**Public Law Board No. 5557**

**Case No. 1**
**Award No. 1**

**Parties to the Dispute:**

Brotherhood of Maintenance of Way Employees, AFL-CIO/CLC
and
Union Pacific Railroad Company
(formerly Missouri Pacific Railroad)

**Statement of the Claim:**

The claim(s), as described by Organization in this matter, is/are phrased as follows:

"Claim of the System Committee of the Brotherhood that:

'(1) The Carrier violated the Agreement when it assigned Union Pacific Supervisor Jeff Bestful on the Concordia Subdivision from June 18 through June 22, 1990 and Supervisor T. J. Talbott on the Oklahoma Subdivision from July 2 through July 4, 1990 to perform all train operations instead of assigning a work equipment mechanic (Carrier's File 900484 MPR).

(2) The Carrier violated the Agreement when it assigned non-agreement Track Supervisor T. J. Talbott to perform rail train operations on Rail Train D19E50 from June 19 through June 29, 1990, instead of assigning a work equipment mechanic (Carrier's File 900485).

(3) The Carrier violated the Agreement when it assigned Union Pacific Supervisor Jeff Bestful on the Concordia Subdivision and Fall City Subdivision from May 8 through May 24, 1990 to perform rail train operations (loading and unloading rail) on the Concordia and Fall City Subdivisions instead of assigning a work equipment mechanic (Carrier's File 900560).

(4) The Carrier violated the Agreement when it assigned Union Pacific Supervisor Tim Talbott on July 20 through July 24, 1990 and Union Pacific Supervisor Scott Hopkins on August 3 and 4, 1990 to unload rail from rail trains instead of assigning work equipment mechanic (Carrier's File 900648).

(5) The Carrier violated the Agreement when it assigned Work Equipment Supervisor T. J. Talbott from August 20 through August 31, 1990 to load and unload rail from rail trains instead of assigning a work equipment mechanic (Carrier's File 910082).

(6) The Carrier violated the Agreement when it assigned Work Equipment Supervisor T. J. Talbott from August 5 through August 11, 1990 to load and unload rail from rail trains instead of assigning a work equipment mechanic (Carrier's File 910085).

(7) The Carrier violated the Agreement when it assigned Work Equipment Supervisor T. J. Talbott from September 4 through September 26, 1990 to load and unload rail from rail trains instead of assigning a work equipment mechanic (Carrier's File 910156).

(8) The Carrier violated the Agreement when it assigned Work Equipment Supervisor T. J. Talbott from October 1 through October 22, 1990 to load and unload rail from rail trains instead of assigning a work equipment mechanic (Carrier's File 910199).

(9) Because of the violation referred to in Part (1) above, Work Equipment Mechanic L. D. McCloud shall be compensated at his time and one-half rate of pay for the eighty eight and one-half (88 ½) hours expanded by the supervisor in the performance of this work.

(10) Because of the violation referred to in Part (2) above, Work Equipment Mechanic L. E. Tosh shall be compensated at the appropriate rate of pay for all hours expended by the supervisor as listed below:

| | | |
|---|---|---|
| June 19 | 8 hrs overtime | |
| June 20 | 16 hrs overtime, | 8 hrs double time |

| | | |
|---|---|---|
| June 21 | 16 hrs overtime, | 8 hrs double time |
| June 22 | 13 hrs overtime, | 8 hrs double time |
| June 23 | 8 hrs overtime | |
| June 24 | 8 hrs overtime | |
| June 25 | 4 hrs overtime, | 8 hrs straight time |
| June 26 | 8 hrs overtime, | 8 hrs straight time |
| June 27 | 11 hrs overtime, | 8 hrs straight time |
| June 28 | 4 hrs overtime, | 8 hrs straight time |
| June 29 | 11 hrs travel time | |

(11) Because of the violation referred to in Part (3) above, the forty (40) work equipment operators listed below* shall each receive pay for an equal proportionate share, at their appropriate time and one-half rate, for all man-hours expended by the supervisor in the performance of this work.

| | |
|---|---|
| *T. E. Blasingame | R. W. Cooper |
| G. R. Knight | A. D. Curtis |
| D. E. Price | V. L. Price |
| R. Buchanan | D. G. Barber |
| D. L. Wharton | R. K. Backus |
| V. A. Hudson | L. B. Byrd |
| D. G. Thurman | R. W. Murray |
| L. E. Tosh | G. A. Howard |
| D. R. Vint | J. P. Koenigsfeld |
| T. J. Maserang | R. G. Holman |
| L. D. McCloud | J. H. McCoy |
| R. E. Hughes | J. L. Byrd |
| R. L. Smith | D. R. Hill |
| A. L. Harshaw, Jr. | M. E. Thirion |
| J. R. Goodman | G. L. Sales |
| R. M. Ussery | L. D. Sales |
| R. L. Goodin | J. Givens Jr. |
| H. S. Wells | K. W. Carson |
| R. D. McKinney | M. Hilliard |
| R. A. Grooms | H. A. Cloyes |

(12) Because of the violation referred to in Part (4) above, the forty (40) work equipment operators listed in Part (11) above shall be compensated at the appropriate rate of pay for an equal proportionate share of the total number of man-hours expended by the supervisor in the performance of this work.

(13) Because of the violation referred to in Part (5) above, Work Equipment Mechanic H. A. Cloyes shall be compensated at the WEM overtime rate for all hours worked by the supervisor from August 20 through August 24, 1990 and compensated at the appropriate rate for all hours expended by the supervisor from August 26 through August 31, 1990 in the performance of this work.

(14) Because of the violation referred to in Part (6) above, Work Equipment Mechanic L. D. McCloud shall be compensated at the WEM overtime rate of pay for all overtime worked by the supervisor in the performance of this work from August 5 through 11, 1990.

(15) Because of the violation referred to in Part (7) above, Work Equipment Mechanic H. A. Cloyes shall be compensated at the appropriate rate of pay for all hours expended by the supervisor in the performance of this work from September 4 through September 26, 1990.

(16) Because of the violation referred to in Part (8) above, Work Equipment Mechanics H. A. Cloyes, A. D. Curtis, L. D. McCloud and A. L. Harshaw, Jr. shall each receive compensation at the WEM rate of pay for an equal proportionate share of the total number of man-hours expended by the supervisor to perform this work from October 1 through October 22, 1990'."

**Opinion of the Board:**

The instant dispute consists of eight (8) separate yet similar claims involving numerous claimants (approximately forty [40]) who are all classified as Work Equipment Mechanics (otherwise referred to as "WEMs", "work equipment operators" or "Roughriders"). According to the parties, Roughrider work consists of "... riding the rail trains, loading and unloading welded and bolted rail, (and) maintenance and repair including preventive maintenance of the trains." In addition, the Roughriders also instruct other Carrier employees how to load, unload, and operate safety around the rail train when so assigned.

The triggering events which led to the filing of the aforestated claims occurred throughout Carrier's system on various subdivisions, including the Concordia, Oklahoma and Fall City Subdivisions, during the approximate time period of May 8, 1990 through October 22, 1990. The gravamen of these claims is essentially whether or not Carrier properly assigned non-Agreement Supervisors to perform work on the claim dates which, heretofore, had otherwise been performed by the Roughriders.

Each of the approximately forty (40) Claimants currently occupy or are qualified to work on the Eastern District Seniority Roster with respect to operating Carrier's continuous weld rail trains.

Carrier, for reasons which will be developed more fully hereinafter, denied the claims; and said claims were appealed unsuccessfully by Organization throughout all of the remaining steps of the parties' negotiated grievance procedure. Thereafter, said claims were appealed to arbitration by Organization; and because of the similar nature of all of the aforestated claims, said claims were consolidated by the parties, and were presented as one (1) single issue to this Board for resolution.

The parties, in support of their respective positions, have submitted extensive written Submissions which were supplemented by voluminous exhibits. Carrier's written Submission has appropriately focused the pending claims into the following three (3) main areas of consideration:

> "(a) Rail train operations for territory other than the Missouri Pacific Railroad across the Union Pacific system
>
> (b) Rail train operations for abandoned territory on the Missouri Pacific Railroad where contracting notice was additionally served.

(c) Rail train operations for the Missouri Pacific on other than the Eastern Seniority District of the Missouri Pacific Railroad."

Carrier's denial of the instant claims is predicated upon nine (9) different, yet interrelated theories. Said theories are as follow:

"(1) The Missouri Pacific Railroad BMWE Collective Bargaining Agreement Scope Rule did not grant exclusive rights for riding trains and inspecting trains or loads to the BMWE.

(2) The work of operating equipment or supervising the loading and unloading of rail trains was not covered under the Scope of their Agreement and the Scope Rule of the Missouri Pacific Railroad BMWE Agreement is a general rule.

(3) The Agreement does not contain a work classification rule and such a restriction has to be bargained for.

(4) The employees nor the Organization possessed a right to any work off of the Missouri Pacific.

(5) Work on the abandoned lines did not belong to the Organization, and even then, notice was served under the 1968 National Agreement.

(6) Eastern District Mechanics do not have seniority rights off of their seniority territory and any work off of their territory was in accordance with Rule 6.

(7) The claims were vague, excessive or not based on fact.

(8) The Organization never proved a rule violation.

(9) There was no loss of work opportunity."

In rebuttal to Carrier's position, Organization's initial contention is that the ample evidence which has been presented to the Board in this matter, clearly demonstrates that the disputed work is contractually reserved to Claimants by Agreement Rules 2, 6 and 14; and that a controlling past practice exists wherein Eastern District Roughriders have continually performed "roughriding" work throughout the Missouri Pacific system since the beginning of the use of welded rail in 1960.

Second, regarding Carrier's contention that the disputed work was performed on tracks which were abandoned by Carrier under the authority of the Interstate Commerce Commission (which, Organization contends, has not been established on the record), Organization asserts that said work on the previously abandoned lines was protected by the Oregon Short Line III Protective Conditions (Oregon Short Line Railroad Company -- Abandonment -- Gosen, 360 I.C.C. 91 [1979]). Accordingly, Organization maintains that under such protective conditions, in virtually all I.C.C. authorizations to abandon or discontinue railroad lines, Carrier, nonetheless, is required to maintain established rates of pay and working conditions for its affected employees -- the latter of which invariably includes the parties' "... collectively bargained scope rule."

Organization's third major area of argumentation herein is that the scope rule exclusivity doctrine, in which an organization must show that work claimed in such a situation is exclusively reserved to a particular craft, is inapplicable when the work is assigned to non-agreement supervisors -- such as that which has occurred in the instant case.

Fourth, and lastly, Organization maintains that ample arbitral precedent has been established by the National Railroad Adjustment Board's Third Division which provides that even though a particular claimant was "fully employed" at the time of the occurrence of a claimed violation and "suffered no loss," a penalty payment, nonetheless, is appropriate in situations, such as the instant case, "... when supervisors were found to have performed scope work in violation of the Agreement."

Given the extensive record which has been presented in this matter, and given the thrust and multifaceted nature of the parties' argumentation herein, the Board is of the opinion that the initial point of departure in this

analysis would be to determine whether or not the Eastern District WEMs' work jurisdiction extends beyond their own seniority bounds of the Eastern District.

As noted previously hereinabove, the instant claims involve, among other issues, alleged Scope Rule violations by various of Carrier's supervisors when engaged in work upon abandoned lines and lines which were formerly operated by the Missouri Pacific Railroad Company but which were subsequently taken over by the Union Pacific Railroad Company through acquisition.

With respect to the matter of the performance of the disputed work on the Union Pacific lines, there is no evidence contained in the record which establishes that Carrier and Organization have agreed to extend the work jurisdiction of the Missouri Pacific Eastern District WEMs after the Union Pacific's acquisition of the Missouri Pacific to those Union Pacific territories not originally constituting the Missouri Pacific Railroad. In addition, railroad arbitral precedent has also established that previously entitled employees do not have a right to perform work on abandoned lines (NRAB Third Division Awards Nos. 12918, 19639 and 19994; and NRAB First Division Awards Nos. 1240 and 5588). Absent any evidence to the contrary, the Board finds that the former Missouri Pacific Eastern District WEMs have no contractual jurisdiction to perform Roughrider work on the old Union Pacific lines. Consequently, those claims which have been filed in this matter claiming a contractual entitlement to said work, are hereby dismissed; and, in addition, those claims relating to previously abandoned lines are also dismissed by virtue of the aforestated First and Third Division precedent.

The next area of consideration in this analysis is whether or not, either by contract or by past practice, Carrier has extended the work jurisdiction of the Eastern Seniority District WEMs over other seniority districts of the former Missouri Pacific Railroad.

The totality of the evidence of record herein leads the Board to conclude that a controlling past practice has been established by the parties regarding the granting of WEMs the right to perform Roughrider work over the entire former Missouri Pacific system. We come to this conclusion after examining several years' worth of Missouri Pacific WEM job bulletins wherein said documents clearly and specifically indicated that such Roughrider work was to be performed by the Missouri Pacific WEMS system-wide. In railroad labor-management relations, similar to that which occurs in all other industries in which there exists a formalized collective bargaining relationship between Management and its employees, in order to establish the existence of a bone fide, controlling past practice, among other things, it must be shown that said practice was clear and consistent, was of relatively long duration and repetition, and was mutually known by and accepted by the parties. The fact circumstances present in the instant case demonstrate that over the years, the Missouri Pacific consistently bulletined the Eastern Seniority District WEMs to perform work system-wide, and that Organization concurred with that action. Consequently, the existence of a past practice herein is apparent.

In opposition to Organization's position concerning this particular point, Carrier argues that Rule 6 - Transfer and Temporary Service of the parties' applicable Agreement "... allows the Carrier to send employees off of their home seniority districts for temporary service." Although this may be true, it does not, however, argue against the existence of a controlling, established

past practice which is amply supported by numerous years of Carrier's bulletining of WEM assignments.

Based upon the existence of such a controlling past practice, therefore, we find that the former Missouri Pacific Eastern District WEMs are properly entitled to perform Roughrider work over the entire system of the former Missouri Pacific Railroad. This is not to say that the applicable Scope Rule, which generally recognizes Brotherhood of Maintenance of Way Employees' work to include that of WEMs, means that Claimants and other Carrier employees so classified may perform out of seniority district work exclusively; but rather that the former Missouri Pacific WEMs may perform work over the former Missouri Pacific non-Eastern District lines; and consequently, Carrier cannot substitute supervisory employees to replace Eastern District WEMS to perform such work.

Had the disputed work been assigned by Carrier to authorized employees of other crafts who are also assigned, on occasion, to perform said work, then the exclusivity doctrine espoused by Carrier herein would have militated against the finding of a contract violation in this case. Under the circumstances of the pending claims, however, it was supervisors, rather than authorized/qualified hourly employees, who were specifically assigned by Carrier to perform the now disputed contractually covered scope rule work.

Despite the Board's finding of the existence of a limited contractual violation in the instant case, however, that does not end our analysis because, having made such a determination, we must next consider what, if any, remedy would be appropriate in this matter.

In this regard, Carrier argues that regardless of the outcome of the Board's determination in the instant dispute, no remedy whatsoever is

warranted because Organization has failed to establish that each individual Claimant has been specifically damaged by the alleged contractual violation(s) in order to qualify to receive remedial compensation. Accordingly, Carrier asserts that at the time of the occurrence of the alleged violation(s), Claimants were otherwise fully employed and did not suffer a loss of work opportunity.

Organization, on the other hand, counter argues that violations of Scope Rules have, in fact, been compensated through the railroad arbitration process, even though the involved claimant(s) was/were otherwise fully employed in Carrier's service at the time of the occurrence of the triggering incident(s). In support of this particular position, Organization cites fifteen (15) Third Division Awards of the National Railroad Adjustment Board as precedential.

Generally speaking, the Chairman of this Public Law Board has held in previous cases that, absent specific evidence indicating that some particular damage/loss was sustained by a particular claimant(s), a claim must fail due to the fact that no remedy was otherwise available. In the instant case, however, the Board must consider the precedent established by the NRAB Third Division in remedying Scope Rules violations which are committed by Carrier's supervisors. In this regard, the Board believes that the principle(s) articulated in NRAB Third Division Awards Nos. 26593, 28185, 28231 and 29036 are compelling. Said Awards essentially hold that when the applicable Scope Rule is violated by a supervisor who performs Scope Rule work, then either a call rate or one (1) day's pro rata rate of pay per violation is appropriate to compensate an otherwise fully employed claimant. Accordingly, therefore, given that the NRAB Third Division has prescribed a doctrine and devised a method to allow the application of a remedy to an

otherwise fully employed employee/claimant whose contractual rights were violated by a supervisor who performed Scope Rule work, then we find that the pending claims in the instant case alleging violations on the former Missouri Pacific Lines are compensable.

Related to the aforestated discussion point, Organization in its argumentation also maintains that Claimant's remedy payments should be calculated and paid at the penalty rate of time and one-half for all hours in which Scope Rule work was improperly performed by Carrier's supervisors. This particular aspect of Organization's remedy request, the Board finds, is clearly excessive; and thus, said payments shall be reduced to pay at the actual straight time hourly rate. This includes actual time expended in the loading or unloading of rail, or any other Scope Rule work performed by the supervisors on the appropriate claim dates; and is exclusive of transport time expended by the supervisor(s) who normally has/have other supervisory/ managerial duties to perform on the train while in transport to the next job assignment.

Still yet further, we also are compelled to note that various of the pending claims which pertain to former Missouri Pacific Lines work which was improperly performed by supervisors, identify multiple Claimants (which suggests a "class action" type of claim) and request that the remedial payments be divided among Claimants on "an equal proportionate share" basis. Said work, however, it appears, was performed by only one (1) supervisor on each of the particular claim date(s). Obviously, not all employees/Claimants employed on a particular job can or should be compensated for the work performed by one (1) supervisor on a given day. Since the record which has been presented herein fails to provide the requisite data which would be needed in order to determine, with any degree

of reasonable certainty, which particular claimant is qualified to receive a monetary payment in this matter, and since the record also fails to establish the Board's authority to direct such "an equal proportionate share" remedy request, then we will remand this particular remedial question to the parties to determine which Claimant(s) would be entitled to receive the penalty payment(s) for the subject Scope Rule violations. Specific guidelines which are to be utilized by the parties for such determinations should include the most senior employee on the assigned crew who was otherwise qualified to perform the disputed work on that particular day.

To recap and review the foregoing, all pending claims in this matter relating to work performed on lines other than those of the former Missouri Pacific Railroad and on those lines abandoned by Carrier, are hereby dismissed. Those claims pertaining to work on the former Missouri Pacific Lines, however, other than the Eastern District, are hereby sustained; and shall be paid in accordance with the above.

**Award:**

Claims sustained in accordance with the above.

John J. Mikrut, Jr.
Chairman and Neutral Member

D. A. Ring
Carrier Member

Roy C. Robinson
Organization Member

Issued in Columbia, Missouri on December 10, 1994.