NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20319
THIRD DIVISION Docket Number CL-20309

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (formerly Transportation-Communication Division, BRAC)
(
(The Central Railroad Company of New Jersey (R. D. Timpany, Trustee)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7327) that:

1. Carrier violated the terms of the February 7, 1965 National Agreement, as modified by local Agreements dated March 1, 1967, April 20, 1967 and September 4, 1969, - particularly Sections 5, 6 and 7 of Agreement of March 1, 1967 and Sections 3 and 4 of Agreement of September 4, 1969, - when by letter dated March 21, 1972 from Assistant Superintendent F. T. Dougherty to General Chairman N. C. Hansen and District Chairman F. E. Bartelt and by letter of same date from Mr. R. K. Horchler to seven individual agents effective at end of tour of duty on Friday, March 31, 1972, abolished all positions in Pennsylvania (including extra positions) and allowed the transfer of the work of these positions to non-scope employes on other Carriers and on Seniority District No. 1 at Lake Junction and at Phillipsburg - without negotiation or agreement on any aspect of the discontinuance of service.

2. Carrier further violated Article 11 - Reducing Forces and Furloughs - as modified by the above Agreements - by furloughing the above named "protected" employes and advising them by letter to each individual employe by letter dated April 12, 1972, in reply to letters dated March 29, 1972, that they "are eligible to file for Railroad Unemployment Insurance benefits, the amount of which is normally deducted from whatever protective allowance may be due you."

3. Carrier violated the above Agreement provisions when it failed at the expiration of vacation periods to honor properly submitted time rolls from the employees, withholding full wages from each and every protected employe - without deduction for outside earnings or railroad unemployment insurance benefits - and failed to arrange for full coverage under Health and Welfare and Insurance contracts and a continuation of all fringe benefits.

4. Carrier violated the February 7, 1965 Agreement and the Washington Job Protection Agreement by failing to afford non-protected employes the benefits to which entitled under abandonments, coordinations and/or operational, organizational or technological changes - and deprived the designated extra employes of work and earnings and fringe benefits by improperly abolishing all positions and improperly transferring work.

5. Carrier failed to enter into or afford an opportunity to the Organization to negotiate an implementing Agreement in spite of repeated offers to do so during conferences on the property.

6. Carrier failed to consider the impact upon promoted and out-of-service employes and to assure them of proper compensation upon their return to the scope of the Agreement.

7. Carrier shall make whole each and every protected employe on the Pennsylvania Division by retroactive payment of all wages due, commencing April 1, 1972 and shall pay 6% interest per annum until such payments are made current - and shall thereafter continue to pay all protected employes in full on a current payroll basis each pay day until such employes are removed by natural attrition in accordance with current Agreements or until the dispute is resolved by negotiation and agreement - the rate of the position held on March 31, 1972 or the protected rate - whichever is the higher - plus subsequent wage increases - to be applicable.

8. Carrier shall further continue all fringe benefits and insurance protection for protected employes as if they continued to work the positions which were improperly abolished.

9. Carrier shall pay all employes the 5% general wage increase due on April 1, 1972, plus 6% interest as per agreement - as provided in letter agreement dated February 25, 1971 - this to include all employes on Districts 1 and 2 - as well as on District 3.

10. Carrier also violated our Agreements and the February 7, 1965 Agreement, as well as the Washington Job Protection Agreement, by abolishing in advance of and in anticipation of the abandonments referred to in Carrier's Blueprint for Survival - and at the time of rerouting of Pennsylvania traffic over High Bridge-Lake Junction as well as at the time of abandonment of Pennsylvania Division - and continuing - and shall compensate all adversely affected employes to be determined by joint check of Carrier's records in connection with elimination of positions on Districts 1 and 2 and transfer of work to nonscope employes in New Jersey.

OPINION OF BOARD: This Claim arose in connection with Central Railroad Company of New Jersey abolishing certain positions under scope of TC-Division - BRAC, effective at the close of business March 31, 1972, concurrent with the cessation of operations by Carrier of that portion of Carrier's lines located in the Commonwealth of Pennsylvania. Claim was initiated May 27, 1972 with the Carrier's Vice-President-Employee Relations (now Vice President-Personnel) by the Brotherhood's General Chairman (normal procedures for handling claims on the property having been waived in the instant case).

Immediately prior to the subject abolishments, the combined owned and leased lines operated by respondent Carrier consisted of 351.90 miles of main line and 239.51 miles of branch lines, or 591.41 total miles, which embraced 416.56 miles within New Jersey and 174.85 miles within Pennsylvania. Effective at close of business March 31, 1972, Carrier ceased operation of its lines in Pennsylvania, continuing to operate within the State of New Jersey, and effective April 1, 1972, Lehigh Valley Railroad Company assumed operation of the lines in Pennsylvania formerly operated by CNJ.

Agreement Provisions

The Claim, in ten paragraphs, asserts that the Carrier violated the terms of the February 7, 1965 National Agreement, as modified by local Agreements dated March 1, 1967, April 20, 1967 and September 4, 1969, - particularly Sections 5, 6 and 7 of Agreement of March 1, 1967 and Sections 3 and 4 of Agreement of September 4, 1969; the Claim asserts that the Carrier violated Article 11 - Reducing Forces and Furloughs - as modified by the aforestated Agreements; that the Carrier violated the above Agreements with respect to vacations, health and welfare and insurance contracts, and all fringe benefits; the Claim asserts violation of the Washington Job Protection Agreement; and that the Carrier violated Agreements by allowing transfer of work to non-scope employees and by not giving effect to the 5% general wage increase of April 1, 1972. It is clear that Agreement provisions in addition to the modified February 7, 1965 National Agreement are involved in this Claim. An appreciation of the extent and complexity of the interlacing and modifications of the basic working rules and provisions of the February 7, 1965 National Agreement requires quotation of the following:

"AGREEMENT DATED MARCH 1, 1967

Appendix "A"

"IT IS AGREED that the seniority of Employes coming within the scope of agreement between The Central Railroad Company of New Jersey, New York and Long Branch Railroad and its Employes represented by the Transportation-Communication Employes Union shall be terminated as follows:

"1. (a) Employees who have attained the age of 65 years, or who shall attain the age of 65 years before May 1, 1967, shall have their seniority terminated effective with the end of tour of duty April 30, 1967.

(b) Employees attaining the age of 65 years subsequent to April 30, 1967 shall have their seniority terminated effective with the end of tour of duty on the date of their 65th birthday.

"2. After the seniority of an employee has terminated as provided in Paragraph 1 above, his name shall be removed from the seniority roster or rosters provided for by the rules and working conditions agreement.

"3. After the seniority of an employee has terminated, as provided in Paragraph 1 above, such person shall not be permitted to work or be re-employed by the Carriers in service coming under the said rules and working conditions agreement between the parties signatory hereto, unless said parties shall mutually so agree.

"4. Hourly and daily rated employees reaching their 65th birthday on April 30, 1967, or subsequent thereto, will receive the birthday-holiday pay.

"5. Employees having their seniority terminated in 1967 under the provisions of Paragraph 1 above will be allowed vacation pay for 1968 regardless of whether they work the required number of days in 1967. Employees having their seniority terminated under the provisions of Paragraph 1(b) after December 31, 1967 will be allowed vacation pay for succeeding year based on proportionate number of qualifying days worked in the year of their 65th birthday.

Example: Employee requires 100 days to qualify for succeeding year's vacation but only works 30 days to his 65th birthday; will be allowed 30/100 of his succeeding year's vacation allowance.

"6. Neither this agreement, nor any provisions contained herein, nor any application thereof, shall be considered or used as a basis for any time or money claim against the Carriers.

"7. Nothing herein will in any way modify or affect the present requirements of the Carrier as to physical and/or visual examinations or restrictions on account of physical condition from any or all service prior to the retirement date above specified.

"8. In the case of dispute about age of an Employee covered hereby, the Carrier's personal record shall govern in the absence of a birth certificate or other document acceptable to the parties signatory hereto.

"9. This agreement shall become effective February 1, 1967 and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended."

Appendix "B"

"IT IS AGREED:

"1. The provisions of the February 7, 1965 Mediation Agreement, Case No. A 7128, exempt as otherwise agreed to herein, are extended to employees on the 1967 Transportation Communication Employees Union rosters on the Central Railroad Company of New Jersey and New York and Long Branch Railroad establishing a date of seniority between October 1, 1962 and March 1, 1966.

"2. In the application of the provisions of the February 7, 1965 Mediation Agreement to employees referred to in Paragraph 1 hereof, the date of March 1, 1967 shall be substituted for 'October 1, 1964.'

"3. Employees will not be required to transfer across seniority lines except by mutual agreement between the Management and the General Chairman.

"4. Article 6(d) of Agreement, effective February 15, 1944, corrected December 1, 1963, is modified to read as follows:

> 'If a permanent vacancy cannot be filled by the application of Article 6(a), the vacancy will be advertised in all other seniority districts. While employes are not, as a condition of protection under any agreement, required to make application for positions off their home seniority district, should they so elect, the senior qualified applicant will be assigned to the vacancy, establishing seniority in the seniority district to which transferred, retaining seniority in the home seniority district from which transferred. In the event such employee subsequently exercises displacement rights in his home district, or successfully bids a position in his home district or some other district, he will forfeit seniority in the district to which previously transferred. Employees can only hold seniority in their home district and one other district at the same time.'

"5. (a) Effective May 1, 1967, the Carrier may abolish, consolidate or dualize positions, other than those involved in the Aldene Plan, when vacated by the incumbent by reason of resignation, death, retirement or dismissal for cause in accordance with the provisions of the existing agreements, or when promoted to nonscope positions or granted disability annuity. Should the Carrier so desire, it may fill such position and abolish, consolidate, or dualize another position on the system. However, attrition credits will not be used on other than the district in which the attrition occurs if such action results in a protected employee being forced from regularly assigned status.

(b) In the event the Carrier does not desire to abolish, consolidate, or dualize any position under the provisions set forth in paragraph (a), it will accumulate attrition credits for subsequent abolishments, consolidations, or dualizations.

(c) Should employees who have heretofore or hereafter been promoted to nonscope positions or granted disability annuities return to a position under the scope of the TCU Agreement, one attrition credit will be cancelled for each such returning employee.

(d) In the event positions not directly involved in the Aldene Plan are eliminated prior to May 1, 1967, such will constitute advance utilization of attrition credits to be earned subsequent to May 1, 1967.

(e) Should the Carrier elect to transfer a position from one location to another in the same seniority district, such transfer will not be considered an abolishment, under the provisions of this agreement.

"6. When positions are abolished, consolidated, or dualized, the work of the eliminated positions will continue to be performed by TCU scope employees, except by mutual agreement between the parties signatory hereto.

"7. When positions, other than those involved in the Aldene Plan, are abolished, and remaining work is assigned to other TCU employees, consolidated, or dualized subsequent to May 1, 1967, an hourly rate increase of 5% of the hourly rate of the eliminated position will be applied to positions agreed upon by the parties signatory hereto as of the date of change, which increase or increases will not exceed accumulatively a total of 5% of the hourly rate of the eliminated position.

"8. Time limits for filing claims and disputes and appeal handling of same by either party are extended sixty (60) days from February 1, 1967, such time extension being restricted to claims and appeals involving application and interpretation of the Mediation Agreement of February 7, 1965.

"9. Updated and revised pages of the current working agreement, embodying all national and local agreements and understandings, will be printed and distributed to all scope employees on or about July 1, 1967.

"10. The Carriers will provide for free deduction of union dues, initiation fees and assessments without charge or expense to the TCU or its members commencing second half of 1967 as per agreement signed this date.

"11. Article 1, Section 5 of the February 7, 1965 Mediation Agreement is modified in accordance with the provisions of this agreement, and Article 1, Section 3 of the February 7, 1965 Mediation Agreement is hereby cancelled.

"12. This Agreement shall become effective March 1, 1967 and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act as amended."

Appendix "C"

"IT IS AGREED effective April 20, 1967:

"1. Employes will not be required as a condition of protection under any agreement to claim or bid in a position located in excess of forty (40) miles from work location (headquarters) or place of residence, whichever is the shortest, at time of change, unless such employee at the time of change is traveling in excess of forty (40) miles, in which event he will not be required to travel in excess of the miles he is traveling at the time of change.

"2. Except as provided in paragraph 1, employes are required to exercise seniority rights on their seniority district within their scope in all classifications. If agreed to by the Management and General Chairman that the employee fails to qualify, he will be given another displacement right with no loss in guarantee and will be paid his guaranteed rate while posting.

"3. (a) Employes adversely affected through the Aldene Plan may exercise their seniority rights to any position under the scope of the Telegraphers Agreement. However, except as provided in Paragraph (b), they will not be required to exercise their seniority to positions outside of their job classification. In the exercise

of seniority to positions they must do so to the fullest extent possible to minimize job protection benefits. Failing to do so they will be considered as occupying the position which they elect to decline paying the highest rate of pay that their seniority will give them.

Example: Towermen will not be required to exercise seniority to Agency positions nor will Agents be required to exercise seniority to Towermen's positions.

(b) In the event there are surplus protected towermen they will be required to exercise their seniority as agents in lieu of unprotected employes, and vice versa, should there be surplus agents they will be required to exercise their seniority as towermen in lieu of unprotected employes.

"4. Effective agreements are modified accordingly."

Appendix "D"

"IT IS AGREED, effective July 25, 1969:

"1. (a) It is recognized that all employees under the scope of the Transportation-Communication Employees Union agreements in District 3, with a seniority date prior to March 1, 1966, are protected employees, without entitlement to retroactive payments.

(b) A copy of the 1967 District 3 Seniority Roster, showing the March 1, 1967 rate annotated to show protective rate as of July 1, 1969, is attached.

"2. Employees displaced must, in order to preserve their protected status, exercise seniority to the fullest extent in accordance with paragraphs 1 and 2 of agreement dated April 20, 1967, as modified in paragraph 3 hereof. Failing to do so, they will be considered as occupying the position which they elect to decline paying the highest rate of pay that their seniority gives them.

"3. In the application of paragraph 2, District 3 is divided into two zones:
(1) Nesquehoning east; (2) west of Nesquehoning.

"4. Protected employees at the time of these or subsequent changes, who do not have sufficient seniority and qualification to obtain regularly-assigned position, will be considered protected extra employees for the purpose of implementing this agreement but will not, as protected extra employees, be required to travel outside their zone. Nonprotected employees will be required to travel and work throughout District 3.

"5. In the application of the February 7, 1965 agreement, as modified March 1, 1967, it is understood that protected employees need not physically vacate a regularly-assigned position in order that attrition credits may be accrued. Attrition credits will not accrue through loss of nonprotected employees.

"6. As a part of this change, one day of the assignment of Relief Cycle C is transferred from Franklin to Ashley.

"7. Effective July 26, 1969, the rates of pay of Operator-Clerks at Ashley will be increased from $3.3326 to $3.4992 per hour."

* * * * * * * * * * * * * *

Without going into detailed analysis of the aforequoted provisions, Paragraph 11 of Appendix "B" of the March 1, 1967 Agreement provides:

"11. Article 1, Section 5 of the February 7, 1965 Mediation Agreement is modified in accordance with the provisions of this Agreement, and Article 1, Section 3 of the February 7, 1965 Mediation Agreement is hereby cancelled."

Sections 3 and 5 of Article I - PROTECTED EMPLOYEES of the February 7, 1965 Mediation Agreement read:

"Section 3 -

In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating revenue and net revenue ton miles

in any 30-day period compared with the average of the same period for the years 1963 and 1964, a reduction in forces in the crafts represented by each of the organizations signatory hereto may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in gross operating revenue and percent of decline in net revenue ton miles divided by 2. Advance notice of any such force reduction shall be given as required by the current Schedule Agreements of the organizations signatory hereto. Upon restoration of a carrier's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days."

"Section 5 -

Subject to and without limiting the provisions of this agreement with respect to furloughs of employees, reductions in forces, employee absences from service or with respect to cessation or suspension of an employee's status as a protected employee, the carrier agrees to maintain work forces of protected employees represented by each organization signatory hereto in such manner that force reductions of protected employees below the established base as defined herein shall not exceed six per cent (6%) per annum. The established base shall mean the total number of protected employees in each craft represented by the organizations signatory hereto who qualify as protected employees under Section 1 of this Article I."

The Parties have materially and substantially modified the February 7, 1965 Mediation Agreement; and their revised Agreements, through their interlacing provisions have brought about extensive and complex integrations between the February 7, 1965

Agreement and the basic working rules Agreement effective February 15, 1944, corrected December 1, 1963. In the light of these fundamental and substantial revisions, it is easily understandable that the Parties by Agreement dated May 25, 1967 provided that disputes arising over the modifying of the provisions of the February 7, 1965 Agreement will be submitted for adjudication in accordance with the provisions of Sections 3 and 7 of the Railway Labor Act, amended. They agreed:

> "With reference to agreement signed March 1, 1967 modifying certain provisions of the February 7, 1965 Mediation Agreement, Case No. A-7128, as well as other provisions of your current basic working agreement:
>
> "In compliance with your request, it is agreed, any dispute involving the interpretation or application of any of the terms of this agreement not settled between the parties within ninety (90) calendar days after dispute arises, may be submitted by the Organization for final and binding resolution in accordance with the provisions of Sections 3 and 7 of the Railway Labor Act, amended."

This Board has held in a number of cases that we must respect the machinery established by the parties for the handling of disputes involving the interpretation or application of the February 7, 1965 Agreement, and in such cases dismissed the claims without prejudice for handling by the Disputes Committee established under that Agreement. See Awards 14979, 15696, 16552, 16924, 16869, 17099, 17516. In the instant case, where there has been fundamental and material modification of the February 7, 1965 Agreement as well as modifications and integrations with the current basic working agreement, we must also accord respect to the machinery established by the parties under their Agreement of May 25, 1967. This Board, under Section 3 of the Railway Labor Act, amended, is obliged to render a final and binding resolution of the instant dispute.

The Carrier raises a fundamental challenge, however, to the jurisdiction of this Board. It argues, in part:

> "On page 7 Organization cites the May 25, 1967 agreement in which Carrier acceded to Organization's request that disputes not settled within 90 days, relating to application of the modified February 7 agreement, could be progressed in accordance with Sections 3 and 7 of the Railway Labor Act.
>
> If the instant dispute merely involved alleged violation of the February 7 agreement, or modifications thereof as they exist on this property, we would not challenge the Organization's reference thereto. But, as stated in our submission and heretofore in our rebuttal, such is not the case. The issues raised are not answerable by this Board nor by the Disputes Committee, since they go beyond the confines of the February 7 agreement, and should be dismissed."

The Carrier's contention is that neither the February 7, 1965 Job Protection Agreement nor the May 1936 Washington Job Protection "is applicable to the situation in Pennsylvania because the operations were discontinued not at the instigation of the Carrier but by an Order of the United States District Court which authorized the Carrier to discontinue, temporarily, operations in Pennsylvania, which Order was subsequently made permanent as a part of I.C.C. Finance Docket No. 26659,". "In actuality," the Carrier argues, "the discontinuance resulted from an action by a body beyond the purview of Carrier's responsibility. Positions were discontinued effective close of business March 31, 1972 by U.S. District Court Order authorizing CNJ to discontinue temporarily operations in Pennsylvania, and subsequent I.C.C. Service Order authorizing Lehigh Valley to operate thereon. Accordingly, no agreement or negotiations were germane."

The Carrier's position here may be understood as a defense of pre-emption by the Interstate Commerce Commission's imposition of protective conditions covering the employees here involved. Whether the Carrier's defense is viewed as pre-emption, or, in effect, an abrogation of agreements providing for protective conditions not contained in the Interstate Commerce Commission's Order in Finance Docket No. 26659, the Carrier's position merits serious consideration.

Prior Awards of this Board have concluded that we have jurisdiction over railroad-employee disputes arising out of the interpretation and application of existing collective bargaining

agreements between Carriers and collective bargaining representatives of employees adversely affected by various "coordinations" which have been implemented subsequent to the authorization and approval of the transaction by the Interstate Commerce Commission. Award No. 15460, Award No. 15028, Award No. 15087. (Also, see Awards Nos. 15477, 15679, 15680, 15681, 15682, 15683, 15684.) For jurisdictional purposes, we conclude that there is no fundamental difference between such disputes and the instant dispute. These prior awards were based on essentially the same defense of pre-emption, and, in our view, there has been no material change in the relevant provisions of the Interstate Commerce Act or the proper interpretation of such provisions. We have carefully considered the United States Supreme Court case of Norfolk & Western Railway Company v. Nemitz, et al., decided November 15, 1971, but conclude that the Court there determined that the protective purposes of Section 5(2)(f) of the Interstate Commerce Act were to be safeguarded. This case did not involve facts and circumstances of an Order by the Interstate Commerce Commission abrogating more valuable protective benefits provided employees under pre-existing collective bargaining agreements. We note, however, that the I.C.C. in Finance Docket No. 26659 proceeded on the basis of Sections 1, (18) and (20) and not Section 5(2)(f) of the Interstate Commerce Act.

We have carefully considered our earlier awards, including the vigorous dissents filed by the Carrier members, and must conclude that none of these awards is palpably in error as to the jurisdiction of this Board. Under the doctrine of Stare Decisis, where a point of law has been settled by decision, it forms a precedent which should ordinarily be strictly adhered to unless overriding considerations of public policy demand otherwise. Our authority is derived from Section 3, First (i) of the Railway Labor Act, as amended, and we reaffirm our previous position that at the minimum this Board has concurrent jurisdiction with the Interstate Commerce Commission over disputes of the nature involved herein. See Award No. 15460 and Award No. 15087. Accordingly, until our jurisdiction is explicitly and definitely superseded in such matters by appropriate constitutional courts having jurisdiction over all indispensable parties and the subject, this Board must exercise its statutory powers by resolving disputes growing out of the interpretation and application of collective bargaining agreements.

This Board has no power to interpret pertinent sections of the Interstate Commerce Act as to Congressional intent or to interpolate the authorities which may be cited in support of the defense of pre-emption by the Interstate Commerce Commission. The ultimate disposition of these jurisdictional issues requires final judicial

resolution. In the meantime, we should exercise our specific and limited jurisdiction expressed in Section 2 of the Railway Labor Act, as amended. This Board has taken notice of Special Board of Adjustment No. 605, Award No. 374, Award No. 375, and Award No. 377, and has studied carefully the Carrier's Position in those cases, involving the same Finance Docket No. 26659, and the same Carrier (CNJ), but not the same agreements as cited and quoted above in this Opinion. In view of the basic and material difference in collective bargaining agreements involved, and in view of the Agreement of the Parties of May 25, 1967 calling for a "final and binding" resolution of the instant dispute, in accordance with the provision of Section 3 of the Railway Labor Act, as amended, we conclude that we will invoke our jurisdiction and consider the merits of the instant claim.

Paragraph 1 of Statement of Claim. On March 21, 1972, by notices of Mr. R. K. Horchler and Assistant Superintendent F. T. Dougherty, (Employes' Exhibit No. 1 and Employes' Exhibit No. 2), positions of named employees were abolished account discontinuance of service on Pennsylvania Division and "due to discontinuance of operations". The Carrier states: "On page 2, third paragraph, Statement of Facts, Organization cites following employees as being adversely affected:

J. J. Gallagher
K. D. Bitler
J. V. Boyle
E. Hager
F. F. Hager
F. J. Pecka,

evidently attempting to include them through Item 6 of claim.

"The first five men were, at the time operations ceased, promoted and working as dispatchers under the scope of American Train Dispatchers Association agreement, while the sixth man was in a non-scope position. It is therefore improper for them to be included as claimants when they were not employed in positions under, nor subject to provisions of the TCU agreement.

"Irelan and Quier were non-protected employees and therefore not subject to provisions of the February 7, 1965 agreement and should not be included in the claim." (Carrier's Rebuttal, p. 1). We accept the Carrier's statement in the absence of denial by the Employees.

The facts are clear that all positions in Seniority District 3, State of Pennsylvania, were abolished. In place of Article 1, Section 3, Reducing Forces - Decline in Business, February 7, 1965 Agreement, it was agreed by the Parties in the March 1, 1967 Agreement that the only ways positions could be abolished, consolidated or dualized, other than those involved in the Aldene Plan, was "when vacated by the incumbent by reason of resignation, death, retirement or dismissal for cause in accordance with the provisions of the existing agreements, or when promoted to nonscope positions or granted disability annuity." (Sec. 5). Section 5 (a) of the March 1, 1967 Agreement also provides: "Should the Carrier so desire, it may fill such position and abolish, consolidate, or dualize another position on the System. However, attrition credits will not be used on other than the district in which the attrition occurs if such action results in protected employee being forced from regularly assigned status." The same Section 5 further provides:

> "(b) In the event the Carrier does not desire to abolish, consolidate, or dualize any positions under the provisions set forth in paragraph (a), it will accumulate attrition credits for subsequent abolishments, consolidations,or dualizations.
>
> "(c) Should employees who have heretofore or hereafter been promoted to non-scope positions or granted disability annuities return to a position under the scope of the TCU Agreement, one attrition credit will be cancelled for each such returning employee."

The Employes assert that "There is absolute evidence that cannot be denied the Carrier abolished all positions held by the Claimants in the State of Pennsylvania and at the time possessed not one attrition credit and a most clearcut violation of the Agreement has been shown by the Employes." The Carrier does not deny that at the time it possessed not one attrition credit.

The record contains no factual support for that part of Paragraph 1 reading: "and allowed the transfer of the work of these positions to non-scope employes on . . . Seniority District No. 1 at Lake Junction and at Phillipsburg". This part of Paragraph 1 cannot be sustained. The Board finds that the Carrier is in violation as claimed in Paragraph 1, but that names mentioned above are excluded from list of Claimants.

Paragraph 2 of Claim. This paragraph asserts that Carrier violated Article 11 of the basic working rules agreement. This Article reads in part:

> "(a) When reducing forces, seniority will govern. Employes whose positions are to be abolished shall be given as much advance notice as possible, in writing, and not less than five (5) working days'. ...Such employes may, within five days, request leave of absence as provided in Article 16 and if granted, may defer exercising displacement rights until five days after the expiration of leave of absence. Employes whose positions are abolished, or who have been displaced by reduction in force, may exercise their displacement rights as provided in Article 12(b)."

In this claim, the Employes contend that the Carrier "further violated the Agreements as modified in violating Article 11 of the basic agreement titled 'Reducing Forces and Furloughs'. The Carrier takes the position that they did not violate this portion of the Agreement simply because notices were properly posted in accordance with said Article 11. That when an employe is deprived of work he is considered furloughed, available for work and eligible for Railroad unemployment benefits and that the Organization is trying to read something into the agreement that is not contained therein." The Employes continue: "We feel that action speaks louder than words. By their actions in furloughing the Claimants the Carrier has violated said Article of the Agreement. Abolishments can only be made through attrition since the modification of the February 7, 1965 Agreement provided for the stabilization of positions, not forces, and the decline in business provisions having been eliminated along with the transfer of forces or work across seniority lines the Carrier could not resort to Article 11 to accomplish what subsequent modification of agreement would not allow."

This Board agrees with the contention of the Employes. The exercise of displacement and seniority rights is clearly modified by the seniority provisions in the Appendices of the local Agreements of March 1, 1967 in the context of the February 7, 1965 National Agreement. We find Carrier's contention that it "did not violate Article 11 of Basic Agreement. Notices were posted in accordance with its requirements." to be without merit. Paragraph 2 of Claim is sustained.

Paragraph 3 of Claim. The Carrier, on page 4 of its submission, states:

> "Article 8 of the National Vacation Agreement of December 17, 1941, as amended, reads:
>
> > "If an employee's employment status is terminated for any reason whatsoever, including but not limited to *** failure to return after furlough, he shall at the time of such termination be granted full vacation pay earned in the preceding year or years and not yet granted ***".
>
> We have interpreted this to permit deferral of vacation payments of furloughed employees until December of the current calendar year. This has not been challenged by the labor organizations. Had Pennsylvania Division employees selected vacation periods subsequent to March 31, 1972, such schedules expired by observance of the District Court Order which dictated discontinuance of Pennsylvania Division positions on March 31, 1972. Subsequently, the validity of Organization's claim for vacations as scheduled, was further challenged by I.C.C. Finance Docket No. 26659 which directed that employees adversely affected by the discontinuance -- those unable to secure employment with another railroad -- would receive but three weeks vacation in the aggregate."

The Carrier also states, in reference to the language of the I.C.C. Order in Finance Docket 26659 pertaining to vacations: "In Conference October 26, 1972, Carrier expanded the three months severance for the individual not employed by the Lehigh Valley by paying full 1971-1972 vacation to the adversely affected individual, a proportion of their 1972-1973 vacation, which goes beyond the language of the Order, and the difference in earnings between the first three months of 1972 and that earned on the Lehigh Valley for those individuals who were subsequently cut off by that Carrier."

In this connection, the Employees argue: "In denying our Claim No. 3 the Carrier takes the position that Vacation payments under the National Vacation Agreement may be deferred until December. That if such vacations were scheduled for periods after April 1, 1972, such scheduling was automatically voided by the Court Order which permitted the Carrier to discontinue its service in Pennsylvania. If the Claimants had been furloughed in a proper manner,

such interpretation by the Carrier might have been proper, however, the Claimants were not furloughed in a proper manner since the Carrier violated the Agreements as modified. However, December 1972 has come and gone and the Carrier still has made no effort to pay the employes the Vacation time which they earned and the Board must now order and require the Carrier to make such payment by their violation of the Agreements in question."

In connection with that part of Paragraph 3 claim " ... and failed to arrange for full coverage under Health and Welfare and Insurance contracts and a continuation of all fringe benefits.", the Carrier states:

> "Organization declares Carrier failed to arrange for full coverage under Travelers 23000. This is not true. In meeting May 27, 1972 and as set forth in letter of August 20, 1972, reading --
>
> 'Confirming our telephone conversation this date, employees in your organization on the Pennsylvania Division roster, who are not now employed on the Lehigh Valley Railroad or any other railroad, will be covered under Travelers Policy No. GA-23000 while we are negotiating the matter.',

Carrier arranged continuation of premiums for those adversely affected pending the temporary Service Order being made permanent or resolution of the dispute. Those employed by Lehigh Valley are being covered on the basis of their earnings with that Carrier."

The Employes argue, however, "On the Question contained in Claim No. 3 concerning the Health and Welfare Benefits the Carrier contends that such benefits were continued for the applicable period under existing Travelers No. 23000 contract. However, what they fail to state or realize is that had they abided by the Agreement the Employes would not have been in a furlough state but would have been under full pay entitled to all the fringe benefits that accrue to an employe thereunder."

This Board finds that the Carrier has partially, but not fully, complied with its agreement obligations to provide the benefits subject of Paragraph 3 of Claim, and to the extent that it has not complied fully, it is in and continues to be in violation. This Board construes Section 1 of Article 1 of the February 7, 1965 agreement, as amended on the property, particularly that portion --

" **** will be retained in service, subject to compensation **** until retired, discharged for cause or otherwise removed by natural attrition" as having been violated and as contemplating, in the term "compensation" the benefits subject of Paragraph 3 of Claim. The Carrier is obligated to comply with the provisions of the National Vacation Agreements (Article 32 of Agreement of Parties effective June 15, 1944, corrected as of December 1, 1963); and with the provisions of the Health and Welfare Agreement (Article 48 of Agreement).

Paragraph 4 of Claim. The provisions of the Washington Job Protection Agreement of May, 1936 become effective and apply whenever two or more carriers party to that Agreement undertake a "coordination". Section 2(a) of the Agreement provides:

> "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."

We construe the terms "joint action" whereby two or more carriers 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, to be terms descriptive of activities or behavior. We construe these terms to relate to the substance and happening of empirical events. They are not to be interpreted as technical, legal "words of art" reflecting the lawyer's value judgment. Accordingly, we must view the transaction reported in Finance Docket 26659 in terms of what is factually and substantively described. Various quotes from the Finance Docket 26659 are set forth below.

> "Prehearing conference pertaining to the three applications was held in October. We were advised that CNJ and LV each had had preliminary negotiations with LC&N, holder of certain leasehold rights in the CNJ lines in Pennsylvania, other than those of L&NE. The parties sought to arrive at agreements which would permit simultaneous approval of the CNJ and LV applications in a manner that would prevent any interruption of freight service available to the public. The bargaining had not produced results. The examiner encouraged further negotiation sessions, and recessed the conference one afternoon to allow the parties to meet privately. He also directed that reports of any

progress be made to him and to the parties of record. Relying upon assurances that the moving parties were seeking to protect continuation of present service availability, many of the shipper and community protests were conditionally withdrawn or modified.

"Public hearings were held at Newark, N.J., Wilkes-Barre, and Allentown, Pa., and Somerville, N.J., during November and December. It was announced at the hearing that CNJ and LV had reached satisfactory agreements with LC&N, or had agreed in principle to terms and conditions. The agreements, upon completion, were subject to appropriate action by the reorganization courts involved. Prior to the close of the hearing, withdrawals were made by a majority of the opposing shippers and communities. Also, several connecting railroads negotiated separate agreements with CNJ, and conditionally withdrew their opposition. The withdrawals are conditioned upon assurances that any approvals by us would provide adequate protection of the normal movement of traffic." (pp. 7-8).

"CNJ instigated and encouraged negotiations by LV with LC&N and Rdg., if required, which would result in LV's application to extend its lines in Pennsylvania to include the LC&N lines heretofore operated by CNJ. An appropriate agreement between CNJ and LC&N regarding the existing leasehold rights also was negotiated. As a consequence of its negotiations, LV herein seeks to assume CNJ's operations in Pennsylvania, subject to a certificate of abandonment first being issued to CNJ. It would operate L&NE lines as a branch line. Also, it intends to operate the disjointed Hauto-Tamaqua segment of L&NE which does not connect directly with lines of L&NE or CNJ. However, separate CNJ-Rdg negotiations are under way for Rdg to serve the Tamaqua segment from the Rdg connection at Tamaqua. Other discussions have been had with D&H, EL and Blue Coal Company, each to perform some of the present railroad service of CNJ, over certain portions of main line and branch lines in Pennsylvania which are sought to be abandoned." (pp. 18-19)

"Attached hereto as Appendix G is a statement of estimated income for 1972, under the restructured operations. The basic premise is that all the abandonments proposed would be permitted and be effectuated. CNJ also presumes that the lines in Pennsylvania would be operated by LV, and that service over certain of the branches in New Jersey would be assumed by connecting railroads. (p. 39)

"The proposal by LV to extend its lines is contingent upon the issuance of an appropriate certificate permitting CNJ to abandon the owned and leased lines operated in Pennsylvania. It includes a request to assume operation of L&NE as an LV branch line. Thus, the proposal is preconditioned upon certification that the present or future public convenience and necessity requires or will require operation of the extension of its line of railroad." (p. 43)

"With required approval of its bankruptcy court, LV has had protracted negotiations with LC&N concerning the remaining term of the contract with CNJ, whereby the latter was authorized to operate the L&S lines until the end of the present lease period, May 8, 1998. An agreement has been submitted to LC&N and LV for signatures and for approval by the Court. By its terms, LV would assume the lease. Rent would be paid out of current funds. LV also has actively negotiated with CNJ and representatives of the United States government concerning terms and conditions under which LV would operate the physically separated segments of L&NE. A dispositive agreement regarding L&NE is expected at an early date." (p. 44)

"The present position of LC&N is stated on brief as being in support of the LV application to operate the L&S lines. Contingent upon approval of LV's application, the position of LC&N is neither in favor of, nor in opposition to the application of CNJ. LC&N notes that on November 17, 1971, it signed an agreement with CNJ, binding LC&N to withdraw as a participant in the CNJ reorganization proceeding; to withdraw its opposition to all pending applications and proceedings of CNJ; and to request dismissal of all proceedings

> instigated by LC&N against CNJ. In consideration for these changes in position, CNJ agreed to pay $500,000 to LC&N. The agreement is further conditioned, among other factors, upon LC&N and LV reaching a satisfactory agreement in regard to operation of the L&S lines; appropriate approval of the agreement by the CNJ Reorganization Court and the LV Reorganization Court as required; satisfactory disposition by the Commission of the applications of CNJ and LV; and the abanonments and takeover of operations becoming fully effective after the time for appeals has expired." (p. 57)

This Board is convinced from its reading of the Finance Docket No. 26659 that, as a matter of empirical fact and actual behavior, there did occur negotiations and agreements between LV and CNJ and subsidiaries which led to the Interstate Commerce Commission authorization of the simultaneous abandonment and extension of operations. The facts of joint action by the Carriers, through negotiations and agreements, cannot be disputed.

Arguably, the joint action of the Carriers may be a necessary but not a sufficient condition for a "coordination" of separate railroad facilities or any of the operations or services previously performed by them through such separate facilities, under Section 2(a) of the Washington Job Protection Agreement. It may be argued that approval by the Interstate Commerce Commission is a requisite condition. Such approval, however, or authorization by the Commission is a requirement normally contemplated in accordance with the provisions of the Interstate Commerce Act. It is not the authorization of the Commission which satisfies the definition of "coordination" in Section 2(a). It is the joint action of the 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."

Experienced and practical railroad men must be presumed to have intended to achieve practical results in their efforts to provide employee protection under the Washington Job Protection Agreement. It seems to this Board that it would be an absurd and meaningless interpretation of the agreed-upon definition of the term "coordination" to construe it so as to permit two or more carriers to negotiate and agree upon arrangements for one railroad to

supplant the other in its operations, with loss of employment to the supplanted railroad's employees, to be accomplished totally without application of the protective provisions of the Washington Job Protection Agreement.

It is simple, of course, to confuse the term "abandonment" as used in the regulatory aspects of the Interstate Commerce Act, with the notion of "abandonment" as contemplated by experienced and practical railroad managers and employee representatives in collective bargaining negotiations. What may be "abandonment" under Section 1(18)(20) of the Interstate Commerce Act is judged to be so in order to achieve the purposes of the Act. For purposes of collective bargaining agreements, where the clear objective is employee protection, it is necessary to avoid an obvious emasculation of purpose and language by the use of common sense which tells us that negotiations and agreements between two or more carriers whereby operation by one railroad is supplanted by another railroad is precisely such a condition as constitutes "coordination" and calls for employee protection, as agreed upon in the Washington Job Protection Agreement, Section 2(a).

This Board has noticed the language of the interim Award No. 377. This Award takes no notice of the negotiations and agreements between the two or more Carriers involved in Finance Docket No. 26659. Moreover, it fails to distinguish between "abanddnment" as contemplated by the Interstate Commerce Act and the notion of "abandonment" as an element of supplantation in a joint action by two or more carriers within the context of a collective labor agreement (the Washington Job Protection Agreement) whose stated purpose is "to provide for allowances to defined employees affected by coordination as hereinafter defined". For these reasons, amongst others, this Board regards the language of interim Award No. 377 to be in palpable error and without precedential force as to this Board.

This Board finds the Carrier to be in violation of the Washington Job Protection Agreement by failing to afford non-protected employees under the modified February 7, 1965 Agreement the benefits provided under said Washington Job Protection Agreement.

Paragraph 5 of Claim. The Carrier states: "This is an attempt on their part to infer the applicability of Article III of the February 7, 1965 agreement, entitled "Implementing Agreements", containing the language 'Carrier shall have the right to transfer work and/or transfer employees throughout the system.' It is apparent two conditions would have to exist for Article III to control; first, it would be the desire of the Carrier to retain in its own service employees of the craft but wish to relocate them to a work location other than the location which existed prior to the date of transfer; second, an implementing agreement would then be necessary to preserve and protect the rights of those individuals being transferred. In the cessation of operations in Pennsylvania on March 31, 1972 Carrier did not, so far as TC Division of BRAC was concerned, intend to relocate headquarter points of the affected individuals to some other point within the Carrier's system; rather, we were directed to cease operations."

In view of the facts of record, this Board sustains Paragraph 5 of Claim.

Paragraph 6 of Claim. The Carrier states that "no promoted man has faced the necessity of returning to TCU scope, and the likelihood of that occuring is in the remote future." The facts of record fail to support the claim, and it is denied.

Paragraphs 7, 8, and 9 of Claim. In view of our determinations of Agreement violations by the Carrier in Paragraphs 1, 2, 3, 4, and 5 of Claim,we decide that Claimants and employees adversely affected are entitled to that compensation which will make each whole, beginning with date of violation, April 1, 1972, to the date of voluntary retirement, to the date of removal by natural attrition, or to the date of expiration of protective benefits under the applicable Agreement provisions. Make-whole compensation shall include vacation, health and welfare, insurance, and fringe benefits under the applicable Agreement provisions. Wage increases subsequent to April 1, 1972 shall be included in computing the make-whole compensation only from and after date made effective in applicable Agreement. The Carrier shall have the right to deduct outside earnings, and the Carrier shall also have the right to deduct such amounts which it has paid and which were received from Carrier allegedly in accordance with the employe protective provisions contained in Interstate Commerce Commission Report, Finance Docket No. 26659. The intent here is to award make-whole compensation and not to duplicate payments to employees here involved.

In view of the nature of this dispute and the unliquidated nature of the claims, the make-whole compensation shall not include interest. In any event, an employe who has been affected by such violation will be limited to only one recovery, regardless of the source.

Paragraph 10 of Claim. Evidence to support this claim is lacking and it is denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreements.

A W A R D

Paragraphs 1, 2, 3, 4, and 5 of Claim are sustained in accordance with Opinion of Board.

Paragraphs 6 and 10 of Claim are denied.

Paragraphs 7, 8, and 9 of Claim are sustained as modified by the Opinion of Board.

Claim sustained to the extent that the Agreements were violated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20319
DOCKET NO. CL-20309 - (REFEREE LAZAR)

Award No. 20319 finds Carrier violated the Agreement. This is simply not true because neither the basic Agreement nor the February 7, 1965 Non-Ops Job Protection Agreement provide protective conditions in the case of abandonment.

The Referee's opinion is replete with errors of fact and inconsistenci It seems to have been constructed on his compulsion to ignore the exhaustive and detailed analysis by the I.C.C. of the history of CNJ's financial situation, industry-accepted standards of employe protective conditions as measured against the CNJ's economic posture, and the Commission's clearly-defined authority to weigh the facts of the issue before it, and dictate, or decline to so do, protec tive conditions under a Section 1(18) proceeding.

The I.C.C., in Finance Docket 26659, determined that CNJ's abandonment proceeding was properly moved under Section 1(18), and such finding has not been found wanting.

It has been the specific intention of the Commission to leave unaffect all contracts between a carrier and the representatives of its employes unless it specifically provides otherwise.

The February 7, 1965 Non-Ops Job Protection Agreement does not make pr vision for cases of abandonment. So far as the abandonment of CNJ's operations i Pennsylvania was concerned, the I.C.C. Order of May 26, 1972 is the sole source of protection for those employes adversely affected.

Employes "displaced" by reason of cessation of operations as of April 1 1972 over a portion of CNJ's line located in Pennsylvania and the subsequent aba donment authorized by said Order are entitled only to the benefits provided in t Order which pre-empts any pre-existing labor agreement. Such benefits are spell out in the Order, to wit, three months severance pay, accrued vacation to an aggregate of three weeks, and any sick and hospitalization benefits during the thr month period commencing April 1, 1972.

The following language contained on page 126 in the Commission's Order of May 26, 1972 in Finance Docket No. 26659 is clear on its face:

> "We find it fair and reasonable to impose moderate employee protective conditions less burdensome to CNJ than those frequently prescribed in abandonment cases. CNJ shall be required to provide 'severance pay' for a period of 3 months to those employees having more than 1 year's seniority who otherwise would be displaced and left without suitable railroad employment. The dollar payment per month shall be an amount equivalent to the average monthly earnings exclusive of overtime payment, received by the unemployed claimant during the 6-month period ending April 30, 1971, prior to the month the abandonment application was

"filed; or in the alternative, during the 6-month period commencing June 1, 1971, whichever is higher.

"The affected employees also shall receive payment for accrued and unused vacation periods, not exceeding an aggregate of 3 weeks. During the 3-month period, sick and hospitalization rights shall continue as at present. Other benefits, including vacation allowances, shall cease as of the first day of the first month of the severance payments. Any earnings in railroad service, or in outside employment, or any benefits received during the period covered shall not be used to decrease the severance payments to which the claimant otherwise would have been entitled. Disputes as to the amount of the payments shall be determined by the arbitration provisions contained in the work-rules agreement effective between CNJ and the craft organization to which the employee held membership prior to the effective date of the abandonments herein."

Protected benefits relating to CNJ's abandonment of operations in ...sylvania were established by the Interstate Commerce Commission Order of May ..6, 1972 in FD-26659.

The question is: Did the I.C.C. Order, rendered under and pursuant to Part I, Section 1(18), (19) and (20) of the Interestate Commerce Act, pre-empt a pre-existing agreements relating to abandonment when the CNJ's operations in Pennsylvania were abandoned?

The answer to this question must be in the affirmative. The pertinent portions of Section 1(18) and (20) read:

Section 1 (18)

"* * * no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. * * *"

Section 1 (20)

"The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * *" (Emphasis supplied)

On May 25, 1971 the CNJ was authorized by the District Court to file an application with the I.C.C. pursuant to Section 1, paragraphs 18 and 20 of the I.C.A., for a certificate of present and future public convenience and necessity permitting abandonment of the CNJ's lines and operation in Pennsylvania. (Order No. 410). On December 20, 1971, the same District Court ordered the CNJ to suspend all operations in Pennsylvania effective April 1, 1972 (Order No. 445) pend final decision by the I.C.C. on Finance Docket No. 26659. It was argued, before the Commission, at least by one Organization, that "the matters herein properly should be treated as a single transaction required to be approved and authorized under Section 5(2)(f), Rp 95) and that Section 1(18) proceedings are not proper * * *". The apparent reason for propounding such argument was argument was that Section 5(2)(f) mandates protective conditions whereas Section 1(18) does not. The Commission replied:

> "* * * The Okmulgee case, upon which UTU relies, following the already referred-to statement, recognizes that our primary concern in abandonment proceedings is the preservation of service for the public previously served by the abandoning line. At pp. 640-1, the decision continues as follows:
>
> > "To avoid any hiatus in service, the Commission has authorized lines being abandoned to be acquired by other carriers under section 1(18) immediately after the abandonment, ruling that there is nothing in the act which requires that a line of railroad, the abandonment of which has been permitted, shall be taken out of service for any particular period of time, before we may authorize another carrier to acquire the line or portion thereof. See Erie R. Co. Acquisition, 275 I.C.C. 679, 686, and the cases cited thereat."

The Commission concluded that the proceeding was not a coordination or consolidation under Section 5(2)(f). The Commission decided the application of the Carrier for an abandonment was properly before it under Section 1(18) and (20) and rejected the Organization's arguments to the contrary.

The Commission applied the provisions of Section 1(18) and (20) to the abandonment proceedings here in question and in doing so it also imposed protective conditions for all the employes involved. The Commission's power to impose such conditions in abandonment cases was recognized by the Supreme Court in Interstate Commerce Commission, et al vs. Railway Labor Executives Association, 315 U.S 373. Admittedly, where there is a consolidation or a coordination, the Commission is required to impose protective conditions for the employes affected. The issue before the Court in I.C.C. v. R.L.E.A., supra, was whether the Commission had the power to impose conditions in abandonment cases.

That decision clearly recognized the Commission's exclusive power to establish or not to establish protective conditions which were to be imposed in abandonments in order to effectuate "the public convenience and necessity". The question in each abandonment case then becomes what conditions, if any, are reasonable and just. The Commission has the exclusive authority to examine the facts and evidence, and decide whether any protective conditions should be imposed. That is exactly what the Commission did in this case. They considered the evidence and argument presented by various organizations, including the R.L.E.A. and C.R.U.,

the policy-making bodies for Railway Unions. These groups insisted on various protective conditions being imposed, including those set forth in I.C.C. 5(2)(f New Orleans conditions; Burlington conditions, and a combination of Burlington and New Orleans conditions.

In the exercise of its discretion, the I.C.C. decided that certain pr tective conditions should be imposed but flatly rejected the formulas advanced the employes. On page 123 of its Findings, the Commission said:

> "Employee conditions. Imposition of protective conditions is not mandatory under the statute governing section 1(18) applications. However, they may be imposed in our discretion based upon the facts and circumstances under consideration. We affirm our earlier holdings herein that the applications of CNJ and LV are properly before us under the provisions of section 1(18). We reject the employees' arguments to the contrary.
>
> "There are many situations wherein abandonments permitted are made subject to conditions that the carrier or carriers involved provide satisfactory employee protection to offset the injury that otherwise would be visited upon employees and their families. The employee protestants fail to consider that the applications herein involve railroads under reorganization, and that each applicant is located in the East, which is peculiarly afflicted by weakened railroad systems also in bankruptcy or otherwise affected by dire financial conditions. The situation herein appears to be treated by these protestants in the same terms that would be applicable in abandonments of lines and operation of distinctly prosperous railroads where savings made possible by an abandonment should in equity be shared by the carrier and its adversely affected employees. But here, the savings are necessary for the preservation of essential rail service, which in turn preserves jobs and might eventually create more jobs. Even if CNJ and LV assented to high cost employee guarantees, we would refuse to impose the elaborate conditions referred to in the briefs of the employee organizations. To do otherwise, would be neglectful of our obligation to safeguard the public's vital interest in transportation." (Emphasis supplied)

On page 124 the Commission said:

> "We certainly are not convinced that the effects upon CNJ and L&NE employees would be such that the overall public convenience and necessity requires denial of the application of CNJ and LV. The record indicates that certain non-operating employees of CNJ would be able to make claims for

> "attrition protection under the February 1965 stabilization agreement. * * * that about half the employees of CNJ and L&NE in Pennsylvania would be hired to operate the lines sought by Lehigh Valley * * *. The abandonments allowed herein may be the only means of assuring CNJ's ability to continue as an operating railroad. Of itself, that would have the effect of preserving the majority of the jobs of present employees in New Jersey." (Emphasis supplied)

A close reading of this portion of the Order underscores the Commissio intent --

> "Certain non-operating employees of CNJ would be able to make claims for attrition protection under the February 7 stabilization agreement * * *."

The operative phrase is "CNJ employees" -- those remaining in the activ employ of CNJ meeting eligibility requirements of the February 7 agreement. The Order excludes those cut off through the abolishments resulting from abandonment of operations, or declining to exercise their seniority.

The Commission's authority to impose protective conditions is without question. In so doing, it provided moderate employee protective conditions "fair and reasonable" to all the employes. Thus, it cannot be concluded, as Petitioner contends, that it would be "just and reasonable" to continue lifetime protective payments for a segment of the work force and "impose moderate employee protective conditions for the remaining employes". That contention ignores the Commission's categorical assertion that it would not impose those costly benefits envisaged by the Burlington, Oklahoma or like provisions - which run only for a 4-year period.

Following issuance of the Order of June 2, 1972, the UTU, under date of July 3, 1972 filed a Petition for Reconsideration arguing, among other things, th the Commission erred in failing to recognize the proceeding as a Section 5(2) pro ceeding and that the labor conditions set forth in the Order are ambiguous.

Under date of July 3, 1972, R.L.E.A. petitioned for reconsideration and clarification of the Commission's Report and Order, including amendment of the Order so as to:

> "Provide affected CNJ employees with a minimum of one year's severance pay in lieu of the ninety days as provided;
>
> "Provide that affected CNJ employees furloughed in anticipation of the abandonments authorized in the Order be protected;
>
> "Delete any reference to the amount of vacation, or compensation in lieu thereof, an employee is entitled to receive;

> "Provide that any interpretation designed to deny former CNJ employees who have secured temporary employment with Lehigh Valley equal benefits afforded other affected CNJ employees, is inconsistent with the intent of the Order;
>
> "Include a provision in the Report specifically reserving jurisdiction to entertain and dispose of disputes arising out of the interpretation and application of 'the novel protective conditions the Commission has seen fit to include * * *'."

By Order of September 11, 1972 the Commission denied the petitions for reconsideration and clarification, stating, in substance, that the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered in the proceedings; the findings in the report and order of May 26, 1972 were adequately supported by the record; the conditions which were necessary for approval of the transaction were imposed upon the CNJ and the Lehi Valley Railroad Company; there was presented no error of fact or law with respec to the matters complained of by the petitioners; and no showing had been made wa ranting reconsideration.

Bearing in mind that the foregoing discussion by the Commission estab- lished the indisputable fact that the Order of the Commission overcame all p viously-existing protective agreements, there can be no merit to contending Carr violated the basic rules agreement involving job abolishment. Since the formerly cepted standard protective conditions were superseded, it follows all agreements if any, relating to abandonment meeting the test of protective conditions were superseded.

Commission alluded to the February 7, 1965 Non-Ops Job Protection Agre ment. However, it must be kept in mind that agreement does not deal with abando ment and is inapplicable in this issue. But were it operable in this case, it, same as other protective agreements discussed in the Commission's Order, would h been pre-empted.

Examining the Referee's Awards point-by-point emphasizes the startling weakness, if not deliberately inane reasoning, of his position which so blatantl clashes with the clarity of Commission's Order, and is the reason for CNJ's dis- sent to Award No. 20319.

Page 11: The Referee states:

> "The Parties have materially and substantially modified the February 7, 1965 Mediation Agreement * * *."

but fails to show any supporting evidence.

In fact, of the several agreements cited in the Opinion, only one nd ed the February 7 agreement:

Appendix "B", March 1, 1967.

(1) Paragraph 11 modified Section 5 of Article 1 and cancelled Section 3 of Article 1. The first involved limiting force reduction on an annual basis to 6% of protected employes. The latter had permitted a matching percentage reduction on a month-by-month basis when business declined more than 5%.

(2) Paragraph 1 gave protective status to employes hired to March 1, 1966. As a result, but 7% of the 1967 roster employes benefitted.

In no way can these amendments, which were balanced by advantages to the Carrier, be accepted as material and substantial modifications. Neither the basic nor the February 7 agreement were materially or substantially changed.

Page 13: Here the Referee appears to indicate acceptance of the essential defense raised by Carrier, that the I.C.C. Order is a pre-emption of pre-existing conditions and says: "* * * Carrier's position merits serious consideration." His contention that the N.R.A.B. has "* * * jurisdiction over railroad employee disputes arising out of the interpretation and application of existing collective bargaining agreements * * *." is correct, absent the circumstances of this issue; namely, pre-emption by the I.C.C.

Here the Referee has gone completely off the track and followed the route of a 5(2)(f) proceeding in absolute disregard of the analysis of the Commission in determing CMJ's case was properly heard under 1(13). Either through arrogance or naivete the Referee writes, in the middle of Page 14:

> "* * * We note, however, that the I.C.C. in Finance Docket No. 28659 proceeded on the basis of Sections 1, (18) and (20) and not Section 5(2)(f) of the Interstate Commerce Act."

but draws no evidence to bolster his subsequent determination that "black is white".

Instead, the Referee alludes to earlier Awards (evidently Third Divisio Nos. 15028, 15087 and 15460) and holds that they were correct. It is not for us to debate that question. It is not the issue involved in Award No. 20319. And, it is here that the Referee causes serious questions of his objectivity to be raised; first, there is no explanation of the transformation from an obvious 1(13 situation to a 5(2)(f), which exists only in the mind of the Referee; second, there is no basis of fact within the Railway Labor Act to support the unilateral opinion that "* * * at the minimum this Board has concurrent jurisdiction with the Interstate Commerce Commission over disputes of the nature involved herein. * * *."

An I.C.C. regulation is not an ordinance of a municipality, or a state or federal statute; it emanates from a federal statute empowering the Interstate Commerce Commission to regulate certain industries, including the railway industry. Therefore, under federal statue, an Interstate Commerce Commission order or regulation is on the same footing as the federal statute or law.

There can be no more precise authority to focus the Referee on the fact that his jurisdiction has been explicitly and definitely superseded.

From the last paragraph on page 14, we sense the Referee has become confused by his own position. He writes:

> "This Board has no power to interpret pertinent sections of the Interstate Commerce Act as to Congressional intent or to interpolate the authorities which may be cited in support of the defense of pre-emption by the Interstate Commerce Commission. * * *."

It seems he should have stopped there since, as he writes, the doctrine of I.C.C. pre-emption is clearly known.

What are "the basic and material differences in collective bargaining agreements involved" upon which the Referee leans, on page 15, to solicit needed support for his opinion of jurisdiction? The agreements to which he refers as being involved in S.B.A. No. 605, Award Nos. 374, 375, 377, are BRAC and BRS. The scope, bulletin assignment, seniority rules are in some degree identical and generally comparable.

BRAC, BRS and TC-Division are parties to the February 7, 1965 Non-Ops Job Protection Agreement and TC-Division is an integral segment of the international BRAC organization.

Speaking now to the point-by-point claim decisions:

1. We agree with the Referee's decision involving claimants named as ineligible because they were either working under the Dispatcher's Agreement or non-protected under the February 7 Agreement, since this is a matter of record.

We agree with his decision that claim Carrier "* * * allowed the transfer of work of these positions to non-scope employees on * * * Seniority District 1 at Lake Junction and at Phillipsburg * * *" cannot be sustained.

We dissent in the decision that agreements were violated, for the reasons heretofore expressed.

2. We dissent. The Referee offers no line of reasoning to show violation of Article 11.

3. We dissent to that portion involving vacation payment because I.C. FD 26659 dictated payment of but 3 weeks vacation in the aggregate.

Had the organization been ready to negotiate settlement of the issue in line with the I.C.C. Order's provisions, Carrier was willing to offer some liberalization. The Referee chooses to adopt the arbitrary position of the organization and refuses to recognize the unreasonableness of their approach. In its Order, the Commission removed from consideration the argument upon which the Referee leans so heavily that employes "* * * will be retained in service, subject to compensation * * * until retired, discharged for cause or otherwise removed by natural attrition."

4. The construction of the Referee's argument leading to his conclusion, when weighed against the Commission's Order, is ridiculous. To allow this Award to stand would be a perversion of common sense, substantiated only by the Alice-in-Wonderland reasoning of the Referee in calling an abandonment a coordination, and then applying the terms of a coordination agreement to an abandonment.

Expressio unius: The expression of one thing is the exclusion of another. The Referee's reasoning overlooks the indisputable fact that, in a coordination, two parties share in the cost of operating, and income derived from, a jointly maintained and operated plant. As pointed out in its submission, CNJ has no voice or cost in the operation of its former lines in Pennsylvania, and derives no income therefrom. We dissent.

5. The record shows the many conferences held after April 1, 1972, at request of Carrier, to resolve the dispute on a mutually acceptable basis. It must be observed that, prior to the date of abandonment, organization made no overtures for reaching agreement. In his opinion, the Referee gives not one clue as to the rational leading to the decision. We dissent.

6. We agree with the decision.

7. - 8. - 9. We dissent in the decision except the portion allowing the Carrier to deduct outside earnings, such amounts paid in accordance with FD-26659, denial of interest, and limitation to only one recovery, regardless of the source.

In ordering payment of the April 1, 1972 wage increase for claimed employes (and those in Districts 1 and 2, who were not affected by FD-26659), the Referee implies that his authority usurps that of the Federal Court overseeing reorganization of the CNJ, which body had ordered deferral of that, and subsequent wage increases, until stipulated relief had been achieved. The Referee does not possess such authority.

10. We agree with the decision covering this Item.

This Award is palpably erroneous and, in its present form, is a complete nullity and we vigorously dissent thereto.

H. F. M. Braidwood

P. C. Carter

W. B. Jones

G. L. Naylor

G. M. Youhn

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS'
DISSENT TO AWARD 20319, DOCKET CL-20309 (Lazar)

The carrier members' dissent to Award No. 20319 begs the very question in issue. They presume each of their contentions to be established and accepted positions. They set forth nothing in support of their contentions but self-serving conclusions embroidered with invective and sarcasm.

The dissent sets forth as the issue to be decided by the National Railroad Adjustment Board, a question which is within the sole province of the courts - as correctly noted by the Majority at page 14 of the Opinion. It characterizes Majority Opinion statements recognizing the existence of carrier contentions as acknowledgements of the accuracy of those contentions. It substitutes exaggeration for argument and confuses its hopes and desires with reality.

The dissent relies upon two basic claims: 1/

1. The I.C.C. superseded the February 7, 1965 Agreement in imposing conditions in the Pennsylvania abandonment cases.

2. The February 7, 1965 Agreement does not apply to abandonments.

1/ The dissent also challenges the Majority's conclusion that the parties had "materially and substantially" modified the February 7, 1965 Agreement. (Dissent, pp. 6-7.) In the context of this proceeding the issue of whether the modifications are "material and substantial" is without significance since the operative effect of the Commission's order and the Board jurisdiction are unchanged in either event.

I.

JURISDICTION OF NATIONAL RAILROAD ADJUSTMENT BOARD AND THE INTERSTATE COMMERCE COMMISSION ORDER

A. The Board's Decision on Jurisdiction.

The Majority determined its jurisdiction in this case to be the interpretation of the agreements before it. Such is the first order of business of any arbitration panel - or, indeed, any tribunal - to which a case is presented.

The Majority determined it had jurisdiction to act and that its jurisdiction had not been explicitly superseded by actions of the Interstate Commerce Commission or any other administrative, legislative, or judicial body. Such action by the Majority is emminently proper. The appropriate forum to challenge the action of the Board is in the courts.

B. The Interstate Commerce Commission Order in the CNJ Abandonment Cases.

The Majority's jurisdictional decision would not have been correct if the Interstate Commerce Commission had held explicitly that it superseded the provisions of the agreements before the Board. The Interstate Commerce Commission, however, held to the contrary further confirming the propriety of the jurisdictional decision of the Majority.

At page one of the dissent there appears a contextually lonesome but fatal admission:

> "It has been the specific intention of the Commission to leave unaffected all contracts between a carrier and the representatives of its employees unless it specifically provides otherwise." (Emphasis supplied.)

The contracts here involved are "contracts between a carrier and the representatives of its employees". The Commission did not "specifically" supersede them. To the contrary, it clearly indicated and acknowledged their continued applicability. The contracts, therefore, by the dissent's own admission, continue to apply.

1. CNJ's Commitment to Observe its Protective Agreements and the Commission's Reliance thereon.

During the course of the hearings culminating in the I.C.C.'s order of May 26, 1972, authorizing CNJ abandonment of operations in Pennsylvania, the CNJ informed the Commission that it would "observe its obligations under the agreements in the event that abandonments" were authorized by the Commission. In its decision authorizing the requested abandonments, the Commission acknowledged CNJ's commitment to honor its obligations under the Agreement of February 7, 1965, and made quite clear the Commission's recognition of the effects of that commitment. At pages 91 and 92 of its decision the Commission stated:

> "A total of more than 809 present CNJ employees represented by several employee organizations have assurance of job protection under a basic stabilization agreement known as the 'February 5, [sic] 1965 Agreement'. It was negotiated by five non-operating unions and virtually all railroad carriers in the United States. Under its terms, CNJ and the other carrier parties may abolish positions and transfer work and employees. The carriers thereby are required to maintain a work force of protected employees on an attrition basis AS LONG AS CNJ CONTINUES IN BUSINESS. Thus, lifetime protection of employment and earnings is provided for

> those employees who had 2 years of service as of October 1, 1964. The agreement sets forth a formula for determining wage guarantees and provides that forces may be reduced only if the business of the carrier declines by more than 5 percent, not to exceed 6% per year. Other provisions and subsequent agreements and amendments also affect CNJ's relationship with employees. CNJ asserts it would observe its obligations under the agreements in the event the abandonments herein are granted." (Emphasis supplied.)

Again, at pages 124 and 125 of its decision the Commission specifically acknowledged that its determination of the type of employee protective conditions to impose in the abandonment case was influenced by the fact that the 809 employees referred to above would be protected by existing agreements:

> "We certainly are not convinced that the effects upon CNJ and L&NE employees would be such that the overall public convenience and necessity requires denial of the applications of CNJ and LV. The record indicates that certain non-operating employees of CNJ would be able to make claims for attrition protection under the February 1965 stabilization agreement; that employees 60 years of age or older could elect retirement benefits; that about half the employees of CNJ and L&NE in Pennsylvania would be hired to operate the lines sought by LV; that our denial of requested abandonment of segments of main line and branch lines in New Jersey would require retention of numerous employees which CNJ had anticipated would be affected; and that employees could claim available unemployment compensation benefits and other temporary rights to aid. The abandonments allowed herein may be the only means of assuring CNJ's ability to continue as an operating railroad. Of itself, that would have the effect of preserving a majority of the jobs of CNJ present employees in New Jersey.
>
> "The extent of the protective conditions we conclude should be imposed are influenced by the foregoing considerations." (Emphasis supplied.)

2. Dissent's Attempt to Evade CNJ's Commitment.

The dissent, at pages 4 and 5, sets forth part of the above quotation from pages 124 and 125 of the Commission's decision and argues that the clause "certain non-operating employees of CNJ would be able to make claims . . ." should be read "certain non-operating employees remaining in the active employ of CNJ after the abandonments take place would be able to make claims . . ." The dissent here not only removes language from its context but literally rewrites it to reflect the dissent's desire as to what it wished the Commission had said. Unfortunately from the dissenters' point of view, the Commission said precisely the opposite.

As noted above, the Commission explicitly held that the type of conditions it imposed was "influenced" by a number of listed factors, including the fact that "certain non-operating employees of CNJ would be able to make claims for attrition protection under the February 1965 stablization agreement". Earlier the Commission noted that "more than 809 present CNJ employees" which included those to be affected by the abandonments, had "assurance of job protection" under the February 7, 1965 Agreement. The Commission then accurately described the basic protection afforded by that agreement and noted that CNJ had committed itself to "observe its obligations under the agreements in the event the abandonments are granted."

Certainly, no implicit reservation limiting Agreement protection to those not affected can be attributed to the Commission in light of its conclusion that "more than 809 present CNJ employees represented by several employee organizations have assurance of job protection." (Emphasis supplied.)

Indeed, such an unspoken mental reservation on the part of the Interstate Commerce Commission or the CNJ in making its commitment to the I.C.C. would have been manifestly absurd. The basic protection of an attrition agreement - or any protection agreement for that matter - becomes effective only when employees are adversely affected. If the employees are not affected - in this case, if they remain in active service - the basic protection to which they are entitled never takes effect. In short, the employees not affected do not need nor do they receive the benefits of the agreement, including job protection, until they are affected. The dissenters would hold that what the CNJ meant when it committed itself to "observe its obligations under the agreement" was that it would not observe its obligations under the agreement to those of the "more than 809 present employees" who would be affected by the abandonments. If such was the position of CNJ at the hearings, then CNJ misled the Commission, the unions, and its employees.

Such a mental reservation in the Commission's decision would be inoperative even if intended by the Commission since the plain language of its decision contradicts it.

3. The Effect of the Conditions Imposed upon the Agreements.

The dissent argues that since the I.C.C. denied the attempt of the labor organizations representing CNJ employees in the abandonment cases to extend the February 7, 1965 type protection to all employees, the I.C.C. superseded the February 7, 1965 Agreement where it applied. The clear language of the Commission's decision as well as the tradition and history of I.C.C. imposition of protective conditions reject such a contention.

When the fact that the parties have executed a protection agreement has been specifically raised in a hearing before the Commission, the Commission's imposition of conditions extend only to those employees not covered by such agreement. Seaboard Coast Line R. Co. - Merger - Piedmont Northern Ry. Co., 334 I.C.C. 378, 386 (1969); Illinois Central R. Co. and Illinois Industries, Inc. - Purchase - Mississippi Central R. Co., 334 I.C.C. 282, 286, 289 (1969); Great Northern Pacific and Burlington Lines, Inc. - Merger, Etc. - Great Northern Ry. Co., et al., 331 I.C.C. 228, 278-279 (1967); Pennsylvania R. Co. -

Merger - New York Central R. Co., 327 I.C.C. 475, 545 (1966); Kansas City, Kaw Valley Railroad, Inc. Abandonment, 271 I.C.C. 705, 712 (1949).

In the CNJ abandonment cases, the Commission imposed a novel formula of protection based upon a number of considerations including the CNJ commitment that "809 present CNJ employees have assurance of job protection" and "would be able to make claims for attrition protection under the February 7, 1965 stablization agreement." This is basically the same procedure adopted by the Commission in many cases without interfering in any way with existing protection agreements. See, e.g., Kansas City, Kaw Valley R., Inc. Abandonment, 271 I.C.C. at 712 (1949), and Southern Ry. Co. - Control - Central of Georgia Ry. Co., 331 I.C.C. 151 at 169-171 (1967).

Clearly then, the Commission's protective conditions in the abandonment case were deliberately designed around the continued effective application of the protective agreements to the affected employees. The Majority, therefore, was correct in its jurisdictional determination.

II.

APPLICATION OF THE PROTECTIVE AGREEMENTS TO ABANDONMENTS

The dissent contains the following unsupported and erroneous conclusion at page 6:

> "Commission alluded to the February 7, 1965 Non-Ops Job Protection Agreement. However, it must be kept in mind that agreement does not deal

with abandonment and is inapplicable in this issue. But were it operable in this case, it, the same as other protective agreements discussed in the Commission's Order, would have been pre-empted."

As noted above, the Commission decision itself repeatedly recognized and relied upon applicability of the February 7, 1965 Agreement to the abandonments it authorized. Furthermore, the changes which occurred in the operations of the CNJ as a result of the Pennsylvania abandonments were operational and organizational changes of the first magnitude and, as such, were subject to the plain, literal language of the Agreement.

In both its application and interpretation of the protective agreements, the Majority was correct.

J. C. Fletcher
Labor Member

9-3-74