PUBLIC LAW BOARD NO. 5529

PARTIES	UNITED TRANSPORTATION UNION-YARDMASTERS DEPARTMENT	)	
		)	AWARD NO. 2
TO	AND	)	
		)	CASE NO. 2
	CSX TRANSPORTATION, INC.	)	
DISPUTE	(FORMER BALTIMORE & OHIO RAILROAD COMPANY)	)	

STATEMENT OF CLAIM:

Claim for Unassigned Yardmaster W. Pavicic, for one day at the Yardmaster pro rata rate of pay at Akron, Ohio, for the following dates including the listed overtime; October 5, 1992, 4 hours overtime; October 6, 1992, 2 hours and 30 minutes overtime; October 7, 1992, 2 hours and 45 minutes overtime; October 8, 1992, 2 hours and 30 minutes overtime; October 9, 1992, 3 hours overtime; October 19, 1992, 3 hours and 15 minute overtime; October 20, 1992, 3 hours overtime, October 21, 1992, 3 hours overtime. This claim was submitted account the claimant was forced out of Akron by not properly applying the Trainmen's Agreement. By the Carrier's error in forcing the claimant out of Akron he missed the claimed Yardmaster work that he is entitled to under Articles 3B and 10B of the Yardmaster Agreement. (Carrier file 11-93-0001)

HISTORY OF DISPUTE:

Prior to October 1, 1992 Claimant was employed as both an Extra Yardmaster and Extra Trainman at Akron, Ohio. On October 1 Claimant was displaced from the Trainmens' Extra Board at Akron, and his seniority was insufficient to enable him to hold another position at that terminal. Consequently, he requested to be placed in the Trainmen's reserve pool. The Carrier denied Claimant's request and instructed him to exercise his seniority at another

location. Claimant obtained a Trainman's position in Cleveland, Ohio.

On October 20, 1992 the Carrier advised Claimant that an error had been made and that he could mark up on the reserve pool at Akron. Claimant immediately attempted to do so but discovered that his seniority was insufficient to allow him to obtain a position in the pool.

Subsequently, the United Transportation Union (UTU), the Organization representing the Trainmens' craft, pursued a claim on Claimant's behalf ". . . for reserve pool pay from 10/01/92 through and including 10/21/92" alleging a violation of the Trainmens' schedule agreement. Claimant also filed a claim under Article 10B, Paragraphs 1 and 2 of the Yardmasters' schedule agreement for eight days in October at the pro rata rate plus overtime contending that had the Carrier placed him properly in the reserve pool at Akron he would have worked as a Yardmaster on the specified days for the number of hours set forth in the claim.

The Carrier denied both claims. The Organization appealed both denials. On May 6, 1993 the Carrier settled the claim for violation of the Trainmens' agreement for $1,595 which represented payment in full for the claim dates ". . . account claimant was not timely allowed to displace onto the reserve pool at Akron." However, the Carrier declined to pay the claim for violation of the Yardmasters' agreement. The Organization appealed the denial to the highest officer of the Carrier designated to handle such

disputes. However, that dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151, et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

The Carrier maintains that the claim in this case should be dismissed because it seeks payment for a hypothetical situation and it is unsubstantiated with proof sufficient to satisfy the Organization's burden in a case of this nature. We cannot agree.

It is not speculative or hypothetical as to whether Claimant would have been entitled to the compensation sought by the claim. Claimant was the only extra unassigned Yardmaster at Akron. The regular Yardmaster was on vacation on the claim dates. The Carrier utilized a substitute Yardmaster junior to Claimant to perform the Yardmaster work at Akron on the claim dates. Had Claimant been working in Akron on the claim dates he would have been entitled to that work under Article 10B of the Yardmaster agreement. Claimant was not working at Akron due to the Carrier's misapplication of the Trainmens' agreement.

We also believe that the Organization has met its burden of proof in this case. The facts outlined in the foregoing paragraph clearly establish a prima facie case that Claimant was denied the opportunity to perform available Yardmaster work as a consequence of Carrier error. As the Organization emphasizes, there is substantial arbitral authority for the proposition that when erroneous or wrongful action by a Carrier deprives employees of an opportunity to perform work secured to them by an agreement the employees are entitled to be compensated for the loss of such opportunity. See NRAB Third Division Award No. 20562, Dec. 30, 1974 (Blackwell, Referee). Inasmuch as Article 10B of the Yardmaster agreement would have guaranteed Claimant the opportunity to perform the Yardmaster work in Akron on the claim dates had the Carrier not forced Claimant erroneously from Akron to Cleveland, it follows that Claimant's rights under Article 10B were abridged.

The Carrier also objects to the claim on the ground that it is excessive citing the fact that Claimant has been compensated not only for his work as a Trainman in Cleveland on the claim dates but also for loss of reserve board pay at Akron during the same dates. Now, emphasizes the Carrier, Claimant and the Organization seek compensation for a third time for the same claim period. Moreover, urges the Carrier, the claim seeks compensation at the overtime rate for time not worked which contravenes clear arbitral precedent.

The fact that Claimant was compensated for his work as a trainman in Cleveland is no bar to the claim in this case. It is well established that an award of compensation is appropriate for lost work opportunities as a result of the Carrier's violation of an agreement even though the employee may have been paid for performing other work during the period of violation. See NRAB Third Division Award No. 21340, Dec. 16, 1976 (Blackwell, Referee). Nor under the circumstances of this case do we believe compensation of Claimant for reserve board pay on the claim dates bars the claim. It must be borne in mind that such compensation was for guarantees that would have been paid Claimant for being on the reserve board but not actually performing Trainmens' work. Claimant would have been available to perform Yardmaster work on the claim dates for which he would have been compensated in the amount claimed. Thus, if Claimant had been treated properly he would have been entitled to reserve board pay as a Trainman and pay for work he would have performed as a Yardmaster. The fact that Claimant was compensated for work performed as a Trainman at Cleveland was due to Carrier error which apparently violated the Trainmens' agreement.

It is true, as clearly held by the arbitral authorities cited by the Carrier, that the proper rate of pay to determine compensation for time not worked is the pro rata and not the overtime rate. However, we believe the compensation sought by the claim in this case does not violate that principle. On each of the

claim dates the Yardmaster work performed at Akron exceeded eight hours. The claim is for the pro rata rate for eight hours on each claim date plus the overtime rate for all time in excess of eight hours. Those hours apparently were worked by the substitute Yardmaster. Had Claimant been treated properly under the applicable agreements he would have been entitled to that work and the attendant compensation. This is not a case where Claimant and the Organization seek compensation at the overtime rate for all hours of Yardmaster work Claimant lost on the claim dates.

In the final analysis we believe the claim in this case is fully supported by the record.

AWARD

Claim sustained.

The Carrier will make this award effective within thirty days of the date hereof.

William E. Fredenberger, Jr.
Chairman and Neutral Member

W. E. Griffin, Jr.
Carrier Member

R. P. DeGenova
Employee Member

DATED: 10/10/94