PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE

and

UNION PACIFIC RAILROAD COMPANY [FORMER SOUTHERN PACIFIC TRANSPORTATION COMPANY (WESTERN LINES)]

Case No. 56

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned UP Roster 9006 employes D. Slattery and D. Martin to perform track work (marking ties) between Mile Posts 138.00 to 143.00 and 150.00 to 155.00 on the Sacramento Division Western Seniority District on the former SP-Western Lines territory beginning June 8, 2003 and continuing, instead of Sacramento Division Western Seniority District employes J. Johnson and E. McGirr (Carrier's File 1372500 SPW).

2. As a consequence of the violation referred to in Part (1) above, Claimant J. Johnson and E. McGirr shall now '...each be paid their proportionate share at their respective rates as Unloading Gang Foremen, for five hundred twenty (520) straight time hours and twenty-three (23) time and one-half hours worked by Messrs. Slattery and Martin of UP System Division Gang 9027 from June 8, 2003 and continuing until such time as the violation cease[s] to exist.***'

Background:

During the 1980s and 1990s, the Carrier (UP) acquired and merged with the Western Pacific (WP), Missouri Pacific (MP), Southern Pacific (SP), St. Louis and Southwestern (SSW), Denver and Rio Grande Western (D&RGW), and Chicago and Northwestern (C&NW) Railroads. SP and its subsidiaries became part of the Carrier under Surface Transportation Board Finance Docket No. 32760. An Implementing Agreement for the consolidation of system operations on UP, SP, WP, D&RGW, and C&NW territories, effective January 1, 1998, was subsequently created (the

"Consolidated System Gang Agreement"). Under § 1 of the Agreement, "all system gang operations listed hereinafter" are combined and are governed by the UP/BMWE Collective Bargaining Agreement. The system operations listed include System Tie and Ballast Gang Work.

Claimants hold seniority in the Track Subdepartment on the Sacramento Division, Western Seniority District, and are governed by the SP-Western Lines (SPW) Collective Bargaining Agreement. The SPW Agreement provides in pertinent part:

RULE 1 – SCOPE

> These rules govern rates of pay, hours of service, and working conditions of employees in all sub-departments of the Maintenance of Way and Structures Department … represented by the Brotherhood of Maintenance of Way Employees….

At the time pertinent herein, Claimants were regularly assigned as foremen of SPW Unloading Gangs 8594 and 8591.

Beginning on June 8, 2003, the Carrier assigned two employees from UP System Division Gang 9207—D. Slattery and D. Martin—to mark ties on the former SP-WL territory (Sacramento Division). The Organization filed the instant claim on July 30, 2003. The Carrier denied the claim by letter dated September 23, 2003. By letter dated October 6, 2003, the Organization appealed the Carrier's denial, and the Carrier rejected the Organization's appeal by letter dated December 1, 2003. The parties discussed the matter in conference on February 24, 2004, but did not resolve it, and therefore have presented it to this Board for final resolution.

Organization's Position:

The Organization contends that maintenance of way tie-marking on the former SPW territory is governed by the SPW Agreement, and therefore such work accrues to

employees with seniority on the SPW territory. The employees the Carrier assigned to do the work are covered by the Consolidated System Gang Agreement. The Organization asserts that ample arbitral authority supports its position that where—as here—there are separate and distinct agreements covering employees, "foreign agreement" employees with no seniority under the controlling Agreement have no contractual right to perform work reserved to Agreement-covered employees.

In response to the Carrier's assertion that the tie-marking at issue was system gang work and related to the work of a system tie and resurfacing gang, the Organization argues that consolidated system gangs perform only work on large projects and new construction, while division, district or section gangs perform routine maintenance regarding ties, track, switches and surfacing. The Organization points out that while the position of "tie marker" does not exist in either the Consolidated System Gang Agreement or the SP-WL Agreement, it does exist in the UP/BMWE Agreement. Moreover, the Organization contends, such work previously has been performed by supervisors represented by the American Railway and Airlines Supervisory Association (ARASA) in relation to tie replacement work, and therefore it is "not inseparable" from the work of system tie and resurfacing gangs. On that basis, the Organization argues:

> [T]he work assigned on the former SP-W Lines territory was plainly SPW Agreement work and since the Carrier admittedly assigned it to Maintenance of Way employes, it could not validly ignore the obligation to assign the work to Maintenance of Way employees with seniority established under the SPW Agreement. (Emphasis in original.)

(Org. Subm. at 21.)

It is the Organization's additional position that "full employment" of Claimants does not mitigate the Carrier's liability in the instant case.

Carrier's Position:

It is the Carrier's position that the Organization has not fulfilled its burden of proving a contractual violation, and therefore the grievance must be denied. The Carrier argues that it has the managerial right to assign work however it deems suitable, except insofar as such managerial right has been restricted by either law or agreement. According to the Carrier, its right to assign the tie-marking work at issue is unfettered.

The Carrier contends that the Organization cannot show that the work at issue falls within the scope of the SPW Agreement, nor indeed that Organization members have *ever* performed such work. According to the Carrier, the Agreement's scope rule is general, and does not reserve the marking of ties to Agreement-covered employees. The Organization has not cited any specific contractual language restricting the Carrier from assigning the work of marking ties on SPW Sacramento Western District territory to employees other than Sacramento Western Seniority District employees, and in fact, no such Agreement language exists.

The Carrier further argues that the tie-marking work in question has not been reserved to SPW Agreement–covered employees by the customary and exclusive performance of such work on the former SPW territory by such employees. To the contrary, the Carrier points out, the Organization has admitted that the work has been customarily performed by ARASA-represented employees. The Carrier asserts that because the tie-marking work in question has not been reserved to either system seniority or division seniority rosters, the work can be assigned to either group. The Carrier cites *N.R.A.B. (Third Division), Award No. 31984* (Benn, May 6, 1997) and *N.R.A.B. (Third Division), Award No. 31821* (Vause, December 26, 1996) in support of its position that

where the work in question is not within the scope of a collective bargaining agreement or has ever been performed by agreement-covered employees, there can be no contractual violation.

Findings:

The issue in the instant case is whether, as the Organization contends, the tie-marking work performed on the former SPW territory, Sacramento Division, by two system gang employees—who hold no seniority under the SPW Agreement—rightfully belonged to Claimants, who do hold seniority under the SPW Agreement. In order to prevail on this issue, the Organization must demonstrate that the work in question is reserved to SPW Agreement–covered employees. The Organization may do this in two ways.

First, the Organization can identify specific language in the SPW Agreement expressly reserving such work to Agreement-covered employees. The Board finds that the Organization has failed to do so. Rule 1 of the Agreement, governing scope, is general in nature and makes no specific assignment of any particular work to Agreement-covered employees. The Organization has not identified any other Agreement provision making such a work reservation. Therefore, the Board finds that the tie-marking work in question is not expressly reserved to Agreement-covered employees by contractual language.

The second way in which the Organization may prove that Claimants, as senior SPW Agreement–covered employees were entitled to the tie-marking work in question is to demonstrate that such work on the former SPW territory has been customarily and exclusively performed by SPW Agreement–covered employees.

Not only has the Organization presented no evidence that the tie-marking work has been performed by SPW Agreement–covered employees customarily and exclusively, the Organization has offered no evidence that such employees have *ever* performed such work. In fact, the Organization has stated forthrightly that such work in the past has been performed by ARASA-represented supervisors. The Board therefore finds that the Organization has failed to meet its burden of proof in the instant case, and the claim must be denied.

Award:

The claim is denied.

Joan Parker
JOAN PARKER, Neutral Member

W.G. R
CARRIER MEMBER

DATED: May 7, 2007

ORGANIZATION MEMBER

DATED: 5-7-07