In the Matter of Arbitration

United Transportation Union (Y)	)	
	)	
vs	)	Extra Yardmaster: C. L. Miller
	)	
Union Pacific Railroad Company	)	Time-Claim 870291 Third Shift (Browder)

STATEMENT OF CLAIM

Claim on behalf of Extra Yardmaster C. L. Miller for one day's pay each day on September 30; October 1, 4, 7, 8, 9, 11, 12, 13 and 20, 1986 alleging the Carrier violated the Agreement when the third shift Yardmaster position at Browder Yard was abolished and the duties were transferred to Carrier Officers and members of other crafts.

Background

On November 15, 1986 and December 1, 1986 the General Chairman of the Organization, Fort Worth filed separate claims for one day's pay for each of the dates cited in the Statement of Claim. These claims alleged that since "Third Shift Yardmaster at Browder Yard, Dallas (was) abolished" certain Yardmaster duties were "transferred to Carrier Officers and members of other crafts". The claims specifically alleged that others besides Yardmasters had performed Yardmaster duties on the days in question. What were the duties in question? They consisted in supervising "...all set outs and pick ups at Browder and Mesquite", and the "...issuing of all instructions and supervision of yard engines and trains and securing the track and time for both...(at)...Browder Yard". Attached to

the claims were information "...taken from transcription of radio conversation at Dallas" on various dates, and other "typewritten copies of radio transcriptions" which were presented as evidence and "proof" for the claims. The claims in all cases allege violation of the Scope Rule of the Yardmasters' Agreement. Denial of the claims by the Superintendent, Fort Worth stated that he "...saw no violation of the Agreement in the manner in which this was handled and no merit to the claims". This declination was further appealed to the company's Director of Labor Relations in Omaha. This appeal included an extensive file of statements by Extra Yardmasters who had held regular assignment at Browder, and by Extra Yardmasters at other points in the Carrier's system. The statements attested to the fact that the work in question had "...been in the past, and (is) now" work of the kind done by and "exclusively assigned to the Yardmaster craft". Absent resolution of these claims on property this dispute has been submitted to this Arbitration Committee for final disposition.

Discussion and Findings

The company's facility at Dallas, Texas consists of two yard operations known as Browder Yard and Mesquite Yard. The Browder Yard has a Yardmaster Tower and the Yardmaster assigned to this location is responsible for both Browder and Mesquite Yards. The instant claim deals with the third shift Yardmaster position which was abolished at Browder Yard and the alleged reassignment of duties of that position to other than members of the Yardmaster craft. This claim before this Committee, and another one dealing

with the second shift under file No. 870292 as well as others outstanding have collectively become known to the parties as the Browder Yard claims. The record shows claims filed dealing with this question under eight Carrier file Nos. (Carrier Ex. G, p.1).

In assessing the arguments presented here by both the parties the arbitrator must note that the claim here before the committee centers on the narrow question of whether the Scope Rule at bar was violated on the dates enumerated in the Statement of Claim. Relief to be provided, if any, in the event of finding of violation of the Agreement,will be limited to those perimeters.

This dispute before the Committee is a contract interpretation dispute. The burden of proof therefore lies with the Organization to prove, by means of substantial evidence, that the Agreement was violated when it contends that such took place. Substantial evidence has been defined, for purposes of arbitral conclusions, as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). For precedent dealing with evidentiary burdens for the moving party see Second Division 5526, 6054; Third Division 15670, 25575; Fourth Division 3379, 3482; Public Law Board 3696, Award 1 inter alia).

The contract clause in dispute is Article 1, Scope which reads in pertinent part as follows:

> Existing scope rules shall be amended by the addition of the following:

> The duties and responsibilities of a Yardmaster include:
>
> (a) Supervision over employees directly engaged in the switching, blocking, classifying and handling of cars and trains and duties directly incidental thereto that are required of the Yardmaster in a territory as designated by the Carrier.
>
> (b) Such other duties as assigned by the Carrier.

The provision at bar is a general one, or one which is customarily referred to in the railroad industry as a General Rule. To prove that such a Rule has been violated the evidentiary requirement is one of exclusivity (See Third Division 13237, 14121, 23217, 25934 inter alia). Such need not be emphasized by this Committee, however, by reference to arbitral precedent alone since the General Chairman who filed the instant claim states, correctly so, that while the craft "...cannot argue that these duties (subject to the claim) are ...specifically detailed under the Scope Rule of the Yardmasters' Agreement, we do contend that such duties, by virtue of having always been exclusively assigned to Yardmasters by the Carrier throughout its system, are duties embraced within the Scope Rule".

Pertinent here for consideration by the Committee is also Article 3(F) of the Agreement which states the following:

> Nothing herein requires the maintenance of any position.

The Organization further argues that there is a provision of the January 21, 1986 Protective Agreement between the company and the Yardmasters which also has a bearing on the instant claim. The Organization argues that the provision at bar is the following, in pertinent part, which it underscores in its submission:

Article II

....In the absence of an employee at present or in the future shown on Attachments "A", "B" and "C" available to perform work covered under the Agreement, Yardmasters' functions may be assigned by the company and will not be subject to any of the Rules of the collective bargaining agreement between the company and the RYA. 1/

The union argues that this provision supports its present claim because the parties "...agreed that Yardmaster work could only be assigned to persons not subject to the RYA collective bargaining agreement in the absence of the employees (Yardmasters) shown on the Attachments" in question. The Organization continues that "(i)n the case at bar, Carrier failed to comply with the amended Scope Rule and the January 21, 1986 Agreement".

The Organization, therefore, presents three arguments in support of its claim. (1) The Scope Rule was violated. (2) Such is so since the work had been the exclusive purview of the Yardmasters. (3) And by abolishing the third trick Yardmaster position at Browder and allegedly giving some of the work of that position to non-members of the Yardmaster craft the Carrier was also in violation of the January, 1986 Protective Agreement.

1/ The 1986 Agreement argument is more fully developed by the Organization in its submission to the second shift claim under the 870292 (M. R. Spears) file. Since both parties reference this other file and its contents the arbitrator has liberally studied both files prior to framing conclusions on both of these cases.

It is the opinion of the arbitrator that it would be wise to discuss and dispose of the argument dealing with the January, 1986 Agreement first. The arbitrator has had the occasion to study closely this Agreement in view of other claims filed thereunder. [2/] The committee must underline that "...in any interpretation of contract, the contract should be viewed as a whole, not in isolated parts". [3/] The Organization argues here that since the Claimant's name appeared on the Dallas Attachement to the 1986 Agreement he was not "absent" and should, therefore, have been afforded the work in question on the dates stated in the Statement of Claim. In view of other language also found in Article II of that Agreement, however, it is clear that the parties recognized, in principle, that employees other than Yardmasters could do Yardmasters' work at the locations covered by the Attachments to the 1986 Agreement because provisions are found in Article II wherein it is stated that such employees were not able to establish Yardmaster seniority, and so on. The arbitrator does not believe that the language found in Article II establishes, as a fact, that other than Yardmasters did such work at these locations, but it is clear that it envisages such eventualities perhaps at some time in the future. Whether this was going on or not is a factual question which does not have to be addressed at this point. This question will b

2/ See, for example, Public Law Board No. 3994, Award 4; and Arbitration Committee File 245-385 (B. B. Shofner & F. R. Pruett).

3/ See, Buffalo Springfield Roller Co, 5 LA 391, 394 (Hampton, 1946; Longview Fibre Co, 63 LA 529, 534 (Smith, 1974), and Consol. Coal Co, Wheeler Creek Mine, AAA 84-12-87-147 (Suntrup, 1987).

discussed below. The applicable language found in Article II of the 1986 Protective Agreement, in addition to that quoted by the Organization cited above, is the following:

> Employees other than shown on Attachments "A", "B" and "C" performing Yardmaster functions at points where employees presently hold Yardmaster seniority or at other locations on and after the effective date of this Agreement will not establish Yardmaster seniority.....(Emphasis ours)

In short, while the 1986 Agreement provides privileges and advantages to both parties, as all Agreements do, read in its totality it does not, at Article II, provide exclusivity support for application of the Scope Rule of the General Agreement between the YMA and the Carrier, as it applies to instances such as the one under scrutiny. It is unclear to the arbitrator if the language found in Article II provides support for the denial of the instant claim; the language in this Article of the 1986 Agreement, however, assuredly does not provide support for sustaining it under the type of Scope Rule found in Article I of the general Agreement and arguments by the Organization to that effect are, therefore, dismissed.

Secondly, was the Scope Rule factually violated? This is an evidentiary issue. The Organization presents considerable evidence in its November 15, 1986 claim filings that Yardmaster work was still being performed on third shift at Browder on the dates in question after the Yardmaster position on that shift had been abolished. If is far from clear if the amount of work was eight hours' work, but the evidence appears to support the conclusion that it was fairly substantial, which dealt with the supervision of "set outs

and pick ups at Browder and Mesquite" on this shift. The same is true for exhibits presented by the Organization with its December 1, 1986 claims dealing with the issuing of instructions and supervision of "yard engines and trains and the securing of track and time for both". What is the Carrier's factual response to these claims dealing with the third shift at Browder? The Superintendent's responses dated December 20 and 26, 1986 state only that he disagrees with the claims but they do not provide counter-evidence to support this disagreement and consequently the Superintendent's basis for denial of the same. On April 10, 1987 the Director of Labor Relations at Omaha, to whom the claims were appealed after their denial on the local level, states the following to the General Chairman, in his further denial of the claims:

> While Yardmasters may have performed many of the duties listed in the claim at Browder they did not perform those duties to the exclusion of all others. Trainmasters have traditionally supervised yard engines along with the Yardmasters. Trainmasters have generally worked on the ground with the switch crews performing duties identical to those performed by Yardmasters.
>
> The supervision of Browder Yard has been a shared responsibility and many of the Yardmasters' duties have been held in common with Trainmasters. (Emphasis ours)

The Carrier offers no factual evidence, however, to show that the above had happened, along with its April 10th correspondence. On August 5, 1987, however, this same Carrier officer states the following in his further declination of the claim:

> I have now had the opportunity to review all of the information concerning this claim. The second and third shift Yardmaster positions were abolished at Browder Yard because

> the Carrier only has first shift switch engines working at that location. Because there is no second and third shift switch engines on duty, there is no need for a Yardmaster on those shifts. Moreover, the work has been rearranged in order to eliminate the need to switch freight cars. This allows the first shift Yardmaster to instruct switch crews in the performance of their duties for the entire daylight shift prior to the end of the Yardmaster's tour of duty at 2:00 PM. (Emphasis ours here and below)
>
> On some occasions it has been necessary to change instructions issued to switch crews due to unusual circumstances. On these rare occasions, a Trainmaster may instruct the switch crew after the first shift Yardmaster has gone home. This procedure, however, does not represent a departure from the procedures used prior to the abolishment of the second and third shift Yardmaster positions. As stated earlier, Trainmasters and Carrier Officers have always instructed switch crews in the performance of their duties at Browder Yard.

An additional point here is of concern. This point deals with the second shift, not with the third shift, but the manner in which it is dealt with by the Carrier has a bearing on conclusions which must be arrived at with respect to the third shift on the days in question. On July 1, 1987 the General Chairman wrote to the Carrier's officer that a Yardmaster at Dallas had been called to work at Browder Yard on June 1-5, 8-10,1987 and Extra Yardmasters had been called on June 6-7, 14 and 21, 1987 to do the same. He notes that these were dates when Trainmasters were unable to work. The General Chairman argues that this proves that they were doing Yardmaster work. The response by the Carrier's officer is, in the estimation of the arbitrator, as interesting for purposes of arbitral conclusions as the argument presented by the General Chairman. The Carrier's officer answers, in his August 5, 1987 correspondence to the Organization, with respect to this point:

> On occasion, the Carrier has found it necessary (since abolishment of the second and third trick Yardmaster positions) to utilize the services of a Yardmaster on the second shift as indicated in your letter of July 1, 1987. The mere fact that a Yardmaster is occasionally called to work in order to absorb overflow Yardmaster work or perform supervisory duties in a relief capacity which are normally and customarily performed by Trainmasters is not violative of the Agreement. (All emphases in foregoing ours).

Accompanying its August 5, 1987 correspondence to the Organization the Carrier finally introduced into the record before the arbitrator some evidentiary proof that Trainmasters shared supervisory duties with Yardmasters at Browder. L. W. Morris states that:"prior to the abolishment of the second trick Yardmaster at Dallas, I gave direct instructions to various crew members in the Browder and Mesquite areas...". Trainmaster S. L. Sublett states: "...Since the start of my assignment at Trainmaster in Dallas, Texas, December, 1983 I have issued direct instructions to various members of Dallas switch engines. My instructing crews has occured with crews working both Mesquite and Crowder Yards at all different times of the day and night". E. A. Basler, Terminal Trainmaster states that:"since my assignment as Assitant Trainmaster in Dallas, Texas, September, 1984I have had several instances where I issued direct instructions to various crew members of Dallas switch engines. These instructions were given to crews working at both Browder and Mesquite". What is somewhat revealing about these statements, in the mind of the arbitratc is that none state how often such instructions were issued. One has to wait to read the statement of Terminal Trainmaster J. R. Argyle,

dated June 22, 1987 who started as a Trainmaster in Dallas in July of 1986 before it is stated that: "...I have many times given switching instructions to the switch crews in the Dallas Yard since becoming a Terminal Trainmaster there in July of 1986. These instructions were given to engines both at Browder and Mesquite. They were given at times when a Yardmaster was on duty and when a Yardmaster was not on duty". The arbitrator must note that the second and third shift positions of Yardmaster were abolished shortly after this Trainmaster assumed this position at Dallas. Further, this is the only Trainmaster who states that he frequently gave instructions: the others only stated that they had done this work in the past, and one stated he had done it only "several times". In comparing these statements with the Carrier officer's statements to the General Chairman under date of August 5, 1987 it is somewhat difficult to determine whether references are to prior or after the abolishment of the Yardmaster positions at Browder: in either case, the officer does state that on "rare occasions" Trainmasters infrequently have instructed switch crews which is a "procedure (which) does not represent a departure from the procedures used prior to the abolishment of the second and third shift Yardmaster positions". The question is: exactly how often, prior to the abolishment of the Yardmaster position, has Trainmasters or any other officers given supervisory instructions to crews? The Trainmasters themselves state they have done it: one states he had done it on several instances; the Carrier officer, after his research into this matter found that Trainmasters did this kind of work on rare occasions, but they did do it. The Organization presents

over fifteen corraborating exhibits from crew members working Dallas who state, under dates of April 12-27, 1987 that they had never taken instructions from Trainmasters or other non-Yardmasters at this location prior to the "Yardmasters being pulled off second shift at Browder". Although such statements do not prove that the Trainmasters might not have been more active on third shift, there is little in the file to suport that they were much more active until shortly after the late summer or early fall of 1986 as only the letter of Trainmaster J. R. Argyle states. In his letter of August 5, 1987 the Carrier's Officer states to the General Chairman that "... (i)nvestigation subsequent to our meeting at Kansas City (on June 18, 1987) has revealed that there are no switch crews on duty at all on the third shift at Browder Yard". (Emphasis ours) While such may be true, it provides no information on what was going on during the months of September and October, 1986. Evidently something was going on during third shift at Browder during these months as the exhibits presented by the Organization along with its filing of claims in November and December of 1986 clearly shows. The record also contains a statement by the Carrier's Terminal Superintendet at Dallas which explains what has been happening at Browder Yard. Referencing the statements by Trainmasters cited in the foregoing the Superintendent states that they are indicative of what was going on at Browder Yard "prior" to the abolishments. Although the Superintendent appears to put particular emphasis on the second shift situation, his remarks can be construed to be equally applicable to the third shift also.

The picture which the Superintendent paints is one of reorganization whereby the Carrier is in the process of boiling down, as he puts it, "...the operation at Dallas (to) the simplest operation possible (where) the yard jobs have only 2 functions (which are) to interchange cars and spot and pull industry cars". Since 1983 the switching and blocking of cars formerly done at Browder has been systematically moved to the Carrier's Fort Worth Centennial Yard. It was at some point in the process of this change that the the second and third shift Yardmaster positions at Browder were abolished. The time-point chosen by the Carrier was during the third quarter of 1986. Given the perimeters of the relief requested in this claim,the question which must be answered by this committee is whether the time-point chosen was too early. Or: was there still sufficient residues of work which exclusively belonged to the Yardmasters on the dates in question that were done by others at Browder to permit the conclusion that the Scope Rule was violated?

Decision and Award

There can be no doubt that some of the supervisory duties done by the Yardmasters on the second and third shifts were shared with others. These others included Trainmasters and others named by the Carrier. There is insufficient evidence to warrant any firm con-conclusions about who these other employees might have been although there is evidence with respect to Trainmasters. The Organization effectively argues that others besides Yardmasters so seldom exercised such duties that they were the exclusive purview of its craft. Some of the evidence presented suggests that under certain circumstances

employees such as Switchmen had never taken orders from Trainmasters at Browder prior to the abolishment of the Yardmaster position on the shift in question. The arbitrator has closely studied the evidence presented by the Carrier to the effect that Trainmasters had done the work jointly with Yardmasters. The evidence is less than persuasive that such had been done by Trainmasters prior to the abolishment of the positions in question except on what the Carrier office refers to as "rare occasions". Such impression is not corrected by the Superintendent at Dallas who basicly relies on the statements of the Trainmasters themselves.

Has the burden of exclusivity been met by the Organization in the instant case? In view of the fact that the exercise of these duties claimed by the Yardmasters were, at most, either hardly ever or idiosyncratically done by Trainmasters as Browder Yard prior to the abolishment of the positions in question the arbitrator must conclude that the weight of evidence reasonably supports the instant claim. It is not uncommon for Carriers to argue, and often with success, that work done by others do not infringe upon the Scope rights of a given craft since the amount of work falls under the de minimus principle (See, for example, Fourth Division 2122, 1486, 3186; PLB 3833, Award 1; PLB 3840, Award 5 inter alia). The instant case represents the other side of the coin. The Yardmasters claim the work is exclusively theirs. The Carrier argues that others have shared the work, thus the criteria of exclusivity has not been met. The evidence presented is that others have done the work, but by all standards only in a de minimus sense.

The arbitrator feels it is appropriate to cite here, in this respect a number of arbitration Awards dealing with this issue. Fourth Division 3168 dealt with a situation somewhat comparable to the instant one, except that the Yardmasters argued that they should have been paid for an amount of work done by a Trainmaster which the Board, in that case, concluded was minimal. In denying the claim the Board concluded as follows:

> ...it is also well established that in order to prevail in cases such as the instant dispute the Organization must show that a substantial amount of the Yardmasters' responsibilities and duties were performed by employees outside the scope of the Yardmasters's Agreement.

In the instant case the Carrier is effectively arguing that the work is not necessarily Yardmasters' work even though the evidence points to only a minimal amount of the work in question had been performed by others than Yardmasters. An older arbitral conclusion coming from Fourth Division 406 is even more restrictive. It states:

> ...we are not required in every case to grant affirmative relief where it may be shown that a clerk, agent or other employee exercises some minor or incidental supervision over yard switching in connection with the discharge of their duties.

Likewise, there is no arbitral imperative to deny a claim for scope rights when the evidence shows that others who have shared the work complained of as being protected have done so only in a "minor or incidental" manner.

Lastly, the Carrier argues that the amount of work itself which was done by others on the dates in question in this case was minimal and the same line of reasoning used above now is applied to this question. This is both an empirical and evidentiary question and

it is a factual issue which has been addressed only opaquely in the record. Both the assumption (and conclusion) of the Organization when it presented its claims on November 14 and December 1, 1986 with attached exhibits was that the amount of work in question was worth one day's pay. It then enumerates evidence taken from radio transcriptions. At various appeal levels the General Chairman continues to offer documentation to the Carrier about alleged instances of scope violation on the dates in question, as well as other documentation about former duties of the Yardmasters at Browder prior to the abolishement of the second and third trick positions. In view of this quantity of materials presented to the Carrier it had responsiblity of affirmative defense. A search of the record fails to produce information which was forwarded to the Carrier officer in Omaha by local supervision which provided him with materials to develop such defense, except to state to the union that the relief requested was "grossly excessive" as he does in his August 5, 1987 letter to the Organization, for example.

It is unclear to the arbitrator if the work complained of represented eight (8) hours' work for each day listed in the Statement of Claim. It is clear that the work was, according to arbitral standards, substantial. Absent additional information on this matter, the arbitrator must conclude that the relief requested by the Organization is not unreasonable. The arbitrator is also aware that this case and 870292 want to be used by the parties res judicata to settle other pending cases. This is possible, of course, assuming that there is agreement that the amount of work complained of on the dates in question for the latter claims is comparable to that which the

arbitrator concludes is subject-matter for these two cases. Time will tell whether the parties are willing to accept such assumption.

The Carrier officer correctly states that "attention is called to the fact that although (various) dates are listed, the claim is not continuous because (various dates after the abolishment of the positions) are conspicuously missing". This is not a continuous claim, but one only for the dates cited in the Statement of Claim. More correctly, the claim is for certain dates during the changeover, as the Terminal Superintendent put it, of certain operations from Browder Yard to Fort Worth's Centennial Yard. In view of the limitation of relief requested, the Carrier officer states arguendo that if the claim would be sustained, no compensatory penalties are due the Carrier since the Claimant "suffered no loss of earnings". In this respect the arbitrator is of the mind that the appropriate remedies, in the instant case, are those precedentially set by various Awards of the National Railroad Adjustment Board, including Awards 11701 and 12374 issued by this Board's Third Division. The Board has held, respectively, in those case the following which is cited here with favor:

> ...It is not enough to recognize (a) breach without expecting the violator to accept the consequences... ...Carrier's position that the Claimant must show that he 'was in some manner adversely affected by the action of the Carrier'...is irrelevant and distracts attention from the real issue of the...violation of the Agreement. The argument that compensation to Claimant would be in the nature of a penalty is likewise extraneous, for it brushes aside the sanctity of the Agreement....
> .....
> A collective bargining agreement is a joint undertaking of the parties with duties and responsibilities mutually assumed. Where one of the parties violates that Agreement a remedy necessarily must follow...

T-Claim (C. L. Miller) 870291

Extra Yardmaster C. L. Miller shall be paid one day's pay each day for the dates of September 30; October 1, 4, 7, 8, 9, 11, 12, 13 and 20, 1986 because of violation of the Agreement by the Carrier. All compensation due the Claimant shall be paid to him within thirty (30) days of the date of this Award.

For the Arbitration Committee

Edward L. Suntrup, Arbitrator

D. D. Matter, Employer Member

D. D. Martin, Employee Member

Date: 11-9-88