ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:	OPINION AND AWARD
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Organization,	Pursuant to Article I, Section 11 of the New York Dock Conditions
and	ICC Finance Docket No. 30249
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Carrier.	Case No. 2 Award No. 2

Hearing Date: May 17, 1988
Hearing Location: Scottsdale, Arizona
Date of Award: November 8, 1988

MEMBERS OF THE COMMITTEE

Employees' Member: C. F. Foose
Carrier Member: G. M. Garmon
Neutral Member: John B. LaRocco

STATEMENT OF THE CLAIM

Claim No. 1: Claim on behalf of Illinois Division Trackman S. W. Lee, holding prior rights on former TP&W Railroad Company for all hours consumed by a senior employe, R. D. Arevalos, of the Santa Fe Railway Company, from November 26, 1986, and continuing forward, account claimant was force reduced while a senior employe (Arevalos), who holds no prior rights on the former TP&W property, was permitted and instructed to protect a temporary headquartered vacancy on the Fairbury Section Gang.

Claim No. 2: Claim on behalf of Illinois Division Trackman R. D. McMahon, holding prior rights on the Santa Fe Railway Company, for all hours consumed by a senior employe, D. P. Thompson, of the former TP&W Railroad from December 29, 1986, and continuing forward, account claimant was force reduced effective December 26, 1986, while a senior employe

(Thompson), who holds no prior rights on the Santa Fe property, was permitted and instructed by the Carrier to protect temporary headquartered vacancies on the Galesburg, Stronghurst and Chillicothe Sections.

Claim No. 3: Claim on behalf of Illinois Division Trackman S. T. Volpe, holding prior rights on the Santa Fe Railway Company for all hours consumed by D. P. Thompson of the former TP&W Railroad, from February 23, 1987, and continuing forward, account claimant was displaced from the Galesburg Section effective February 23, 1987, by Thompson, who holds no prior rights on the Santa Fe property.

OPINION OF THE COMMITTEE

I. INTRODUCTION

On or about December 17, 1980, the Interstate Commerce Commission (ICC) approved the Atchison, Topeka and Santa Fe Railway Company's petition to control and acquire the Toledo, Peoria and Western Railroad (TP&W). [Finance Docket No. 30249.] On August 17, 1983, the ICC approved the merger of the TP&W into the Atchison, Topeka and Santa Fe Railway Company ("Carrier" or "Santa Fe"). The merger was consummated on January 1, 1984. As a result of the merger, the former TP&W became the Peoria District on the Carrier's Illinois Division. To compensate and protect employees affected by the acquisition and the subsequent merger, the ICC imposed the employee merger protection conditions set forth in New York Dock Railway - Control - Brooklyn Eastern District Terminal,

360 I.C.C. 60, 84-90 (1979); affirmed, New York Dock Railway v. United States, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on the Carrier pursuant to the relevant enabling statute. 49 U.S.C. Sections 11343, 11347.

This Board is duly constituted by a letter dated January 11, 1988. Hearing on this dispute was held on May 17, 1988. At the Neutral Member's request, the parties waived the Section

11(c) forty-five day limitation period for issuing this decision.[1]

II. BACKGROUND AND SUMMARY OF THE FACTS

In anticipation of the merger, the parties entered into what can be best characterized as a master merger implementing agreement. The July 12, 1983 Memorandum of Agreement provided that employees adversely affected by the merger would be subject to the benefits afforded by the New York Dock Conditions. Sections 1 and 2 of the July 12, 1983 Memorandum of Agreement read:

> 1. Effective with the merger of the two Carriers party to this Agreement, employes of the Toledo, Peoria and Western Railroad, represented by the Brotherhood of Maintenance of Way Employes shall be transferred to and become employes of The Atchison, Topeka and Santa Fe Railway Company, and will thereafter be covered by the Maintenance of Way Agreement(s) in effect on The Atchison, Topeka and Santa Fe Railway Company. Seniority dates previously established by employes on the Toledo, Peoria and Western Railroad will be dovetailed into the appropriate seniority roster of the applicable seniority Group(s) and Class(es) on the Illinois Division and/or Eastern Lines.
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> 2. Following the dovetailing procedures outlined in 1 above, employes in each Group and Class on the consolidated roster(s) will be designated so as to provide prior rights to service on their former seniority district. Prior rights to former Toledo, Peoria and Western service will not apply to employes holding system seniority [occupants of positions in gangs requiring seniority in Group 8 (System Steel Bridge Gang) and Group 11 (System Rail Laying and Plow Gangs)] performing work in former Toledo, Peoria and Western Railroad

[1] All sections pertinent to this case are set forth in Article 1 of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

> territory, nor will the use of such employes serve to replace employes having prior rights on the former Toledo, Peoria and Western Railroad. Failure to protect service in the prior rights territory will result in forfeiture of said prior right.

As specified in Sections 1 and 2 of the Agreement, the seniority of former TP&W employes, who would now be working under the Santa Fe scheduled Agreement, was dovetailed into the appropriate roster (for each Maintenance of Way Class) on the Illinois Division. However, as expressly stated in Section 2 of the Agreement, workers retained prior rights to service on their former territory. Former TP&W employes held prior rights to service on the new Peoria District while former Illinois Division workers held prior rights on the old Illinois Division territory (before it was expanded to include the former TP&W property). Section 2 also stated that the prior rights principle would not apply to two types of system gangs.

In accord with a June 8, 1984 Letter of Understanding, the parties deleted the last sentence of Section 2 of the July 12, 1983 Memorandum of Agreement. The June 8, 1984 Letter of Understanding also amended the fourth paragraph of a July 12, 1983 Letter (which was apparently an addendum to the July 12, 1983 Memorandum of Agreement as specified below.

> It was further agreed that, effective July 1, 1984, the fourth paragraph of my letter dated July 12, 1983, reading:

"It was agreed that, notwithstanding the provisions of the Agreement between BMWE and AT&SF, furloughed employes of the former TP&W as well as employes holding seniority on the Illinois Division and Eastern Lines seniority districts of the AT&SF prior to the merger, will be recalled for bulletined vacancies on their prior rights territory before bids are accepted from employes who do not have prior rights on the territory where the vacancy occurs."

is eliminated and the following will apply in lieu thereof:

"Employes whose names are listed on the consolidation rosters with prior rights shall have the right to exercise their seniority to bulletined positions in the territory where they hold prior rights over employes their senior on the consolidated roster who do not hold prior rights in such territory."

Employes with prior rights, shall be entitled to exercise same as follows:

1. When positions are bulletined, all employes on the consolidated seniority roster having seniority in the same group and class as the position(s) being bulletined may submit a bid therefor. The senior qualified employes bidding on same who have seniority in the group and class of the position(s) being bulletined and have prior rights on the territory where the bulletined position(s) will locate, shall have preference to such position(s). In the event that there are no bids received from employes holding prior rights on the territory where the bulletined position(s) will be located, the senior qualified employes on the consolidated roster having submitted bids therefor will be considered and assigned in accordance with the provisions of Rule 9-(a).

2. In the exercise of displacement rights, employes on the consolidated seniority roster who have been affected by a job abolishment or displaced in the exercise of seniority rights shall have prior rights in the exercise of their seniority to regular established bulletined positions in the territory where they hold prior rights; also, they will have rights over employes on the consolidated roster who do not hold prior rights in any territory.

3. When forces are increased, employes who have been cut off-in-force reduction will be recalled to service in accordance with the provisions of Rule 4, giving preference to the senior qualified off-in-force reduction employes who have prior rights in the territory where the positions will be located.

4. When no bids are received on a vacancy or new position bulletined under Rule 9-(a), the vacancy or position will be filled in accordance with the provisions of Rule 9-(g), giving preference to the senior qualified off-in-force reduction employe who has prior rights in the territory where the vacancy or position exists.

The three claims herein arose when the Carrier utilized schedule Rule 10-(a) to fill temporary vacancies on either the old Illinois Division or the former TP&W territory instead of applying employees' prior rights. The pertinent portion of Schedule Rule 10-(a), which was in effect when these disputes developed, provides:

> Vacancies on Positions Under Advertisement and Temporary Vacancies of Thirty Calendar Days or Less. Vacancies on positions under advertisement and temporary vacancies of thirty calendar days or less, that are to be filled, shall be filled in the following sequential order:

(1) By the senior employe of the class at the location who is working on a lower rated position or off in force reduction;

(2) By the senior available qualified employe of the class working on a lower rated position at the nearest location or off in force reduction;

(3) By promoting a qualified employe of a lower class working at the location nearest to the location where the vacancy occurs or off in force reduction.

In Claim No. 1, the Carrier furloughed Claimant, a Trackman holding prior rights on the former TP&W, on November 26, 1986. Shortly thereafter, a vacancy arose on the Fairbury Section of the former TP&W property. The Carrier advertised the vacancy on December 4, 1986, and awarded the job on December 22, 1986. The successful bidder held prior TP&W rights. In the intervening period between the advertisement and the award, the Carrier filled the temporary vacancy per Rule 10-(a) by assigning the senior trackman on the combined Illinois Division roster although the Carrier blanked the position from December 9 to December 14, 1986. The two employes assigned to fill the temporary vacancy (from December 1 to December 8 and from December 15 to December 22) did not hold prior rights on the former TP&W territory but they were senior to Claimant on the consolidated Illinois Division roster.

The second claim concerns a Trackman whom the Carrier furloughed on December 26, 1986. Claimant held prior rights on the former Illinois Division (Santa Fe) territory. The

Carrier instructed Trackman D. P. Thompson, who held more seniority than Claimant on the consolidated roster but lacked prior rights on the old Illinois Division, to protect temporary vacancies on the Stronghurst Section from December 29, 1986 to January 10, 1987 and the Chillicothe Section from January 12 to January 23, 1987. However, the record reflects that Claimant declined to work a temporary vacancy from January 12 to January 16, 1987. Commencing on January 26, 1987, Claimant began to protect temporary vacancies on a regular basis.

With regard to Claim No. 3, Claimant, a Trackman with prior rights on the old Illinois Division, was displaced from his position on the Galesburg Section on February 23, 1987. Trackman Thompson, who was also involved in the second claim, worked a temporary vacancy on the Galesburg Section from February 23 to February 27, 1987, and from March 2 to March 13, 1987. Claimant occupied a temporary vacancy from March 2 to March 13, 1987 and, on the next work day, he was assigned to a bulletined job on Extra Gang No. 62.

The issue is whether the Carrier properly filled the temporary vacancies by following schedule Rule 10-(a). Put differently, did the July 12, 1983 Memorandum of Agreement, as amended, require the Carrier to assign employes to fill temporary vacancies according to their prior rights.

In conjunction with the consolidation of the Chicago Terminal Division into the expanded Illinois Division, the parties, on September 10, 1987, entered into agreement rendering moot any future disputes concerning whether pre-merger work rights applied to temporary vacancies. In the Agreement, the parties specifically provided that employes with prior rights would be given preference for temporary vacancies on their former territories. The September 10, 1987 Agreement was not retroactive.

III. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Contrary to the Carrier's position that prior rights applied only to the four situations described in the June 8, 1984 Letter of Understanding, Section 2 of the July 12, 1983 Agreement expressly conferred prior rights on employees when exercising all facets of their seniority. Except for the last sentence, the parties left Section 2 of the July 12, 1983 Agreement in tact, and thus, the Section 2 prior rights remained in full force and effect subsequent to June 8, 1984. Section 2 obligated the Carrier to apply the prior rights of former Illinois Division and TP&W employees in lieu of Rule 10-(a) whenever it filled temporary vacancies on a prior rights territory. If the parties had wanted to limit workers' right to exercise their prior seniority rights, they would have written such a restriction into the Agreement as they did for certain system gangs. The Carrier deprived each Claimant of his preferential right to a

temporary vacancy on his former territory because the Carrier filled the vacancy with the senior off-in-force-reduction employee on the consolidated roster who did not have prior rights on the particular territory. Each Claimant is entitled to a dismissal allowance computed in accord with the New York Dock Conditions for the period he was furloughed while a worker, without prior rights, filled a temporary vacancy in a prior rights territory.

B. The Carrier's Position

The Carrier points out that Rule 10-(a) clearly provides the procedure for filling vacancies of thirty days or less. The Carrier further avers, that there is nothing in the July 12, 1983 Agreement indicating that the parties intended to supersede Rule 10-(a). On the contrary, in the June 8, 1984 Letter of Understanding, the parties promulgated, in great detail, the mechanics for applying prior rights for filling vacancies. None of the procedures addressed temporary vacancies. The absence of a detailed method for filling temporary vacancies according to prior rights allowed the Carrier to invoke Rule 10-(a) when assigning temporary vacancies. Prior rights become applicable to filling temporary vacancies only upon the effective date of September 10, 1987 Agrements. Thereafter, the issue was moot. Also the 1987 Agreement demonstrates that, absent an express contract provision, Rule 10-(a) exclusively applied to the filling of temporary vacancies.

IV. DISCUSSION

Section 2 of the July 12, 1983 Agreement vested employes with prior rights.

While the Carrier urges us to focus solely on the June 8, 1984 Letter Agrement, the natural starting point for determining the scope of prior rights is to interpret the provision creating those rights. The amendment is meaningless if read in a vacuum. The clear language of Section 2 discloses that employees' prior rights applied to "...service on ... their former seniority district." The word "service" encompasses all work and positions. The parties did not exempt temporary vacancies. Because the parties wrote an express exception into Section 2 for certain system gangs, they could have easily excluded temporary vacancies from the operation of prior rights. As we held in Award No. 1, this Committee is bound to follow the ordinary meaning of the language adopted by the parties in their agreements. To properly interpret a contract, we need go no further than the express language when such wording is clear and unambiguous. Thus, Section 2 of the July 12, 1983 Agreement governed the filling of temporary vacancies.

Nonetheless, the Carrier contends that the June 8, 1984 Agreement limited the application of prior rights to the filling of and displacement to regular positions. We disagree for three reasons. First, the Carrier relies on the portion of the June 8, 1984 Letter of Understanding

which was substituted for the fourth paragraph of the July 12, 1983 Letter. The fourth paragraph was not the origin of the prior rights concept. The Carrier has not articulated how the June 8, 1984 Letter restricted the broad operation of the prior rights principle when the amendment (on which the Carrier relies) did not modify Section 2 of the July 12, 1983 Agreement. Second, when the parties drafted the June 8, 1984 Letter of Understanding, they had an opportunity to completely eradicate Section 2 of the July 12, 1983 Memorandum of Agreement. Instead, they merely deleted the last sentence of Section 2. Preservation of the remainder of Section 2 manifests the parties' intent that prior rights continued to apply to all "service" on the prior rights territories (except certain system gangs). Third, the language in the June 8, 1984 Letter was not as broad as the language in Section 2 of the July 12, 1983 Agreement. The amended provision concerned only the exercise of prior seniority rights to "bulletined positions." Thus, when the parties went on to structure the process for filling positions, they, of course, concentrated exclusively on bulletined positions as opposed to temporary vacancies. Since the June 8, 1984 revision was applicable only to bulletined positions, the parties found no need to address temporary vacancies.

In sum, the June 8, 1984 amendment did not alter the broad but clear language in Section 2 of the July 12, 1983 Agreement. Therefore, the Carrier was obligated to apply prior rights when filling the temporary vacancies.

Claimants are only entitled to a dismissal allowance for the period that they were deprived of working a temporary vacancy because a worker without prior rights on the territory where the vacancy existed worked the temporary job. Each Claimant was under a duty to mitigate his damages and so, for example, when Claimant McMahon [Claim No. 2] voluntarily rejected an opportunity to fill a temporary vacancy, the Carrier could offset what he would have earned from his dismissal allowance.

AWARD AND ORDER

The claims are sustained to the extent specified below:

1. In Claim No. 1, the Carrier shall pay Claimant a dismissal allowance for the periods from December 1 to December 8, 1986 and from December 15 to December 22, 1986.

2. In Claim No. 2, the Carrier shall pay Claimant a dismissal allowance for the period from December 29, 1986 to January 10, 1987.

3. In Claim No. 3, the Carrier shall pay Claimant a dismissal allowance for the period from February 23, 1987 to February 27, 1987.

4. The Carrier shall comply with this Award within thirty (30) days of the date stated below.

DATED: November 8, 1988

C. F. Foose
Employes' Member

G. M. Garmon
Carrier Member

John B. LaRocco
Neutral Member

[BMWE-2.AWD]