was held in Chicago, Illinois on February 16, 1999, at which the parties were afforded an opportunity to present oral and written evidence, and to make such arguments as deemed relevant to the instant matter. Following the presentation of this case, the arbitral proceeding closed.

APPEARANCES

For the Carrier:

Mr. R. L. Luther, Director, Labor Relations

For the Organization:

Mr. R. L. Marceau, Vice President

Mr. J. D. Fitzgerald, General Chairman

ISSUE

The parties stipulated at the arbitral proceeding that the issue to be resolved in this dispute is as follows:

What shall be the working conditions for brakemen employed in road switcher service on the former Great Northern territory of the merged BNSF system under a Road Switcher Agreement established in accordance with Article VII, Section 2 of the October 31, 1985 National Agreement?

PERTINENT CONTRACT PROVISIONS

The following contract provisions of the October 31, 1985 National Agreement are most directly related to the instant dispute:

ARTICLE VII - ROAD SWITCHERS, ETC.

\* \* \* \*

Section 2 - New Road Switcher Agreements

(a) Carriers that do not have rules or agreements that allow them to establish road switcher assignments throughout their system may serve a proposal for such a rule upon the interested general chairman or chairmen. If agreement is not reached on the proposal within 20 days, the question shall be submitted to arbitration.

(b) The arbitrator shall be selected by the parties or, if they fail to agree, the National Mediation Board will be requested to name an arbitrator.

(c) The arbitrator shall render a decision within 30 days from the date he accepts appointment. The decision shall not deal with the right of the carrier to establish road switcher assignments (such right is recognized), but shall be restricted to enumerating the terms and conditions under which such assignments shall be compensated and operated.

\* \* \* \*

STATEMENT OF FACTS

The Carrier's desire to establish a rule for road switcher service on the former Great Northern territory can be traced to a proposal submitted with a Section 6 Notice it served on the Organization on May 26, 1981 pursuant to the Railway Labor Act. Based on this proposal, the Carrier sought the unilateral right to establish road switcher assignments (where it did not have that right) which would not be assigned to more than 50 miles of territory. Under this proposal, such assignments would be: (a) assigned five, six or seven days per week; (b) paid on a daily basis with overtime after eight hours but not subject to any initial, final or intermediate

terminal/point delay or switching pay rules; and (c) permitted to move back-and-forth and in-and-out of any terminal/point as many times as may be needed to perform their work. This proposal did not come to fruition because the parties were unable to reach a mutually acceptable accommodation for a road switcher rule on the former Great Northern territory. While this initiative remained dormant on the Carrier's property, the National Agreement of October 31, 1985 provided for the negotiation of new road switcher agreements. Specifically, Article VII, Section 2 of the National Agreement stated:

- (a) Carriers that do not have rules or agreements that allow them to establish road switcher assignments throughout their system may serve a proposal for such a rule upon the interested general chairman or chairmen. If agreement is not reached on the proposal within 20 days, the question shall be submitted to arbitration.

\* \* \* \*

On June 27, 1987, the Carrier again served notice on the Organization in accordance with the provisions of Article II, Section 2 to establish a rule for road switcher assignments on the former Great Northern territory. Although that notice triggered negotiations between the parties which continued into 1990, they failed to reach an agreement on such a rule. Nearly ten years passed until the Carrier, on May 29, 1997, served another notice on the Organization under the same provisions of the October 31, 1985 National Agreement, exercising "its right to create a rule which will provide for the establishment [of] road switcher assignments on the former Great Northern property." Carrier Exhibit No. 3 To that end, the Carrier submitted a proposed Memorandum of Agreement containing the following conditions:

\* \* \* \*

1. Road Switcher assignments may be established, and when road switchers are established, the home terminal of such assignments must be at a location where suitable lodging and eating facilities are available, in accordance with BN Labor Agreement OPS 27-80, effective August 1, 1980, or suitable transportation will be provided.

2. To establish road switcher assignments for a conductor and one (1) brakeman, the Carrier will issue bulletins which will contain the following information: (1) the nature of service and territorial limits of assignment, (2) the train number or designation, (3) the home terminal of assignment, (4) the days of the week service is to be performed, (5) the rest days, (6) the approximate on-duty time, and (7) the date assignment will be established. The on and off-duty point for a road switcher established under the terms of this agreement will be the same point. Road switcher agreements may be established for either five, six or seven days per week, and on five-day assignments, the rest days will be consecutive.

3. Road switchers may be run back and forth over the same territory within the limits of the assignment, and into, out of, and through assigned

terminals without additional compensation. Conductors and brakemen assigned to a road switcher assignment under provisions of this Agreement will not be required to run more miles in a single turn-around trip than the time-miles (175 miles) encompassed in a twelve (12) hour day. Rules covering terminal switching and terminal delay will not apply.

4. Conductors and brakemen working in assigned or unassigned service, other than road-switcher assignments, may perform any service within road-switcher limits without penalty occurring by reason of this agreement. Nothing herein shall be interpreted as establishing "road-switcher" as a different class of service within the meaning of the more than one class of service rule.

5. Conductors and brakemen working road-switcher assignments established under provisions of this agreement shall be paid the five-day yard rate of pay. However, no other rules and/or working conditions of the agreement in effect between the Carrier and its yardmen are applicable to employees assigned to road switchers established under the terms of this agreement.

6. Eight hours or less shall constitute a minimum day's work. Time shall be computed, continuously from the time required to report for duty until released from duty, with overtime after eight hours computed on a minute basis at a rate per hour of three-sixteenths of the daily rate. Conductors and brakemen in this service will be allowed a reasonable meal period without deduction in pay.

7. The national holiday agreement provisions shall apply to road switchers without regard to mileage operated.

8. Conductors and brakemen who are required to work less than the bulletined number of days of the assignment will be guaranteed a yard day's pay, at last service rate, for each day not worked to a maximum of six days per week. If traffic is temporarily interrupted because of snow blockade, washouts, wrecks or similar track obstructions, and it is impossible to perform regular service, the guarantee does not apply.

9. Except as specifically provided herein, nothing contained in this agreement shall be construed as modifying, amending or superseding any of the provisions of schedule agreements between the United Transportation Union and this Carrier.

\* \* \* \*

The parties met on June 6, 1997, which initiated their negotiations for road switcher service on the territory in question. At this meeting, the Organization presented the Carrier with a counterproposal, also in the form of a Memorandum of Agreement, which expanded the establishment of road switcher service "throughout [the Carrier's] system." Employees Exhibit No. 4 In this regard, the parties agreed, preliminarily, to include the former Northern Pacific and

Spokane, Portland and Seattle territories in negotiating a common rule governing the operation of road switcher service. Such negotiations would involve the Organization's General Committees of Adjustment representing conductors and brakemen on these three territories.<sup>1</sup> It was observed by the Carrier that the "three former line segments intertwine with each other on the Carrier's northern tier, ... creating the necessity for one common [road switcher] agreement on all three (3) properties." Carrier Submission at 2.

Although the Organization's counterproposal paralleled the Carrier's proposal, it, nevertheless, featured several significant differences. In particular, the differences between the two proposed road switcher agreements were as follows:

- Paragraph numbered 1 of the Organization's counterproposal limited the total mileage (i.e., territorial boundaries) of road switcher trips to 35 miles, whereas the Carrier's proposal under paragraph numbered 3 did not provide a definite limitation for these assignments.
- Paragraph numbered 2 of the Organization's counterproposal limited the establishment of road switcher assignments to either five or six days per week, while the Carrier proposal would allow such assignments to be established as much as seven days during a calendar week.
- Paragraph numbered 3 of the Organization's counterproposal prohibited the establishment of interdivisional-intradivisional road switcher assignments. The Carrier's proposal contained no such prohibition. Further, the Organization's counterproposal was silent on the application of the rules covering terminal switching and terminal delay, whereas the Carrier's proposal stated that such rules would not apply.
- Paragraph numbered 6 of the Organization's counterproposal, like the Carrier's proposal, required overtime pay after a road switcher crew performed eight consecutive hours of work, provided however, that if road switcher crews were instructed to leave the home terminal after having been on duty eight consecutive hours, a new pay day would be started. This latter provision was not contained in the Carrier's proposal.
- Paragraph numbered 8 of the Organization's counterproposal was basically the same as the Carrier's proposal dealing with a guaranteed yard

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<sup>1</sup> It was noted at the June 6, 1997 negotiating session that the operation of road switcher assignments on the former Northern Pacific territory fell under the former Northern Pacific Schedule Rule 28. Since this rule met the requirements of Article VII of the October 31, 1985 National Agreement, the Carrier was precluded from compelling the Northern Pacific General Committee of Adjustment to renegotiate the conditions for road switcher service. Consequently, the Carrier asked the Organization's Vice President, R. C. Marceau, to contact the Northern Pacific General Chairman to ascertain whether he would consider attending the parties' negotiations on a "voluntary and nonprejudicial basis, for purposes of exploring the possibilities of amending former Northern Pacific Rule 28." Carrier's Exhibit No. 5 The General Chairman of the Northern General Committee of Adjustment was amenable to this arrangement. Id.

day's pay if conductors and brakemen were unable to work the bulletined number of days of the assignment. However, where traffic was temporarily interrupted which made it impossible to perform regular service, the Organization proposed that the pay guarantee would cease after three calendar days. Under the Carrier's proposal, such guaranteed pay would be discontinued immediately.

Paragraphs numbered 4, 5, 7 and 9 of the Organization's counterproposal were identical to the Carrier's proposal.

Following the June 6, 1997 negotiating session, the parties resumed negotiations on July 17 and 18 in Springfield, Missouri. This round of negotiations was now expanded to include all three territories - viz., the former Great Northern, Northern Pacific and Spokane, Portland and Seattle territories - within the framework of a common rule governing road switcher service. Overall, the Carrier and Organization (which included the General Committees of Adjustment on the three properties) held seven multi-day negotiating sessions during a thirteen-month period in addition to meeting on other occasions to discuss details germane to the accord they were endeavoring to consummate. By mid-July, 1998, the parties' negotiations culminated in a proposed Memorandum of Agreement (referred to hereinafter as the "Road Switcher Agreement") which they initialed.<sup>2</sup> Essentially, the key provisions of the proposed Agreement provided as follows:<sup>3</sup>

- Road switcher assignments will be limited to a fifty (50) mile territory.
- Road switcher assignments may be established to perform daily service on five (5) or six (6) days during a calendar week. No seven (7) day assignment will be established.
- Such assignments will have a regular specific on duty time, which will be the same time each day it is bulletined to operate.

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<sup>2</sup> A separate Memorandum of Agreement was prepared for each of the covered territories since this proposal, if ratified by the affected employees, would amend former Northern Pacific Schedule Rule 28, modify the Road Switcher Agreement on the former Spokane, Portland and Seattle territory, and establish a road switcher rule under the former Great Northern Schedule Agreements for conductors and brakemen.

<sup>3</sup> The remaining provisions of this Agreement are common to all road switcher agreements negotiated or arbitrated under Article VII, Section 2 of the October 31, 1985 National Agreement; i.e., establishing road switcher service at any location provided that such assignments are bulletined to go on duty at a location where suitable lodging and eating facilities are available; road switcher crews will only perform the service allowable under the applicable National Agreements at locations where yardmen are employed; conductors and brakemen working road switcher assignments under the proposed agreement will be paid at the five-day yard rate of pay; eight hours or less will constitute a minimum day's work, with overtime pay after eight hours of work; other road and yard crews performing service within the assigned road switcher limits will continue to be compensated for service under provisions of the applicable schedule rules and agreements; "road switcher" will not be established as a different class of service within the meaning of the "more than one class of service rules"; and the national holiday agreement provision will apply to all road switcher cases regardless of the mileage operated.

- Road switcher crews may operate in any direction within the limits of their territorial boundaries, including into, out of, and through terminal locations. However, they may not operate beyond the territorial limits of their assignment, except as starting a new day.
- Road switcher crews will be governed by road rules, except that rules providing automatic release, arbitrary allowances for terminal switching and terminal delay and earliest start times will not apply.
- Road switcher assignments will be guaranteed a yard day's rate of pay for each day not worked up to a maximum of six (6) days per week, except when an Act of Providence prohibits the continuation of regular service. In the event of an Act of Providence causing the annulment of the assignment for more than two (2) consecutive bulletined working days, the job will be abolished allowing the crew to exercise their seniority in accordance with prevailing schedule rules.
- Crews assigned to road switcher service will be allowed a reasonable length of time to eat without a reduction in pay, at or near the expiration of every six (6) hours, provided they notify the dispatcher in advance.

Concomitant with the proposed Road Switcher Agreement were three side letters initialed by the Carrier and the Organization's General Committee of Adjustment representing the conductors and brakemen on the former Great Northern and Spokane, Portland and Seattle territories, clarifying certain provisions in this proposal.<sup>4</sup> Specifically, Side Letter No. 1 stated that the scope and purpose of this Agreement (i.e., Section 6) were not intended to permit the Carrier "to unilaterally substitute or...supplant yard crews with road switcher crews"; Side Letter No. 2 stated unequivocally that the application of the proposed Agreement (i.e., paragraph numbered 5) instituting road switcher service was not intended "to supersede or...amend provisions of Article IX of the October 31, 1985 National Agreement pertaining to interdivisional service"; while Side Letter No. 3 increased the five-day yard rates of pay for conductors and brakemen performing work under the proposed Agreement (i.e., Section 7).

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<sup>4</sup> The Organization's General Committee of Adjustment representing conductors and brakemen on the former Northern Pacific territory had similar written assurances as those contained in the side letters identified hereinabove as Side Letters Nos. 1 and 2. However, the Carrier and this General Committee had a different Side Letter No. 3 which did not concern rates of pay for conductors and brakemen working in road switcher service. The third side letter pertaining to the former Northern Pacific property stated that the proposed Road Switcher Agreement was not intended to permit the Carrier to unilaterally substitute or supplant "road transfer crews" operating in the surrounding areas of Seattle, Auburn and Tacoma, Washington under the provisions of existing Northern Pacific rules and agreements with road switcher crews. Nevertheless, the letter specified certain conditions where the Carrier has a need to obtain or retain a customer and road switcher service is considered more cost effective. Under this circumstance, the Carrier would be required to serve the General Chairman with a 14 days' advance written notice which includes "an explanation of the need to provide road switcher service and a description of the service." The parties would then be required to meet within the next thirty days to determine whether there was a need for this type of service. If they were unable to agree on such a need, road switcher service would be allowed to operate for a period of six months. Upon the expiration of the six-month period, the matter would be referred to arbitration in the event the Organization continued to object to this service. See Carrier's Exhibit No. 6.



Accordingly, the daily rate for conductors in road switcher service would be \$150.00 per day, while the daily rate for brakemen in this service would be \$144.00 per day. Both rates of pay would also be subject to wage and cost-of-living allowance increases.

Before the proposed Road Switcher Agreement could be implemented by the Carrier, it was subject to ratification by the conductors and brakemen working on the covered territories. To that end, the General Committee of Adjustment representing these employees on the former Great Northern and Spokane, Portland and Seattle territories mailed ballots and a summary of the proposed Agreement to them on August 7, 1998. Ballots were returned to the General Committee on September 10, 1998 and were tabulated. The conductors and brakemen on the former Spokane, Portland and Seattle territory ratified the proposed Road Switcher Agreement. While the conductors on the former Great Northern territory also ratified the Agreement, the brakemen on this territory rejected the proposal.<sup>5</sup> On September 18, 1998, the General Committee of Adjustment informed the membership on both territories of the ratification vote as well as advising the Carrier of the results. In this regard, the General Committee noted that the road Schedule Agreements on the former Spokane, Portland and Seattle territory, covering conductors and brakemen, have been modified to reflect the adoption of the proposed Road Switcher Agreement; that the applicable Schedule Agreements for conductors and brakemen on the former Great Northern territory apply separately, and by reason thereof, the Schedule Agreement for conductors has been modified to reflect the establishment of a new road switcher rule in accord with the proposed Agreement they ratified, but that the Schedule Agreement for brakemen remains unchanged. Mindful of this dichotomous situation, the General Committee requested another meeting with the Carrier in order to "revisit via negotiations" a rule to establish a road switcher rule for brakemen on the former Great Northern territory.

On September 23, 1998, the Carrier acknowledged the Organization's letter of September 18 and indicated that the proposed Road Switcher Agreement governing the conductors and brakemen on the former Spokane, Portland and Seattle territory and conductors on the former Great Northern territory would become effective upon implementation. The Carrier, however, rejected the Organization's request to renegotiate a rule acceptable to the brakemen working in road switcher service on the former Great Northern territory. Instead, the Carrier advised the Organization that it would invoke the arbitration clause under Article VII, Section 2 of the October 31, 1985 National Agreement for purposes of seeking an arbitral determination of whether the proposed Road Switcher Agreement these brakemen rejected should apply to them on the territory in question.

As previously mentioned, the matter at issue was placed before this Board and arbitrated on February 16, 1999.

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<sup>5</sup> Based on information the Organization presented to the Arbitrator, the vote on the Spokane, Portland and Seattle territory was as follows: 21 conductors for ratification, 7 brakemen against ratification. Yardmen on this territory were not required to vote but did so and approved the proposed Road Switcher Agreement by a vote of 13 for ratification, 8 against ratification. On the former Great Northern territory, the vote was as follows: 114 conductors for ratification, 66 conductors against ratification; 11 brakemen for ratification, 17 brakemen against ratification. Similarly situated employees on the former Northern Pacific territory rejected the proposed Agreement, thereby retaining their existing rule governing road switcher service (i.e., Northern Pacific Schedule Rule 28).

## FINDINGS AND OPINION

Here, it is the Carrier's position that the proposed Road Switcher Agreement negotiated by the parties and approved by the majority of the Organization's members should be imposed through arbitration without modification. The Carrier opines that since the conductors and brakemen on the former Spokane, Portland and Seattle territory and the conductors on the former Great Northern territory ratified the proposed Agreement, it would serve no useful purpose to renegotiate a new agreement for the brakemen on the latter territory. Commenting on this point, the Carrier asserts that the central theme throughout the negotiation process was to establish a common rule governing road switcher service on all three territories on the northern portion of its merged rail system for the sole purpose of maintaining consistency. From the Carrier's perspective, if the brakemen on the former Great Northern territory were permitted to disregard the negotiation process in order to modify the proposal to their satisfaction, such a tactic would create an unworkable situation throughout the property.

In seeking a favorable arbitral determination in this case, the Carrier posits that the proposed Agreement has similar features as those road switcher agreements it has negotiated with other General Committees of Adjustment of the Organization elsewhere on the merged BNSF system that are in place, e.g., on the former Chicago, Burlington and Quincy territory, Joint Texas Division and the St. Louis-San Francisco territory. It is the Carrier's desire to implement consistent and efficient working conditions for conductors and brakemen alike on the former Great Northern territory that are compatible with previously negotiated road switcher agreements. Insofar as the Carrier is concerned, the contractual arrangement it negotiated with the Organization represents "a fair and equitable balancing of both parties' respective interests." To that end, the Carrier urges this Board to implement the initialed Agreement.

While acknowledging that it responded to the Carrier's notice of May 29, 1997 and negotiated a road switcher accord that was acceptable to the conductors on the former Great Northern territory (as well as the conductors and brakemen on the Spokane, Portland and Seattle territory), the Organization harbors the view that this should not be construed to show that all issues regarding road switcher service were satisfactorily addressed. The Organization contends that its counterproposal delineated the desired provisions for a road switcher agreement, whereas the Carrier's proposal delineated the conditions for such an agreement that were achievable in the course of negotiations. Notwithstanding the proposed Road Switcher Agreement that was initialed in mid-July, 1998, the Organization believes that the conditions for road switcher service spelled out in its counterproposal "are fair and equitable for all parties" and should be adopted as the applicable rule establishing road service assignments for brakemen on the former Great Northern territory.

According to the Organization, the brakemen's rejection of the proposed Road Switcher Agreement on the territory in question reflected this particular craft's concern over lost job opportunities that occurred as a result of the 1980 and 1993 Crew Consist Agreements on the Carrier's merged property. The Organization avers that, for all intents and purposes, these Agreements eliminated brakemen from all but a few assignments like local and work trains. In this regard, the Organization points up that the affected brakemen's continued concern over lost

jobs heightened as a consequence of the proposal to negotiate a new road switcher rule on the former Great Northern territory.

It is the Organization's penultimate position that this Board consider the terms and conditions of its counterproposal as the appropriate road switcher rule to resolve the instant controversy. If not, the Organization submits, alternatively, that the Board should impose terms and conditions governing road switcher service for brakemen that are no less than those originally negotiated and initialed by the parties.

Clearly, the crux of this dispute is whether the brakemen employed in road switcher service on the former Great Northern territory should be covered by the working conditions established under a Road Switcher Agreement the conductors on this territory ratified but they voted to reject. The resolution of this issue can be readily perceived by comparing the Carrier's proposal of May 29, 1997 and the Organization's counterproposal of June 6, 1997 in juxtaposition with the Road Switcher Agreement they actually negotiated. As recounted herein, the Carrier's proposal and the Organization's counterproposal each consisted of nine numbered paragraphs, of which paragraphs numbered 4, 5, 7 and 9 were essentially the same. The parties' differences were found in paragraphs numbered 1, 2, 3, 6 and 8.<sup>6</sup> Specifically, they differed over the territorial boundaries of road switcher assignments; the number of days during a calendar week in which these assignments are established to perform daily service; prohibiting interdivisional-intradivisional road switcher service; whether overtime pay or the payment of a new day prevails when a road switcher crew is required to leave the home terminal after being on duty eight consecutive hours; and discontinuing the guaranteed yard day's pay where conductors and brakemen are unable to work the bulletined number of days of the road switcher assignment due to a temporary interruption in traffic caused by an Act of Providence.

Judging from the proposed Road Switcher Agreement they initialed in mid-July, 1998, the Carrier and Organization skillfully negotiated the terms and conditions governing road switcher service by reconciling significantly their earlier differences. The parties adopted a host of provisions under Sections 4 and 5 of the proposed Agreement which establish the maximum territorial boundaries of road switcher assignments to a radius of 50 miles. This radius is far closer to the Organization's proposal of 35 miles than the Carrier's original proposal linking the territorial limits to the extent of the specific assignment. With the exception of the agreed upon provisions regarding the payment of overtime which parallels the Carrier's original proposal now incorporated under Section 8 of the proposed Agreement, the Organization achieved other notable concessions from the Carrier. Under Section 3 of the proposed Agreement, the Carrier agreed to the Organization's counterproposal to establish road switcher assignments to perform daily service on five or six days during a calendar week; and the parties agreed under Section 12 of the proposed Agreement to compensate the conductors and brakemen who work less than the bulletined number of days of their road switcher assignment a guaranteed yard day's pay for each day not worked to a maximum of six days per week. Although this provision is inapplicable when the line segment associated with the assignment becomes impassable because of an Act of Providence making it impossible to perform regular service, the Carrier, however,

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<sup>6</sup> See Statement of Facts, *supra* at 5-6.

agreed that the guaranteed pay will only cease after the assignment is annulled for more than two consecutive bulletined working days. Originally, the Carrier wanted the guaranteed pay to cease immediately under this circumstance, while the Organization felt it should be discontinued after a lapse of three calendar days when it became apparent that regular service could no longer be performed.

In addition to the terms and conditions embodied in the proposed Agreement, the Carrier and Organization reached certain understandings that were set forth in side letters. These side letters, which were also initialed by the parties, tend to clarify portions of the proposed Agreement as well as alleviate the brakemen's concern on the former Great Northern territory over any loss of jobs resulting from a new rule governing road switcher service. Here, Side Letter No. 1, in context with Section 6 of the proposed Agreement, makes it abundantly clear that the Carrier will not use road switcher crews "to unilaterally substitute or...supplant yard crews...." In effect, Side Letter No. 2, as it relates to Section 5 provisions of the proposed Agreement, prohibits the use of road switcher assignments in interdivisional service. The understanding reached here satisfies this concern which the Organization previously expressed in paragraph numbered 3 of its counterproposal. Finally, Side Letter No. 3 establishes new and higher rates of pay for conductors and brakemen working in road switcher service. In light of these side letters, it is cognizable that the Organization realized significant operating and pay-related concessions.

Overall, the proposed Agreement is largely hinged on the Carrier's and Organization's ability to reach compromises on many of the conflicting provisions contained in their original proposals which they achieved through the process of collective bargaining by knowledgeable and skilled representatives. Adjudicating a controversy of similar import, Arbitration Board No. 484, in the matter involving Burlington Northern Railroad Company and United Transportation Union (Cluster, 1989), observed that provisions of an agreement shaped by mutual concessions "...are entitled to be given great weight, and the Board should not undertake to change them absent convincing evidence that they fail to meet the standard the Board is instructed to apply – the prevailing features of other road switcher agreements found on Class I railroads, or, if that standard is not applicable, convincing evidence of a substantive nature to support the change proposed by one of the parties." *Id.* at 5 In the instant case, the prevailing features of other road switcher agreements implemented on the Carrier's merged rail system can be found in the proposed Road Switcher Agreement that the conductors and brakemen on the Spokane, Portland and Seattle territory and the conductors on the former Great Northern territory ratified. Moreover, no "convincing evidence of a substantive nature" was presented by the Organization's General Committee of Adjustment representing the brakemen on the former Great Northern territory who rejected the proposed Agreement to impel this Arbitrator to now adopt the Organization's June 6, 1997 counterproposal as the applicable road switcher agreement for this craft of employees. Needless to say, it would be incongruous to cover the conductors and brakemen working in road switcher service on the former Great Northern territory under separate and incompatible agreements.<sup>7</sup>

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<sup>7</sup> The fact that the conductors and brakemen on the former Northern Pacific territory failed to ratify the proposed Road Switcher Agreement does disturb the above finding. As noted herein, the conductors and brakemen on that territory were already covered by a road switcher rule. See n. 5 supra at 8.

A compelling reason for the adoption of the proposed Road Switcher Agreement on the former Great Northern territory rests on a strong arbitral preference for negotiated agreements. In the Matter of CSX Transportation Inc. and United Transportation Union, (Harris, 1993), is a case on point. There, the arbitrator recognized this preference when he imposed an agreement that had failed to obtain the ratification by one of the three UTU General Committees. He predicated his decision on Consolidated Rail Corporation and United Transportation Union (Peterson, 1982), which held:

\*\*\*[I]t should be recognized that regardless of the amount of time one could spend in negotiating an agreement, no amount of effort will solve or cure all individual worker or management needs or desires. The purpose of collective bargaining representation is to entrust individual rights with accredited representatives so as to avoid the pitfalls of bargaining on an individual basis. Thus, the neutral referee has placed great weight upon the fact that the representatives for the Union had indicated acceptance of the agreement and that for the neutral referee to attempt to arbitrarily change that which had been agreed to would no doubt only lead to further controversy.

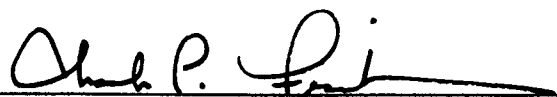
Id. at 11.

In harmony with the foregoing observation, which controls in the instant case, the Schedule Agreement covering brakemen on the Great Northern territory will be modified to reflect the establishment of a new road switcher rule that is compatible with the Road Switcher Agreement the conductors on this territory have ratified and the Arbitrator here has adopted in its entirety.

#### AWARD

The Road Switcher Agreement which the Carrier and Organization negotiated and initialed in mid-July, 1998 constitutes the appropriate terms and working conditions for brakemen employed on the former Great Northern territory of the merged BNSF system. In addition, the understandings memorialized in the side letters between the Carrier and Organization, previously identified as Side Letter No. 1, Side Letter No. 2 and Side Letter No. 3, are incorporated in an Addendum to the Road Switcher Agreement adopted by the Arbitrator and made a part thereof.

Accordingly, the parties to this arbitration will be bound by the terms and conditions of the Road Switcher Agreement and Addendum approved herein, which will become effective as of May 1, 1999.



Charles P. Fischbach  
Arbitrator

Dated at Chicago, Illinois,  
this 15th day of April, 1999.