RAILWAY LABOR ACT

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Award No. 2
Case No. 2

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE WAY EMPLOYEES

and

NATIONAL CARRIERS' CONFERENCE COMMITTEE

STATEMENT OF ISSUES:

The Employees' Statement of the Issue:

Did the Carrier have the contractual right to furlough the following employees subject to protection under Article I, Section 1: D. C. Gonzales (Carrier File No. MWA 97-5-21AI); F.E. Allen (MWA 97-4-11AJ); R.A. Sanchez (MWA 97-5-1AH); S.E. Miller (MWA 97-5-9AA); R.D. Teaney (MWA 97-6-3AK); P.A. Furar (MWA 97-J020-31) and R.A. England (MWA 97-5-28AB)?

The Carriers' Statement of the Issue:

Do the provisions of Article I, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, prohibit the Burlington Northern Santa Fe from furloughing protected employees D.C. Gonzales, F.E. Allen, R.A. Sanchez; S.E. Miller; R.D. Teaney; P.A. Furar and R.A. England and compensating such employees while in furlough status in accordance with the provisions of Article IV, Section 1?

FINDINGS: The Board finds that the Carriers and Organization are, respectively, Carriers and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended; that the Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing, which was held on June 8, 1999. The Board makes the following additional findings:

1. The Carriers and Organization are Parties to a collective

bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carriers' employees in the Maintenance of Way craft.

2. Claimants are employees of the Burlington Northern Sante Fe Railway Company, subject to protection under amended Section 1 of Article I and were in active service on September 26, 1996. The Organization asserts that Claimant Gonzales' claim is representative of all Claimants' claims. The record indicates that the Carriers furloughed Claimants in January 1997 after certain positions were abolished. The Parties do not dispute that Claimants were protected employees under Section 1 and that the Carriers agreed to compensate Claimants under the protected rate for the regular work days on which they were furloughed. In its claim, the Organization seeks Claimants' recall to service. The Organization argues that the Carriers are required, by Article I, Section 1, to restore Claimants to service.

3. The Parties subsequently discussed Mr. Gonzalez's claim, and the Carriers, in a letter dated July 17, 1997, declined to return Claimant Gonzalez to service, stating:

> As to your assertion that the Claimant may not be furloughed because he is a protected employee under Article I, Section 1, the language of the Agreement itself, the Questions and Answers, and the awards interpreting the Agreement make it clear that the February 7 Agreement does not prevent the furlough of employees. It only provides them compensation under certain circumstances.

4. The Organization appealed the Carrier's determination and the matter proceeded to arbitration.

5. On February 7, 1965, BMWE and four other Unions entered into an agreement with the National Railway Labor Conference ("NRLC") and the Eastern, Western, and Southeastern Carriers' Conference Committees. The Agreement provided employment and income stabilization for employees with two or more years of employment with a signatory Carrier, as of October 1, 1964. Article 1, Section 1 of the Agreement provides, in pertinent part:

"All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this agreement have been restored to active service, and who had two years or more of employment relationship as of October 1, 1964 and had fifteen or more days of compensated service during 1964, will be retained in service subject to compensation as hereinafter provided unless, or until retired, discharged for cause, or otherwise removed by natural attrition. Any such employees who are on furlough as of the date of this agreement will be returned to active service before March 1, 1965, in accordance with the normal procedures provided for in existing agreements and will thereafter be retained in compensated service as set out of above, provided that no back pay will be due to such employees by reason of this agreement. For the purpose of this agreement, the term "active service" is defined to included all employees working, or holding an assignment or in the process of transferring from one assignment to another (whether or not October 1, 1964 was a work day), all extra employees on extra lists pursuant to agreements or practice who are working or are available for calls for service, and are expected to respond when called, and where extra boards are not maintained, furloughed, employees who respond to extra work when called, and who have averaged at least seven days work for each month furloughed during 1964."

6. The February 7 Agreement was amended on September 26, 1996. Section 2 of the amended Agreement states, in relevant part:

Article I, Section 1 of the Agreement shall be amended to read as follows: Section 1 - All employees, other than seasonal employees, who are in active service and who have or attained ten (10) or more years of employment relationship will be retained in service subject to compensation herein provided unless or until retired, discharged for cause, or otherwise removed by natural attrition. For the purpose of this agreement, the term 'active service' is defined to include all employees working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not the date of such ten more years of employment relationship is acquired was a workday). An employee who is not regularly assigned on the date the employee is otherwise eligible to achieve protected status under this Section will be deemed to be protected on the first day assigned to a regular position in accordance with

existing rules of the BMWE agreement.

7. The Organization asserts that the plain language of Article 1, Section 1 prohibits the Carriers from furloughing Claimants absent other authority provided in the February 7th Agreement. It asserts that the language "retained in service subject to compensation" is clear: An employee cannot be furloughed unless such action is taken pursuant to authority contained in other Sections of the Agreement.

8. The Organization argues that under the 1996 Amended Agreement, employees are either full-time, protected employees who hold the regularly assigned positions protected by Article I, Section 1, or "seasonal" employees protected under Section 2 of the same article.

9. The Organization asserts that "active service" means employees holding an assignment and "all extra employees on extra lists pursuant to agreements or practice who are working or available for calls for service and are expected to respond when called" and furloughed employees who worked, on average, seven days during each full month furloughed in 1964. The Organization claims that any employee falling into these classes was to be "retained in service subject to compensation".

10. The Organization contends that under the Carriers's interpretation of Article I, Section 1, there would have been no need to recall protected employees to service as long as they were compensated at their protected rates after March 1, 1965. The Organization argues that that is not what the section required. The Organization contends that Section 1 required employees protected under it to be recalled to active service, retained in service, and compensated. The Organization further contends that the 1996 amendments, as explained by this Board, simplified the protective scheme contained in the February 7 Agreement: Employees are either full-time protected employees who hold regularly assigned positions protected by Article I, Section 1 or "seasonal" employees protected under Article I, Section 2. The Organization claims that the Amendments do not contemplate "extra employees" or any other classes of employee except regularly assigned and seasonal.

11. The Organization further claims that the Carriers' view of Section 1 protection as it applies to multi-rate employees - that it has the right to furlough such employees for any length of time during the calendar year so long as they pay the employee in the following calendar year for any loss in guaranteed compensation - is contrary to one of the purposes of the February 7th Agreement; to provide income and employment stability to long-service employees. The Organization submits that this example provides further "internal support" within the February 7th Agreement that the Carriers had no authority to furlough Claimants.

12. The Organization contends that the February 7 Agreement permits reductions in force of protected employees under only two circumstances: when a Carrier suffers a decline in business in accordance with the formula contained in Section 3; or when, under Section 4, an "emergency" exists which forces a reduction. The Organization points out that, in furloughing Claimants, the Carriers did not rely on either Section for authority.

13. Citing authority, the Organization argues that the Board has previously determined that employees protected under Article I, Section 1 must be retained in service subject to compensation until removed by natural attrition. Citing further authority, the Organization asserts that the Board has concluded that the Carrier's furlough of employees without evidence of either a business decline or an emergency is without contractual authority.

14. The Organization further claims that contemporaneous explanations of the February 7th Agreement given by the Carrier's Chairman, at the time the Agreement was executed, demonstrate that the Carriers understood protected employees could not be furloughed. The Organization points out that in response to questions, the Chairman stated that once an employee is protected, the Carriers are "stuck with him". In so stating, the Organization contends, the Carriers' representatives understood that employees are to be retained in service subject to compensation and that a Carrier may not furlough an employee protected under Section 1 unless Section 3 and 4 exceptions are present. The Organization asserts that since Sections 3 and 4 were not relied upon by the Carriers, it had no right to furlough Claimants. For these reasons, the Organization contends that the claims should be

sustained.

15. The Carriers assert that Article I, Section 1 must be read *in toto*. The Carriers point out that in the provision, the Parties used three different phrases to address how protected employees would be handled: (1) retained in service subject to compensation; (2) returned to active service; and (3) Retained in compensated service. The Carriers assert that the phrase "retained in service" means that a protected employee retains his employment relationship with his employing Carrier whether he is holding a regularly assigned position, on an extra board or extra list, furloughed, on a leave of absence, or unable to work due to personal injury or illness. The Carriers argue that by the Agreement, the Parties agreed that protected employees would retain their employment relationship "unless or until retired, discharged for cause, or otherwise removed by natural attrition."

16. The Carriers point out that the February 7 Agreement provides that employees who were furloughed on the date of the Agreement would be returned to "active service" and "before March 1, 1965." The Carriers assert that the Parties use the phrase "returned to active service" when they intend to change the status of an employee from furloughed to active service; the Parties did not use the phrase "*retained* in active service" in the first sentence of Article I, Section 1, and asserts they would have done so if it had been their intent that protected employees could never be furloughed in the future. The Carriers point out that, instead, the Parties used the phrases "retained in compensated service" and "retained in service subject to compensation". The Carriers argue that if the experienced negotiators and drafters of the Agreement had intended that all employees would forever be "retained in active service" they would have used that phrase, just as they *did* elsewhere in the very same section of the Agreement. The Carriers contend that the fact that the Parties did not do so is direct evidence of the Parties' intention that Article 1, Section 1 guaranteed covered employees two things: retention of employment status, and, if furloughed, compensation protection.

17. The Carriers assert that under Article II, Section 1, entitled "Use and Assignment of Employees and Loss of Protection",

the Parties understood and expected that employees would be furloughed from time to time. The Carriers point out that the provision states: "A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee."

18. The Carriers further point out that there is evidence contemporaneous with the adoption of the Agreement that protected employees were furloughed immediately following the implementation of the agreement beginning as early as March 1, 1965. The Carriers point out that the Organization never filed a claim or contended at that time that the Carriers were contractually barred from furloughing these protected employees.

19. Citing authority, the Carriers contend that the Board has previously addressed this very issue, in 1967; the Board found no bar in the Agreement to the furloughing of protected employees under the provisions of the February 7th Agreement. In one decision, the Carriers point out, the Board specifically found that the February 7, 1965 Agreement "permits the furloughing of an extra-protected employee where there is neither a decline in the Carriers's business nor any emergency conditions as set forth in Sections 3 and 4 of Article 1 of that agreement."

20. Citing further authority, the Carriers assert that the Organization has repeatedly filed compensation claims on behalf of protected employees who were furloughed, but never challenged the Carriers' authority to furlough those employees in those instances.

21. Finally, the Carriers argue that the Organization's position would create an absurd result. The Carriers argue that the Organization's position would effectively "freeze" the workforce at the level of all protected employees. The Carriers assert that it is not obligated to create "make-work" or positions in order not to furlough employees during a time when there is no work. The Carriers argue that the Board has long established the principle that the Parties agreed to maintain a workforce of protected employees, not to maintain unnecessary positions. For these reasons, the Carriers urge that the claims be denied.

OPINION: The facts in this matter are not in dispute. Following an abolishment of certain positions, Claimants had insufficient seniority to hold regularly assigned positions and were furloughed. During the period of their furlough, Claimants were paid protective benefits in accordance with Article IV, Section I. They were subsequently returned to active service in accordance with their seniority rights.

The Organization argues that the Carrier may only furlough employees under the Agreement where there is "a decline in a carrier's business in excess of 5%" (under Article I, Section 3) or "under emergency conditions such as flood, snowstorm, hurricane, earthquake, fire or strike" (under Article I, Section 4). The Carrier responds that it has always possessed the right to determine the size of its active BMWE-representative work force except as expressly limited by the Agreement, and did not violate the February 7 Agreement by furloughing Claimants. For the reasons which follow, the Board is persuaded that the Carrier is not prohibited under Article I, Section 1 from furloughing Claimants and thus did not violate the Agreement in so doing.

The February 7th Agreement states, in pertinent part;

> All employees, other than seasonal employees, who were in active service as of October 1, 1964, or who after October 1, 1964, and prior to the date of this agreement have been restored to active service, and who had 15 or more days of compensated service during 1964, *will be retained in service subject to compensation* as hereinafter provided unless or until retired, discharged for cause or otherwise removed by natural attrition. Any such employees who are on furlough as of the date of this Agreement will be returned to active service before March 1, 1965, in accordance with the normal procedures provided for in existing Agreements, and will thereafter be retained in compensated service as set out above, provided that no back pay will be due to such employees by reason of this Agreement.

Contrary to the Organization's contention, the Agreement neither expressly states nor implies that employees will not be furloughed. The Agreement states that certain employees "*will be retained in service* subject to compensation as hereinafter provided

unless or until retired, discharged for cause, or otherwise removed by natural attrition." The Agreement does *not* state that such employees will be retained in *active* service, as the Organization asserts. Rather, it explicitly states that such employees will be retained in service subject to compensation. The Carrier correctly points out that a furloughed employee is "retained in service subject to compensation".

The Board is persuaded that, in making the Agreement, the Parties specifically chose not to require the Carriers to retain protected employees in "active" service. Article II, Section 1 establishes that the Parties understood that a protected employee could be furloughed, but would lose his or her Article I, Section 1 protection if he or she fails to respond to extra work when called. (*See* Article II, Section 1)("A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee").

The 1996 Amendment to the February 7th Agreement continued the protection to employees "who are in active service and who have or attain ten (10) or more years' of employment relationship". The protection afforded to those employees is the same in the September 1996 as the February 7th Agreement: "[Such employees] will be retained in service subject to compensation as herein provided unless or until retired, discharged for cause or otherwise removed by natural attrition".

The Board is persuaded that the foregoing interpretation of the February 7th Agreement and its 1996 Amendment is consistent with the Parties' practice and prior Board decisions. Correspondence submitted by the Carrier from the period shortly after the February 7th Agreement was adopted indicates that in 1966, the Carrier furloughed a number of employees on several occasions. (*See* Carriers' Exs. E-1 through E-6). The Organization never contended at that time that the Carrier was acting beyond its rights in furloughing said employees.

The Board is persuaded that the fact that the Organization failed to claim that the Carrier was barred by the February 7th Agreement from furloughing protected employees indicates that the

Organization believed at the time that the Carrier had the right to furlough employees. The Board also notes that the Organization, in several cases decided by SBA No. 605, argued that employees whose positions had been abolished reverted to a furloughed status. (*See, e.g.*, SBA No. 605, Award No. 126; SBA No. 605, Award No. 157).

There is also prior Board precedent on the point which indicates that the issue in this dispute was raised and resolved against the Organization's current position. In *Hotel and Restaurant Employees and Bartenders International Union and the Chicago, Rock Island and Pacific Railroad Company*, Case No. H&RE-5-W, Award No. 17, SBA No. 605 addressed whether the Carrier violated the February 7th Agreement when it furloughed an extra man who had been in active service on October 1, 1964, and was thus a protected employee under the February 7th Agreement. There, the Carrier furloughed the employee on August 14, 1965 "because of a surplus of extra employees to perform the extra work required. The Organization contended in that dispute that the Carrier had no right to furlough the employee unless there was a decline in the Carrier's business in excess of 5%, as provided for in Article I, Section 3, or emergency conditions existed as provided for in Article I, Section 4. The Organization argued that the employee was improperly furloughed because none of those conditions were present at the time the furlough was effected.

In rejecting the Organization's position, SBA No. 605 found there was:

> "no contract bar to the furloughing of protected employees under the provisions of the Mediation Agreement in evidence here. Sections 3 and 4 of Article I of the Mediation Agreement apply solely to reductions in the workforces of protected employees under the conditions set forth therein with consequent suspension of the protective benefits of the Agreement. Conversely, a protected employee who is furloughed suffers no suspension of those benefits. Thus the distinction between an employee adversely affected by a reduction in force and one who is furloughed is clearly drawn. Moreover, Article II, Section I, impliedly recognizes the distinction between a protected furloughed employee and

an employee whose protection is suspended under Sections 3 and 4 of Article I by providing that 'A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee'. (emphasis in original).

SBA No. 605 concluded that the February 7th, 1965 Agreement permitted the furloughing of an extra-protected employee where there is neither a decline in the Carrier's business nor any emergency conditions as set forth in Sections 3 and 4 of Article I of the Agreement. The Board is persuaded that the reasoning of SBA No. 605 in *Hotel and Restaurant Employees* is sound and equally applicable to this dispute.

The cases cited by and relied upon by the Organization are not to the contrary. In *Chicago, Rock Island and Pacific Railroad Company and Brotherhood of Maintenance Way Employes*, SBA No. 605, Award No. 102, (June 10, 1969), Arbitrator Friedman found that the Carrier's claim that employees on furlough had lost their protected status under the February 7th Agreement lacked merit. The Board found that the Carrier "was obliged pursuant to Article I to return them to active service before March 1, 1965, and thereafter retain them in compensated service". The Board did not state that the Carrier was obligated to retain Claimants in active service, as the Organization argues here.

In *New York, Susquehanna and Western Railroad Company and Brotherhood of Railroad Signalmen*, SBA No. 605, Award No. 164 (December 8, 1969), Claimants had been furloughed without compensation. The Carrier asserted that they had been so furloughed under Article I, Section 3 on account of a "decline in business and weak financial position". Noting that the Carrier was prohibited from laying off protected employees simply because "business had fallen off", SBA No. 605 found that the Carrier failed to prove that it had suffered a decline in its business in excess of 5% as required by Article I, Section 3 and thus had no contractual authority to furlough Claimants. The Board did not address the question presented in this dispute, whether the Carrier had contractual authority to furlough employees under Article I, Section 1.

AWARD: The Board concludes that Article I, Section 1 did not prohibit the Carriers from furloughing Claimants. The claims of the Organization are denied.

E. William Hockenberry
Chairman and Neutral Member

Donald F. Griffin
Organization Member

A. Kenneth Gradia
Carrier Member

see dissent

Ernest L. Torske
Organization Member

John F. Hennecke
Carrier Member

Dated: August 20, 1999

LABOR MEMBERS' DISSENT TO AWARD IN CASE NO. 2

We respectfully dissent from the majority's award here. The majority held that it was not "persuaded that the Carrier is not prohibited under Article I, Section 1 from furloughing Claimants and thus did not violate the Agreement in doing so." We submit that holding is wrong.

As the majority concedes, the facts here are not in dispute. The claimants all were subject to protection under Section 1 of Article I. In other words, the claimants held regular assignments on the date they obtained protection. They were "full time" employees assigned to permanent positions. Although the claimants were "full time," the majority erroneously concludes the carrier may furlough them. In reaching that decision, the majority relies upon contract language and arbitral awards applicable to "extra employees," a class of employee that no longer exists within the maintenance of way craft.

The majority relies primarily upon two items to support its incorrect conclusion. First, the majority refers to Article II, Section 1 that states a furloughed protected employee loses protection if "he or she fails to respond to extra work when called." The problem for the majority is that the claimants were not "extra" employees because the Union and the Carrier conceded there were no such employees working for the Carrier in 1996. Therefore, Article II, Section 1 lends no support to the majority because it concerns the obligations of a class of employee that no longer exists. A class of employee, to which the claimants did not belong.

Second, the majority places strong reliance upon Award No. 17 of SBA No. 605. That award, as the majority conceded, concerned the carrier's ability under the Feb 7th Agreement to furlough protected *extra* employees. However, the claimants here were not "extra" employees. They held regular assignments when they obtained protected status.

More on point is Award No. 164 of SBA No. 605. There, the claimants were employees who held regular assignments, yet were furloughed by the carrier because of a downturn in business. The Board rejected the carrier's claim that it had the right to furlough the employees because the only downturn in business recognized under the Feb 7th Agreement was that subject to the formula contained in Article I, Section 3. Because the carrier failed to justify the furloughs under the Feb 7th Agreement, the Board ordered the claimants returned to service. That case, unlike Award No. 17, is directly on point with the dispute presented here. The majority erred in failing to follow the unambiguous holding of Award No. 164.

Finally, we regret to note the majority's award finishes the evisceration of the rights held by multi-class employees under the Feb 7th Agreement. In the Answer to Question No. 3, this Board held that multi-class employees cannot make a claim for compensation until the end of each calendar year. That result was harsh even if the Carrier could not otherwise furlough multi-class employees. Under this award, the carrier can furlough a multi class employee in February, keep the employee out of work for months, yet have no obligation to compensate the claimant until the following year. You do not have to be a rocket scientist to realize that the protection this Board's decision offers the multi-class employee is no protection at all. That result is an

affront to all employees protected by this Agreement and gross perversion of the parties' intent in 1965 when this Agreement was first made and again in 1996 when they amended it.