Award No. 15028
Docket No. MW-15589

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the agreement when, effective at 12:01 P. M. on July 24, 1963, it abolished Section 41 headquartered at Industry, Georgia, and transferred the work to employes of the Southern Railway who are not covered by the agreement, and as a result thereof:

(2) Track Foreman H. C. McRae, Ident. No. 57559, and Track Laborers W. Arnold, Ident. No. 2138, J. Barnes, Ident. No. 3856, M. Crowder, Ident. No. 18137, A. Dixon, Ident. No. 22286, J. T. Harris, Ident. No. 35185, N. Ellison, Ident. No. 35297, W. Starr, Ident. No. 83695, A. Smith, Ident. No. 78905, A. Smith, Ident. No. 78917, L. Smith, Ident. No. 79765, D. Woodward, Ident. No. 97813, C. G. Souder, Ident. No. 82705, E. Thomas, Ident. No. 86802, G. L. Walton, Ident. No. 91368, and R. Watts, Ident. No. 92433, and/or any employes they may affect through the exercise of their seniority, each be paid at his respective straight time rate of pay beginning at 12:01 P.M., July 24, 1963 and to continue until the settlement of this claim.

EMPLOYES' STATEMENT OF FACTS: On July 23, 1963, the Carrier's Chief Engineer addressed a letter to the Division Engineer, which reads:

"Savannah, Georgia
July 23, 1963
wec/ur

Mr. G. W. Benson:

Effective at 12:01 P.M., please arrange to abolish the following:

Section No. 1, headquartered at Macon, Georgia
Section No. 41, Industry, Georgia
B&B Gang, Foreman Hale, No. 1.

thereby because Section 5(2)(f) of the Interstate Commerce Act provides that "**an agreement pertaining to the protection of the interests of said employes** (employes adversely affected as a result of the transaction authorized by the Commission **may hereafter be entered into.**" (Parenthesis and emphasis ours.) The clear and unmistakable effect of that holding is that an agreement which does not specifically pertain to the protection of the interests of employes who may be adversely affected as a result of the transaction authorized by the Commission has no application to employes so affected. The schedule agreement relied on by the Brotherhood in the claims which it here presents to the Board does not in any way specifically or impliedly pertain to the protection of the interests of employes who may be adversely affected as a result of the authorization granted by the Commission. On the contrary, that schedule agreement was not "hereafter . . . entered into" after the Commission proceedings had commenced and was not made in contemplation of or in any way in relation to any aspect of that transaction. Indeed, it does not contain any provisions which could in any way reasonably be construed to be applicable to any of the consolidations of facilities or any other actions included within the authorization granted by the Commission.

E. CORRESPONDENCE ON THE PROPERTY

The correspondence on the property pertaining to this alleged unadjusted dispute is attached hereto as Carrier's Exhibit D.

(Exhibits not reproduced.)

OPINION OF BOARD: Throughout the handling of the Claim on the property Carrier steadfastly declined it, giving as its reasons:

> ". . . your 'claims' were **not** recognized as ones arising out of the rules and working conditions agreement, that the matters are not subject to the Railway Labor Act. . . .
>
> This will confirm the Carrier representative's statement to you in conference that the matter of abolishing certain positions and transferring the work to the Southern Railway was handled in strict keeping with the authorization granted by the Interstate Commerce Commission in Finance Docket No. 21400, Southern Railway Company control of Central of Georgia Railway Company.
>
> It was likewise stated to you that we shall treat with those individuals named in your letters in accordance with the protective conditions laid down by the Commission, but **not** to the extent outlined in any of your letters of May 8, 1964. Your 'claims,' as filed, therefore, remain declined in their entirety. . . ."

After receipt of written notice that the Organization intended to file an Ex Parte Submission, pursuant to Section 3, First (i) of the Railway Labor Act (RLA), Carrier wrote the Executive Secretary, Third Division of the National Railroad Adjustment Board, herein called the Board:

> "Please be advised that the so-called 'claim' is **not** recognized by this company as one arising out of the rules and working conditions agreement between the parties, and that the matter is **not** subject to the Railway Labor Act, as amended. It is the company's positive posi-

tion that the National Railroad Adjustment Board does **not** have jurisdiction in this matter. The fact is, this subject is covered by Interstate Commerce Commission Finance Docket No. 21400, Southern Railway Company–Control–Central of Georgia Railway Company.

Without prejudice to the foregoing position in any manner whatsoever, and with the clear and distinct understanding that the filing of an ex parte submission with your Board is **not** to be construed as a waiver or abandonment of our position, we shall file our submission within the time limit, or any extension thereof which may be granted."

Consequently we are confronted with what in substance is a special appearance by Carrier coupled with a motion to dismiss for lack of jurisdiction.

The Organization's position is set forth in a letter dated May 8, 1964, from its General Chairman to the Director of Personnel for Central:

"We can not agree that the abolishment of this position and the subsequent transferral of the work of this position to others was in accordance with the conditions laid down by the Interstate Commerce Commission in Finance Docket No. 21400, Southern Railway Company control of the Central of Georgia Railway Company. The conditions imposed by the Commission modified, and were an adjunct to, the Washington Job Protection Agreement to which the involved parties are signatories.

The abolishment of the position in question was in order to effect a 'coordination' within the meaning of that term as defined in Section 2(a) of the Washington Agreement. However, Section 5 imposes an absolute bar to Carrier making an assignment of employes necessary to a 'coordination' unless it is done on the basis of an agreement between the Carrier and the organization representing the employes affected. Your Carrier has consistently refused to confer in order to negotiate an agreement which is a condition precedent to any assignment of employes. Therefore, your Carrier having failed to comply with the Washington Agreement, we contend that the provisions of the collective bargaining agreement prevail and must be honored."

I. JURISDICTIONAL ISSUE

A. BACKGROUND

Southern Railway Company, herein called Southern, filed an application with the Interstate Commerce Commission, herein referred to as ICC, on December 15, 1960 for authority under Section 5(2) of the Interstate Commerce Act (49 U. S. C. Section 5(2)) to acquire control of Central of Georgia Railway Company, herein referred to as Central. Prior to hearing by ICC Southern and Central agreed upon an employe protection plan which included a proposal that the assignment and selection of the employes to perform the work at the corresponding facilities of Southern would be upon whatever basis might be agreed upon by the representatives of the employes of both raliroads; but, if no such basis was proposed by the representatives of the employes prior to final ICC approval the Southern employes (with minor exceptions) would be left undisturbed and only the Central employes would be affected.

At all times material herein there were in existence two collective bargaining agreements between Central and the Organization: a Basic Agreement effective September 1, 1949, which contains the following provision:

> "Rule 35. These rules shall be effective as of September 1, 1949, and shall continue in effect until changed as provided herein, or in accordance with the provisions of the Railway Labor Act. Should either party hereto desire to change or modify these rules, thirty (30) days' written notice shall be given the other party, containing the proposed changes, and conferences will be held in accordance with Section 6 of the Railway Labor Act, as amended, unless another date is mutually agreed upon."

and an agreement referred to in the industry as the Washington Job Protection Agreement of May 21, 1936, herein referred to as the Washington Agreement; pertinent provisions being:

> "Section 2 (a). The term 'coordination' as used herein means joint action by two or more Carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.
>
> * * * * *
>
> Section 3 (a). The provisions of this agreement shall be effective and shall be applied whenever two or more Carriers parties hereto undertake a coordination. . . .
>
> * * * * *
>
> Section 4. Each Carrier contemplating a coordination shall give at least ninety (90) days' written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such Carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.
>
> Section 5. Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the Carriers involved on basis accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the Carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.
>
> * * * * *

Section 13. In the event that any dispute or controversy arises (except as defined in Section 11) in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions of this agreement (or of the agreement entered into between the Carriers and the representatives of the employes relating to said coordination as contemplated by this agreement) which is not composed by the parties thereto within thirty days after same arises, it may be referred by either party for consideration and determination to a Committee which is hereby established, composed in the first instance of the signatories to this agreement. Each party to this agreement may name such persons from time to time as each party desires to serve on such Committee as its representatives in substitution for such original members. Should the Committee be unable to agree, it shall select a neutral referee and in the event it is unable to agree within 10 days upon the selection of said referee, then the members on either side may request the National Mediation Board to appoint a referee. The case shall again be considered by the Committee and the referee and the decision of the referee shall be final and conclusive. The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them."

Southern, too, is party to the Washington Agreement.

ICC recognized the existence of the Washington Agreement; but, notwithstanding, and over objection of the Organization, it approved the merger conditioned upon employe protection provisions — substantially those proposed by the Carriers — at variance with and in derogation of terms of the Washington Agreement 317 ICC 557, 562-570, November 7, 1962. Of major import is the uncontroverted fact that the conditions did not include conditions similar to Sections 4 and 5 of the Washington Agreement.

Southern acquired control of Central on June 17, 1963. It and Central then proceeded to comply with the employe protection provisions prescribed in the ICC Report and Order of November 7, 1962. In accomplishing this Carriers abolished positions at Central and transferred the work here involved to employes of Southern as alleged in paragraph 1 of the Claim. This and like actions gave rise to the instant Claim as well as numerous Claims by the Organization and by other collective bargaining representatives of Central employes.

Collective bargaining representatives initiated a multiplicity of actions in Federal District Courts in which they sought a permanent mandatory injunction directing that Central and Southenr rescind all consolidations that had been accomplished in furtherance of the ICC Order, alleging basically that no consolidation involving displacement or dismissal of personnel of either Carrier could be accomplished without complying with the Section 6 notice procedure of RLA (45 U. S. C. Section 156); without complying with Sections 4 and 5 of the Washington Agreement; and, without complying with the terms of the rules and working conditions of the applicable Basic Agreement. For the most part the actions have either been dismissed or are being held in abeyance. We need cite only one which discloses the judicial status of the litigation.

On July 9, 1963, Railway Labor Executives' Association filed an action in the United States District Court for the Eastern District of Virginia seeking

to set aside, annul and suspend the conditions of Virginia seeking to set aside, annul and suspend the conditions prescribed by ICC for the protection of employes on the ground that the failure to impose the rejected conditions brought the ICC Order into conflict with Section 5(2)(f) of the Interstate Commerce Act (49 U. S. C. Section 5(2)(f)) in that it did not require 90 days of advance notice of intended coordination of facilities followed by agreement or arbitration between representatives of the employes and the Carriers as to the selection of forces for the consolidated operation as provided for in Sections 4 and 5 of the Washington Agreement. The case was submitted to a three-judge court, 28 U. S. C. Sections 2321-2325, which upheld the validity of the conditions prescribed by ICC. Railway Labor Executives' Association v. United States, 226 F. Supp. 521 (E.D. Va. 1964). The case was appealed to the Supreme Court which in a per curiam opinion (379 U. S. 199) remanded the case to the District Court with direction to remand to ICC:

> "to amend its report and order as necessary to deal with (RLEA's) request that Section 4, 5 and 9 (of the Washington Agreement) be included as protective conditions, specifically indicating why each of these provisions is omitted or included."

The matter is now pending before ICC.

The three-judge court issued its decision in the RLEA case on January 31, 1964. On February 17, 1964, ICC decided, sua sponte, in a Supplemental Report and Order of the Commission, three Commissioners dissenting, that:

> "Subsequent to the decision of the three-judge court, it came to the Commission's attention that counsel for the parties, including the Commission, had urged or acquiesced in certain interpretations of the conditions for the protection of employes which are not in accord with the Commission's intent and purpose in prescribing them. Accordingly, we find it necessary, in fairness to all concerned, to clarify the situation.
>
> It was and is our intention that the protection afforded the affected employes is not limited to the protection set forth in Appendix II, but that, as we stated in the first report, the protection afforded by the New Orleans conditions will be fair and equitable. 317 ICC at 565-66. We thereby incorporated all the provisions of the New Orleans conditions, **which embraced the provisions of the Washington Agreement except as specifically modified in Appendix II.**
>
> It was our finding that employes adversely affected by the transaction in this proceeding were to be afforded the protection of all provisions of the Washington Agreement of May 21, 1936, **which were not specifically modified** by the provisions set forth in Appendix II of our original report (317 ICC at 588 **et seq.**).
>
> The Washington Agreement was negotiated by collective bargaining between the contracting parties and, except as we have specifically done so (as, for example, section 2 of Article II of Appendix II to our original report in this proceeding) **we have not in this or any prior proceeding superseded in any way that Agreement as a private contract.** It follows **that after January 9, 1967,** when the protection under the conditions of Appendix II ends, the terms of the Washing-

ton Agreement, if applicable, shall continue, since **the labor protective conditions which we have prescribed in this proceeding do not supercede the Washington Agreement as a private contract."**
(Emphasis ours.)

B. THE ISSUE

The issue is whether ICC, in a merger proceeding, has the power to abrogate in whole or in part, modify, amend or suspend the terms of existing collective bargaining agreements to which the merging Carriers are party.

C. PERTINENT PROVISIONS OF INTERSTATE COMMERCE ACT

Pertinent Provisions of the Interstate Commerce Act, Sections 5(2) and 5(11), (49 U. S. C. Section 5(2) and 5(11)), with emphasis supplied are:

"SECTION 5.

Combinations and Consolidation of Carriers.

2(c). In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, . . . (4) the interest of the Carrier employes affected.

* * * * *

(f) As a condition of its approval, under this paragraph, of any transaction involving a Carrier or Carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employes affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employes of the Carrier or Carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employe pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employe was in the employ of such Carrier or Carriers prior to the effective date of such order. **Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employes may hereafter be entered into by any Carrier or Carriers by railroad and the duly authorized representative or representatives of its or their employes.**

* * * * *

(11) Plenary Nature of Authority Under Section.

. . . any Carriers or other corporations, and their officers and employes and any other persons, participating in a transaction approved or authorized under the provisions of this Section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to

enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . ."

D. CENTRAL'S ARGUMENT

Throughout Central's Submissions in this proceeding the position is taken that this Board has no jurisdiction with respect to the Claim. This it says is so because Sections 5(2)(f) and 5(11) and authorities cited "make clear" that the Order of ICC pertaining to protective conditions for employes "are 'exclusive and plenary' and preempt all existing agreements, laws and obligations in conflict with these protective conditions." We find that Sections 5(2)(f) and 5(11), do not clearly support the interpretation which Central urges. Nor, do we find in any of the many cases cited by Central a holding that ICC has the power to abrogate in whole or in part, modify, or suspend the terms of existing collective bargaining agreements. In urging us to make such findings Central is asking us to interpret the referred to provisions of the Interstate Commerce Act as to Congressional intent and to interpolate the authorities which it cites. This we do not have the power to do. Nor do we have the power to make a finding that the Interstate Commerce Act does not give ICC the power which Central argues it has, which the Organization urges we do. This too would require our interpreting that Act. In both respects we would be acting **ultra vires** of our prescribed limited statutory competence. Resolution of the difference between the parties as to interpretation of the relevant provisions of the Interstate Commerce Act must be left to the appropriate constitutional courts having jurisdiction of indispensable parties and the subject matter.

E. BOARD'S JURISDICTION

That this Board has exclusive jurisdiction of railroad-employe disputes growing out of the interpretation and application of existing collective bargaining agreements is firmly established. Order of Railway Conductors v. Pitney, 326 U. S. 561 (1946); Slocum v. Delaware, L&W R. Co., 339 U. S. 239 (1950); Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U. S. 30 (1957); Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U. S. 257 (1965). The Claim in the instant case is that Central violated such an "existing" agreement; a fortiori, we have jurisdiction.

While Central attacks our jurisdiction what in reality it presents is a defense that by operation of law we are enjoined from granting the relief prayed for in the Claim.

We will invoke our jurisdiction and pass upon the merits of the Claim.

F. PROTECTION OF PARTIES

The preamble to RLA is that it is "An Act To provide for the prompt disposition of disputes between Carriers and their employes." In the instant case we have a dispute which continues unresolved after more than five years notwithstanding it has been the subject of a multiplicity of law suits. This contravenes the will of the Congress expressed in Section 2(1) First and Second of RLA. This Board is under mandate to exercise its statutory powers to bring it to a prompt and orderly settlement.

In our proceeding to consider this Claim on the merits neither party will be prejudiced. If either party or both are aggrieved by our Award judicial review is available as a matter of right, Section 3, First, (q) of RLA which was inserted in the Act by Pub. Law 89-456; 80 Stat. 210, approved June 20, 1966. In an action initiated pursuant to that Section the issue as to the power of ICC relative to existing collective bargaining agreements can be squarely faced and judicially determined. Judicial resolution of the issue is of great importance in the administration of RLA; and, it is of equal importance to Carriers and employes who are charged "to exert every reasonable effort to make and maintain agreements" (RLA Section 2, First).

II. THE MERITS

Central's only defense to the Claim, proffered on the property and a matter of record, is that, relative to employe protection in mergers, the plenary and exclusive authority vested in ICC by Section 11 of the Interstate Commerce Act preempts this Board's exclusive jurisdiction to resolve disputes between the merging Carriers and their employes growing out of interpretation or application of existing agreements. We have dealt with this defense, **supra**, and found it wanting before this forum. We may not consider defenses first raised by Central in Submissions and argument before this Board. It remains for us to determine whether the Organization has proven a **prima facie** case of violation of the Basic Agreement as alleged in paragraph 1 of the Claim; and, if so, the measure of damages.

A. WASHINGTON AGREEMENT

We held in Award No. 11590 that in effectuating a "coordination," within the meaning of that term as defined in Section 2(a) of the Washington Agreement, the Carriers involved must fully and timely comply with the provisions of that Agreement; otherwise, that Agreement does not supercede the basic collective bargaining agreement and is not available as a defense in disputes alleging violation of the basic agreement. Inasmuch as Central admits that it and Southern have not complied with the Washington Agreement in their coordination, we find the terms of that Agreement immaterial and irrelevant in our consideration of the instant Claim on the merits.

B. PARAGRAPH 1 OF CLAIM

Central admits that it abolished the positions and transferred the work to employes of Southern, as alleged in paragraph 1 of the Claim; and, it did this without negotiation with the Organization. The Organization has shown that the work had been exclusively performed by Central employes covered by the Basic Agreement. Consequently, we find Central violated Rules 1 and 35 of the Basic Agreement; for, as we said in Award 14591:

> "The precise issue is whether Carrier was contractually barred from transferring work exclusively within the Scope of the Agreement to persons not within the collective bargaining unit of that particular contract. Who the persons may be or their relationship to Carrier is not material.
>
> The heart of the collective bargaining agreement is the work and the right to perform that work vested in the employes in the collective bargaining unit as against the world. The bargain once made may not thereafter be lawfully unilaterally changed by either party.

It is not controverted that some of the work transferred to Chillicothe was work within the Scope of the Agreement before us. Therefore, the employes in the collective bargaining unit were contractually guaranteed the right to perform that work so long as it remained to be done. In unilaterally withdrawing the work from the collective bargaining unit, Carrier violated the Agreement."

Therefore, we will sustain paragraph 1 of the Claim.

C. PARAGRAPH 2 OF CLAIM

In paragraph 2 of the Claim the Organization prays only for monetary damages as remedy for the violation.

In awarding monetary damages we hold that employes adversely affected by reason of violation of a collective bargaining agreement are legally entitled to be made whole.

We will award to each employe referred to in paragraph 2 of the Claim that amount of money which will make him whole for such loss of wages and expenses incurred as he may have suffered because of the violation, from the date of the violation alleged in paragraph 1 of the Claim to the date of this Award, less what he actually earned in that period plus such amounts received from Central purportedly in compliance with the employe protection provisions prescribed in Interstate Commerce Commission Report in Finance Docket 21400, decided November 7, 1962 (317 ICC 557, 562-568).

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Central violated the Agreement.

AWARD

Paragraph 1 of Claim sustained.

Paragraph 2 of Claim sustained to extent of application of the formula prescribed in II (C) of Opinion, supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of December 1966.

CARRIER MEMBERS' DISSENT TO AWARD 15028, DOCKET MW-15589 (Referee John H. Dorsey)

The Carrier members respectfully dissent from the majority's (the Referee's and the Labor Members') assumption of jurisdiction, an exercise which we believe to be not only erroneous as a matter of law but clearly in derogation of this Board's primary obligation to effectuate the national transportation policy. It is clear from the Carrier's submissions presented to the Board that the federal courts have and will continue to exercise jurisdiction in this case and that the Interstate Commerce Commission has and is continuing under Supreme Court mandate to exercise jurisdiction. Yet by its decision the majority feeds the fires of confusion, as did Referee Bernstein of a Section 13 Committee by attempting to assert authority of a body where such authority did not exist, and it has thus endeavored to fashion still another overlapping and conflicting remedy. This award by its nature disposes of nothing, solves no problem and answers no properly posed question. Its sole effect is to plunge the National Railroad Adjustment Board into a morass of judicial and administrative disorder from which it will be difficult to withdraw without embarrassment. The majority's gratuitous comments under subheading "F. Protection of Parties," belie the uncertainty obviously attendant upon the Referee's conclusion to "invoke . . . jurisdiction and pass upon the merits of the claim." This uncertainty is apparent for in the two next succeeding paragraphs of the award a "mandate" to the Board is claimed by the majority in order to "bring (the subject dispute) to a prompt and orderly settlement." Yet the Referee immediately proceeds in the award he authored to suggest that should "either party or both (be) aggrieved" by his having invoked a jurisdiction, which it is again submitted by Carrier members did not exist, and passing on the dispute "judicial review is available as a matter of right." This comment in the award demonstrates the spirit and atmosphere in which the majority approached the overwhelming jurisdictional aspects of this proceeding.

In its discussion of the jurisdictional aspect, the majority, under subheading "B. The Issue," frames the basic underlying issue of this entire problem in clear and welcome fashion. The reader of the majority's award is thus led to believe that the discussion to follow will grasp the issue, confront the basic problem, and dispose of the question in an intelligent and logical fashion. However, the reader is destined to disappointment for it seems to us that much of the remainder of the award by reason of its author abandoning logic is replete with contradictions, inconsistencies, and ipsedixitism. Illustrative of this fact are the following statements quoted from Part "D" of the award:

> "Nor, do we find in any of the many cases cited by Central a holding (as urged by Central) that ICC has the power to abrogate in whole or in part, modify, amend, or suspend the terms of existing bargaining agreements.
>
> In urging us to make such findings Central is asking us to **interpret** the referred to provisions of the Interstate Commerce Act as to Congressional intent and to interpolate the authorities which it cites. THIS WE DO NOT HAVE THE POWER TO DO." (Emphasis ours.)

Yet in this same Part "D" the Referee nevertheless proceeds to in fact interpret, that is, construe, the Interstate Commerce Act, for he says: "We find that Sections 5(2)(f) and 5(11), do not clearly support the interpretation

which Central urges." And to compound his confusion and own contradictions, the Referee concludes Part "D" by saying in effect that resolution of the differences between the parties as to the "interpretation" of the "relevant" provisions of the Interstate Commerce Act "must be left to the . . . courts . . . having jurisdiction of . . . the subject matter."

The award in Part "D" goes on to state:

> "Nor do we have the power to make a finding that the Interstate Commerce Act does not give ICC the power which Central urges it (the Commission) has, which the Organization urges we do (have). This too would require our interpreting that Act. In both respects we would be acting **ultra vires** of our prescribed limited statutory competence."

Notwithstanding his declaration set out above in which he in effect said that the Board has no "power" to make either an affirmative or negative finding with respect to whether the Interstate Commerce Act bestows authority on the Commission to abrogate or modify the terms of existing collective bargaining agreements the Referee proceeds in Part "E" of the award to "invoke (the Board's) jurisdiction and pass upon the merits of the Claim," when a resolution of the so-called merits of the claim is so wholly dependent upon the overall jurisdictional issue that the latter issue must of necessity be resolved before any body, judicial or administrative, can determine whether there has or has not been a breach of the collective bargaining agreements.

Under subheading "D" of the award entitled "Central's Argument," the Referee in two brief and otherwise unsupported statements construes, as we have stated above, Sections 5(2)(f) and 5(11) of the Interstate Commerce Act (49 U. S. C. Section 5(2) and 5(11) and summarily disposes of the Carrier's contention that the orders of the Interstate Commerce Commission imposing protective conditions for railroad employes affected by consolidations is exclusive, plenary and pre-emptive of all existing conflicting agreements, laws and obligations. The majority's reasoning as expressed through the Referee seems to be that the Act does not say so in so many words and that this Board is without power to construe the provisions of the Interstate Commerce Act as to congressional intent. By so holding the majority would withdraw the acts of this Board into an administrative vacuum that is devoid of, and which refuses to recognize, the basic realities of very real situations. Such an abstract approach carried to its logical proportions will inflict, of course, substantial injustice, but this is its less serious consequence. The really troublesome result will be found in the disruptive effect of this award upon the clearly expressed national transportation policy. We, the dissenting members point up the fact that the Railway Labor Act is a part of this national transportation policy, that the primary duty of this Board under that Act is to pursue the goals laid down in this national policy. We do not fulfill our duty when we blindly ignore the fact that other enactments (in this instance the Interstate Commerce Act) are also expressive of this great national policy. We cannot properly ignore the impact and restraint on our jurisdiction of these other enactments. To the extent that such enactments do or may limit our power to act upon a particular controversy it is within both our statutory competence and mandate to recognize and be guided by such enactments.

It is not the purpose of this dissent to expound in detail on the pertinent aspects of the national transportation policy. We think it is clearly evident that

such policy favors railroad consolidations such as that involving Central and Southern. This is not the mere assertion of these dissenting members; it is the legislative intention discovered by the highest court constituted to construe and interpret the laws of the United States.

> "The congressional purpose in the sweeping revision in Section 5 of the Interstate Commerce Act in 1940 . . . was to facilitate merger and consolidation in the national transportation system."
>
> County of Marin v. United States, 356 U. S. 412, 416 (1958).

The responsibility for effecting such a policy was placed upon the Interstate Commerce Commission. We believe it improbable that Congress intended to entrust responsibility to the Commission without at the same time empowering that body to act effectively in the pursuit of its responsibility. Yet in this instance the majority acts in utter disregard of the overriding authority and responsibility imposed by law in the Interstate Commerce Commission. We think it clear from the most basic analysis that there are two major areas of restraint affecting the effectuation of this policy goal. The first is the effect of the federal anti-trust laws and their related competition-insuring state laws and policies. The second is the impact of such consolidations upon the railway labor force. Congress in supplementing the Interstate Commerce Act therefore relieved the Carriers involved in such transactions —

> "from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ." (49 U. S. C. Section 5(11).)

The language just quoted is broad and sweeping and it cannot with reason be given a narrow interpretation. The relief afforded is from "all other restraints, limitations, and prohibitions of law." We cannot restrict that language so as to remove from its reach collective bargaining agreements existing at the inception of a consolidation movement. To do so would be to restrict the Commission's authority in a manner neither contemplated nor expressed by Congress. Yet, by assuming and exercising jurisdiction in this particular case, that is exactly and precisely what this Board has attempted to do.

We cannot understand the majority's summary dismissal of the abundant authority cited in the brief argument, and submission of the Carrier. Admitting, as has the Referee, that the issue is one for ultimate determination by the courts, it would appear far more preferable to align this Board's position with the existing authority. Such authority may be found in Kent v. Civil Aeronautics Board, 204 F. 2d 263 (2nd Cir. 1953). That case arose out of an airline consolidation. In such a situation the CAB acts in a capacity similar to that of the ICC in railroad control and consolidation situations. In Kent the Court of Appeals held that a collective bargaining agreement "must yield to the paramount power of the (Civil Aeronautics) Board to perform its duties under the statute creating it to approve mergers." Id. at 266. This decision was subsequently followed in Hyland v. United Air Lines, Inc., 265 F. Suppl. 367 (N. D. Ill. 1966.) The following language is illustrative:

"This important area of the total complex of merger consolidations cannot be subject to independent scrutiny and interference by the courts pursuant to a separate statutory scheme." Id at 372.

While the CAB does not function under the Interstate Commerce Act, it, like the ICC, is charged with the responsibility of carrying into effect the national transportation policy. The crucial question is whether Congress in pursuit of the national policy invested the CAB with more power in effecting airline mergers than was conferred upon the ICC charged as it is with a requirement to effect the necessary consolidations in the national railroad structure. We have heard nothing to explain or justify such an inconsistency and, in the absence of this explanation and justification, are reluctant to attribute to Congress any so glaring a legislative inconsistency and imperfection.

It is not our purpose in this dissent to involve ourselves in a long dissertation on the authority which we feel lends support to our position. However, we cannot pass from this point without pointing up the language below of the Supreme Court in Schwabacher v. United States, 334 U. S. 182 (1948), language which we feel gives indication of the extent to which the majority moves in the direction of error contrary to guideposts of existing atuhority.

"The jurisdiction of the Commission under both Section 5 and Section 20(a) is made plenary and exclusive and independent of all other state or federal authority." Id at 197.

It follows that the Commission's authority conferred upon it by Section 5 (11) of the Interstate Commerce Act being exclusive and independent "of all other . . . federal authority" must necessarily be exclusive and independent of the authority of this Board which having had its creation in a federal act (RLA) falls within the classification of federal authority.

The majority has erred grossly in assuming jurisdiction of the present controversy. It does so in the face of clearly controlling, contrary authority. It refused to interpolate existing statutory mandates. Instead, it establishes the Railway Labor Act in a state of grand isolation separate and apart from its inescapable interrelationship to other exactments of Congress, and in this artifically fashioned enclave of the law the majority has discovered a justification for its decision. This decision is wrong and it is hard to reach any conclusion other than that it will not be the final word dispositive of this matter.

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