DOCKET NO. 102 --- Withdrawn by Organization

Railway Employes' Departncnt, Fed. 66)
)
vs.) Parties to the Dispute
)
Chicago, Rock Island and Pacific Railroad Company)

QUESTION: That under the terns of the Washington Job Protection Agreement of May 1936, two Electricians, namely: T. L. Casey and 0. L. Hackney, who were employed by the Chicago, Rock Island and Pacific Railroad Company, are entitled to receive coordination allowance, in accordance with the provisions of Section 7 (a) of said agreement, and other benefits *resulting* from their previous employment on the Chicago, Rock Island and Pacific Railroad, in accordance with Section 8, of said agreement, as a result of the coordination of passenger facilities of the Chicago, Rock Island *and* Pacific Railroad Company, with the Illinois Central Railroad Company, at Memphis, Tennessee, on or about June 1, 1961.

DECISION: Withdrawn.

DOCKET NO. 103 --- Decision by Referee Bernstein

Lighter Captains' Union, Local 996,)
I.L.A., AFL-CIO)
) Parties to the Dispute
vs.)
)
Erie-Lackawanna Railroad Company)

QUESTIONS: "Interpretation of Section 7, (c), 2., of the Agreement of May, 1936, Washington, D.C., relative to an employee being deprived of his employment and entitled to a coordination allowance, under that portion of Section 7, (c), 2., which reads as follows: * * * * * * 'or by other employees, brought about as a proximate consequence of the coordination, and if he is unable by the exercise of his seniority rights to secure another position on his hone road or a position in the coordinated operation.' (Enphasis added by underlining.)

"Interpretation of Section 12, of the Agreement of May, 1936, Washington, D. C., relative to a practice whereby the Erie R.R. Co., in 1959 and 1960; in deference to repairing and maintaining its own floating equipment; chose to lay up its own floating equipment, and did thereby lease, charter, rent or acquire floating equipment from the D.L. & W. R.R. Co.; said D.L.& W. barges and scows being manned by D.L. & W. Lighter Captain forces. This necessitated the furloughing of Erie Lighter Captains who would have continued to work, had the Erie R.R. Co. maintained its floating equipment. However, such was not the case and the Erie R.R. did rearrange its forces by pressing D.L. & W. Lighter Captains into service with the Eric R.R. Co., aboard D.L. & W. floating equipment. This joint action by the former Eric and D.L. & W. R.R. Cos., deprived certain Erie Lighter Captains of active employment during 1959 and 1960. This was during a period when the Erie R.R. Co. and the D.L. & W. R.R. Co. were anticipating merger."

FINDINGS: This case involves the Erie and Lackawanna merger approved by the ICC in its September 1960 order which, by its terms, was to take effect on October 17, 1960. As a result of litigation, implementation of the order as it applied to Lighter Captains in New York harbor was delayed until February 20, 1961 when a dovetailed seniority list of Erie and Lackawanna Captains went into effect. All the Claimants, except Captain LaFrenz, made claims for a Section 7 "coordination allowance" for months subsequent to February 1961; in essence, Captain LaFrenz claims that he was adversely affected by the merger after the combined seniority list went into effect.

In addition, the Organization contends that the "test period" average earnings of the Claimants, former Erie Captains, was improperly distorted because in 1959 and 1960 the Erie, in contemplation of the merger, failed to repair floating equipment and instead leased Lackawanna equipment manned by Lackawanna Captains. In effect, the argument is made that Section 12 of the Agreement is applicable and that the 1959 and 1960 earnings of Claimants ought to be excluded from their test period averages.

The Carrier denied these claims on the ground that the Claimants were in either a "furloughed[1] or a part time employment status"[2] prior to the merger and that the Erie-Lackawanna leasing arrangements in 1959 and 1960 were in accordance with normal practice and not in contemplation of merger.

I. The Chartering Issue[3]

Section 12 of the Washington Agreement provides:

> If any carrier shall rearrange or adjust its forces in anticipation of a coordination, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this agreement as an employee immediately affected by a coordination, this agreement shall apply to such an employee as of the date when he is so affected.

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1. This ground of denial applied only to three of the fifteen Claimants: Captains Mellish, James Finizio and William Finizio. Captain Mellish was recalled from furlough in March 1960 almost a year before the dovetailed seniority list went into effect. On the property this was apparently misread as March 1961 (compare Carrier Exhibits D(p.1) and F(p.1). Captain James Finizio was on furlough from at least mid-October 1959 (the first period for which records were presented) until March 23, 1961 more than a month after the first seniority list went into effect--a period of 19 months. Captain William Finizio also was on a furlough from at least October 17, 1959 through April 1960--or more than 20 months before his post-coordination recall.

2. The Carrier usually refers to them as "Extra Lighter Captains" (e.g. in Carrier Exhibit D).

3. The findings here are based upon the evidence presented in both the Employee and Carrier submissions in Dockets Numbered 102, 109, 125, and 129, involving the same Organization and Carrier, where the same contention is made. These cases were handled together on the property and divided into four dockets only when the cases were progressed to the Section 13 Committee.

The Organization asserts that the Erie's failure to maintain its own floating equipment and its chartering of Lackawanna equipment manned by Lackawanna captains during 1959 and 1960 constituted a rearrangement or adjustment of forces "in anticipation of coordination" which took place in the latter part of 1960 thereby bringing Section 12 into play. As noted, the argument based upon this allegation is that during that period the Claimants lost work properly theirs thereby diminishing their test period average earnings.

Such an attempted application of Section 12 is at odds with the specific language. If such a rearrangement or adjustment is made ". . , this agreement shall apply to such an employee /one thereby deprived of Washington Agreement benefits/ as of the date when he is so affected" (emphasis added), In other words, he is to be treated as adversely affected in the pre-coordination period and be granted benefits for a protective period starting with the first occasion he suffers loss.

But even if the claim under Section 12 were treated as one seeking an allowance during the period of the alleged pre-coardinaticn "adjustment," there is no showing that the charter arrangement was an "adjustment in anticipation of a coordination" nor that specific Claimants thereby were deprived of earnings. The parties were in disagreement about how common chartering of barges and scows is among carriers engaged in harbor work. However, the Carrier did present an example of roughly comparable chartering by other carriers on a sample day in 1960. It gives the reasonable explanation that cargo-and equipment on hand frequently do not match demand and that carriers in temporary need charter from those with temporary surplus capacity. The record for specimen days during the first nine months of 1960 shows sow Erie charters from other carriers, although the great bulk of such arrangements was with the Lackawanna. This was explained by the proximity of the two carriers' facilities. Moreover, the "adjustment of forces" contention also is weakened by the fact that of a total of 956 charter days during the first six months of 1960 some 254 charter days involved using Erie Captains because the chartered equipment was supplied without a Captain; that strengthens the Carrier version that it wanted the equipment not substitute personnel.

For all of these reasons, I conclude that the Organization's Section 12 contention is not substantiated.

II. The "Extra" Issue.

The Carrier's principal ground of denial was that most of the claimants (in sum all but Captains J. and W. Finizio) were "extra-employee" / s./ prior to the merger and after it and were continued without change of status. (This also is a main issue in Docket So. 129 involving the same Organization and Carrier.)

Whether an employee who is working "extra" at the time of coordination can qualify for benefits under the Washington Agreement is discussed in Docket #108, which is controlling here.[4] However, it is not amiss to note the length and degree of employment of these Claimants, whom the Carrier denominates as "extra employee" / s /. Here then is the record for all of the thirteen claimants who were not on furlough prior to the coordination:

Captain	bays worked during year preceding implementation of merger 12/20/60-2/20/62	# of consecutive months in which employed prior to October 17, 1960 (excluding October, 1960)	# of consecutive months in which employed prior to new seniority list of 2/20/61 (excluding February, 1961) /	# of days worked Oct.1-16, 1960	# of days worked Feb.1-19, 1961
Mellish	137	7	11	2	13
Griner	109	3	7	1	13
Hess	64	3	7	0	13
Berner	94	3	7	0	13
Blanken	188**	9	13	10	10
Gatti	205	7	11	10	13
Price *	223**	12*	16*	10	13
H.Kristofferson	178	7	11	10	13
Ottiali	190**	12*	16*	8	13
Munafo	158**	11	15.	6	13
Carcich	144..	12	2	0	13
Sullivan	80	6	1	3	13
LaFrenz	142	10	14	6	12

This analysis shows chat: Claimants were employed preceding the effective date of the ICC order and the implementation of the coordination for many months (except for Captain Sullivan); in the half month immediately preceding the effective date of the ICC order all but three of the Claimants were employed by the Brie; immediately preceding the implementation of the coordination all of the Claimants (except Captains J. and W. Finizio) had substantial employment; and that during the year preceding implementation all of these

4. This makes it unnecessary to decide whether the Claimants ware "extra" men as claimed by the Carrier. The Organization asserts that under Rule 14(b) Captains are to be recalled for other than regular assignments only if they agree in writing; hence, as there were no such signed notifications by Claimants, *they* could not be "extra" man. Nonetheless their record of irregular work indicates that they probably did not hold regular assignments. If it were necessary to decide. I would agree with the Carrier's characterization although it might constitute an infraction of the rule (which might be excused by practice -- a point I do not decide as it is not before me.)

/ A two week tug strike in January 1961 reduced the work available.

* Record does not reach back before October 17, 1959. Hence continuity of employment preceding coordination may bc longer.

** Includes *entire* month of February 1961.

"extra employee" [s] had very substantial total employment, especially when the January 1961 tugboat masters' strike and the seasonal nature of their work are considered. These claimed "extra employee" [s] were not mere casuals catching a snatch of work now and then; on the contrary, they worked with a fair degree of regularity and for substantial periods for the Erie during various periods before the merger and its implementation. (And, for the most part, their test period earnings would be based upon the 12 months immediately preceding their claimed adverse affect rather than months remote in time when other patterns of employment may have prevailed.)

In addition, the Carrier denied the claims for Section 7 "coordination allowance" [s] on the ground that because the thirteen Claimants were extra men before and after the coordination, they did not suffer any change in status and were not "deprived of employment" within the definition of those terms in Section 7. On this issue, the Carrier's position in the companion Docket #109 supports the reasoning and result in Docket #108; the Carrier argues that the term position in Section 7 means "an opportunity to work--not necessarily full time" and that an employee with a position on an "extra board" is not "deprived of employment." The same reasoning supports the analysis that he is one who is "continued in service" within the meaning of Section 6.

While much of the dispute turned upon the proper interpretation of Section 7(c) (2) concerning eligibility for Section 7 allowances, the Organization invoked the terminology of Section 6 in the March 19, 1962 appeal, (Carrier Exhibit B) and the language of Section 5(2) (f) of the Interstate Commerce Act, which is patterned after Section 6, asserting that the Claimants "find themselves in a worse position, with respect to their employment." The Organization's appeal refers to "coordination claims" (quotation marks mine). The Carrier reply of May 4, 1962 is the first in the record to refer to "coordination allowance." It would be unfortunate if employees with valid claims under one section of the Washington Agreement forfeit them because they mistakenly invoke another section. Claimants often are aided, it is true, by experienced union representatives. However, they typically are not assisted by counsel. Even in court proceedings those represented by lawyers are no longer required to do more than state a claim upon which relief can be granted even if they mistake the legal basis for the claim or ask for the wrong remedy. Of course, if the party against whom the claim is asserted is "surprised" or acts to its detriment then a claimant might be limited to the original issue he presented. But, here the Claimants asserted "adverse effect." It is not at all clear when the controversy became centered upon Section 7, although this may have been the Carrier's doing (as the preceding account indicates). In any event, the Carrier's argument in the companion Dockets Numbered 109 and 125 indicates that it understood that the import of its argument was not only that Section 7 was inapplicable but that by the same reasoning Section 6 was applicable. It will hardly be surprised if the Section 13 Committee agrees with its analysis of the Washington Agreement. Hence the claims of adverse affect, if valid, are not barred because the Claimants at some earlier stage in the proceeding pursued the wrong remedy.

III. The Merits--"Adverse Effect".

The coordination effected two major changes: (1) the harbor work performed by the separate facilities of the formerly separate carriers was combined and rationalized and (2) the seniority lists of the Lighter Captains of both carriers was combined into one with many former Lackawanna Captains coming ahead of the Claimants. Each of these major changes could diminish

the work opportunities of the Claimants and these occurrences make out a prima facie case of "adverse effect" upon all those whose work and seniority standing were merged. In order to show actual "adverse effect" under Section 6 a Claimant also must show that his post-coordination compensation was lower in any month for which a claim is made than his test period average monthly compensation. In this case such a showing must await a check of the Carrier records. If the Claimants, other than Captains James and William Finizio, are shown to have earnings for the months claimed (and thereafter) which are lower than the test period monthly average, they are eligible for a Section 6 benefit.

Captains James and William Finizio, however, present a different pattern. For at least 16 months prior to implementation of the coordination they had been on furlough, i.e., without any employment by the Erie. They were recalled only after the implementation. Their claims begin with the month in which they returned to work or the month immediately following. In these circumstances it is difficult--indeed impossible for me--to see how the coordination adversely affected them. On the contrary, only after it took place did their furlough status of more than a year end. It is not only the fact that they were on furlough when the coordination and its implementation took place that prevents a finding that these occurrences adversely affected their employment (worsening their "position with respect to compensation"), for an employee on furlough for part of a year may reasonably expect work in another period of the year and that opportunity may be diminished by a coordination. How long a period of furlough prior to a coordination prohibits a finding of adverse effect, I cannot declare; other factors may affect the determination. All that need be decided here is: furlough status at the time of coordination or implementation does not prevent Section 6 eligibility; in this case such status for a year and a quarter prior to coordination and for over a year and a half prior to implementation negates the prima facie showing of adverse effect established by coordination of work and seniority list and (allegedly) lower earnings than those of the test period average. In determining causation the entire fact situation must be taken into account; it involves balancing the insulation against adverse effects of coordination which the Agreement is designed to provide and the intention to limit carriers' liability to the consequences of coordinations.

DECISION: (1) Section 12 of the Agreement was not violated and the relief sought on that claim is denied;

(2) The claims of Captains James Finizio and William Finizio are denied;

(3) The claims of adverse effect of all other claimants are sustained if a payroll check shows that after the months in 1961 for which their claims are made their monthly compensation was less than their test period monthly average; the difference is to be paid them for each such month in accordance with Section 6 of the Agreement.

DOCKET NO. 104 --- Withdrawn by Organization

Brotherhood of Railway and Steamship Clerks)
vs.) PARTIES TO DISPUTE
Erie-Lackawanna Railroad Company)

QUESTION: 1. Mr. S. R. Rivers, an employe of the Erie-Lackawanna Railroad Company, was involved in the merger and consolidation of the facilities of the Erie Railroad Company and the DL&W Railroad at Hoboken, N.J., which occurred on or about October 17, 1960, and as an employe "continued in service" is, therefore, entitled to be paid a Displacement Allowance under Section 6 of the "Agreement of May, 1936, Washington, D. C.";

2. As an employe involved in the merger and consolidation, Mr. Rivers is entitled to be paid a displacement allowance equal to the difference between his monthly earnings on any position he has held or will hold during the protective period provided in Section 6 and his average monthly earnings during the "test period" as defined in Section 6 (c) of the "Agreement of May, 1936, Washington, D. C." (File 17.2 Claim #5)

DECISION: Withdrawn.

DOCKET NO. 105 --- Decision by Referee Bernstein

Brotherhood of Railroad Signalmen)
vs.) PARTIES TO DISPUTE
Louisville and Nashville Railroad Company)

QUESTION: "Claim that C. E. Grant is entitled to a displacement allowance because he was displaced by a former N.C.&St.L. Signalman on May 8, 1961, and subsequently forced to work on a Signal Helper position, as a result of the merger between The Nashville, Chattanooga and St. Louis Railway and the Louisville and Nashville Railroad Company (I.C.C. Finance Docket No. 18845, decided March 1, 1957, effective August 14, 1957)."

FINDINGS: Although the merger was approved by the I.C.C. in 1957, effective August 14, 1957, an Implementing Agreement governing certain signal installations and operations was not made until March 22, 1361 (Carrier's Exhibit A). In another agreement made the same day (Carrier's Exhibit B) the Carrier agreed to provide cooks for certain signal gangs in satisfaction of a long-standing employee demand, and the Organization agreed to put all signal employees under the L & N rules. After that agreement was concluded a question was raised about the rights of furloughed N.C.&St.L. Signalmen. It was agreed (in Carrier's Exhibit C) that they should have the right to displace junior employees in system signal gangs, if they made application before May 16, 1961. As the result of such an application the Claimant was bumped from a Signalman position to that of a Signal Helper. The pivotal issue, then, is whether the third agreement (Exhibit C) was a part of the merger, or so closely associated with it, that the Claimant's displacement was a result of the merger, thereby qualifying him for Section 6 benefits under the Washington Agreement.

The Organization points out that the merger was expected to take a long time to implement, citing the I.C.C.'s prescription of the New Orleans Conditions which were designed for situations in which mergers are a long time in working out, and it argues that all three March 22, 1951, agreements were elements in effectuating the merger. Some force is given to this argument by the fact that Exhibit A, concededly an Implementing Agreement, was concluded at the same time as the agreement at issue.

The Carrier contends that the agreement embodied in Exhibit B was a

normal collective bargaining agreement which granted a long standing demand of the Employees and, in return, permitted the Carrier (with some minor exceptions for the protection of employees) to apply one set of rules to former employees of both carriers. While the provision in this second agreement to provide cooks for system signal gangs obviously is a routine bargaining matter, it does not change the character of the other portion of the agreement dealing with the L&N rules described by the Carrier as one intimately related with the merger; indeed, this latter change was a further step in putting together the work of former L&N and former N.C.&St.L. employees. And, as the Carrier's brief declares, the third agreement (Exhibit C) was "connected with and a part of collective bargaining agreement Carrier's Exhibit B." (Carrier's Answer, p.2 and a similar statement on p. 12.) Exhibit C need not be for the Carrier's benefit in order to make it a step in effectuation of the merger.

Inasmuch as the Claimant's displacement came about through the operation of the third agreement (Carrier's Exhibit C), it follows that it was a result of the coordination and the Claimant is eligible for the benefits of the Washington Agreement.

The Carrier's contention that the protective period of the New Orleans Conditions for this employee had ended prior to his displacement because it could extend beyond the effective date of the merger only for a time equal to his pre-coordination service is without merit. That issue is dealt with in the opinion in Docket No. 133.

DECISION: Claimant Grant was displaced from his position as a result of a coordination and therefore was entitled to the benefits of the Washington Agreement for any period and in amounts in which its total benefits exceeded the total of those under the Oklahoma Conditions.

DOCKET NO. 106 --- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks)
vs.) PARTIES TO DISPUTE
The Baltimore and Ohio Railroad Company)

QUESTION: "Claim of the System Committee of the Brotherhood that:

"(a) The closing of the Baltimore and Ohio, Cincinnati, Ohio City Ticket Office on January 1, 1962, and the transferring of the work involved thereat to the Ticket Office of the Cincinnati Union Terminal Company, is a coordination of separate railroad facilities and subject to the terms and conditions of the Agreement of May 1936, Washington, D. C.

"(b) The Carrier violated the terms and conditions of the Washington Agreement when it failed to furnish a Section 4 notice of intended coordination and failed and refused to apply the terms and conditions of the Agreement for the protection of the employees adversely affected by the coordination.

"(c) The Carrier shall now be required to apply all of the terms and conditions of the Agreement to the coordination involved."

FINDINGS: (a) The Merits

On December 31, 1961 the Carrier, Baltimore and Ohio Railroad Company, closed down its city ticket office (CTO) in Cincinnati. The Organization contends that this shutdown resulted in a shift of the work formerly performed by Carrier employees at CTO to employees of the Cincinnati Union Terminal (CUT), which like the B & O is a signatory of the Washington Agreement. The CUT is a corporation formed by the B & O and several other carriers which continue to own it and direct its affairs. This shift, it is claimed, constitutes a coordination.

Docket No. 68 also involved the shutdown of a city ticket office and the alleged transfer of its work to a union terminal in which the carrier operating the CTO participated as a stockholder. There, as here, a substantial amount of business was handled at the CTO and after its closing the union terminal ticket sales for that carrier increased appreciably. In that earlier case I held that (1) the transfer constituted a consolidation or merger of the operations and services formerly performed at separate facilities; and (2) the union terminal was the result of a joint action which continued so that the augmented business at the union terminal was "an addition to the past joint action."

An attempt is made to distinguish this case from the situation in Docket No. 68 because there only the terminal ticket office existed to take on the services formerly performed at the CTO whereas here several other B & O ticket offices were operating and continued to operate. However, as the Carrier expected, the bulk of the former sales volume of the CTO in fact showed up in the increased sales at the terminal ticket office. The attempted distinction is insignificant.

In effect the Carrier here seeks to overturn that earlier holding and places reliance upon Docket No. 56 There a CTO was closed and a union terminal ticket office existed. I found "no showing . . . /of/ any explicit joint action. Nor is there any showing that there was any service performed at the City Ticket Office whose discontinuance there would require any consequent 'action' on the part of the Union Depot." Consequently I held that there was no coordination. A review of the record of that case shows that the Organization made no factual showing of the amount of business transacted prior to the CTO shutdown nor of any immediate increase in business at the union terminal ticket office. Indeed, it made no factual showing except of the shutdown and the existence of the terminal ticket facilities. That earlier case stands for little beyond a failure to show what work had been performed at the CTO or that the discontinuance necessarily involved a shift of services to the joint terminal office. Hence Docket No. 56 provides no basis for overruling Docket No. 68.

Were the CTO and the terminal closed and their former services thereafter performed at a new site by a consortium of the carriers owning the terminal there would be little difficulty in seeing that a coordination of services formerly performed separately had taken place. The fact that the combination occurs at the continuing site of the terminal does not make it any less a unification, consolidation or merger of "operations or services previously performed . . . though . . . separate facilities." The carriers are the B&O and those owning the terminal company. The joint action, in addition to the necessity of the B&O informing the terminal company of its action, consists of the

continuation of the joint enterprise, the terminal company, whose operations are augmented by the additional transfer of B&O work (from the CTO) and its combination with its own services and operations.

The Carrier calls attention to assertedly inconsistent arguments by the Organization in its submission to the Adjustment Board, e.g. the Organization statement:

> It is noted that the Carrier's declining letter does not state that a contract does not exist between the B.&O. and the C.U.T. that is contractual in nature and is in some manner, covered by contract.

This is not inconsistent with the holding in Docket No. 68, which is followed here, that it is the arrangements for operation of the terminal and their continuation that constitute the joint action.

And elsewhere:

> Whether such transfer of work was made through an agreed upon movement between the principal carrier and the servicing carrier, or, as was done here, the forced transfer of service through the elimination of service availability to the patrons, the result is the same. The servicing carrier is, by some agreement or contract, performing service that was formerly performed by the incumbents of the position in the City Ticket Office and to which said incumbents did have, and still retain, [sic] under the provisions of the Clerks' Agreement. The removal of the work was entirely within the control of the Baltimore and Ohio Railroad, the employing party to the agreement, and the agreement was violated in the action taken without prior agreement with the employes.

This is much the same point. It must be remembered that the Organization was stressing the alleged violation of the rules agreement. Assuredly the initiative for the change came from this Carrier and was initially "within the control of the Baltimore and Ohio Railroad." The effectuation of the resulting transfer was the result of joint action.

Even inconsistent arguments cannot change that. Non-lawyers often are shocked by inconsistent theories and arguments and are prone to regard them as admissions if not worse. But one of the great advances of modern procedure is flexibility in argument and presentation of varying theories of a case. In an earlier formalistic period plaintiffs had to do everything "just so" or lose--and mostly they lost. They had to choose one theory of a case no matter how unsettled the law and no matter how the law might become settled while their case wended its often weary way to decision. But procedural reforms have stressed giving all parties what they have coming without undue regard to exactitude of pleading and the purity and consistency of "the" theory on which they proceed. So, inconsistent theories in the same proceeding are specifically permitted in the Federal Rules of Civil Procedure, Rule 8 (e)(2); many state codes follow that by specific rule or decision. Arbitration should not lead a retreat back to the 18th century after gains so arduously won.

(b) Procedure

When this case was presented to the Committee and the Referee it was argued that it was not properly before us because a claim based upon the same occurrences had been submitted to the Adjustment Board, Third Division. It was argued that the Organization had improperly "split its cause of action" and, having elected to pursue its possible remedy before the Adjustment Board for violation of its rules agreement, it could not press here its alleged violation of the Washington Agreement. However, that very statement of the issue shows its lack of comparability to the "splitting cause of action" argument which might be made to a court of general jurisdiction because the claims are different and the two forums have differing jurisdiction.

It is possible for the same action to violate two laws of the same or different jurisdictions. It also is possible for the same act to breach two agreements, even two agreements between the same parties. The transfer of work from Clerks of the B & O to the Clerks of another carrier might violate the rules agreement. The Washington Agreement permits such action if it is taken in conformity with its procedures; when they are not followed, the exception to the rules agreement is not granted and, in addition, the Washington Agreement is independently breached by failure to give the requisite notices and to reach an implementing agreement before putting the coordination into effect.

In order to apply the objection that the Organization is improperly "splitting its cause of action" by proceeding before the Adjustment Board and this Committee, the Organization would have to be able to submit its entire dispute to one or the other. Nor is this a sterile procedural point because the remedies before the Board and the Committee may be different. The Organization could reasonably believe that only if it proceeded in both forums could it be certain to vindicate fully the rights of its members--assuming that violations are proven.

Since the oral argument, the Adjustment Board dismissed the claim on the ground that the same situation was pending here (Docket No. CL-14284). The wisdom of pursuing both courses is thereby demonstrated. For "election of remedies" to foreclose a party the selection must be a conscious choice between inconsistent courses. In view of the uncertainty of what would eventuate in either forum, the Organization and the Claimants can hardly be taxed with having made a preclusive choice, especially where the supposedly inconsistent course has proven remediless.

(c) The Appropriate Remedy

This and several other cases before me present issues of the appropriate remedy in the way of (1) compensation and (2) affirmative orders directing carriers to give the notice and negotiate the implementing agreement required by Sections 4 and 5, respectively, of the Washington Agreement as prerequisites for putting a coordination into effect.

(1) Compensation [1/]

1. Carriers assert that no monetary claim is before the Committee so that this portion of the opinion and the related portion of the decision are improper. But part (c) of the claim asks that the Carrier be required to apply the Agreement. Necessary to such a decision is "how" it is to be applied.

As already noted, a shift of work from employees of one carrier to those of another carrier by outright transfer or combination without observance of the Washington Agreement procedures would violate not only the Washington Agreement but could also violate the rules agreement of the first carrier because the scope rules commonly confer "job ownership" in the covered categories of work in the employees of the contracting carrier represented by the contracting organization. The Organizations argue that this is universally the case; the Carriers argue that there are many exceptions. Suffice it to say that the scope rule in this industry commonly has that effect.

The Adjustment Board determines whether rules have been violated and decides the appropriate remedy. In this case the Adjustment Board declined to reach the merits of the controversy whether the rules agreement was breached by the same transfer involved in this case because of the pendency of this case. This disposition overlooks the possibility that the remedies for violation of the rules agreement and the Washington Agreement may differ. So, if a rules violation were found, the Adjustment Board probably would award a time claim to the incumbents of the jobs immediately affected. However, under the Washington Agreement others who suffered compensation or job loss as a result of the coordination might be entitled to compensation under several different sections of the Washington Agreement.

In this and similar cases this Committee was not asked to determine whether there had been a rules agreement violation nor was evidence presented on that issue, and no finding is or can be made on the record before us that the rules agreement was violated. Nonetheless it is urged that it is appropriate and necessary to compensate employees to put them in the position they would have been in had the coordination not taken place when the Washington Agreement, which specifies the conditions upon which coordinations may be put into operation, has not been observed. The argument has considerable appeal and all the more so because Claimants seeking recompense for alleged violation of the rules agreement are apparently barred from a consideration of their claims on their merits only because the same set of events gave rise to a claim of violation of the Washington Agreement. Although based on different grounds, the remedy for a rules violation and compensation to place all employees in the position they would have been in if the unauthorized coordination had not taken place probably might be the same.[2] If they are to be denied the former because of a companion charge under the Washington Agreement, it would seem appropriate to afford them whatever remedy the Washington Agreement can give. But Carriers argue that such a remedy is essentially the remedy for violation of the rules agreement and such violations are properly the business of the Adjustment Board.

Manifestly claimants should not be driven from both forums with the argument that the other is the proper one and yet be unable to secure full relief

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2. However, some provisions of the Washington Agreement conferring additional protection and benefits might be applicable, e.g., those of Section 10.

for all the contract breaches they do prove. I: is for the Adjustment Board to pass upon alleged violations of rules agreements and what remedy should flow (with provision for set off to prevent double recoveries - for the aim is compensation, not punishment for wrongdoing). But if a hearing on the merits of such claims cannot be obtained, then similar relief that is based upon the ground that employees should be made whole where they sustain losses due to coordination which breach this Agreement should not be withheld. For that relief does not flow from violation of the rules agreement but is based upon violation of this Agreement. If the Adjustment Board does grant relief, the only objection to similar relief under this Agreement would be a double recovery, Hence in the absence of a compensation award by the Adjustment Board which would be open to that objection, employees are entitled to the difference between their actual earnings from this Carrier and what they would have received if the coordination had not been put into effect until the procedures of this Agreement are followed. The benefits due tinder Section 6, 7, etc. of the Washington Agreement come into play after Section 4 notices are served and an implementing agreement is reached as required by Section 5.

Carriers argue that the remedy should be limited to whatever payments would have been payable under the Washington Agreement had it been observed. But this would permit Carriers to pay the less than full compensation permitted by the Agreement even though it refused to apply it. In order to claim its advantages, the Carrier must observe the Agreement. Even if it had given the notices it would not be entitled to displace employees and only pay the Agreement's benefit; until an implementing agreement was achieved. Thus it asks for more than observance of Agreement would give.

"Strict logic", as the Organizations urge, may call for a protective period which only begins to run when the Carrier serves its Section 4 notice after the issuance of this decision, rather than one which starts 90 days after the coordination actually was effectuated. However, the effect of the decision is to give full recompense for all compensation loss occasioned by the unauthorized coordination. To add to the several years of compensation thus awarded Agreement benefits for five more years seems to me tc go beyond an appropriate remedy for the improper Carrier action. Had the Agreement procedures been followed lesser amounts would have been payable 'З af fected employees. Moreover, the protection of some sections, such as Section 10, would be most needed during the period following actual coordination and should be made available for the period following the changes which caused employees to move their places of residence. If Carriers consider this illogical, the alternative would be to adopt the Union proposal to start the protective period after Section 4 notices are given.

(2) Affirmative Orders Directing Observance of Section 4 and 5.

In this and other cases the Organizations seek affirmative orders directing the giving of notice of intended coordination and negotiation of an implementing agreement. Carriers argue that the Referee has no authority to order such a remedy and that compensatory payments under Section 6 and 7 are remedy enough for failure to observe Sections 4 and 5.

Quite clearly Sections 4 and 5 impose requirements beyond the later sections which accord compensatory benefits. It has been held that Carriers must negotiate an implementing agreement before putting a coordination into effect. Dockets Numbered 70 and 57. The requirement is not simply a formal one; collective bargaining may help achieve a more effective and acceptable plan of coordination than one promulgated unilaterally.

Nor is the Carrier argument that it can observe its contractual undertaking or breach and pay damages persuasive, especially because it maintains that allowances under Section 6, 7 and other provisions constitute compensation for such breach. Clearly they do not; they are independently required by the Agreement. The observe or breach-and-pay approach no longer enjoys much credit in regard to commercial contracts. In the realm of labor relations it is an invitation to chaos and, additionally, is impracticable because placing a monetary value on the breach will so often be difficult or impossible.

Contrary to the contention that the Agreement confers no remedy power upon the Section 13 Committee, Section 13 specifically provides that unresolved disputes over "interpretation, application or enforcement of any provisions of this agreement" (emphasis supplied) may be referred to and decided by this Committee, Such an assignment would seem necessarily to comprehend a decision as to how enforcement is to be effectuated. I" the face of a Carrier contentio" that a violation 0-F Sections 4 and 5 nerd not be remedied by their observance, nothing less than a direction to observe them will do. (And if the parties do not conclude the requisite agreement, this Committee ca" write one for them. Docket No. 70.)

Nor are notices and an implementing agreement sterile, academic exercises. They require specific Carrier proposals and provide the opportunity for Organization participation i" deciding how best to effectuate the c-ordination, thereby bringing to bear the knowledge and experience of the employees and consideration of their interests, which must be reconciled with the interests of the coordinating Carriers in achieving maximally efficient and productive arrangements.

Nor would I regard the serving of notices and the negotiation and execution of an implementing agreement as moot if, as is possible, the protective period measured from 90 ninety (sic; after the coordination was put into effect should expire before such a" agreement is concluded. Those procedures are important parts of. the Agreement and nothing less than an implementing agreement actually achieved and put into effect will discharge the obligations of the parties.

DECISION:

(a) The discontinuance of the Baltimore and Ohio City Ticket Office and the transfer of its operations and services to the Cincinnati Union Terminal Ticket Office constituted a "coordination."

(b) The lack of a notice of coordination and of an agreement between the Organization and the non-application of the benefit provisions of the Washington Agreement constituted violations of the Washington Agreement.

(c) The Carrier is directed to pay full back pay (i.e. based upon the average of compensation earned in the 12 months preceding the dates of the changes and including all fringe benefits and improvements in pay and fringes since that time), less actual wages and/or benefits received, to all employees affected by those unauthorized changes until Section 4 notices are served and a Section 5 implementing Agreement is achieved. The protective conditions under the Washington Agreement shall be in force through March 31, 1967.

The Carrier is further directed to serve the required notices and negotiate the required agreement.

DOCKET NO. 107 --- Withdrawn by Parties

The Pennsylvania Railroad Company and Lehigh Valley Railroad Company vs. Lighter Captains Union, Local 996 International Longshoremen's Association; International Organization of Masters, Mates and Pilots, Inc.; Seafarers International Union; Transport Workers Union of America; Marine Engineers Beneficial Association; Sheet Metal Workers International Association, System Federations 96 and 152; Brotherhood of Railway Carmen of America, System Federation 96; International Brotherhood of Electrical Workers, System Federation 96; International Association of Machinists, System Federation 96 and 152; International Brotherhood of Boilermakers;. Iron Ship Builders, Blacksmiths, Forgers and Helpers, System Federations 96 and 152; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, System Federation 96; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes	PARTIES TO DISPUTE

QUESTION: 1. Should the Carriers' proposals for the selection and assignment of enployes set forth in the proposed agreements attached hereto as Exhibits "J", "K", "N", and "P", be adopted for effectuating the coordination of Pennsylvania and Lehigh Valley marine facilities, services and operations in the New York harbor area?

2. In the event it is determined that the Carriers' proposal concerning the selection and assignment of employes should not be adopted in t heir entirety, what provisions should be adopted for effectuation of this coordination? 3

DECISION:

Withdraw.

DOCKET NO. 138 --- Decision by Referee Bernstein

Brotherhood of Locomotive Firemen and Enginemen)
)
and) Parties to Dispute
)
Erie-Lackauanna Railroad Company)

QUESTION:

"Claim of Avoca, Pa. Fireman W. J. Tuffy for being adversely affected by reason of merger of the Erie Lackawanna Railroad for the months of October, November, December, 1960 and January, February, March, April, May and June, 1961."

FINDINGS:

I. The Extra Issue

In denying the claims in this and other cases (e.g. Dockets Numbered 103, 115, 137, 139) the carriers interpreted Sections 6 and 7 of the Washington Agreement as affording protection only to full time regular incumbents *of* bulletined positions to the exclusion of employees who were working "extra" or in furloughed status when the coordinations took place. Reliance for such an interpretation is placed upon the decision in Docket So. 95 which held that the guarantee of Section 6 against "a worse position with respect to compensation" applies to a bulletine position only and was not a guarantee to extra employees whose compensation psition became poorer as a result of the coordination. This interpretaion of Section 6 led the Carrier in Docket No. 121 to declare Section 6 inapplicable to regular position holders whose worsened compensation resulted from lessened opportunities for extra work. And in this Docket (No. 108) the interpretation put upon "position" in Section 6 was applied to "position" in Section 7 so as to deny claim of a fireman who, assertedly, worked regularly on a regulated extra board prior to the coordination but moved to the "emergency list", an inactive status as a result of the coordination.

Because the "extra" issue runs through so many of the cases now before me, I shall discuss it at length and in detail in this opinion and shall include

facts and arguments pertinent to it which were presented in other cases in the group submitted to me for decision.

The starting point is the following language of Section 6:

> (a) No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of the coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position . . . to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this Section as occupying the position which he elects to decline.

In Docket No. 95 a series of displacements by regular employees brought on by the abolition of the Telegrapher's position in the newly coordinated operation caused a former regular position holder to revert to the extra list. Claim was made on behalf of those who had been on the extra list prior to the coordination whose opportunities for work and earnings were reduced by the appearance of the former regular employee ahead of them on the extra list. The referee decided:

> 'A "position" under the Telegraphers' Agreement always has meant, with rare exceptions, a post of employment with a well defined place of work, hours, duties, and a fixed compensation to be periodically paid for regular work or services of greater worth and responsibility than that of a manual or menial kind.
>
> "Position", regular or extra, within the contractual meaning of the tern, are those that are advertised as such on the system of railroad in accordance with existing rules and practices and/or awarded in the exercise of seniority.
>
> Reasoned as above, additional protective benefits are not allowable in connection with this particular "coordination".[1]

As I *observed in* Docket No. 50, consistency in the interpretation of agreements is desirable, and there I followed an earlier decision under this Agreement with which I disagreed. Most reluctantly, I must decline to follow

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1. The language quoted is the entire discussion of this issue in that decision.

the holding in Docket No. 95 because:

(1) It is not consistent with the implications of Docket No. 17, an early case decided without a referee;

(2) It is not consistent with the decision in Docket No. 66;

(3) It is not compatible with either literal terms of the Section nor its regular application to those reduced to extra positions in coordinations;

(4) It is inconsistent with several well-reasoned holdings in cases arising under comparable provisions of protective provisions derived from the portion of this Agreement at issue;

(5) It is not compatible with the basic scheme of the Washington Agreement.

I shall take up these points in order.

(1) The Organizations cite Docket No. 17 for the proposition that employees come within the protection of Section 6(a). In that case ten of the dozen claimants were, as the Committee's decision recites, "assigned to extra board prior and subsequent to coordination." However, as the Carriers argue here, the decision does not "hold" that they were eligible for Section 6 allowances because that was not in dispute. The Committee did decide two other issues. One is not relevant here (the effect of the failure of an eligible regular employee to take an available job at the coordinated faculty). The second issue decided was how Section G allowances for these claimants should be compu ted. The case nay have as much or even greater force than a holding on the eligibility of extra issue because it was handled without a referee - which means it represents the interpretation of both carrier and organization representatives, rather than that of a referee - necessarily an "outsider," - fairly early in the life of the Washington Agreement (1942) when this Committee had members who participated in or witnessed the negotiation and drafting of the Agreement. It seems most unlikely that they would decide how Section 6 allowances should be computed if they believed that the claimants were not eligible in the first place.[2] There is the counter argument that the treatment of extras in this case stemmed from the Carrier's offer of settlement. But the Carriers' memorandum to me dated August 16, 1965 indicates the present Carrier Members' belief that if the determination of the second issue had been

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2. Although the Carriers do nor concede the correctness of the Organization contention, they assert that if Docket No. 17 is influential on this point, the Organizations are equally bound by the Committee's decision of the issue as to how to compute allowances for employees continued in employment who later suffer reductions in earnings demonstrably due to non-coordination developments. The argument seems reasonable. Whether the holding of Docket No. 17 undermines the later holding of Docket No. 67 (Part (3)), asasserted by Carriers, is discussed in Docket No. 129.

unsatisfactory the Carrier members might not have felt bound by the interpretation of Section G implicit in the offer. But this carries little persuasiveness because, as the discussion in Docket No. 129 shows, the Carrier party probably was unsuccessful in the computation of compensation issue in Docket No. 17. At the very least, the case shows that within 5 few years of the Agreement's inception one carrier thought that Section 6 allowances were due extremployees whose compensation was reduced by the coordination and that the Committee did nothing to cast doubt upon that view.

(2) As the referee who decided Docket No. 95 observed, that decision stemmed in large part from this reasoning:

> I tried, but could not reason that the words "worse position" appearing in Section 6(a) differed from the use of the work "position" five more times in the same Section, or in connection with its many other appearances elsewhere in the Agreement of May, 1936, Washington, D.C. See Sections 6(c), 7(a), & (c), 7(f), and 9.*

It is to be remembered that ho held that only an "advertised" position came within its compass. Yet in an earlier case, Docket No. 66, I held, as urged by the Carrier members, that a non-bulletined, non-bargained extra board assignment can qualify as a position for the purposes of Section 7. Docket No. 66 declares :

> . . . The Carrier contends that the claimant did not effectively make such an election before he was offered a "position" on the clerks' extra board. The Organization asserts that the offer of the "position" was not made until after the election under Section 9 and that the proffered status is not a "position" within the meaning of Section 7(c) 2.

The Carriers urged that "position" can mean something other than a bulletined bargained position and the decision held that this was so. This means that the reasoning of Docket So. 95 on this point was faulty and in conflict with a" established precedent.

I" this Docket (NO. 108) the Carrier declined the claim on the ground, among others, that the Claimant was not the holder of a bulletined position and hence not eligible for a Section 7 allowance, relying upon the decision in Docket No. 95. The fact is that there were no firemen "positions" at Avoca and that all work in that classification was performed by me" on the "extra board" before and after the coordination. Under such circumstances the denial of eligibility is completely at odds with the purpose of the Agreement. I" turn, such an attempted application shows how unpersuasive the reasoning underlying Docket No. 95 is and how much at odds it is with the earlier decision in Docket No. 66.

Carriers argue that if Docket No. 95 is to be overruled, which they do not concede CO be necessary or proper, the holding should be limited to claimants holding the equivalent of full-time jobs - as in Docket No. 66 and this

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* From his reply to the Organization dissent.

case. But both the language and application of Section 6(a) preclude such a result.

(3) What must be decided is the meaning of "position" when it first appears in Section G(3) and later in Section 1. As shown, that word, contrary to the reasoning of Docket No. 95, need not mean bulletined, bargained position when used in Section 7. Moreover, its subsequent uses in Section 6(a) are not necessarily limited to such a "position", contrary to the arguments made in Docket No. 95 and before me. For the seniority of extra men entitles them to priority in assignment in many Situations - hence the "position" [sic] spoken of later in the section could be extra work. Even if this were not so, it is not unknown for the same term to be used in different senses within the same document or even sentence.[3] This is especially so in collective bargaining agreements often drafted by hurried and exhausted negotiators.

But the first use of "position" in this Agreement and its application to "extra" men are even more persuasive of a result contrary to that reached in Docket No. 95. The language at issue is:

> No employee . . , shall . , . be placed, as a result of such coordination, in a worse position with respect to compensation . . .

*"position" there is used to compare the pre- and post- coordination "position". In other words, "position" is used to describe the employee's "position" after as well as before the coordination.

In Docket No. 9 the Committee was presented this question:

> Are affected employees who have insufficient seniority to obtain and retain a regular assignment, but who revert to and perform service from the extra list, entitled to compensation under Section 6 or Section 7, of the Agreement, or under a combination of both Sections?

Its answer, without the aid of a referee, was: "Section 6." Review of the record in that case shows that in reaching that conclusion the Committee

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3. In his comment on the Organization dissent to Docket No. 95, the Referee set out extensive Q and A before Emergency Board No. 148 in which the (then) Telegraphers were arguing for the attrition principle. The definition of "position" put forward in that case for purposes of an attrition agreement was thus limited to bulletined positions; he apparently deduced that that Organization definition was 5 proper one for "position" throughout the Washington Agreement, which was not involved before the Emergency Board. The contents differ so widely and the purposes of the definition in an attrition arrangement are so different iron those in protective arrangements that such a transfer seems thoroughly unrealistic.

apparently rejected the Carrier arguments that in order to qualify for a Section 6 allowance an employee had to be in a regular "position" after the coordination affected him adversely. Essentially the same arguments were made in that case for that proposition as were made in Docket No. 95 and here that "position" can only mean one who holds a regular position at the time of coordination. It seems quite clear that if "position" when first used in Section 6(a) does not mean "regular position" when applied to his post-coordination situation it does not mean regular position in regard to his pre-coordination situation. (The case is further discussed in another context in Docket No. 129).

Similarly in Docket No. 17 one claimant who had been a regular position holder and reverted to extra status was accorded a Section 6 allowance. Indeed, this seems to be general practice. This must be by virtue of their worsened post-coordination "position".

(4) Several boards have applied the Oklahoma and Burlington conditions to reach results contrary to that of Docket No. 95. They are based upon Section S (2) (f) of the Interstate Commerce Act which in turn was derived from the Washington Agreement; as the Commission has noted, all of its protective conditions follow the pattern of this Agreement. So the experienced Francis Robertson, as sole member of Arbitration Board No. 84, held that Section 4 of the Oklahoma Conditions[4], comprehended not only the bulletined position the claimant held during the test period but all other assignments (which undoubtedly can include "extra cork"). He observed:

> It will be noted that the words "worse position" as they first appear in the language of the Conditions are in line with the provisions of the statute. There can be no doubt that as the work position is used in the statute it is not synonymous with job or assignment but rather connotes status, situation or posture. The provisions of Section 4 apply to all classes of employees operating and con-operating. It is common knowledge that in the operating group a large

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4. The relevant provision of Section 4 is:

> If, as a result of the abandonment of operation herein permitted and the purchases, etc., herein authorized, hereinafter referred to as the transaction, any employee . . . is displaced, that is placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced.

proportion of such employees work on assignments which might vary from day to day. Hence in referring to an employee's position with respect to compensation and rules governing work conditions it is apparent thot in this context the word "position" cannot be intended to mean a specific job or assignment. Hence it is clear that what the Commission was seeking to accomplish in imposing the Oklahoma Conditions was to assure an affected employee that his employment status insofar as compensation and working conditions were concerned would be preserved to him for the four years protective period.

The very same reasoning applies to Section 6(i); in addition, Section 5(2)(f), Section 4 of the Oklahoma Conditions and Section 6(a) cf this Agreement all have the same purpose and should be construed in the same way, absent quite specific reasons for different treatment[5] none of which appears to be present.

Referee Rogers in SEA 226. case No. 41, observed, in applying the similar provision of the Burlington Conditions[6]: ". . . it is immaterial whether 'the claimant;' was an extra employee or a regular employee at the time she was forced to leave Hollis on account of the abandonment." In that case the Board did determine that she was a regular employee because she was the senior extra employee replacing an ill regular employee in a bulletined position; the Carriers claim that this is a limiting factor of the case. But, while not a square holding, the quoted conclusion and reasoning are of some value. The referee observed that the term "position", when referring to both pre- and post -abandonment periods , applied to as many differing positions as the employee held in the test and guarantee periods and that the computation of

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5. In the June 3, 1965 arbitration award in the Chicago, Northwestern and Transportation-communication case an extra employee's claim to a displacement allowance under the 1962 strike settlement agreement was denied because there were other specific provisions for extra employees guaranteeing them 40 hours of work a week.

6. It provides:

> If, as a result of the abandonment permitted herein, any employee of the Chicago, Burlington & Quincy Railroad Company, . , . is displaced, that is, placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation hc received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthiy compcnsotion received by him in the position from which he was displaced.

allowances took into account all compensation in those periods whether earned as an extra or regular employee. That is assuredly true of the test period under the Washington Agreement.

Moreover, it should be observed that in Case No. 41 the claimant was an "extra" employee after the abandonment, but nonetheless was held to be in a "worse position."

In Arbitration No. 273 (Southern Pacific Co. and The Order of Railroad Telegraphers, 1963) we find:

> . . . the primary question ultimately at issue hare is whether the Burlington Conditions are intended to afford protective benefits to an extra employee who, following an abandonment, is retained as an extra employee, but is given a different assignment where his compensation fails to equal that which he enjoyed on the position or positions to which ho had been assigned during the immediately preceding twelve months. Put a little differently, the question is whether the word "position" as used in the language, "placed in a worse position", refers to placing an employee in a worse condition with respect to his employment, compensation, etc. The Carrier agrees that extra employees dismissed when extra lists are reduced because of work loss solely attributable to the abandonment, are entitled to protection under Item 2 of the Burlington Conditions.

The Board concluded:

> As we have reviewed the legislative and judicial history, and the experience out of which the various railroad employee protective plans, and especially the disputed language of the Burlington Conditions have emerged, we have become convinced that it was not the intent of Section 5(2)(f) of the Transportation Act of 1940, and is no: the intent of the Burlington Conditions, that a line should or can be drawn between extra employees as such and regular assigned employees in determining who is "adversely affected," or who is entitled to protection against the adverse effects of abandonments . . . .
> . A

This decision came after Docket No. 95 and the referee noted it.

(5) The fundamental purpose and desigof the Washington Agreement argue for extending its benefits to "extra" men and women. Commonly under rules agreements in this industry covered work cannot be transferred to others outside the unit. (See discussion i n Docket No. 106). This factor made it impossible for railroads to achieve the greater efficiency and economies which merged facilities and services often will produce. .The Washington Agreement overrides this limiting factor of rules agreements and permits such transfers if effectuated in accordance with its procedures; in return, t h e Agreement provides for allowances to the employees adversely affected. The transfer of the work performed by extra men is no less prohibited by the rules agreements than that performed by regular position holders. A carrier commonly could not transfer either kind of work were it not for the Washington Agreement. That Agreement, however, does permi t transfers 0: both categories of work. (It should b c noted that this Agreement is not limited by the terms to coordinations in which the rules do have this prohibitory cffcct.) It would seem

reasonable to conclude that the protection of the Agreement should be co-extensive with the common prohibition of the rules agreements and the release of that prohibition by this Agreement.

Otherwise a substantial segment of the railroad employee population would be denied the protection of the Agreement despite the apparent protection afforded their work by rules agreements. Moreover, if extras were excluded from Section 6(a), it would be possible for carriers to manipulate the scope of this Agreement simply by having fewer regular positions and more extras at work; proof that such arrangements violate Section 12 of the Agreement would be difficult.

Tending to the same conclusion is the drafting history of this Agreement.[7] The May 7 proposal of the Carriers included these provisions:

> It is the intention of the parties that the coordination allowance contemplated in this section shall be made to the regularly assigned incumbent of the positions affected, it being understood that in no event shall the allowance apply to more than one person with respect to any one position. (emphasis added)

and

> It is the intention of the parties that the protection against reduction in rate of pay provided for in this section shall apply only to the regularly assigned incumbent of the position affected, it being understood that in no event shall the protection apply to more than one person with respect to any one position.[8]

Section 7(f) contains language something like the underscored portion of the first paragraph quoted above, with, however, some significant changes. But nothing like the second paragraph affecting reduced compensation was incorporated in Section 6 of the final Agreement, which tends to suggest that the Carriers did not prevail on this point. Of course, drafting changes can have many explanations, e.g., that the language is unnecessary because the point is already covered in another fashion or is implicit in a more general statement. Nonetheless, the latter proposal and its elimination seem to negative the

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7. Neither party cited this to me. The Carriers provided me with the history, prepared by the Organizations. It was cited in argument on Docket No. 119 for the proposition that the basic purpose of the Agreement is compensatory. As I was already persuaded of this, I did not refer to the history in reaching my conclusion. Thereafter the Carriers indicated that a specific change occurred that was relevant to the issue I had already decided. In reading the history on that point, I was struck by the language quoted below.

8. Report of the Railway Labor Executives' Association covering Their Legislative Activities and Conferences with a Committee Representing Carriers in the United States on the Subject of Protection of Rights and Interests of Railway Employees Involved in the Coordination of Railroads on Their Facilities, pp. 28, 29 (undated).

contention that the parties agreed at the outset that only regular position holders were covered by what became Section 6.

The Problem of "Windfall" Benefits.

As noted under point (3), Section 6(a) applies to all crafts and classes. To limit it to bulletined jobs would exclude whole groups to whom it obviously should apply - as with Firemen in this case. For the many reasons noted, it seems inappropriate to limit Section 6(a)'s protection to those with the equivalent of full time jobs. As several cases show, some extra men make more than regular position holders, some make about the same and many make less. But many extra men and women work hundreds of hours a year and earn thousands of dollars. In other words, many extras have a regular and substantial attachment to their railroad jobs and are dependent upon those jobs for at least a substantial port, if not all, of their livelihood. Where the attachment has been tenuous the test period earnings will tend to be low and easily matched and exceeded by post-coordination earnings.

Where employees are "furloughed" at the time of coordination, Carriers argued, they might capture large windfall benefits because the test period under Section 6(c) depends upon the 12 months prior to his displacement "in which he performed service." The fear was expressed that some remote period in which employment was regular and earnings high might provide a high test period earnings average for employees whose actual work and job connection just before the coordination were slim. To a considerable extent, perhaps completely, such a possibility is obviated by my ruling (see Docket No. 103) that there must be a showing that the lowered earnings are due to the coordination; little or no work in the year or many months preceding the coordination would tend to show that the coordination was not the cause. Despite such a ruling which turns on all possibly relevant facts, Carriers persisted in arguing that all "furloughed" employees be excluded fron the cover of Section G(a) lest they obtain such windfalls. In our mid-July meeting I asked the Carriers to search for examples of such potential occurrences. Their mid-August memorandum reported no example in the presently pending group of 30 cases despite the presence of many claims for extra and furloughed[9] employees, nor were any examples from other coordinations proffered.

It also was argued that on some properties it is the practice for furloughed employees to be able to decline extra work offered on other than weekends (impliedly because they hold not-railroad week day jobs) or for less than the equivalent of a full time job. Hence, the argument goes, they can refuse work but get the benefit of the guarantee. But that is not so; Section 6(c), which governs the computation of allowances, explicitly requires the subtraction from benefits of pay lost due to "voluntary absences."

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9. A difficulty with any such distinction is that from craft to craft and carrier to carrier classifications and practice vary greatly. I believe that the test period averages and my ruling in ***Docket So.*** 103 protect against disproportionate allowances.

For all of these reasons, I interpret Section 7 as providing protection to "extras" with the equivalent of full-time positions and Section 6 to be available to all categories □↗ ● ⊠♦✳◍◪ and furloughed employees (there is ■□ contention that they are not "employees") where they otherwise establish eligibility under those provisions. [10]

II. The Issue of Adverse Effect

The Erie-Lackawanna merger was approved by the ICC in mid-September 1960; the ICC set October 17, 1960 as the effective date of its order. A few days before the latter date, employee representatives obtained an order restraining the newly-merged Carrier from abolishing positions or furloughing employees in effectuating ccordinstions in the absence of implementing agreements. That order was subsequently dissolved but was reinstated while a direct appeal to the United States Supreme Court was prosecuted. In May 1961 the Court ruled adversely to the employee representatives' claims. Meanwhile in early February 1961 the Carrier and the Brotherhood cf Locomotive Firemen and Enginemen reached an Implementing Agreement.

Claimant and the Organization claim that he was adversely affected on October 17, 1960, the effective date of the ICC order. The Carrier contends that it made no changes in operation that could have affected the Claimant prior to July 1951. it states: "No actual merging or consolidating of work assignments in Mr. Tuffy's seniority district occurred immediately following the date of merger." Although this might possibly be read a s ot pertaining t o changes allegedly made on October 17, 1960, I think ic was meant and taken as a denial of Claimant's allegation as to adverse effect on and after October 17.

The Claimant and Organization assert that en October 17, 1960 there was a reduction of former Erie men amounting to three train crews. This allegedly was caused by the shutdown of the former Erie freight house and a change in [illegible] switching arrangements and a change from Erie-Lackawanna crews in serving certain industries ; and in March 1961, allegedly some interchange work formerly handled by former Eric Crews was assigned to former Lackawanna crew. Mr. Tuffy's removal from the Wyoming Division extra list, the Carrier maintains, resulted from a deterioration in business which began long before the merger and has persis ted and worsened since.

As I have noted in Section 13 Committee discussions, a record consisting of exchanges of correspondence and assertions in submissions makes resolution of issues of fact extremely difficult. However, uncontroverted assertions of the Carrier lead me to conclude that the Claimant and the Organization have not shown that there were coordination changes prior to June, 1961 which were the cause of Claimant's removal from the extra list and the consequent diminution of his earnings. So, for example, the Carrier stated, without contradiction, that the shutdown of the former Erie freight station did not result in

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10. This is a holding as to the other cases in the group pending before me in which the issue is directly involved. As noted at the outset, all of the cases with this common issue - and the related one as to Section 7 - are discussed together here for convenience.

the loss of an assignment, noting that prior to October 17, 1960 only one car was handled there three times a week with no more than 30 minutes required to spot and pull the car on each occasion. Moreover, the presence of "substantial" industries in the vicinity required continued service by former Erie crews. And I find that the three other causes of crew reduction assertedly resulting from changes in operations in October, 1960 made possible by the merger were refuted by the Carrier. In addition, during the five months preceding October 1960, Claimant worked no more than 3 to 6 days a month on the Wyoming Division in contrast to much greater employment during the period October 1959 through April 1960, which buttresses the Carrier argument that it was poor business rather than merger which brought on the Claimant's loss of work.

For these reasons, I conclude that the claim is without merit.11

DECISION:

The claim of Fireman W. J. Tuffy was timely filed and he would have been eligible to receive a Section 6 or 7 allowance although he only worked "extra". The claim is denied, however, for lack of proof that any merger or rearrangement of work on the Wyoming Division took place prior to June 1961 which adversely affected him.

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11. Another carrier ground of denial that the claim was untimely filed washed out during the hearing.