ARBITRATION

pursuant to
Section 11, New York Dock Protective Provisions
imposed by the
Interstate Commerce Commission
in
Finance Docket No. 28676 (Sub No. 1)

UNITED TRANSPORTATION UNION (YARDMASTERS)

and

GRAND TRUNK WESTERN RAILROAD COMPANY

John C. FLETCHER, Chairman & Neutral Member

D. R. CARVER, Employee Member

R. J. O'BRIEN, Carrier Member

AWARD OF ARBITRATION BOARD

May 24, 1993

Introduction:

Grand Trunk Western Railroad Company (GTW, Carrier) and the Yardmasters Department of the United Transportation Union (Union, Organization) entered into an agreement establishing an Arbitration Board (Board) under Section 11 of the New York Dock protective provisions as imposed by the Interstate Commerce Commission (ICC) in Grand Trunk Western Railroad - Control - Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company, Finance Docket No. 28676 (Sub-No. 1). Carrier named Mr. R. J. O'Brien, Assistant Director Labor Relations, as its Member of the Board. Union named Mr. D. R. Carver, Assistant to the President, as its member of the Board. Mr. John C. Fletcher was selected as the Neutral Member and Chairman of the Board. Pre-hearing briefs were furnished the

Chairman by both parties on April 26, 1993. A hearing on the matter was held in Carrier's offices in Detroit, Michigan on May 7, 1993 at which time the parties pre-hearing briefs were reviewed and both sides were given full opportunity to present argument and evidence in support of its case.

Background:

GTW made application to ICC to acquire control of the Detroit, Toledo and Ironton Railroad (DTI) and the Detroit and Toledo Shore Line Railroad (DTSL). This application was made under ICC Finance Docket No. 28676 (Sub. No. 1), and was approved by ICC with the imposition of employee protective benefits comparable to those set forth in New York Dock Ry. - Control - Brooklyn Eastern District, 354 I.C.C. 399 (1978) as modified at 360 I.C.C. 60 (1979) (New York Dock), but supplemented by enhanced employee protective conditions as agreed to by GTW and various organizations representing its employees, including what was then known as the Railroad Yardmasters of America (RYA).[1] These supplemental protective conditions, agreed upon on September 4, 1979, are known as the "1979 Agreement."

The 1979 Agreement incorporated New York Dock, but extended additional benefits (the nature of which are not material to this dispute) subject to the understanding and stipulation set forth in Section 11, providing:

> This Agreement will be effective as to each labor organization upon the date of acquisition or the date upon which the labor organization and GTW come to agreement on a single working agreement for all the employees

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1 RYA subsequently became a part of the United Transportation Union and is now known as the United Transportation Union - Yardmasters Department. For the sake of simplicity, the term "Organization" or "Union" as used in this Award, will refer to both identities.

> they represent on GTW and DT&I, whichever date is later and the employees shall be entitled only to the protective conditions provided in Finance Docket No. 28676 (Sub. No. 1F) until such date. It is understood that DTSL employees will be subject to such single working agreement only when and if the DTSL is acquired in its entirety by GTW.

On September 4 1979, GTW and Organization also agreed to a side letter containing, *inter alia*, the following provision:

> To avoid any misunderstanding as to the intent and meaning of the clause "come to agreement on a single working agreement" which appears in Section 11, this is to advise that before GTW will agree on a single working agreement the following provisions, at a minimum, must be included in the agreement:
>
> (1) Following the effective date of the acquisition the G.T.W. shall have the right to transfer work and/or employees from the D.T.&I. Railroad to the G.T.W.
>
> (2) In the event the G.T.W. secures full ownership of the DT&SL RR. the G.T.W. shall have the right to transfer work and/or employees from the DT&SL Railroad to the G.T.W.
>
> (3) Satisfactory seniority points and seniority lists covering the territory of the DT&I Railroad Company and the DT&SL Railroad Company must be agreed upon.

GTW acquired DTI on June 24, 1980, but did not merge it into its operations until December 31, 1983. DTSL was acquired on April 13, 1981, and this carrier was merged into the operations of GTW on October 1, 1981. When DTI was acquired, the yardmaster employees on that property were not represented by any union. Organization represented yardmasters on both GTW and DT&SL. On January 8, 1985, following an election conducted among all yardmasters of GTW, DTI and DTSL, the National Mediation Board (NMB) certified Organization as the exclusive representative of all yardmasters on the merged system. Since that date the parties have applied the GTW Yardmasters Agreement on the line of the former GTW and DTI, but have applied the DTSL Yardmasters Agreement on the lines of that former property.

THE ISSUE

Organization has presented the following statement of issue:

> Did the UTU - Yardmasters (former Railroad Yardmasters of America) have a single working agreement for the yardmasters they represented on the Grand Trunk Western (GTW) and the Detroit, Toledo and Ironton (DTI) on June 24, 1980, in accordance with the ICC Finance Docket No. 28676 (Sub No. 1) provisions and the September 4, 1979 Agreement?

Carrier has stated the issue as:

> Do the yardmasters have a single working agreement, as required by the September 1979 agreement, which would qualify them for the protective benefits of that agreement?

As the statement of issue proffered by Organization is more precise and conforms more closely to the Agreement, the Board adopts it for the purpose of this award.

THE POSITION OF THE PARTIES

The Position of Organization:

Organization asserts that on June 24, 1980, the effective date of GTW's takeover of DTI, all of the yardmasters employed by GTW were under a single agreement. It further asserts it did not represent yardmasters on DTI until the certification by NMB on January 8, 1985.

Organization also states it was sent a letter on July 3, 1980, by Director, Labor Relations D. E. Prover, presenting four agreements for approval, and taking the position that these agreements must be approved before the 1979 Agreement can become effective. One of these agreements provided as follows:

> In the event the National Mediation Board, pursuant to Section Ninth of the Railway Labor Act, as amended, should certify the R.Y.A. as

> the organization designated and authorized to represent Yardmasters on the D.T.&I. Railroad then at such time the rates of pay, (unless otherwise agreed to by the parties), working conditions and rules contained in existing collective bargaining Agreements in effect between the G.T.W. Railroad Company and the R.Y.A. will apply to those employees on the D.T.I. Railroad occupying positions represented by the R.Y.A.

Another of these agreements provided as follows:

> Yardmasters on the D.T.I. Railroad are not represented by any union and the R.Y.A. does not legally represent them at this time, therefore, it is recognized the requirements in Section 11 to come to agreement on a single working agreement for Yardmasters of both railroads cannot be accomplished at this time. Notwithstanding the aforementioned it is agreed that the September 4, 1979 Agreement shall become effective for Yardmasters on the G. T. W. effective 1980.[2]

The Organization avers that these agreements were signed and returned to Carrier, although Carrier does not acknowledge that they were received. Nevertheless, Organization insists that only one agreement existed on the implementation date of DTI control, whether or not Carrier received signed copies of the four agreements it presented to Organization for signature.

The Position of Carrier:

Carrier argues the terms of the 1979 Agreement conditioned its application upon the negotiation of a single working agreement for the class and craft of Yardmasters. It notes that DTSL yardmasters continued to work under their collective bargaining agreement subsequent to the acquisition of that property on April 13, 1981, and there has been no suggestion from either

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2 It is apparent from the original text that the space between "effective" and "1980" was left in order to insert a precise date.

party that there is a single working agreement, or that the GTW Agreement should be automatically applied to DTSL employees.

Carrier states that single working agreements were the consideration exchanged for the extension of benefits from New York Dock to those afforded by the 1979 Agreement. It avers that a single agreement would allow Carrier to realize cost savings which would offset the greater protection burden. Because those savings have not been realized, Carrier argues the agreement fails for lack of consideration. Carrier further submits that Organization's claim is confusing as it claims protection only for former GTW yardmasters.

Carrier notes that Organization did not represent DTI yardmasters at the time of the 1979 Agreement, a fact known to all parties. Therefore, continues Carrier, Organization agreed to a condition it was impossible for them to perform, namely negotiating an agreement to cover DTI employees. Even though NMB certified Organization as the exclusive representative of yardmasters on the entire merged system as of January 8, 1985, Carrier states that yardmasters still work under two agreements.

Carrier contrasts the situation with yardmasters with that of other crafts. It states that it has negotiated single working agreements with all shop craft organizations, dispatchers and signalmen. According to Carrier, these agreements go beyond merely adopting the terms of a GTW agreement. Carrier states these agreements contain all of the understandings between the parties concerning seniority on the merged system, as well as a variety of other items normally found in an implementing agreement under New York Dock. Carrier submits that these agreements allowed it to close redundant facilities,

centralize functions and transfer employees to points where they could be more fully utilized. By comparison, Carrier points out, yardmasters still work only on the lines of their former carriers.

Carrier denies that it has ever received the July 1980 agreements from Organization. Even if they were received, Carrier states these agreements are only partially executed, and, therefore, not binding. Carrier also argues the fact that DTSL yardmasters still work under their old agreement contradicts any claim that these agreements have any validity. Carrier also asserts its cover letter to these agreements indicated that the agreements would have to be signed before the 1979 Agreement would be effective. Carrier takes this as an acceptance by the Organization that Section 11 of the 1979 Agreement would not be automatically satisfied without further understanding between the parties.

Carrier finds significant the fact that DTSL yardmasters were not brought under the GTW Agreement when that property was acquired. According to Carrier, neither party has ever suggested that DTSL yardmasters currently work under any agreement other than the DTSL Agreement. It cites the fact that the parties met in 1982 and 1983 to negotiate a single agreement, and that Organization, on September 22, 1983, filed a RLA Section 6 notice seeking to have the GTW Agreement apply to DTSL yardmasters. This notice was withdrawn by Organization following NMB's certification. Nonetheless, Carrier argues Organization's filing of a Section 6 notice should be taken as evidence that a single agreement does not exist.

Carrier cites as further support a July 26, 1989 New York Dock arbitration award between these parties by a committee chaired by Arbitrator Robert E. Peterson (Peterson Award). That arbitration dismissed a claim under the doctrine of laches, but Carrier cites dicta in the award where the Committee found the claim for protective benefits to have lacked merit because the 1979 Agreement conditions were conditional upon their being a single working agreement. Carrier cites other awards which also denied benefits under the 1979 Agreement because various conditions had not been satisfied.

DISCUSSION

In anticipation of the acquisition of DTI and DTSL, Carrier negotiated agreements with various organizations which were designed to reap the benefits of a consolidated system. In doing so, Carrier presented identical agreements to each organization. In return for protective benefits superior to those afforded by New York Dock, Carrier sought to place employees of the various properties under a single working agreement for each craft. Organization executed such an agreement, and now contends the conditions were satisfied as of the effective date of GTW's acquisition of DTI, namely June 24, 1980.

In conjunction with the 1979 Agreement, and on the same day thereof, Carrier and Organization entered into a side letter agreement which purportedly clarified what Carrier intended to achieve in a single working agreement.

The thrust of Carrier's argument is that, as of the date of the hearing before this Board, there is no single working agreement covering all

yardmasters on the GTW system. Therefore, it concludes, the conditions precedent to receiving the enhanced employee protective conditions have not been satisfied. While it is true that the parties have continued to operate as if the DTSL Agreement is still applicable to employee on that former property, there is some doubt in the mind of the Board that this is a proper application. Looking at the situation from today's perspective would require the Board to accept everything that has led up to today. Such a reverse chronological analysis would tend to give credence to all previous decisions and actions of the parties, whether or not such credence would be warranted.

The Board is sure that a more appropriate analysis would be consider the agreements and events in their true chronological order. To this end, the Board finds the following chronology to be relevant:

September 4, 1979 -	Carrier and Organization agree to employee protective agreement enhancing New York Dock benefits and side letter.
December 3, 1979 -	ICC approves Carrier's acquisition of DTI and DTSL
June 24, 1980 -	DTI acquired by Carrier.
July 3, 1980 -	Carrier proposes four agreements to Organization to make the 1979 Agreement effective.
April 13, 1981 -	DTSL acquired by Carrier.
October 1, 1981 -	DTSL operations merged into Carrier
December 31, 1981 -	DTI operations merged into Carrier
March 1982 to September 1983 -	Carrier and Organization meet to discuss a single agreement for GTW and DTSL yardmasters.

September 22, 1983 -	Organization serves Section 6 notices to place DTSL yardmasters under GTW Agreement.
January 8, 1985 -	National Mediation Board certifies Organization as the exclusive representative of all Carrier yardmasters.
April 15, 1985 -	Organization withdraws Section 6 notices.

Beginning the analysis of this chronology with the September 4, 1979 Agreement, the Board finds that the Agreement will be "effective upon the date of acquisition or the date upon which the labor organization and GTW come to agreement on a single working agreement for all employees they represent on the GTW and DT&I, whichever is later ... ." On that date (September 4, 1979) Organization did not represent any employees on DTI. There already was a single working agreement for all the represented yardmasters on GTW. Thus, the second condition of the 1979 Agreement was satisfied as of September 4, 1979. Because the date of acquisition was not until June 24, 1980, that became the effective date of the enhanced protective benefits of the 1979 Agreement.

In arriving at this conclusion, the Board has relied upon several factors. First it is evident Carrier offered identical agreements to each organization without regard to individual circumstances, such as those present in the case with DTI yardmasters being unrepresented by Organization. It does not appear that the terms of this agreement were the result of negotiations, but, rather, were drafted unilaterally by Carrier. Thus, the principle of contract law that a contract will be interpreted against the party selecting the language is applicable.. In this case, Carrier chose the phrase "all the

employees they represent on the GTW and DT&I." While for some organizations, this may have broadened the group of employees covered, in this case it narrowed it by excluding yardmasters on the DTI because they were unrepresented.

The choice of language Carrier used in the Agreement must be given meaning. It is very specific and the group identified is readily ascertainable. By specifically referring to "employees they represent," instead of all members of the craft and class, or some other appropriate terminology, Carrier obviously intended to define a specific group, which, in this case, turns out to be only the yardmasters on the former GTW.

The language Carrier placed in the side letter setting forth conditions Carrier required in a single working agreement becomes moot because there already was a single working agreement for the group of yardmasters identified in the 1979 Agreement. No further negotiations were necessary. The fact that this single working agreement may not have contained certain provisions sought by Carrier in its side letter did not render the GTW Working Agreement void, nor did it make that Agreement anything less than what was required in the 1979 Agreement, namely a single working Agreement for yardmasters on the GTW.

The agreements proposed in Carrier's letter of July 3, 1980, did not enter into this decision. First, there is no evidence they have ever been executed by both parties. Second, Carrier's statement in that letter that Organization's approval of these agreements was necessary before the 1979 Agreement could be applied lacks validity. The 1979 Agreement contained its own conditions

triggering its effective date. Carrier was not at privileged to unilaterally impose additional conditions one year later. On the other hand, the Board did not consider Carrier's apparent willingness to apply 1979 Agreement benefits to GTW yardmasters because DTI yardmasters were unrepresented at the time.

This Board is also not persuaded by the Peterson Award, cited when discussing the Position of Carrier. As noted there, that Board dismissed the claims before it under the doctrine of laches. We do not find that that Board directly addressed the question herein. Moreover, the Peterson Award concluded with the following statement:

> The committee's decision is without prejudice to a determination as to on what date, if any, outside the parameters of this dispute, a single working agreement came to be in effect for all covered yardmasters. Such a question could only be answered after a determination of the relevant facts, certain of which are intertwined with this dispute, but most of which were not fully joined by the parties in this dispute.

The Board is cognizant that this decision may raise more questions than it answers. For example, the Board is without authority to determine whether 1979 Agreement coverage is extended to former DTI and DTSL yardmasters as the Organization did not raise this as an issue. It apparently sought coverage only for the former GTW yardmasters and it would be beyond our authority to expand upon the Organization's claim.

This decision also avoids making a determination of what agreement is applicable to yardmasters on the former DTSL. As has been observed above, the parties have applied the DTSL Agreement to this group of yardmasters since the acquisition in 1981, notwithstanding the fact that the 1979 Agreement contains the following understanding:

> ... It is understood that DTSL employees shall be subject to such single working agreement only when and if the DTSL is acquired in its entirety by GTW.

The issue of applicability of the GTW Agreement to former DTSL yardmasters, however, is not before this Board. Resolution of that question, if the parties elect to pursue it, must remain to another day.

Finally, it was agreed by the parties that the Board's decision in this matter would be without prejudice to either party's position regard the merits or the timeliness of individual claims.

An award in favor of the Organization will be entered.

AWARD

The question at issue, as stated by Organization and adopted by the Board as more precise and conforming more closely to the Agreement, is answered in the affirmative.

John C. Fletcher, Chairman & Neutral Member

R. J. O'Brien, Carrier Member
Dissent

Donald R. Carver
D. R. Carver, Employee Member

Dated at Mt. Prospect, Illinois, May 24, 1993