Award No. 15087
Docket No. CL-14986

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

CENTRAL OF GEORGIA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5528) that:

(1) The Carrier violated and continues to violate rules of the Clerks' Agreement effective December 1, 1956, except as amended, when it arbitrarily and unilaterally abolished all positions in the Accounting Department at Savannah, Georgia, including the offices of the Car Accountant, Auditor of Disbursements, Comptroller, Auditor of Revenue and Auditor of Machine Accounting; and,

(2) Each of the following named clerks and/or persons who may have been working on their positions on a temporary basis shall be reimbursed for all salary losses from June 18, 1963, and shall have all other rights contemplated in the Agreement restored:

Office of Car Accountant

Name	Position
M. K. Augustine	Key-Punch-Operator
A. W. Bailey	Key-Punch-Operator
E. E. Blake	Clerk
E. L. Bradley	Clerk
B. C. Deal	Key-Punch-Operator
E. J. Dumas	Clerk
L. E. Eitel	Clerk-Comptometer Operator
J. G. Getz	Key-Punch-Operator
G. R. Halpin	Clerk
J. N. Kessler	Chief Clerk
J. J. Magee, Jr.	Utility Clerk
J. O. Morgan	Clerk
N. F. Porcher	Steno-Clerk
C. S. Prescott	Key-Punch-Operator
E. M. Reddick	Clerk

Name	Position
W. X. Smith	Utility Clerk
E. S. Straus	Clerk
E. R. Sullivan	Clerk
M. L. Sykes	Clerk
H. G. Wells	Chief Stat. Clerk
H. D. Williams	Utility Clerk
R. L. Wilson	Traveling Car Agent

Office of Auditor of Disbursements

F. J. Baran	Clerk
S. Berliner	Clerk
A. B. Burch	Comptometer Operator
A. B. Castellow	Clerk
H. O. Cato	Clerk
H. L. Dickey	Head Clerk
E. J. Fahey	Clerk
B. W. Gill, Jr.	Clerk
N. T. Hiott	Clerk
L. M. Hobbs, Jr.	Clerk
J. D. Holland	Clerk
E. E. Juchter	Stenographer
A. O. Kelly	Clerk
C. J. Kelly	Clerk
G. D. Knight	Clerk
J. E. Lambertson, Jr.	Clerk
R. H. Lee	Clerk
F. Miller	Clerk
H. J. Minton	Clerk
E. L. Miscally	Clerk
B. H. Moore	Clerk
J. T. Morris	Clerk
A. J. Nease	Comptometer Operator
G. M. Nichols	Clerk
W. E. Osbourne, Jr.	Clerk
H. B. Reinhardsen	Clerk
G. S. Richards	Clerk
T. M. Richards	Steno-Typist
V. G. Richards	Clerk
C. S. Rockwell	Clerk
E. A. Scoville	Head Clerk
M. V. Smith	Clerk
C. R. Sowell	Clerk
G. E. Thompson	Key-Punch-Operator
W. F. Tomat	Clerk

Name	Position
J. A. Waters, Jr.	Head Clerk
S. L. Whitaker	Clerk
C. E. Williams	Key-Punch-Operator
F. E. Willis	Chief Clerk
L. A. Wise	Clerk

Office of Comptroller

T. W. Adams	Mail Clerk
J. F. Bel	General Bookkeeper
A. E. Cheshire	Statement Clerk
J. M. Cook	General Bookkeeper
C. F. Griffin	Station Accountant
E. R. Howard	Bookkeeper
E. L. Hunt	Steno-Typist
G. R. Kessler	Bookkeeper
H. S. McCallar, Sr.	Bookkeeper
J. A. Naismith, Sr.	Chief Clerk
H. W. White	Correspondence Clerk
H. J. Zipperer	Bookkeeper
E. B. Haylow	Steno-Typist

Auditor of Revenue

D. C. Adams	Clerk
R. A. Aimar	Clerk
M. G. Alderman	Jr. Clerk
P. R. Audesey	Clerk
G. A. Bandy	Clerk
E. M. Bart	Clerk
W. P. Bignault	Jr. Clerk
J. T. Bosen	Clerk
A. W. Bridger, Jr.	Rec'd. Clerk
A. W. Bridger, Sr.	Clerk
H. Broadman	Clerk
E. J. Burroughs	Key-Punch Operator
E. G. Butler	Clerk
W. G. Butler	Clerk
H. P. Canady	Clerk
E. W. Cave	Clerk
H. L. Cave, Jr.	Clerk
M. L. Cheatham	Jr. Clerk
K. D. Cler	Clerk
J. T. Collins	Head Clerk
L. P. Collins	Jr. Clerk
M. C. Conway	Typist

Name	Position
J. H. Cooper	Clerk
V. R. Crook	Key-Punch Operator
J. C. Anderson	Jr. Clerk
Mrs. J. B. Ihley	Jr. Clerk
T. E. Cubbedge	Clerk
L. G. DeLoach	Jr. Clerk
M. T. Edwards	Clerk
A. M. Faust	Key-Punch Operator
J. M. Ferrell	Comptometer
C. H. Ferrelle	Clerk
T. J. Fogarty	Clerk
J. P. Greene	Clerk
M. H. Harley	Clerk
W. S. Harney	Clerk
F. B. Haymans	Clerk
W. K. Heckman, Sr.	Clerk
K. Helmly, Jr.	Clerk
P. J. Hernandez	Clerk
J. J. Hinely, Jr.	Clerk
R. U. Hinely	Clerk
A. S. Hobbs	Jr. Clerk
R. L. Holland	Clerk
S. K. Howard	Comptometer Operator
M. A. Jackson	Clerk
G. T. Karatassos	Typist
L. G. Keebler	Clerk
M. H. Kennickel	Clerk
J. F. Kessler	Clerk
R. W. Kessler	Clerk
E. J. Limehouse	Clerk
P. L. Madison	Clerk
A. L. Matthews	Clerk
D. E. Matthews	Jr. Clerk
H. T. McGrath	Clerk
J. J. McGrath, Sr.	Head Clerk
C. M. McKay	Clerk
L. J. Michel, Jr.	Clerk
H. J. Middleton	Clerk
M. V. Miltiades	Clerk
A. C. Morgan	Clerk
C. P. Morgan	Jr. Clerk
R. Mosley	Clerk
W. R. Muller	Clerk
D. E. Parker	Clerk

Name	Position
L. H. Pender	Clerk
D. B. Powell	Clerk
E. C. Prendergast	Clerk
J. L. Rainey	Clerk
J. J. Reilley	Clerk
B. F. Rogers, Jr.	Chief Clerk
C. F. Russell, Jr.	Clerk
B. F. Shealey	Clerk
C. R. Sheppard, Jr.	Clerk
W. P. Shirah	Clerk
F. H. Siebert	Key Punch Operator
N. P. Simon	Clerk
A. F. Spann	Clerk
I. L. Spence, Jr.	Clerk
L. J. Straus	Clerk
M. B. Sullivan	Clerk
C. E. Summerlin	Clerk
D. S. Sumner	Clerk
G. W. Taylor	Clerk
H. S. Thompson	Clerk
W. G. Thompson	Clerk
L. C. Walker	Comptometer Operator
R. W. Warnock	Jr. Clerk
A. L. Wells	Key Punch Operator
F. D. Williams	Clerk
F. H. Williams, Jr.	Clerk
E. F. Woods	Typist KPO
R. Zoucks	Head Clerk
J. B. Miller, Jr.	Jr. Clerk

Auditor of Machine Accounting

J. K. Folker	Machine Operator
J. L. Hendrix	Computer Operator
H. J. Kennedy	Head Programmer
M. Lowenkopf	Machine Operator
M. L. McCurry	KPO Typist
M. L. Tidwell, Jr.	Supervisor

This claim is to remain in effect until all work and/or positions are restored to clerks of the Central of Georgia Railway Company; and

(3) All of the clerks in the Accounting Department at Savannah, Georgia, who were displaced as a result of the action described in Item (1) hereof shall likewise be reimbursed for all salary losses and shall have all rights contemplated in the Agreement restored in the same manner as prescribed in Item (2) hereof; and,

(4) If the work of the clerks referred to herein remains transferred to the Southern Railway Company, all of the employes affected shall have their seniority "dovetailed" in such manner that they shall not lose any seniority rights as a result thereof; and,

(5) All other conditions attached to the Clerks' Agreement effective December 1, 1956, except as amended, shall continue to apply to the clerks referred to herein and/or their successors; and,

(6) The records of the carrier shall be checked to determine all of the foregoing in complete detail.

EMPLOYES' STATEMENT OF FACTS: As information to the Board, all of the employes involved in the instant dispute were in the same seniority district. However, they held positions in separate bureaus under the supervision of Carrier officers assigned to each separate bureau or department. Formerly, the offices of Car Accountant, the Auditor of Disbursements, the Comptroller, the Auditor of Revenue, the Auditor of Machine Accounting and the Treasurer were separate and distinct seniority districts but they were combined effective July 1, 1958, into one seniority district known as the "Accounting Department —-Treasurer's Office" pursuant to the terms of the Memorandum Agreement dated June 23, 1958. Effective April 1, 1959, the Purchasing Agent's office and Stores Department subdivision thereof, including the office of the Superintendent of Commissary, were consolidated with the "Accounting Department-Treasurer's Office" into a new combined seniority district identified and known thereafter as the "Accounting, Treasury and Purchasing and Stores Department." This latter consolidation was accomplished under the terms of Memorandum of Understanding dated March 20, 1959.

Effective as of 2:00 P. M., on June 18, 1963, the Carrier — The Central of Georgia Railway Company — abolished all of the positions in the Accounting Department at Savannah, Georgia, and transferred the work thereof to the Southern Railway Company to be performed in the latter Carrier's Accounting Department at Atlanta, Georgia. On June 18, 1963, bulletins notifying the employes of this action were issued jointly by the Comptroller of the Central of Georgia Railway Company, Mr. W. P. Haynes, and by the Comptroller of the Southern Railway Company, Mr. W. R. Divine. Copies of these bulletins are attached as Employes' Exhibits Nos. 1-A, 1-B, 1-C and 1-D.

Claims as set forth in the Employes' Statement of Claim were initially filed with Director of Personnel L. G. Tolleson on August 8, 1963. The claims were presented to Mr. Tolleson because on August 8, 1963, there was no employing officer left on the Central of Georgia. This handling was consistent with advice received from former Assistant Director of Personnel, Mr. J. L. Ferrell. Copies of the bulletins which are referred to herein as Employes' Exhibits Nos. 1-A, 1-B, 1-C and 1-D were appended to the claims presented to Mr. Tolleson as was a copy of the January 1, 1963 seniority roster for the seniority district involved. Among other things, this seniority roster indicated the names, seniority dates, positions, office locations and rates of pay of all employes of the Accounting Department at Savannah. Copy of said roster is attached hereto as Employes' Exhibit No. 2. Copy of the General Chairman's letter of August 8, 1963, addressed to Mr. Tolleson is attached as Employes' Exhibit No. 3.

judge court annul and set aside the above Supplemental Report and Order of the Commission. In that action, **Southern Railway Company and Central of Georgia Railway Company v. United States of America and Interstate Commerce Commission and Railway Labor Executives' Association,** Civil Action 3276, Southern and Central are attacking the validity of the Supplemental Report and Order on the grounds, among others, that: the Supplemental Report and Order were issued after the Commission's jurisdiction over the transaction had ceased; that they attempt to overrule the earlier three-judge court decision referred to on page 15 hereof; that they attempt to retroactively impose additional onerous conditions on Southern, Central and their employes which were not contained in the employe protective conditions previously ordered in that proceeding and upon which the carriers had relied, and were therefore in violation of the Due Process clause of the Fifth Amendment and in excess of the powers of the Commission; and that they constitute modifications of prior Commission orders without notice or hearing in further violation of the Due Process clause of the Fifth Amendment and Section 5 of the Administrative Procedure Act, 5 U.S.C. §1004. That action is still pending.

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: The Organization filed instant claim on behalf of those employes who were affected as a result of the acquisition of control by Southern Railway Company of the Central of Georgia Railway Company.

It would unduly protract this opinion were we to recount the complete factual background which precipitated this dispute. In order to facilitate this matter, therefore, we will merely record those portions which may be useful in aiding us to portray the events chronologically.

On December 15, 1960, Southern filed an application with the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act, 49 U.S.C., for authority to acquire control of the Central of Georgia Railway Company through ownership of a majority of the latter's capital stock. The application was processed and recorded under Finance Docket No. 21400. Thereafter, extensive hearings were held to determine the feasibility of such acquisition. The sum total of the evidence presented was sufficient to convince the Commission that consolidation of certain yards, shops, agencies, accounting department and other facilities of Central with Southern's would materially benefit Central in terms of greater efficiency, better service and greater economy.

On November 7, 1962, the Commission issued its Report approving the transaction. Both the Railway Labor Executives' Association and Southern petitioned the Commission for reconsideration. The Commission subsequently issued a second Report and Order on June 10, 1963.

On June 17, 1963, Southern proceeded to consumate the acquisition of Central pursuant to the Order of the Commission. Thereafter, numerous court actions were instituted by the various Organizations on behalf of their affected members. Noteworthy herein, is the suit filed on July 9, 1963, **Railway Labor Executives' Association v. United States,** wherein the petitioner

sought to set aside the conditions imposed for the protection of employes by the Commission, on the ground that failure to impose certain provisions contained in the Washington Job Protection Agreement of 1936 conflicted with Section 5(2)(f) of the IC Act. The Petitioners, though defeated in the lower courts, were more successful in the Supreme Court. In a recent **per curiam** opinion (379 U.S. 199), the Supreme Court instructed the District Court to remand the matter to the Commission for the purpose of clarifying the relationship between the conditions imposed and the Washington Job Protection Agreement of 1936. The Court presumably directed such action in light of the **sua sponte** Supplemental Order and Report issued by the Commission on February 17, 1964, by which the parties were informed that the protective provisions of the Washington Agreement were embodied therein.

Thus, in effect, the Commission is now required to specifically state why Sections 4, 5, and 9 of the Washington Agreement were either omitted or included. In furtherance thereof, hearings have been scheduled and are now being held at various locations.

Subsequently, in April, 1964, the dispute was submitted to the Arbitration Committee established pursuant to Section 13 of the Washington Agreement and assigned Docket No. 141. At the hearing before Referee Bernstein, the Carriers raised a jurisdictional challenge. Nevertheless, on July 22, 1966, Referee Bernstein determined that the Washington Agreement was neither abrogated nor modified by Sections 5(2)(f) or 5(11) of the Interstate Commerce Act, nor by the ICC Orders in Finance Docket No. 21400. Thereupon, the Referee concluded that the Carrier's had violated Sections 4 and 5 of the Washington Agreement and his Award contained remedial provisions.

In the instant claim, the Organization relies primarily on a violation of Rules 1 and 59 of the effective Agreement, independent of Sections 4 and 5 of the Washington Agreement. Parenthetically, were we to find that these Rules were violated, the result, in all probabilities, would ultimately achieve the same objectives as determined by Referee Bernstein in Docket No. 141.

The pertinent provisions of Rules 1 and 59 of the effective Agreement, dated December 1, 1956, provide as follows:

"RULE 1. SCOPE

(c) Positions or work within the scope of this agreement at effective date thereof belong to the employes covered thereby, and nothing in this agreement shall be construed to permit the removal of positions or work from the scope and operation of these rules except in the manner provided in Rule 59."

"RULE 59.

EFFECTIVE DATE AND NOTICE OF CHANGE IN AGREEMENT

This agreement shall be effective as of December 1, 1956, superseding all other rules, agreements, and understandings in conflict herewith and shall continue in effect until it is changed as provided herein, or under the provisions of the Railway Labor Act, as amended.

Should either party to this agreement desire to revise or modify these rules, thrity (30) days' written advance notice, containing the proposed change, shall be given, and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

In its behalf, the Carrier vigorously and trenchantly addresses a jurisdictional challenge to our Board's authority to consider this dispute, with the same vehemence and similar arguments which it presented to the Section 13 Committee under the Washington Agreement. Prior to considering the question of this Board's jurisdiction vis-a-vis the ICC, we will briefly take cognizance of the jurisdictional issue with respect to the Section 13 Committee. In Award No. 11590, we stated as follows:

"Carrier having failed to comply with the Washington Agreement we find that Agreement is not a defense to Carrier's violation of the collective bargaining agreement." (Also see Award No. 14401.)

In essence, the Carrier contends herein, that the instant claim is not one arising under the Railway Labor Act. Rather, this dispute flows from the provisions of the Interstate Commerce Act. Therefore, predicated upon the authorization granted by the ICC for Southern to acquire control of Central in Finance Docket No. 21400, the ICC conditioned its authorization as prescribed by Sections 5(2)(f) and 5(11). Critical herein, and basic to the Carrier's attack upon our jurisdiction, is the degree to which its stresses the phrase contained in Section 5(11), to wit: "The authority conferred by this section shall be exclusive and plenary . . ."

Hence, our initial problem is to consider the Carrier's attack upon our authority to assume jurisdiction of the instant dispute. In this connection, the pertinent provisions of the Interstate Commerce Act, Sections 5(2)(f) and 5(11), 49 U.S.C., are hereinafter quoted:

"Section 5(2)(f). As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, 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."

"Section 5(11). The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in

or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a mapority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and 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 hereby 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. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

In our view, the Carrier's interpretation of Section 5(11) of the IC Act cannot be sustained. The Carrier argues that the ICC has exclusive and plenary authority to relieve it from certain provisions. We wholeheartedly endorse this proposition. However, we differ as to the type of relief which the ICC may grant carriers under its exclusive and plenary authority. A careful reading of Section 5(11) reveals that the Commission, under the provisions of this section, shall grant relief "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal . . ." It is our view that the exclusive and plenary power of the Commission, under this section, is confined to transactions which involve operation of the antitrust laws. Therefore, under the **ejusdem generis** rule, "of all other restraints" can only be meaningful if it has reference to the previous specific phrase "antitrust laws." Thus, by no stretch of the imagination can a collective bargaining agreement be included within the general catch-all statement contained in this section after the words, "operation of the antitrust laws."

We believe this interepretation to be consistent with Section 5(2)(f), inasmuch as the latter section does not contain the term, "by this section," as does Section 5(11). Furthermore, the distinction between these two sections is even more apparent when we consider their subject matter. Section 5(11) is concerned with property rights and, hence, within the scope of the Commission's authority to grant relief from a possible violation of the antitrust laws. On the other hand, Section 5(2)(f) is concerned with employes rights, labor — therefore, the Commission is admonished as a condition of its approval to "require a fair and equitable arrangement to protect the interests of the railroad employes affected."

The Carrier further argues that the Commission's employe conditions supersede the Rules contained in the effective Agreement. Hence, the ICC's pronouncements to the Carrier, pursuant to the Orders in Finance Docket No. 21400, are exclusive and plenary and, therefore, this Board is deprived of jurisdiction.

Under the Railway Labor Act, as amended, 45 U.S.C., our authority is derived from Sec. 3. First (i), the relevant portion of which is hereinafter quoted:

> "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . may be referred . . . to the appropriate division of the Adjustment Board . . ."

Predicated upon the aforementioned section of the RLA, the Organization submitted the instant dispute to this Board on the ground that the Carrier violated Rules 1 and 59 of their effective Agreement. Thus, the dispute involves an alleged violation of certain Rules contained in a collective bargaining agreement between the parties of which this Board has jurisdiction by an Act of Congress. It is our considered opinion that insofar as jurisdiction is involved herein, we have, at the minimum, concurrent jurisdiction with the Commission and until our jurisdiction is explicitly superseded by higher authority we are required to act thereunder.

We believe our analysis is fully supported by a careful examination of Sections 5(2)(f) and 5(11) of the Interstate Commerce Act. Previously, we indicated that Section 5(11) specifically granted the Commission exclusive and plenary authority to relieve a Carrier from the operation of antitrust laws. On the contrary, however, we find no such authority contained in Section 5(2)(f). In effect, the absence of a specific grant to the Commission to exercise exclusive and plenary power concerning employe protective conditions confirms our conclusion that the Adjustment Board has not been deprived of jurisdiction.

The Carrier, additionally, supports its attack on our jurisdiction by citing a number of court decisions as authority for its position. We would initially distinguish two groups of cases. The first, **Kent** v. **Civil Aeronautics Board,** 204 F. 2d 263, 2d Cir. (1953); cert. denied 346 U.S. 826; **Hyland** v. **United Air Lines, Inc.,** 265 F. Supp. 367 (1966), and others, which originated under the exclusive and plenary power granted the CAB, are in a different category than those which fall within the ICC's jurisdiction. We recognize that the CAB has to a certain degree, been accorded comparable powers to those vested in the ICC, insofar as **airline mergers** are involved. It is also significant that under Title II of the RLA, as amended, Congress provided that carriers by air and their employes are specifically covered by this Act, **except** that they are excluded from the provisions of Section 3 thereof. As previously indicated, Section 3, First (i) is the basis for this Board's exercise of jurisdiction. Hence, by the very nature of the provisions of the RLA, as amended, and until the National Mediation Board acts to establish a permanent national board of adjustment for air carriers and their employes pursuant to Section 205 of Title II, they are distinguishable from railroad carriers. Thus, under present circumstances, in our judgment, the CAB does have exclusive and plenary authority, **including** collective bargaining agreements.

Furthermore, it is our view that Congress, with deliberate intent, established a National Railroad Adjustment Board for railroad carriers whereas none was provided for air carriers. Hence, the conclusion is unassailable, that we should continue to function in those instances of alleged violations as complained of herein, until Congressional intent demonstrates otherwise.

The second group of cases include **Brotherhood of Locomotive Engineers v. Chicago and North Western Ry. Co.**, 314 F 2d 424, 8th Cir. (1963); cert. denied 375 U.S. 819, (1963); **Texas, et al, v. United States,** 292 U.S. 522, (1934), and others. We have studied the numerous cases cited by the Carrier, in its behalf, as authority for the proposition that we lack jurisdicition in this matter. We do not find them persuasive on this point and our analysis is doubly fortified by the conclusion reached in Docket No. 141 by Referee Bernstein. We find it appropriate to quote his words, as the Carrier cited the same authorities to attack his jurisdiction under Section 13 of the Washington Agreement:

> ". . . While language in all of them indicates the broad scope of Section 5(11), the differing contexts and issues of the cited cases and this set of cases (sic) involving the Southern and Central of Georgia must be taken into account. Texas v. United States, 292 U.S. 522, 533-34, (1934) and Schwabaucher v. United States, 334 U.S. 182, 200, 201 (1947) are hardly apposite. Kent v. CAB (2d Cir. 1953) 204 F 2d 263, is put forward for the proposition that federal agency power in carrier merger cases extends to overriding private collective agreements. The court there dealt with the CAB's power which it likened to that of the ICC; it also compared the CAB's power to override a collective agreement dealing with the normal subjects of such contracts with the way in which collective agreements take precedence over individual contracts of employment under the National Labor Relations Act — an example of how a court may blur innumerable differences which are apparent and important to those familiar with the many peculiarities of labor relations and agreements in different fields (to say nothing of the many differences in the applicable statutes) and parlay them into possibly unwarranted propositions. Among the many differences in the situations discussed in that case and this group of cases is that the last sentence of Section 5(2)(f) explicitly provides for the concurrent existence, and thereby operative effect, of private agreements providing employe protection and ICC-imposed conditions.
>
> Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (8th Cir. 1963), 314 F. 2d 424, dealt with a railroad merger situation in which the parties agreed that a somewhat modified version of the Washington Agreement provided 'a fair and equitable arrangement or the protection of interests of such employes as provided in Section 5(2)(f) . . .' and the Commission adopted the agreed upon arrangements in its order approving the purchase of one carrier's facilities and rights by another looking to the coordination of some facilities. The acquiring carrier gave the required Section 4 notice and sought to negotiate an implementing agreement. The carrier sought arbitration when negotiations stalled in the face of a union contention that the coordination constituted changes in rules which could only be accomplished under the procedures prescribed by the Railway Labor Act for such changes. In this context the Court held that Section 5(2)(f) displaced the requirements of the Railway Labor Act. Quite apart from the dubious reliance upon Kent v. CAB for that

conclusion, the case does not present any conflict between Section 5(2)(f) and the Washington Agreement. Indeed it was a modified version of the Agreement concluded by the parties that was being enforced under Section 5(2)(f); no challenge to the last sentence of Section 5(2)(f), validating private employe protective agreements was involved. (N.B.: The Court's caution that 'We limit our decision to the peculiar factual situation of the present case.' 314 F 2d at 434). These cases, then, do not lead to the conclusion that Section 5(2)(f) displaces the Washington Agreement."

(Referee Bernstein in Docket No. 141, pp. 9-10.)

We similarily, believe that the aforementioned cases do not lead to the conclusion that this Board has been deprived of jurisdiction under Section 5(2)(f). On the contrary, we are more convinced than ever, that this Board has, at the minimum, concurrent jurisdiction in this type of case with the ICC. Thus, having concluded that we have jurisdiction in this matter, our next problem is concerned with the substantive portions of the claim.

We have previously indicated that the Supreme Court remanded the dispute to the District Court for remand to the ICC. Further, Referee Bernstein, in a proceeding under Section 13 of the Washington Agreement, found the Carrier in violation thereof, and fashioned a remedy. In this posture, on the substantive portion of this dispute, we are confronted with the Carrier's subsidiary defense that it disregarded Rules 1 and 59 of the effective Agreement between the parties predicated upon the exclusive and plenary powers allegedly contained in Sections 5(2)(f) and 5(11) of the IC Act. We have, furthermore, reached the conclusion that the ICC provisions did not insulate the Carrier from liability based upon a claim submitted to our Board, unless it availed itself of the preliminary requirements of the Washington Agreement. Admittedly, the Washington Agreement provided an escape clause for a violation of the pertinent Rules herein. However, the Carrier had not availed itself of such protection and, additionally, has continued to challenge the remedy fashioned by Referee Bernstein in Docket No. 141. Thus, it is our view that we have no other alternative than to hold that the agreement was violated.

In summary, our analysis has led us to the conclusion that the Carrier's attack on our jurisdiction was nebulous and without substance. Further, that it failed to abide by Rules 1 and 59 of the effective agreement. Nevertheless, in seeking to fashion a proper remedy for such violation, we are mindful of the fact that the ICC is presently conducting hearings pursuant to the Supreme Court's remand, as well as the decision of the Section 13 Committee of the Washington Agreement in Docket No 141, rendered by Referee Bernstein on July 22, 1966. We, therefore, believe that under the circumstances evidenced herein, that the best interests of the parties would be served by remanding the matter to the parties for the purpose of resolving the remedial provisions. It is recognized that, in any event, an employe who has been affected by such violation will be limited to only one recovery, regardless of the source.

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 the Agreement was violated.

AWARD

Claim sustained to the extent that the Agreement was violated. However, the matter is remanded to the parties solely for the purpose of resolving the remedial provisions, per opinion. In the interim, we shall retain jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of December 1966.

CARRIER MEMBERS' DISSENT TO AWARD 15087 DOCKET CL-14986

The carrier members respectfully dissent from the majority's (the Referee's and the Labor Members') assumption of jurisdiction in this proceeding, an exercise 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 does not exist. 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 diffcult to withdraw without embarrassment.

The majority is quite correct when it proceeds in the award to construe and interpolate Section 5(2), (11) of the Interstate Commerce Act, 49 U.S.C. §5(2), (11), in order to determine the effect of that enactment upon the jurisdiction of this Board. By so doing it directly adopts the keystone of the carrier's argument to the effect that this enactment affects the jurisdiction of this Board where the dispute, as is the case here, has arisen within the factual context of a railroad consolidation. This being true, the only question remaining is the matter of what interpretation is to be placed upon those portions of Section 5 of the Interstate Commerce Act which impinge or might impinge upon this Board's jurisdiction. This being the essential issue before us, it is the determinative which must be resolved in order to properly dispose of the claim. We, the carrier members of this Board, dissent from so much of the award as is concerned with the construction and interpretation of Section 5 of the Interstate Commerce Act.

The majority is in error when it so interprets paragraph (11) of Section 5 as to restrict the power conferred upon the ICC only to relief from the

operation of the antitrust laws. This construction is unsound. It is a general rule of statutory construction, founded in common sense and logic, that every word, sentence or provision of an enactment is intended for some useful purpose and that some reasonable effect is to be given to each. **Pacific Gas & Electric Co. v. SEC,** 139 F.2d 298, aff'd. 324 U.S. 826. The well-established presumption in aid of construction is that no superfluous words or provisions were used. **Crabb v. Zerkst,** 99 F.2d 562. Reading carefully, as the Referee says he did, paragraph (11) of Section 5, the grant to the Interstate Commerce Commission of power to relieve carriers is "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal . . ." The majority states that "under the **ejusdem generis** rule, 'of all other restraints' can only be meaningful if it has reference to the previous specific phrase 'antitrust laws'." Such a statement has absolutely no foundation in the sound and accepted rules of statutory construction. Its initial function is to render absolutely superfluous the phrase "and of all other restraints, limitations, and prohibitions of law . . ." Reading the statute and omitting these words would empower the Commission to relieve "from the operation of the antitrust laws, Federal, State, or muncipal." This is the exact interpretation which the majority applies. By the further process of elementary reasoning, the omitted words would necessarily have been inserted for the purpose of avoiding the very interpretation which the majority has adopted. We feel that the statute is clear and that the only proper interpretation is one that will make the act mean what it says. What it says would seem to be quite clear. It authorizes the ICC to relieve from "the operation of the antitrust laws and all other restraints," etc. The authority granted extends beyond the antitrust laws to reach and affect all other restraints. Certainly this phrase "all other restraints" is amply broad to reach existing collective bargaining agreements. Nothwithstanding the numerous references made throughout the award to the words "antitrust laws" appearing in Section 5 (paragraph 11) of the Interstate Commerce Act, it obviously did not occur to the Referee that specific mention of such laws was perhaps made by Congress in this enactment by reasons of the fact that antitrust laws might easily reach and have a limiting effect where rail mergers, consolidations, etc, are involved. It is submitted therefore that it was for this reason that Congress specifically spelled out antitrust laws immediately before making reference to the fact that in affecting consolidations, etc., approved by the Interstate Commerce Act, carriers are also to be relieved of "all other restraints, limitations, and prohibitions of law . . ." where necessary to enable them to carry into effect the authority granted by the Interstate Commerce Commission.

The Referee also erred when he construed the "exclusive and plenary" authority of the ICC as relating only to those powers specifically enumerated in paragraph (11) of Section 5. This is a result of a faulty assumption that the phrase "the authority conferred by this section shall be exclusive and plenary" has reference **only to paragraph (11) of Section 5.** The expression "Section 5(11)" as used in the opinion supporting the award is in actuality merely a reference to a portion, to-wit, a paragraph of Section 5 of the Act. It does not constitute a section of the Interstate Commerce Act in and of itself. While this argument might appear to be highly technical, it is crucial in this particular instance to an understanding of the power Congress has given the Interstate Commerce Commission. Federal enactments follow a rigidly standardized format: sections, paragraph and subdivisions. Sections are numbered; we are here concerned with Section 5. Paragraph are identified by numbers in parenthesis; we are here concerned in particular with paragraph

(11) of Section 5. This format is followed throughout the entire enactment. Thus in paragraph (1) of Section 5 the term "this section" is used in a context which can only be meaningful if understood to refer to Section 5 in its entirety. Whenever it is intended to limit the scope of a provision to particular paragraph that limitation is expressed by reference to "this paragraph" or "paragraph (2) of this section." See such references in paragraph (3), (4), (7), (9), (10), (13), (14), (15) and (16) of Section 5. Again see paragraph (5) and (6) of Section 5 where certain definitions are set forth "for the purposes of this section." That is, Section 5 in its entirety.

The majority's clear error at this starting point leads in due course of the discussion to the wrong assertion that the "exclusive and plenary" authority of the Interstate Commerce Commission does not extend to employe rights which are dealt with in paragraph (2). This, of course, is the logical destination to be reached when one starts at the erroneous starting point and moves in the wrong direction. From this the majority concludes that it has "at the minimum, concurrent jurisdiction with the Commission;" in other words, the majority holds that the power and authority of the Commission is not "exclusive and plenary" but is partial and incomplete, being shared with this Board. The jurisdiction of this Board is, by the majority's admission, founded upon this unsupportable whimsy. A critical analysis of the majority's reasoning reveals that such jurisdiction is nonexistent.

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