File: 900052

Public Law Board No. 3994

Parties to Dispute

United Transportation Union - Yardmasters' Department)
)
vs) **Case 7/Award 7**
)
Missouri Pacific Railroad)

STATEMENT OF CLAIM

Claim for one day's pay for each of the following days for W. C. Trojacek, First Shift Yardmaster, Ray Yard, Denison, Texas, account work opportunity lost when the First Shift Yardmaster position was abolished and duties transferred to other personnel i.e. M.T.O.'s, Footboard Yardmasters, Switchmen, Dispatchers and others not covered under the Yardmaster's Agreement. Days claimed are: December 5-9, 1989 and all subsequent days until condition corrected.

Background

On December 30, 1989 the General Chairman of the Organization at Fort Worth, Texas filed claim with the Carrier's Manager of Labor Relations in Omaha on grounds that the Carrier was in violation of the operant Agreement by abolishing the First Shift Yardmaster position at Ray Yard, Denison, Texas. The thrust of the claim was that the duties accruing to this position were then transferred to other personnel not covered under the UTU(Y) Agreement. At issue here is Article I (a) and (b) of the September 1, 1987 Agreement which states the following, in pertinent part.

Article I - Scope and Employees Affected

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 ty the carrier.

The claim was denied by the Carrier. After it was subsequently appealed up to the Carrier's highest officer designated to hear such the claim was docketed before this Board for final adjudication. This is but one of nine (9) claims, filed by the Yardmasters, dealing with scope issues at Ray Yard. The others have been designated as Dockets 892384-5, 892404, 900048-51 & -53.

Discussion & Findings

After the ICC approved acquisition of the MKT by the MP in 1988 the UP/MP and the UTU-Y signed Master Merger Agreement No. 43 which dealt with consolidation of MKT and MP Yardmaster work which would then be covered by the MP Agreement. In September of 1989 the Carrier served notice to the UTU-Y, in accordance with Article II, Section I of the Merger Agreement, of its intent to "transfer former MKT Yardmaster work to (various) locations...". Among other things, the Carrier proposed to transfer work then being done at Denison, Texas to Fort Worth, Texas which would affect six (6)

Yardmasters, including the Claimant to this case. According to the Carrier the transfer of Yardmaster work from Denison to Fort Worth was brought about by the transfer of switching duties from Ray Yard at Denison to the Carrier's facilities at Fort Worth. As a result, Yardmaster positions at Denison, including the one held by the Claimant, were abolished. The degree and extent to which the duties actually associated with the Ray Yard Yardmaster positions were abolished are the subject-matter of this and related cases filed by this craft dealing with the scope of their work at Ray Yard. According to the claims, the positions were abolished, but Yardmaster work remained.

On December 30, 1989 the Yardmaster's General Chairman at Fort Worth filed a claim stating that the work of the first shift Yardmaster at Denison's Ray Yard had been abolished, but the actual duties associated with that position were transferred to MTO's, Footboard Yardmasters, Switchmen, Dispatchers and others not covered by the Yardmaster Agreement. The first day claimed was December 5, 1989. Relief requested was for one day's pay for each day that the violation of the Agreement continued or "until the condition (was) corrected". The details of how much work remained at Ray Yard is subject of considerable controversy between the parties and the Board is provided with a voluminous record compiled by the Union to document that work of various types, allegedly always done by Yardmasters at this location, continued to be done after the December 5, 1989 date. In its first denial of the claim

the Carrier did not deny that various types of work which had been done by Yardmasters remained, but argument by the Carrier was that the Yardmasters had no exclusive right, under their Agreement, to the work that remained. According to the Carrier, the "handling of trains" had been done by various other personnel both before, and then rightfully so after, the date first specified by the claim. There is no factual dispute that work traditionally done by Yardmasters remained after December 5, 1989 at Ray Yard. The substantive question is the extent to which such work remained, and whether it had been shared by Yardmasters and other employees as a matter of past practice. Secondly, the Carrier attempts to put a limit on any potential liability stemming from this and associated claims by stating in its August 23, 1991 correspondence to the union that in either case "...Yardmaster work at Ray Yard had been completely eliminated by July 17, 1990". The Carrier states that the union took "...no exception to this observation" after the parties had met at Ray Yard itself to try and sort out the details of the "complexity of this case". As a matter of fact, the Organization did take exception to this in its submission although the Board can find no return correspondence to the Carrier on this point after the Carrier's August 23, 1991 letter. The Board will, therefore, deal with the claim within the perimeters of the

original claim date of December 5, 1989 through July 17, 1990,[1] as a preliminary matter.

(1) Yardmaster Work at Ray Yard: 12-5-89 Through 7-17-90

According to the original claim Yardmasters at Ray Yard had always exclusively performed the following supervisory work at Ray Yard. They issued instructions and supervised all yard engines; all pick ups and set outs by trains; and granted permission to crews to enter and leave the yard. Yardmasters also coordinated the work of switchmen, carmen, section men and train crews. Further, Yardmasters were in charge of keeping the PICL inventory updated at all times. As support for its contention the Organization provides documentary evidence, references the operant Agreement, the Carrier's Operating Rules at Rule 650, and arbitral precedent. Rule 650 states the following, in pertinent part:

> The general direction and government of a yard is under the direction of the Yardmaster where one is employed. At such locations, employees in yard, train and engine service must comply with instructions from the Yardmaster.....
>
> The Yardmaster is responsible for and shall have direct supervision over the work of yard crews, clerks and all

---

[1]The Organization states the following with respect to post July 17, 1990 Yardmaster work being done at Ray Yard, in its submission: "(The Carrier)...state(s) that the Organization failed to take exception to the observation by the Carrier that by July 17, 1990 all the Yardmaster work at Ray Yard had been completely eliminated. Obviously, if the Orgnaization took no exception to this observation, this claim would not have been continued past that point in time. As proof of the amount of Yardmaster work still being done at Ray Yard, we submitted the vast amount of radio transcriptions".

> other employees working the yard and must see that they carry our their work in a safe, efficient and economical manner, in accordance with rules, regulations and instructions of the company. Yardmasters are charged with the prompt and regular movement of cars, also giving special attention to the proper make-up of trains and to their prompt movement into and out of the yard.

The Board must agree with the Organization that there is numerous arbitral precedent, most of it emanating from the Fourth Division of the National Railroad Adjustment Board, wherein it has been ruled that the duties of Yardmasters are, in accordance with their Scope Rule, the supervision of car and train movements in freight yards and the issuance of orders to all train yard employees. Such precedent also has clearly stated that specificity of such duties are found in Carrier's operating rules which complement Agreement provisions (See Fourth Division 1340, 2032, 3297, 3335, 3480 inter alia). There is a large file of statements in the record, provided by the Organization which the Board has closely examined, by Yardmasters and by other employees who attest to the fact that the supervision of employees handling trains has traditionally been Yardmaster work both at Denison and at other points in the Carrier's system. Clearly, objection by the Carrier at first level of handling which states that "handling of trains" at Ray Yard was also done by other crafts does not sufficiently rebut that the primary duties of Yardmasters is the supervision of such handling by other employees and the Board must rule accordingly. That such duties accrue to Yardmasters is also supported by extensive arbitral precedent (See Fourth Division 1999, 2189, 3009 inter

alia). Of particular interest here, however, is contention by the Carrier that other than Yardmasters, in the specific instance of Ray Yard, on occasion had done work otherwise normally recognized as work which had been performed by Yardmasters. First of all, according to the Carrier, several years prior to the MKT and MP merger, a third shift Yardmaster position was abolished at Ray Yard and a "Footboard Yardmaster position created without complaint from the Organization". The Carrier notes that if, after the merger, and after the date outlined in this claim, a Footboard Yardmaster utilized a CRT to change the freight car inventory in the computer it was not with authorization of the Carrier and "...the mere fact that a Footboard Yardmaster chose to perform this function without permission from the Carrier does not constitute an agreement violation". Further, the Carrier argues that the "...Organization failed to demonstrate that the Carrier was even aware that a Footboard Yardmaster was performing this function" on the local level. The Board must here observe that whether local supervision was aware of the work being done by its own Foodboard Yardmasters or not, which the Organization responds that it finds to be less than credible, is not determinative of whether a violation in fact was taking place. That PICL work belonged to the Yardmasters at Ray Yard is itself supported by a number of considerations. The Organization argues, with supporting evidence by statements in the record by both Yardmasters and other employees, that PICL work belonged to Yardmasters at Ray Yard. The Carrier itself implied

that this work belonged to Yardmasters. If such were not the case it would have been moot for the Carrier to have argued that local management did not even know that Footboard Yardmasters were doing this work. The Organization argues that in another case dealing with the TCU before PLB 4288 the Carrier had also argued that "...the record reveals that Yardmasters at Shreveport, Longview and even at Fort Worth have performed the work of PICL'ing cars and operating a CRT...". Thus for the Organization to argue that such happened also at Denison, even without specific documentary proof, would be but to point to practices which were consistent with those at other points on the system. It may be that Footboard Yardmasters did do some PICL'ing at Denison prior to the merger. But evidence of record is that such would have been so anecdotal that application of the de minimus rule would be warranted. The PICL'ing of cars at Ray Yard, if such was done by Footboard Yardmasters, does not rebut primary fact that work of this type belonged, as a matter of past practice, to the craft which is party to this case.

Having reasonably established, therefore, that the work in question belonged to Yardmasters at Ray Yard, it remains for the Board to determine how much Yardmaster work remained during the time-frame in question after the Carrier abolished the Yardmaster positions. There can be no doubt that some of the work remained during the time-frame here under scrutiny since the Carrier itself argues that all Yardmaster work had been abolished only after July 17, 1990. Such is supported further by first denial of the claim

under date of January 25, 1990 by the Carrier's officer wherein it was not argued that "handling of trains" was not, in fact, continuing at Ray Yard. The only contention of the latter denial was that the work which was continuing was not Yardmaster work. Reference above the incorrectness of that position.

The Organization provides a large file of documentary evidence to show that after the claim date pick up, set out and switching instructions were being issued at Ray Yard by various employees other than Yardmasters. These included managers, switchmen, Footboard Yardmasters, others on "light duty", and dispatchers. The many statements in the record to that effect were signed by engineers, switchmen themselves, conductors and by other employees working at Ray Yard who signed statements without, in cases, identifying their job title. Although the parties to this case argue about the actual amount of Yardmaster work done at Ray Yard from December 8, 1989 through July 17, 1990 the Carrier never explicitly contests the validity of the documents provided by the Organization to support it claim, in this case, as moving party. The Board must, therefore, accept such statements as substantial evidence. The file of record also contains numerous switch lists, records of car movements, radio transmission logs, and so on of what the Board can only construe to be a large amount of train activity at Ray Yard after the first date claimed by the craft in this case. In its correspondence to the Carrier under date of March 24, 1990 the General Chairman states, among other things, the

following:

> "(The) Carrier will probably contend that decrease in the volume of work at Ray Yard necessitated the abolishment of the Yardmaster positions...(but)...there is still a substantial amount of work being done at Ray Yard. Besides those trains shown on the T-Plan, there are two engines working regularly on first shift and one engine working regularly on second shift. Obviously, there must be a substantial volume of work to be done or the company would...not bear the expense of three engines and crews where none are needed."

In that letter the Organization also references a statement in the record from a Customer Service Clerk to the effect that an "update is being done from Ray Yard". Such is accompanied by a copy of procedure changes put out by the Carrier to Customer Service "...stating that Ray Yard at Denison will remain open and the trains and engines that would continue to work at Ray Yard". The Carrier's response to this is as follows, in its correspondence dated May 23, 1990:

> "Immediately prior to the merger the Carrier maintained two (2) regular Yardmaster assignments and one (1) Relief Yardmaster assignment (at Ray Yard). At that time the Carrier maintained....(four switch engines daily and)...two relief engines (which) were assigned to work each week for a total of thirty (30) yard engine shifts per week. Subsequent to the merger the Carrier discontinued the Sherman Local which was originated at Denison and abolished all of the yard engines at Ray Yard. All of the work previously performed at Ray Yard was moved to other locations such as Dallas. Along with the abolishment of the switch engines, the Carrier also abolished the Yardmaster positions...."

On July 30, 1990 the General Chairman responds to the Carrier and his response is cited here, in pertinent part, for the record:

> "You stated in your letter that the Carrier has discontinued the Sherman Local and all of the yard engines at Ray Yard. As we pointed out in our appeal,

> the yard engines have not been discontinued at Ray Yard. There are two yard engines on the first shift and one on the second shift. The Sherman Local only provided a miniscule amount of work in the first place and its discontinuance had no effect whatsoever on the operations at Ray Yard. The three Footboard Yardmasters who are operating at Ray Yard are (named). This information can easily be obtained from the radio transcripts which were attached to our appeal. As even further proof that these engines are still operating in Ray Yard, we have attached another set of radio transcripts under Attachment A...Prior to the merger Katy trains 102, 103, 104, 105, 106, 107 and 154 were switched or had pick ups and set outs at Ray Yard. Subsequent to the merger and up to the present, trains FWNP, FWKC, FWEK, NPFW, KCFW and NPHOZ are switched and pick up and set out at Ray Yard. A net loss of one train".

In its August 23, 1991 letter to the Organization the Carrier states, on the one hand, as noted earlier that it is its contention that in either case all Yardmaster work was eliminated by July 17, 1990 albeit, ironically the Board might note, it concurrently admits that there were still two switch engines operating at Ray Yard. Its argument is, therefore, that switch engines continued to operate but that Yardmaster work had been completely eliminated. The Carrier also admits, in this letter, after further conferencing the claim with the Organization at Ray Yard itself, that three switch engines had been operative at this yard after the merger until, it appears, reduction to two by July 17, 1990.

As moving party to this case the Organization bears the burden of proof which consists in providing to a forum such as this what arbitral precedent and the courts refer to as substantial evidence. Such has been defined 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). A review of the full record warrants the conclusion that the Organization has adequately and reasonably met that burden in the instant case for the time-frame of December 5, 1989 through July 17, 1990. The consistent contention of the Organization has been that the Carrier had kept three engines working at Ray Yard after the abolishment of the Yardmaster positions and it has provided abundant documentary evidence of work associated with the operation of those switch engines which the Carrier had shifted to other employees not covered by the Yardmasters' agreement. It is reasonable to conclude that the Carrier was phasing out switching operations at Ray Yard and by July 17, 1990 it admits that its operations were down to two switching engines, which the Organization does not deny. But from all evidence of record the Board must conclude that local management decided to eliminate the Yardmaster positions at Ray Yard, after the merger, prior to the elimination of a very large percentage of the Yardmaster functions which still remained at that yard.

(2) Yardmaster Work at Ray Yard After 7-17-90

In its August 23, 1991 letter to the Organization the Carrier states that its switching operations were reduced to two engines by July 17, 1990 and that "currently there is only one switch engine operating at Ray Yard". "Currently" can only be interpreted as the day of the writing of that letter which was August 23, 1991.

According to the Carrier, there remained "...on average, a total of betweem 89-129 freight cars...picked up and/or set out at Ray Yard during a 24 hous period" on or after August 23, 1991. So some Yardmaster work continued to be done after July 17, 1990 at Ray Yard but the extent of such work was clearly decreasing. It is also clear that operations at this yard were being phased out. The rip track facility, the downtown car shop, the roundhouse, and five yard tracks had all been eliminated. Of the seven remaining tracks, two were what were known as "stub" tracks. The Carrier had already sold a large portion of Ray Yard's real estate. It is reasonable for this Board to conclude that Yardmaster work at Ray Yard was becoming minimal by August 23, 1991 and that it had already been greatly reduced after July 17, 1990 although certainly some Yardmaster work remained between those dates. Documentation provided by the Organization on Yardmaster work actually done at Ray Yard after July 17, 1990 is minimal. In view of the total record, and in view of statements by the Carrier itself particularly in its rendition of facts found in its August 23, 1991 correspondence, the Board is not warranted in relegating all remaining Yardmaster work at Ray Yard after July 17, 1990 to de minimus status. In deciding on this matter, therefore, the Board does not believe that it would be unreasonable to extend penalty date associated with this claim for another sixty (60) calendar days after July 17, 1990 and it so rules.

With respect to relief, argument by the Carrier is that even

if a violation may have occured arguendo no compensatory relief is proper since the Claimant suffered no monetary loss. Such line of reasoning has been rejected by arbitral precedent in this industry and it would be improper for this Board to diverge from such precedent absent rationale other than that provided here by the Carrier. In prior cases before these parties this Board has cited Second Division 4506 and Third Division 11701 & 12374 and it incorporates them herein by reference. Likewise, a large number of other Awards issued particularly but not only by the Third Division of the National Railroad Adjustment Board underline that "it is not enough to recognize (a) breach (of contract) without expecting the violator to accept the consequences of its act" (See Third Division 11701; also 11937, 16946, 21340 inter alia). As Third Division 17108 puts it, which is an Award often cited with respect to the issue at bar: "...(a) violation of...contract is not limited to lost earnings of Claimants, but the loss of opportunities of earnings must also be considered...".

As a final matter, the Board notes that on occasion there is divergence, in the large quantity of materials before it on this case, between arguments presented during the handling of the case on property and those proffered in submission. In all instances conclusions derived in this Award are based on the record generated on property. It is well established in this industry that a Board such as this will not consider material nor arguments that were not submitted during the handling of a case on property. This firmly

entrenched doctrine, which rejects ambush tactics, is codified by Circular No. 1 and has been articulated in many Awards (See Third Division 20841, 21463, 22054; Fourth Division 4132, 4136, 4137 inter alia).

Award

The Claimant shall be paid one (1) per diem for each day he would have worked as Yardmaster at Ray Yard at Denison, Texas from December 5, 1989 through September 15, 1990 (or: through July 17, 1990 + 60 calendar days) at rate he would have received had he worked. All monies owed to him shall be paid within thirty (30) days of the date of this Award. All other relief requested in the Statement of Claim is denied.

Edward L. Suntrup, Neutral Member

D. D. Matter, Carrier Member

J. D. Martin, Employee Martin

Date: May 29, 1992

Omaha, Nebraska