PUBLIC LAW BOARD NO. 5303

Parties to Dispute:

United Transportation Union Yardmasters Department	)	
	)	Case No. 12
vs.	)	Award No. 12
Missouri Pacific Railroad Company	)	

STATEMENT OF CLAIM:

"Claim in behalf of the senior available qualified Yardmaster for one day's pay beginning March 29, 1993 and continuing until condition is corrected, account work opportunity lost when the Relief Yardmaster position at Parsons, Kansas, was abolished and the duties of the position were allegedly transferred to other personnel not covered by the UTU(Y) Agreement." (NMB Subject Code: 177 - Scope.) Carrier File No. 930492.

FINDINGS: In the instant case the Organization filed Claim by letter dated August 30, 1993 "for the senior available qualified yardmaster" account Carrier violation in abolishing Relief Yardmaster Position and transference of work thereof to those foreign to the Agreement. The original Claim did not mention a specific Claimant or Rule violated. The Carrier's initial denial dated June 23, 1993 indicates no confusion thereto and denies exclusive right to the work at Parsons, Kansas or evidence to support any violation of the Agreement.

The Organization appealed this case by letter dated June 30, 1993 for the "senior available qualified yardmaster on the system"(emphasis added). The Organization argues that the supervision of switching, blocking, classifying, making-up of

trains, and other duties exclusively performed for thirty years by Yardmasters were now being performed by other crafts and classes of employees. The Organization presented over one hundred employee statements, radio transcripts, Conductor's trip slips on set outs, as well as other probative evidence to substantiate that the work belonged to the Yardmasters and continued to be performed after abolishment by non-yardmasters. In view of the evidence submitted, the Organization argued for a sustaining Award.

The Carrier responded by letter of October 15, 1993 issuing a denial based on both procedural grounds and merits. The Carrier argues that the Claim is procedurally barred due to a violation of Rule 6 of the Agreement. The Carrier alleges that upon appeal the Organization enlarged and amended the Claim to cover employees not involved in the original grievance. Under Rule 6, when the Claim was originally filled it covered UTU(Y)-represented employees who were the senior qualified at Parsons, Kansas. When the Claim was appealed it was amended to cover UTU(Y)-employees "on the system." The Carrier argues that this fundamentally changed "the scope of this claim, as well as its issues" and therefore the Claim for an employee on the system was barred from further consideration. On merits, the Carrier holds that Yardmaster work was eliminated at Parsons after all switching was eliminated. The Carrier maintains that no violation of the Scope Rule occurred.

First, after full consideration, the Board does not find the Claim procedurally defective. The Claim was not expanded by the clarification of "on the system." There is no denial in this record that the parties understood that the alleged Scope Rule violation was the Claim. If a violation was found, the Organization designated an appropriate Claimant. In this dispute the Carrier has argued that the Claim has been altered to a determination over outcomes and procedures for the consideration of a proper Claimant, due to a modification from point seniority to system seniority. The Board does not agree. The Claim remains centered on an alleged Scope Rule violation. There is absolutely no doubt in the Board's mind that the parties were knowledgeable

that the disputed position at Parsons was governed by Master Merger Agreement No. 43. If a violation of the Scope Rule were determined, both parties fully understood that the UTU(Y) progressed this Claim knowing that its employees had both point and system seniority rights and obligations. Whomever was the senior available qualified Yardmaster would be thereafter determined and that employee was the same as in the original grievance. There is insufficient proof that this change is indicative of a barred claim.

Second, the Scope Rule was violated and there was lost opportunity. There is sufficient probative evidence to substantiate the Claim. Based upon our additional review of the extensive evidence and issues we arrive at the same conclusion as more fully developed in our prior Award No. 11 of Public Law Board No. 5303. Accordingly, we sustain the Claim.

Lastly, while the Board would have stopped at this point, the parties stated on property the following:

> the parties agreed in conference that the issue in this claim was whether the Carrier was obligated to bulletin Yardmaster positions system-wide or in the absence of a UTU(Y)-represented employee at the point, the Carrier had the right to have yardmaster work performed by other than UTU(Y)-represented employees.

As such, the Board has reviewed all of the applicable Agreements and arguments raised by the parties on property. This issue supra, was fully joined. When this Board met, both parties requested that the neutral member address this issue if it were reached. Having found a proper Claim and sustained it, this Board now turns to the language of the Agreements.

Put succinctly, all prior UTU(Y)-represented employees at Parsons had assigned positions. In the designation of an employee to the Relief Yardmaster position the Carrier argues that as there were no additional UTU(Y)-represented employees at Parsons, Master Merger Implementing Agreement No. 43 gives the Carrier the right to

utilize other than UTU(Y)-represented employees. The Organization argues that under the instant circumstances where there were no UTU(Y)-represented employees at Parsons, the Carrier was obligated by Agreement to bulletin the no-local bid Relief Yardmaster position system-wide. If the job went no-system bid the Carrier could thereafter utilize a non-UTU(Y)-represented employee.

The Board has fully read all applicable Agreements including Master Merger Implementing Agreement No. 43 and Letters of Understanding pertaining thereto. We have focused upon Articles II and VII and Letters of Understanding Nos. 1 and 4. We have studied the utilization of the word "require" in Letter No. 1 and Article VII and hold that it was loosely used and within context carried a differential meaning. A full reading of the Agreement convinces this Board that the intent of the parties was clear.

Article II, Section 2 bulletins positions first with incumbents at the point, next with unassigned protected Yardmasters at the point and lastly with protected Yardmasters on the system. Article VII, Section 1 specified expenses for protected Yardmasters who were "required to change place of residence" under Article III, Section 3. Letter of Understanding No. 1 states that:

> nothing in this Agreement will prohibit the Carrier from hiring a new employe to fill a vacancy rather than require a protected Yardmaster to relocate. (emphasis added)

Our review of Letter of Understanding No. 4 finds nothing stated thereafter that refers to Letter of Understanding No. 1 or suggests in any manner that the Carrier is free of the listed obligations therein to go for a system bid. There is no evidence in the Agreement that Letter of Understanding No. 1 was to precede

Letter No. 2 which was to precede Letter No. 3 and so on. Although the Carrier argues that the intent of Letter No. 1 was to permit the Carrier to put a non-UTU(Y)-represented employee on the instant position; that is to say that the Carrier would have no obligation to bulletin system wide if it had to relocate an employee, we do not agree. If that were the purpose of Letter No. 1 it would have been easy to have made it clear and to have incorporated said language throughout Letter No. 4, as well as to have made Letter No. 1 applicable prior thereto. Organization's arguments are more persuasive. The language of Letter No. 4 is clearly precedent thereto:

> ... vacancies on Yardmaster positions will be filled in seniority order to protected yardmasters at the location and in the absence thereto, the following is agreed.
>
> 2. (a) In the event no applications are received for the position, notice will be sent to all extra unassigned protected Yardmasters receiving compensation from the Carrier, recalling them to the unfilled position in inverse seniority order..

The more persuasive argument is that the word "require" in Letter No. 1 is best interpreted as "force". A reading of all Letters of Understanding convinces this Board that Letter No. 4 more clearly enunciates the full intent of the Master Merger Implementing Agreement (particularly Article II, Section 2) and that Letter No. 1 only <u>permits</u> the Carrier to employ a non-UTU(Y)-represented employee rather than force protected Yardmasters to positions.

In short, Letter of Understanding No.1 is specific in reference to "the provisions concerning the <u>recalling</u> of employes" (emphasis added), namely Article II, Section 2(b), or Letter of Understanding No. 4, Paragraph 2(a) as it pertains to <u>recall</u>. Once the position goes no bid on the system the language of the Agreement gives the Carrier the right to hire a non-UTU(Y) employee

at Parsons rather than require a UTU(Y)-represented employee to be assigned under a system-wide recall. Claim is therefore sustained for lost opportunity to the senior available qualified Yardmaster.

AWARD:

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to Claimant be made. The Claim is sustained as set forth in the Findings.

Marty E. Zusman

Marty E. Zusman, Chairman
Neutral Member

D R Carver

Mr. D. R. Carver
Employee Member

D. D. Matter

Mr. D. D. Matter
Carrier Member

Date: 9/19/94.

PUBLIC LAW BOARD NO. 5303

INTERPRETATION NO. 1 TO AWARD NO. 12
CASE NO. 12

PARTIES TO DISPUTE: (United Transportation Union
(Yardmasters Department
(
(vs.
(
(Missouri Pacific Railroad Company

FINDINGS:

This Board upon the whole record and all the evidence finds that:

The Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended.

This Board has jurisdiction over the dispute involved herein.

The issue at bar is a determination of the Board's intent when it sustained the Claim in Case No. 12 of Public Law Board No. 5303 for lost opportunity to the senior available qualified Yardmaster. The Organization argues that the intent of the Award was to provide the qualified bidder a day's pay irrespective of previous earnings. The Carrier maintains that the Award does not intend a penalty payment.

This Board notes that in Public Law Board No. 5303, Case No. 12, Award No. 12, we held that:

> ...the Scope Rule was violated and there was lost opportunity. There is sufficient probative evidence to substantiate the Claim. Based upon our additional review of the extensive evidence and issues we arrive at the same conclusion as more fully developed in our prior Award No. 11 of Public Law Board No. 5303. Accordingly we sustain the Claim.

After full consideration of the substance of this dispute, the Board holds that the intent is consistent with Interpretation No. 1 to Public Law Board No. 5303, Case No. 11, Award No. 11. The qualified bidder is to receive a day's pay for lost work opportunity irrespective of previous earnings.

AWARD:

The Claim is sustained as set forth in the Interpretation.

Marty E. Zusman
Mr. Marty E. Zusman, Chairman
Neutral Member

Donald R. Carver
Mr. D. R. Carver
Employee Member

D. D. Matter
Mr. D. D. Matter
Carrier Member

Date: 1/14/95