DOCKET NO. 145 --- Dispute pending.

Southern Pacific Company (T&L Lines))
St. Louis Southwestern Railway)
)
vs.) Parties to the Dispute
)
The Order of Railroad Telegraphers)

QUESTION

1. When a coordination of services and facilities at a terminal is made under the terms of the Agreement of May, 1936, Washington, D.C., which involves a transfer of telegraph services from a yard office to a joint telegraph office, does The Order of Railroad Telegraphers have right to require that yard office clerical work now assigned to such telegraph force located in the yard office be transferred with the telegraph service and be handled by telegraph forces in the joint telegraph office?

2. Does The Order of Railroad Telegraphers have right to require an increase in wage rates when a coordination is made?

3. If the answers to Questions 1 and 2 are negative, does the assignment of force proposed by the Carriers constitute a proper selection of forces to permit Carriers to proceed with the coordination?

DECISION:

Dispute pending.

DOCKET NO. 146 - - - Decision by Referee Bernstein

Brotherhood of Locomotive Engineers)
)
vs.) Parties to the Dispute
)
Erie -Lackawanna Railroad Company)

QUESTION:

"Claim of New York Division Engineer W. R. Van Sickle for the loss of earnings during the month of February 1964 account of being adversely affected as a result of the merger of the Erie Railroad Company and the Delaware, Lackawanna and Western Railroad Company."

FINDINGS:

This controversy is governed by an Implementing Agreement dated February 7, 1961, which in Article XIV, pursuant to ICC Finance Docket No. 20707, adopts Section 6(c) of the Washington Agreement as modified by the New Orleans Conditions.

The latter imports Section 4 of the Oklahoma Conditions. All three provisions add up to the same thing.

The Implementing Agreement provided for the allocation of work between former Erie and Lackawanna men on a percentage of mileage basis. At the time of coordination, Claimant, formerly an Erie man, was a Fireman working out of Port Jervis. In May 1961 he became an extra Engineer on the Hoboken district. Due to the merger, substantial amounts of traffic handled prior to the merger on the Scranton district of the former Lackawanna were diverted to the former New York Division. This led to increased work opportunities for Hoboken-based Engineers. Due to a general increase in traffic Scranton-based Engineers found it unnecessary to work out of Hoboken in order to work full time or better. As a consequence Hoboken-based employees worked in excess of the mileage called for by the allocation provision of the Implementing Agreement. The Carrier attempted several times to effectuate the allocation provision by having Scranton men come to Hoboken to take their agreed share of the work - but they lacked the incentive to do so. Finally in 1964 it was agreed to rearrange the work to enable the former Lackawanna rostermen to catch up on the mileage due them. This led to a change in assignment for Claimant for which this claim is made. His claim for February 1964 is based upon lower compensation as compared with the 12 months worked prior to that time.

The Carrier argues that the diminished earnings are not attributable to the coordination but stem from merger-caused inflated earnings in the post-merger test period. The Organization asserts that the reduction in compensation clearly stems from an application of the merger agreement and hence eligibility for a displacement allowance is clear.

While the change in assignment is immediately attributable to the application of the Implementing Agreement, the lowered earnings--which are an index of adverse effect--are not attributable to the merger in the manner contemplated by the Agreement. The Claimant's test period earnings, if computed in the usual fashion, were substantially augmented by the diversion of traffic to the New York division, a change made possible by the merger. Hence, until February 1964 the Claimant's earnings were enhanced by the merger. The subsequent drop was not a result of the merger vis-a-vis the pre-coordination situation. Section 1 of the Washington Agreement makes it quite clear that the Washington Agreement was meant to cushion the adverse effects of coordinations; Section 6(a) explicitly requires that the employee's worsened position be "a result of such coordination." That purpose must be observed and read along with other provisions of the Agreement. A similar purpose informs Section 4 of the Oklahoma Conditions.

As I noted in Docket No. 62:

> In the normal and usual case, applying the formula of Section 6(c) will show whether an employee is "in a worse position with respect to compensation." In other words, if an employee drops below the "average compensation" (all earnings) for a period equal to or less than the "average monthly time paid for" he makes out a prima facie case that he is in a worse position than before the coordination. Because of the many variables--new schedules, possible differences in size of work force, probable differences in volume of work, and a host of other factors -- the drop in average compensation is inferentially caused by the coordination.

The inference is rebuttable. Section 6(a) is quite explicit that the "worse(ned) position" must be "as a result of such coordination." If it can be shown that the difference in "compensation" is due to some cause unrelated to the coordination, the allowance would not be due. For this reason clearly demonstrable abnormalities in the test period which are absent after the coordination would negate the coordination as the causative factor. Here it was due to the prospect of the coordination and the Carriers understandable desire not to hire new employees before the coordination. Where such a clear showing of abnormal earnings is made, the prima facie showing is overcome. There may be complicated situations in which the lower compensation is the result of both an abnormal situation before a coordination and the coordination itself. It is sufficient for Section 6(a) to show that any part of the decrease in compensation is caused by the coordination for an employee to qualify for the full difference between the test period average and actual compensation under the formula.

The Unions agree that Section 6(c) provides an element in determining worsened positions, but they object to making the test rebuttable and subject to a showing that other elements in fact caused the drop in earnings. The Carriers object to employing Section 6(c) in this fashion but approve the rejection of claims where a showing is made that test period earnings were abnormally high due to coordination. While I am open to persuasion that a former ruling of mine was mistaken, neither side has shown me a more satisfactory interpretation. Hence I adhere to the analysis employed in Docket No. 52. In applying it, I conclude that Claimant's diminished earnings were not the adverse result of the coordination but were due to enhancecent of earnings caused by the coordination which did not persist - a quite different thing.

DECISIOS:

Claimant W. P.. Van Sickle is not entitled to a displacement allowance because his reduced compensation in February 1964 was not a "result of the coordination" within the meaning of Section 6(a) of the Washington Agreement or as contemplated by Section 4 of the Oklahoma Conditions.

GRAND LODGE
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
BROTHERHOOD OF RAILWAY CLERKS BUILDING
CINCINNATI, OHIO 45202

C. L. DENNIS
GRAND PRESIDENT

File 469-2-11

Subject: Washington Job Protection Agreement Decisions - Section 13 Committee

Circular No. 14-67

January 26, 1957

ALL RAILROAD GENERAL CHAIRMEN
IN THE UNITED STATES

Dear Sirs and Brothers:

With my August 4, 1966 Circular No. 62-66, I furnished you with the Findings and Decisions of Referee Merton C. Bernstein in the docket of Section 13 Committee cases he had under consideration. On December 16, 1966, the Carrier Members parties to the Section 13 Committee issued a-general dissent to Referee Bernstein's decisions. On January 9, 1967, Referee Bernstein responded to the Carrier Members' dissent. Copies of . both are enclosed.

The Carrier Members' dissent is extremely provocative and abusive. In my judgment, it generates more heat than light and contributes not to a better understanding of the Washington Agreement and Section 13 Committee decisions but just the reverse - confusion and chaos.

Carrier's comments with respect to the interworkings of labor agreements and Federal statute have never been upheld either in arbitration or courts of law. Their comments with respect to Interstate Commerce Commission protective conditions affecting Washington Agreement protection fail to take into consideration that the I.C.C. itself has clearly stated on several occasions that it was never intended that conditions prescribed under Section 5(2)(f) of the Transportation Act were to annul or nullify labor contracts such as the Washington Agreement.

Many other comments could be made with respect tc the Carrier Members' 33 page vituperative essay, but suffice it to state that the dissent should not in any manner influence the enforcement of the wards or the application of the agreement. Presently the Labor Members of the Section 13 Committee are considering the preparation of a response to the dissent. In the event we decide to publish a response, I will furnish you with a copy.

Sincerely and fraternally,

C. L. Dennis

Grand President

cc - Grand Lodge Officers
All other General Chairmen (As information)
Regional & District Representatives
Organizers & Auditors

SECTION 13 COMMITTEE
AGREEMENT OF MAY, 1936, WASHINGTON, D. C.
(WASHINGTON JOB PROTECTION AGREEMENT)

General Dissent of Carrier Members
to Referee Decisions Dated July 22, 1966

The Referee in this docket of cases has made awards which result in so distorting and mutilating the Washington Job Protection Agreement that the carrier representatives feel it is necessary to file a general dissent thereto, While dissents could very well be filed in connection with other mistakes the Referee made, we are limiting our comments to some of the glaring errors in the reasoning upon which the Referee based his erroneous awards.

The Washington Job Protection Agreement was executed over 30 years ago by practical railroad men, and in large measure has been interpreted and applied by the-parties with only a limited area of dispute requiring decision by the Section 13 Committee. The Referee in this docket of cases has now seen fit to change in numerous basic respects the interpretations and applications followed by the parties over the years in the face of the obviously clear language used in the Agreement.

As will be pointed out below, these awards in many instances ignore the clear and unambiguous language of the Agreement between the parties, disregard the surrounding curcumsfances at the time the Agreement was made, and do violence to the intent and purpose of the Agreement. In other instances they disregard, distort and violate beyond recognition, the plain language of the Interstate Commerce Act and the decisions of the Federal Courts and the Interstate Commerce Commission which defined the impact of that Act upon the Agreement. In some of his decisions, the Referee has also exceeded the authority and jurisdiction of the Section 13 Committee and in others has ruled on questions not submitted to him for decision, so that he is guilty of gross error perhaps resulting from an inability to understand railroad labor agreements or the statutes and decisions subordinating them to the Interstate Commerce Act, and to make impartial determinations within the clear intent of such agreements, statutes and decisions.

The shortcoming of the Referee in the decisions in this docket of cases can be illustrated in four categories, each of which are discussed below:

I. Decisions Involving Section 6 of the Agreement

Section 6 of the Agreement provides benefits for "displaced" employees. This "displacement allowance" is to be equal to the difference between an employee's compensation, month by month, following the date of his displacement, and his average monthly compensation for the twelve months preceding his displacement; an adjustment is made for any month in which he works more hours than his pre-displacement average. (Section 6(c)). To be eligible for such an allowance, an employee must meet four requirements set forth in Section 6(a). These four requirements are listed below, together with the manner in which the Referee has ignored or distorted them in his decisions in various cases in his assignment.

1. An employee must be "continued in service." In Docket 127 the Referee brushed aside the first requirement. That case involved 10 employees who were not continued in service, but who lost their positions (wherefore they came under the provisions of Section 7) and were furloughed but "performed extra work as it became available." The Referee nevertheless ruled that they were "eligible for Section 6 benefits."

2. An employee must be "placed * * in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination." (Section 2(c) defines "time of coordination" as the date in the period following a coordination "when that employee is first adversely affected as a result of such coordination.") The second requirement - a showing that the employee has been placed in a worse position with respect

* - tocompensation - necessitates merely a showing that the employee has been displaced to a job with a lover rate of pay or fewer hours, or both, or that while he has not been displaced the earnings opportunities of his own job have been reduced. If this situation exists it may readily be demonstrated, and as the Referee was informed the common procedures for applying the Washington Job Protection Agreement require a claimant employee to make such a showing (see point 3 below).[a] However, the Referee has ruled that no such simple showing is needed. In several dockets he has compared the employee's post-coordination compensation in a single month with his average monthly pre-coordination compensation, and used this comparison as the test of requirement No. 2. By that test any employee can establish eligibility, even if there has been no change in his job, his work, his hours, orhis rate of pay.

For example, in Docket 131 the claimant's post-coordination position was at least substantially identical with his pre-coordination position as to shift worked, rate of pay, number of hours worked, duties, and rules governing working conditions. However, the referee ruled that the claimant is "entitled to a displacement allowance for any month in which his post-coordination earnings did fall below his test period average after September 1, 1962 because his work was changed in an admitted coordination; the lowered earnings would constitute a worsened position in regard to compensation." No claim or shoving had been made that claimant had been adversely affected, and no "test period" was or could have been determined. No claim or shoving had been made that the claimant had been "placed in a worse position with respect to compensation

a Only the occurrence of such a displacement can identify the "time of coordination" for the individual employee; that date when he is first adversely affected, and not the effective date of a coordination, determines his "test period" under Section 6(c).

or rules" than he had occupied earlier. The effect of the decision accordingly is that the Referee's test of worsening is the post-coordination compensation for any month compared with the average monthly pre-coordination compensation. Thus the Referee in effect holds that in every February, and every other month containing fewer working days or hours than the average number of working days or hours[b] in the twelve-month period preceding the coordination, claimant was in "a worsened position in regard to compensation."[c] The workings of the

[b] No month contains the same number of working days or hours as the average number of working days or hours in a twelve-month period, under current generally applicable schedules. For example, on the basis of five-day work week with eight holidays per year the average month includes 168-2/3 work hours. An actual month of 20 work days amounts to 160 hours, 21 work days amount to 168 hours, 22 work days to 176 hours, 23 work days to 184 hours, etc. Thus, even without being affected in any way by a coordination or any other changes, an hourly or daily rated employee who continues working the same hours and days will find certain months in which his hours worked, and therefore his compensation, are less than their twelve-month average. In each of the remaining months the number of hours worked is greater than the average, and in those months the hourly or daily rated employee would make up in earnings the deficit from the short months. But in these longer months, if a monthly-rated employee is under consideration the formula in Section 6(c) would require additional pay because more hours are worked for the same compensation. Thus if the formula in Section 6(c) is used as -the test of Worsened position," even if there is no change in rate paid or hours worked a make-up allowance would be required for some employees every month; for hourly and daily rated employees in the shorter-than-average months and for monthly rated employees in the longer. Section 6(c) by its terms sets up the "displacement allowance" which is to be paid if the employee is eligible therefor; it is inappropriate for use as a test to determine whether the allowance is payable, and was not so intended.

[c] The carrier members made clear to the Referee that if it had been determined that an employee had been placed in a worse position with respect to compensation and he had otherwise qualified under Section 6(a), the displacement allowance payable under Section 6(c) would inevitably result in increasing his compensation during the protected period over his compensation during the test period, because Section 6(c) makes no provision for offsetting the long months against short ones; they stated that they did not take issue with this effect of the operation of Section 6(c) as a remedy for the employee who had been found to be in worse position and otherwise eligible for a displacement allowance. They made clear that their objection ranspecifically to the use of tne Section 6(c) formula as the test of worsened position with respect to compensation rather than solely (as the agreement provides) as the remedy for such worsened position. They made clear that their objection ran to situations in which the terms of the Washington Job protection Agreement had not been modified by an implementing agreement; in Docket 62, to which tne Referee has many times referred, the Referee's ruling may have been defensible in the light of certain modifications which in that case had been made by the implementing agreement.

calendar alone are such that this test is invalid, but for other reasons as well (details of which would unduly burden this statement) an employee may be in even a better position with respect to compensation and yet have impaired earnings in some months. In a number of cases in addition to Docket 131 the Referee has used the same erroneous approach to determine whether an employee had been "adversely affected" or "placed in a worse position with respect to compensation": Dockets 103, 115, 121, 137, and especially 138 (as to which see note (d) below).

3. Such placement in a worse position must have been "as a result of such coordination." The Referee has observed the third requirement, but his distortion of the second requirement has resulted in a distortion of the third as well. In Docket 108 he refers to his "ruling (see Docket No. 103) that there must be a showing that the lowered earnings are due to the coordination." Perhaps more accurately, in Docket 121, referring to his earlier decision in Docket 62, he words it this way: "unless the carrier makes an affirmative showing that the diminished compensation stems from a cause other than the coordination." The Referee has thus set up his own comparison-of-compensation test not called for by the Agreement, and has imposed on the railroads the burden of overcoming it. A number of cases before him clearly demonstrate that it is readily possible for a claimant to show, by such independent evidence as displacement from one job to another resulting from coordination, or loss of work pertinent to a position as result of a coordination, that he has been placed in a worse position as result Of the coordination: see Docket 105, in which such a showing was made (or so the Referee ruled), and Locket 138 in which the parties had agreed that such

a showing should be made as part of a claim."[d] Section 6(a) does not relieve an employee, seeking to establish eligibility for the protection afforded through Section 6(c), 'to show (at least in a prima facie way) that his having been placed in a worse position with respect to compensation was as a result of the coordination, and there is no basis for making that factor an assumption in every case and imposing on the railroads the burden of disproving it.

4. An employee must be "unable in the normal exercise of his seniority rights" and without making "a change in residence" "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." The Referee's treatment of the fourth requirement is doubly indefensible. In a single decision he appears to wipe it out of the agreement, but makes clear that if left in the agreement so far as he is concerned it is meaningless.

(a) In Docket 121 claimants were assigned to positions following the coordination which carried the same rates and hours as their pre-coordination positions. No other work (overtime or the like) was in any cay involved in those positions either before or after the coordination. Admittedly, following the coordination (but for reasons only tenuously related to it) they had less opportunity for work on higher-rated positions for which they were in line by virtue of seniority. The carrier members pointed to this fourth

[d] In Locket 130 the Referee went to extraordinary lengths to negate this requirement. The claimant in that case had enjoyed an increase in his rate of pay and his compensation, except of course for one or two short months which contained fewer than the average number of working hours. He lost no collateral job opportunities and could not possibly have been held to have been "placed in a worse position with respect to compensation." The Referee nevertheless held that "in order to determine whether he is adversely affected the employee continued in service must know his test period earnings," and as such earning; had not been furnished it was not necessary for him to prove that he had been placed in a worse position with respect to compensation as a result of the coordination.

requirement - that to be eligible for a displacement allowance an employee must be "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.,' In his printed decision, the Referee refers to this as "a more subtle argument" and an "ingenious reading [which] seeks to overcome the basic guarantee set forth in Section 6." There was nothing subtle either about the argument or about the language of Section 6(a); the ingenuity lies on the part of the Referee in reading it out of that section - and in reading into the section a "basic guarantee" for those who do not meet its requirements.

Even more indefensible is the Referee's action in closing his eyes to this requirement in Docket 138, in which an employee after the coordination enjoyed a lob at-a higher rate of pay and full hours and work opportunities.

(b) Having thus disparaged this fourth requirement, the Referee proceeds to emasculate it by holding, in effect, that any and all compensation to an employee is "compensation of the position.' First he refers-to his holding in Pocket 62, which the carrier members made clear they accepted in the context of that docket: "compensation of the position" is not necessarily limited to the product of the rate of pay of the position tines its assigned hours, but may include pay for other work involved with the position. Specifically he there stated:

> "Certain jobs normally involve overtime, e.g. for a sixth day's work when an unassigned employee is not available for usual and recurrent, or at least frequent overtime on given days. Such overtime at premium pay is desired and considered 2 perquisite of the position."

Now the Referee goes further and holds that not only work which is "a perquisite of the position," but also work which is the fruit of an employee 's seniority, may be considered "compensation of the position" :

> "In Docket No. 62 the illustration (and it was only an illustration, not a limiting holding) was of overtire on the same position, But it is also commonplace for position holders to obtain extra work either in the same or a related classification (e.g. as here where Telegraphers also qualify as Dispatchers and work in both classifications) ."

The carrier members of the Section 13 Committee pointed out that they did not regard the "illustration" in Docket 62 as "only an illustration, not a limiting holding"; it was the specific situation involved in that docket, and they made this clear to the Referee.

The language above, quoted from Docket 121, that position holders "obtain extra work either in the same or 2 related classification," simply cannot be reconciled with the words "compensation of the position held by him" in Section *6(a).*

The Referee also ignored or distorted other provisions of Section 6 of the Agreement as follows:

1. Adverse effect resulting from other causes. In several dockets the Referee ruled that in applying Section 6(c) that it is not proper to take ***account*** of conditions not related to the coordination which, after the employee's eligibility for a displacement allowance had been established, served further to reduce his compensation. While Section 6 (c) does not make specific provision

for reduction of a displacement allowance to take account of such matters as subsequent sharp or temporary declines in traffic, Section 1 does so, and the decision of the Section 13 Committee in Docket 17 specifically sactioned it, a decision rade without a referee. The effect of the decision in Docket 17 was explained to the Referee, not only orally but in writing, but he has pretended an inability to understand it. The Referee 's action in Dockets 125, 129 and 139 overruled the longstanding precedent in Docket 17 in this respect and distorted the intent of the parties to the Agreement.

2. Protection not to exceed five years. Section 6(a) contains other language which was placed in issue before the Referee but disregarded in his decisions. The protected period as defined in Section 6(a) is "a period not exceeding five years following the effective date of such coordination." Docket 133 involved the words "not exceeding" in that phrase. The procedure followed in deciding that docket was extraordinary, to say the least. The Referee first indicated to the Committee he would decide in that case that the protected period was a certain period less 'than five years; later he reversed himself on the basis of a presentation made in an entirely different proceeding in which the carrier members of the Section 13 Committee had no part. The issue was reargued in an executive session of the Section 13 Committee, and the carrier members explained their reasoning and their views as to the applicability of the "not exceeding" language, but the extent to which the Referee closed his mind to his earlier views is reflected in the fact that his decision does not even disclose the basis of the carrier members ' argument. As a result, so iar as holdings by this Referee are concerned the words "not exceeding" might as cell not be in the agreement.

3. The extra and furloughed issue. A number of cases in this Referee's assignment involve what he has termed "the extra issue" - the matter of whether the protection of Sections 6 and 7 extends to employees working from extra lists or extra boards or furloughed lists. Although there had been some uncertainty as result of earlier decisions as to the application of Section 6 to extra employees, it was clear that it applied to only those employees who were "continued in service," the first of the four requirements listed above. The Referee has now interpreted "Section 6 to be available to all categories of extra and furloughed employees (there is no contention that they are not 'employees') when they otherwise establish eligibility under these provisions. ' The Referee's discussion in Docket 108 preceding that ruling (the issue is not directly involved in that case) has done little to clarify the issue. The matter has been made worse by the Referee's ruling that test period comparisons may be used to determine whether an employee has been placed in a worse position with respect to compensation, discussed above in connection with the second requirement of Section 6(a). The result of this ruling has been to extend to employees who had been extra, or furloughed prior to a coordination (and for reasons *not* related to the coordination) protection beyond any granted by or to be inferred from the Washington Job Protection Agreement. From this the carrier members vigorously dissent. This holding affects the decisions in Dockets 115, 127, 135, 137, 139 and 141, and is referred to in Docket 121.

II. Remedies Awarded

The Referee has rendered decisions in a number of cases on matters which were not before him. In other cases he has awarded remedies which are

not supported by any provisions of the Washington Job Protection Agreement. In some of these cases, the very fact of violation of the Washington Job Protection Agreement which he found to exist and to call for a remedy is traceable directly to the confusion caused by his earlier conflicting decisions and does not reflect any failure of a railroad to follow the understood provisions of the Washington Job Protection Agreement.

1. Decision not responsive to question submitted. The decision in Docket 127 is not responsive to the question presented but decides another question. The question presented was whether claimants should be paid Section 6 displacement allowances "in those protected period months in which they perform service:" implicitly it recognized applicability of Section 7 in other months. The decision is that claimants "are eligible for Section 6 benefits," which tbe Referee made clear meant that they came under all of the provisions of Section 6 and none cf the provisions of Section 7. Complete lack of understandinr of the fundamental differences between Section 6 and Section 7 is reflected in this decision.

2. Remedies eratuitouslv awarded. In Docket 122 the sole question presented was whether the railroad had violated the Washington Job Protection Agreement. The- question does not raise any issue calling for assessment of remedy if violation is found. Evidently a finding of violation was all that the petitioning party desired. Yet the Referee not only found a violation, he went further and directed the railroad to make certain payments. The discussion below, in connection with Docket 106, of the inappropriateness of payments directed is applicable also to this case.

In several cases the claim presented was that the Washington Job Protection Agreement had been violated and that the railroad should now be

required to apply all of its terms to the coordination involved. (As noted above, Docket 122 presented only the first element - it did not ask for any remedy. Typically these cases involve question as to whether a specific situation in fact constituted a coordination within the meaning of the mashington Job Protection Agreement.) Illustrative of these cases are Dockets 106 and 128. The Referee had made two prior decisions in cases which were essentially indistinguishable from each other and from this one, but those decisions were opposites. In reliance upon its views of the provisions of the Washington Job Protection Agreement, as confirmed by this Referee in one of his earlier decisions, in these Dockets the railroad proceeded on the premise that there had been no coordination. But the Referee followed the other decision, and decided that there had been a coordination and that the Washington Job Protection Agreement had been violated.

No monetary claim was before the Referee in Dockets 106 and 128 - only claims that the railroad he required to apply all the terms and conditions of the Washington Job Protection Agreement. Nevertheless the Referee has directed the railroads to pay back-pay to employees involved, on a basis which is totally without support in the Washington Agreement. This error is compounded b-warranted reference to the question of violation of the "rules agreement" which far exceeds the bounds of reasonable dictum. Although admittedly not asked to determine whether there had been a rules violation, and in the face of a complete absence of any evidence in that connection, the Referee expresses considerable opinion in this respect. Apparently he is attempting to justify a basis for compensation which cannot be found in any provision of the Washington Agreement.

Some of the specific examples of misstatement and excess of authority by the Referee appear at pages 7, 8 and 9 of the Opinion in Docket 106.

On page 7 he states:

> "A shift of work from employes 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 ***** "

It is not necessarily true that such a transfer violates the Washington Agreement and the statement may be characterized as a reckless generalization which, even if correct, does not prescribe compensation.

Further at page 7 the broad statement is made to the effect that scope rules in this industry "commonly" have the effect of conferring "job ownership" in certain covered categories of work. No proper basis exists for such statement and again it appears the Referee is seeking some means to justify his decision on compensation.

His reference at page 8 to the National Railroad Adjustmsnt Board and what it probably would do with respect to rules violations is pure dicta, having nothing whatsoever to do with the Washington Agreement.

The Referee offers his philosophy on the law as related to splitting a cause of action and stresses the right of the claimants to engage in separate and distinct proceedings before two different forums as a result of the same action. With this we do not quarrel; however, we believe it should stop there. Not so the Referee. At page 8 he asserts:

> "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."

He indicates further that the claimants should be afforded whatever remedy the Washington Agreement can give; that their relief comes not from violations of a rules agreement but must te based on violation of the Washington Agreement.

Then, he decides that claimants arc entitled to the difference between their actual earnings from the Carrier and what they would have received if the coordination had not been put into effect until the procedures of the Washington Agreement are followed. He reasons the claimants are entitled to that relief because the Adjustment Board did not grant a compensation award in connection with a rules violation claim. e In effect the Referee is granting a remedy for a rules violation and not compensation provided by the Washington Agreement.

The Referee agrees that Sections 6 and 7 accord the compensatory benefits which the Washington Agreement provides, but insists that they are independent of a breach of that Agreement and that the carrier must pay separately and in some other manner if the Agreement is breached. Regardless of what he might do if he were serving on some other tribunal, he has no authority to award such a remedy while he is serving under Section 13 of the Washington Agreement.

The Referee also erred when he embellished the damages erroneously awarded by including "fringe benefits and improvements in pay and fringes." Clearly this approach exceeds the basic provision and intent of the Washington Agreement with respect to protective payments which may accrue to individuals adversely affected by a bona fide coordination. If a compensatory award were proper and justified, the most that should have been done here was to reconstruct what would have occurred had notice of a coordination been served in January of *1962.*

e This was not a factor in Docket 128. No case involving the situation there presented has ever teen before the Adjustment Board. The Referee holds in Docket 128 that "the disposition cf this case is governed by Docket No. 68 and Docket No. 106." The claim in Docket 128 is substantially the same as the claim in Docket 68 (as well as in Docket 106). Nevertheless, having in Docket 106 awarded damages for what he supposes to have been a violation of the rules agreement but as to which the Adjustment Board pointedly did not rule, the Referee awards the same damages in Docket 128 without making my pretense of reconciling such award with his earlier action in Docket 68.

Further evidence that the Referee exceeded his authority and clearly intended to levy punitive damages against the carrier rather than to award affected employees that to which they might be entitled under the Washington Agreement is found in the section entitled "Affirmative Orders Directing Observance of Sections 4 and 5."

We think the Referee is inconsistent in his attempt to justify his conclusion. Additionally, he has failed to cite a proper basis in the Washington Agreement tc support the decision on compensation.

3; Affirmative Orders Directing Observance of Sections 4 and 5.

The-award made in Docket 106 is clearly excessive, The Referee says the carrier must make employees affected by the closing of the City Ticket Office whole by payment in full of back wages (including increases and fringe benefits) with deduction of other earnings "until Section 4 Notices are served and a Section 5 Implementing Agreement is achieved." Such a payment dating from January 1, 1962 until some future date when an Implementing Agreement may be reached with the Organization is beyond all reason. It is contrary to accepted principles of compensation for breach of contract, and is inconsistent with the Referee's decision that the protective period in this instance should run for five years to March 31, 1967. Certainly there is no proper basis for requiring the carrier to pay anything beyond a protective period. The Washington Agreement makes no provision for payment of benefits in excess of a five year period. To assess damages oi full wages from January 1, 1962 until the carrier now serves the necessary notices and an implementing agreement is reached is far in excess of any recognized principles for damages.

This Referee from his experience on this Committee is certainly aware of the improbability i i not thimpossibility of an implementing agreement

being consummated. He indicates that likelihood by noting that eventually the Committee could write such an agreement for the parties,

Reasonably and logically, if a monetary award were proper and justified, the most compensation thatcould be allowed affected employees should be on the basis of a reconstruction of what would have happened under the Washington Agreement had it been applied. The positions of affected employes would have been maintained during the period of notice and the negotiation of an implementing agreement (not to exceed ninety days) and thereafter those employees would have received the benefits of Sections *6, 7,* etc. of the Agreement in accordance with their compensation and service as of that time.

The Referee himself states that if agreement procedures had been followed, lesser amounts would have been payable to affected employees, If this be the case, then what is the basis for awarding more? He also holds that the aim here is compensation, not punishment. Again there is inconsistency, for more is prescribed than the Washington Agreement provides for affected employees. The Carrier is being punished not for its refusal, as the Referee indicates, to apply the Washington Agreement but because it did not become aware until after four years that a coordination had been effected. The Carrier did not "refuse" to apply the Washington Agreement. Failure to comply with the terms of an Agreement, in circumstances wherein there is serious question as to its application, and particularly where the carrier is satisfied that the Agreement does not apply, cannot fairly be characterized as a deliberate refusal. Actually, the Referee himself was responsible for the situation in this respect for he had ruled one way in Docket No. *56* and the opposite in Docket No. *68,* thus placing the Carrier in a position where it had to make a choice,

Inasmuch as the Referee held that disposition of Docket No. 128 was governed by Docket No. 68 and Docket No. 106, these remarks apply equally to

the Findings and Decision in Docket No. 128. They apply also to paragraph 2 of the decision in Docket No. 122, which as stated above was completely gratuitous. They also apply to Docket numbers 140, 141, and 142.

III. Implementing Agreements

In three cases in which the parties had. reached implementing agreements (which under Section 13 the Referee is empowered to interpret) the Referee's determinations indicate that he has followed his own views as to how matters should be handled, rather than what the agreements provided.

Two of these cases have been commented on above in connection with Section 6. Both of them involve the same agreement, which requires that when an employee is "displaced or deprived of employment" test period computations under Section 6 will be made.

In one of these cases (Docket 138) the claimant had been displaced within the meaning of the implementing agreement, wherefore a test period was determined and the railroad was obligated to furnish his test period earnings. It did not do so. As discussed above (Footnoted on page 6) the Referee used this failure to furnish information as the basis for excusing claimant from submitting his claim on the form provided, as the implementing agreement required, or even in form which would include all relevant information including the basis for his claim. The Claimant had secured a higher-rated position and made more money (except in one or two short months); he was not, by any stretch of the imagination, "placed as a result of such coordination in a worse position with respect to compensation." The six paragraphs of the Referee's discussion identified in his footnote 1 are completely irrelevant to any issue raised in that case.

In the other case, Docket 131, the claimant had not been "displaced" within the meaning cf that word in either the Washington Job Protection Agreement, the implementing agreement or the schedule agreement. Accordingly no test period could have been postulated, and no "test period averages" could have been computed. In excoriating the railroad for "withhold/ing/ test period information where it decides there is no eligibility for benefits" (an issue not involved in this case), the Referee injected an issue which was never argued before the Committee. The statement on page 5 of his decision that the railroad's argument, which was that no test period earnings need be computed because claimant was not displaced, "proves too much because it would remove from the protection of the agreement * * * those whose jobs are abolished" demonstrates that the Referee failed even to realize the provision of the implementing agreement under which the issue arose: the same provision required test period averages to be furnished when en employee was either displaced or "deprived of employment."

The remaining case in this category, in which the Referee followed his own views as to how matters should be handled rather than what the parties to implementing-agreements had themselves agreed upon, is Docket 115, in which the Referee held that because there had been a coordination in which the railroad had introduced "economies which reduced work opportunities" an employee had been adversely affected by the coordination. The implementing agreement in that case had the purpose and intended effect cf allocating among the employees on the respective portions of merged railroad such work opportunities as wore available at any traffic level; it was entered into in contemplation of the only "economy" involved, which was the use by the merged railroad of the more

favorable grade provided in a certain territory by one of the two former railroads. The parties themselves had devised the work allocation formula as the means for caring for this operating arrangement and thereby preserving to employees of the two former railroads their appropriate shares of work at whatever traffic level ensued. Ample evidence of a decline in traffic was before the Referee, and it was this decline in traffic which through the operation of the seniority system lad resulted in the claimant being adversely affected. The Referee's holding, in the face of the allocation provisions of the implementing agreement, that the coordination bad placed the claimant in a worse position, goes far to destroy the value and effectiveness of implementing agreements and works to the detriment of employees as well as the railroads.

IV. Jurisdiction - Subordination To The interstate Commerce Act

In Dockets 140, 141 and 142, the Referee, in addition to misinterpreting the Agreement with respect to the scope of its coverage and permissable remedies, has flagrantly misconstrued the law, as established by the Interstate Commerce Act and decisions of the Federal courts and the Interstate Commerce Commission, which (a) oust this Committee from jurisdiction and (b) relieve the carriers of the legal restraints of the Agreement. Compounding these errors of substantive law, he has denied the carriers fair opportunity to present the facts and has based his findings and conclusions upon allegations shown to be false. His attempted usurpation of unlawful jurisdiction, his repeated abuses of his discretion, his capricious perversions of the Interstate Commerce Act and decisions of the Federal courts and the Interstate Commerce Commission, as well as of the Agreement, and his arbitrary denial of a fair hearing have rendered

his purported "awards" in these cases unenforceable as to the immediate parties and valueless as precedents. Of more general importance to the Industry, and ultimately to the organizations as well, the effectiveness of this Committee in resolving disputes will soon be destroyed, if its decisions are reached and its proceedings conducted in the manner of these three cases.

The cases arose out of coordinations incidental to an acquisition of control of one carrier by another, pursuant to authority of an Order of the Interstate Commerce Commission, Section 5(11) of the Interstate Commerce Act provides that such an Order of approval by the Commission is "exclusive and plenary" and that the parties are relieved from all legal restraints against compliance with the conditions set forth in such order. It was shown that the courts have consistently held that these provisions overcome contractual as well as statutory obstacles to compliance, including obstacles found in employer-employee statutes and agreements.[g] The Commission's order prescribed a specific code of conditions to govern the adverse affect of the transaction upon employees, including arbitration procedures for the settlement of all disputes. At the request of the organizations, the Commission's order provided that those arbitration procedures were to be "mandatory" - i.e., exclusive - and declared that this was done for the specific purpose of preventing resort to §§ 13 of the Washington Agreement for

[g] See, e.g. Schwabacher v. United States, 344 U.S. 182, 200-201; Texas v. United States, 292 U.S. 522, 533-534; Kent v. Civil Aeronautics Board, 204 F. 2d 263, 266 (Cir. 2); cert. den. 347 U.S. 826; Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Company, 314 F. 2d 424, 429-430 (Cir. 8) cert. den. 375 U. S. 819.

settlement of disputes.!! The Order was upheld by the Federal courts in all respects, except for a remand to the Commission to determine whether §§4, 5, and 9 of the Agreement were to be included or excluded from the Commission's conditions. A dispute arose when the carriers consummated the transaction and completed the coordinations which had been proposed to the Commission, without first observing the requirements of §§ 4 or 5 of the Washington Agreement, neither of which was mentioned in the code of conditions. When the organizations resorted to this Committee for enforcement of those requirements, rather than the mandatory arbitration procedures which had been ordered by the Commission at the organizations' request, the carriers challenged the Committee's jurisdiction.

In direct violation of the Commission's Order making its own arbitration procedures mandatory for the settlement of all disputes, and of the statutory provisions and judicial decisions giving Interstate Commerce Commission Orders precedence over all conflicting legal obstacles and restraints, the Referee has upheld this Committee's jurisdiction and attempted to apply §§ 4 and 5 of the Agreement without awaiting determination by the Commission in compliance with the Supreme Court's Order, The tortuous mutilation of plain English and misapplication of the law by which he has reached his conclusions attest to their lack of validity.

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h The Commission said: 'The possibility also exists that a carrier will refuse to accept arbitration procedures under Paragraph 8 and require employees to invoke the provisions of Section 13 of the Washington Agreement, which involves a permanent committee whose decisions ray be subject to protracted delays if a claim is made. In our opinion, fairness and equity require adoption . . . of the condition urged by the issues with respect to arbitration, which will make mandatory the submission to hinding arbitration of the disputes not settled by agreement between the carrier and the employee." 317 i. C. C. 557, at 566.

First, he has ruled that the Commission's Order does not mean what it plainly says, holding that the language, making the Commission's procedures "mandatory" was merely an expression of opinion that those procedures are "superior," not a proscription of the substitute procedure of §13. Enforceable awards of this Committee cannot rest upon such complete distortion of plain English, irrespective of whether the distortion is deliberate or the result of carlessness or inability to understand.

The main thrust of the Referee's ruling, however, is that the Commission is powerless to oust the §13 Committee from jurisdiction, or to prescribe conditions superseding the provisions of the Agreement, "if it wanted to." Throughout his report he has refused to accept the fact that the Interstate Commerce Act is the supreme law of the land governing the benefits and protections to be accorded employees affected by the unification transaction approved by the Interstate Commerce Commission, and that that Act gives Orders of the Interstate Commerce Commission respecting such matters the full force of the statute. He has attempted to overcome the plain language of §5(11) of the Act making the Commission's orders "exclusive and plenary" and relieving the parties of all conflicting legal obstacles to compliance with its conditions, by resorting to speculation that if the language of that Section had been intended to mean what it clearly says, "it would have meant a major legislative battle" over its enactment in 1940, and that "it staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time." His attempt is unsupportable in either law or fact. Statutory language, like §5(11), which is clear and unambiguous on its face does not permit resort to extraneous matters of speculation concerning a hidden contrary intent. Moreover, subjective speculation as to how much legislative opposition there would have been if the statute meant what it clearly says is not a reasonable

basis for-construing the statute contrary to its language. In addition to its legal invalidity, the Referee's entire factual premise for his speculation is false. The pertinent provisions of §5(11) did not make a "radical change," but on the contrary had been in effect in one sub-section or another of §5 since 1920 and were merely re-designated as sub-section (11) in the Transportation Act of 1940.

Like others before him, the Referee has attempted to shrink the broad, unrestricted operation of §5(11) to "corporate anti-trust and state and local regulatory laws, " an effort which has forced him to disregard, brush aside or mutilate the language of the statute, as well as express pronouncements of the Federal courts to the contrary. The specific holding in Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Company, 314 F. 2d 424, 432, (based upon an analogous ruling in Texas v. United States, 292 U.S. 522, 534) that there was no express or implied exception from the operative provisions of §5(11) of the Railway Labor Act, he has attempted to brush aside as "not persuasive." The principle established in Texas v. United States, supra, and Schwabacher v. United States, supra, that §5(11) operates to relieve contractual as well as statutory restrictions, the Referee has attempted to dismiss as "hardly apposite," apparently upon the erroneous assumption that §5(11) somehow silently distinguishes between private contracts between employer and employees on the one hand, and private contracts on the other, in so far as the exclusive and plenary power of the Interstate Commerce Commission is concerned. Such disregard for legal principles and specific rulings by the Supreme Court and other Federal courts cannot serve as the basis for a valid decision of this private Committee.

In attempting to distinguish between Kent v. Civil Aeronautics Board, supra, and Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co., supra, in which the courts of appeals expressly held the power of the Civil Aeronautics Board and the Interstate Commerce Commission, respectively, to override labor-management agreements, as part of their authority to regulate mergers, the Referee has resorted to double distortion of the last sentence of §5(2) (f) of the Interstate Commerce Act, in addition to the mutilation of §5(11). First, he has ruled that in specifically granting exemption to agreements entered into subsequent to the enactment of §5(2) (f), the sentence thereby granted equal exemption to the Washington Agreement, executed prior to such enactment. As any student of law, or even of English, should know, the effect was just the opposite. When Congress specifically confined its grant of exemption to subsequent agreements, it unquestionably intended a different rule for prior agreements. If it had intended the exemption to also apply to prior agreements, there would have been no occasion to mention subsequent agreements - it would have applied to all agreements. Moreover, under the Referee's interpretation of the exemption as also applying to the Washington Agreement there would have been little if any reason for the statute to authorize the Commission to prescribe any employee conditions, since substantially all railroads and substantially all employee organizations were parties to the Washington Agreement. In fact, the Referee's interpretation would unquestionably be unacceptable to the organizations themselves because its obvious effect would be that the Washington Agreement would take precedence over any conditions the Commission might prescribe under §5(2) (f) in every case, nnd thereby always substitute the less generous compensatory provisions of the Agreement for the more generous compensatory

provision's of §5(2)(f). Since the exemption of the last sentence of §5(2)(f) thus does not apply to the Washington Agreement, the Referee's attempted distinction of the Kent case as not involving a statute exempting private agreements, is seen to be meaningless - these dockets likewise do not involve an exempted private agreement.

The Referee has compounded his misunderstanding of the last sentence of the Section by misconstruing it as merely providing for "co-existence" between Commission Orders and §5(2)(f) agreements. His construction is legally erroneous and operationally impractical, particularly as related to the Washington Agreement, the provisions of which conflict with the Commission's conditions in substantially every respect. The sentence grants an exemption, and its legality as well as its practical effect, long recognized by the Commission, is that agreements coming within its legal limitations supersede any conflicting set of conditions which the Commission may prescribe. In fact, where such agreements are made prior to the Commission's decision, the Commission frequently refrains from prescribing conditions concerning the employees covered by such agreements. To say that the conditions prescribed by the Commission must "co-exist" with Agreements conflicting therewith would be to permit semantics to produce a nonsensical, chaotic, and self-frustrating result, It cannot be presumed that the Congress intended such results. One or the other must take precedence. The only sensible reading of §§5(11) and 5(2)(f) is that the Commission's conditions shall be exclusive and plenary and take precedence over all other arrangements for the protection of interests of the employees affected by an approved unification, except where a specific agreement for such protection has been entered into by the carriers and employees subsequent to the enactment of §5(2)(f), in which case such Agreement shall

take precedence over end supersede the Commission's conditions. Thus, the Referee's attempted distinction of Brotherhood of Locomotive Engineers on the ground that "no challenge to the last sentence of §5(2) (f) validating employee protective agreements was involved" is meaningless - no such challenge was involved here either.

The decision of the United States Court of Appeals in the latter case is clearly not only in point, but determinative here. The main problem before the court was whether, under §5(11), an Interstate Commerce Commission Order under §5(2) (f) governing adjustment of resulting labor disputes takes precedence over conflicting provisions in work rules and the Railway Labor Act, where the Commission's order had adopted a stipulated set of conditions providing for compulsory arbitration. The Court held that the order takes such precedence, on the grounds of: (a) "the plain language of §5(11) conferring exclusive and plenary jurisdiction upon the Interstate Commerce Commission," with "no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of §5(11)"; (b) the principles followed in the Kent case; (c) the Commission's past exercise, with judicial approval, of its jurisdiction to settle Labor disputes arising out of mergers by compulsory arbitration;[1] and (d) the fact that the Supreme Court's decisions in Brotherhood of Maintenance of Way Employees v. United States, 366 U. S. 169, Railway Labor Executives' Association v. United States) 339 U. S. 142, and U. S. v. Lowden, 308 U. S. 225, "afford very substantial support for the view that Congress intended the Interstate Commerce Commission to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers". The Referee's ruling that the sentence of

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1 Arnold v. Louisville & Nashville R. R. (D.C. M.D. Tenn.) 180 F. Supp. 429-435-435 and New Orleans & Northeastern RR. Co. v. Bozeman, 5 Cir. 312 F. 2d 264.

§5(2)(f) takes the instant cases outside the operation of the principles of that decision is untenable. The decision and the authorities cited therein clearly support the supremacy of the Commission's Order over the Washington Agreement, as to both the explicit provision ousting this Committee from jurisdiction and the implicit provisions superseding the remainder of the agreement.

It is clear from his decision that the Referee has failed to understand the basic purpose of the Transportation Act, as expressed in §5 thereof. The Supreme Court of the United States has repeatedly declared that purpose to be to promote and facilitate railroad unifications which, like the transaction here involved are found, following public hearings, to be consistent with the public interest. See County of Marin v. United States, 356 U.S. 412, 416-17; Brotherhood of Maintenance of Way Employees v. United States, 366 U. S. 169, 173. Because of that basic failure and his failure to recognize the function of §5(11) in the statutory scheme for the accomplishment of that purpose, the Referee has mistakenly assumed that the Washington Agreement is the only "key which unlocks the rules preventing transfer and consolidation of work," and has failed to see that §5(11) is the master "key," which expressly unlocks all legal restraints and obstacles to compliance with the conditions ordered by the Commission, whether found in other statutes, in the work rules, or in the Washington Agreement itself.

The foregoing errors have caused the Referee to misconceive the power of the Interstate Commerce Commission, to misconceive his jurisdiction in direct violation of the Commission's Order specifically proscribing that jurisdiction, and to fail to see that the Commission's prescription of a complete, self-contained code of conditions governing benefits for employees

affected by the approved transaction relieved the parties from compliance with the entire code of conditions in the Agreement, which conflicts with the Commission's code in *every* essential. Those misconceptions have, in turn, led him into other serious errors.

As indicated, the Interstate Commerce Commission now has under consideration, on remand from the United States Supreme Court, the question whether §§4, 5, and/or 9 of the Washington Agreement shall be included in the Commission's conditions. The Referee has erroneously ignored two important effects of that remand which strongly militate against action *of* any kind by this Committee and particularly any attempt by the Committee to apply §§4, 5, 13 or other provisions of the Washington Agreement. In the first place, it must be remembered that the United States District Court in Railway Labor Executives' Association v. United States, supra, upheld the Commission's Order which had made no express inclusion of any provision of the Washington Agreement until after the expiration of 4 years. The Supreme Court's express limitation of the appeal and the remand to §§4, 5, and 9 of the Agreement implicitly negates the inclusion of any other provisions of that Agreement. The Referee's attempted application of §§6, 7 and 13 of the Agreement thus squarely conflicts with the clear implications of the Federal Court decisions.

Second, and of equal or greater importance, is the Referee's *error* in attempting to apply and enforce §§4 and 5 of that Agreement, in the face of the Supreme Court's Order to the Commission to determine whether those specific Sections shall apply. In Switchmen's Union v. Central of Georgia Railway, 341 F. 2d 213, 217, involving suits by *some* of the same organizations against the same carriers, alleging the same violations *of* §§4 and 5 of the Washington Agreement as in these dockets, the Court of Appeals for the Fifth

Circuit held that it would be inappropriate even for that high Federal Court to act upon the claims in the light of that remand. The Court said: 1

> "No final disposition can be made of the appeal of Switchmen's Union v. Central of Georgia & Southern Railway Co. because the basis of their attack in the trial court is the Washington Agreement. **** Since, therefore, the Order here litigated has been remanded to the Commission for further consideration it would be inappropriate for this Court to proceed further in the matter until full effect has been given to the Supreme Court's mandate."

Although noting that these cases had been brought to his attention and that the carriers had requested him likewise to defer action upon the organizations' requests for enforcement of those same sections until the Interstate Commerce Commission had acted, the Referee has arbitrarily refused that request, declaring that if the Commission imposes the Sections, a second ground for his decision would be provided. The carrier members of the Committee submit that this private Committee, and the Referee acting in its name, owe the Order of the Supreme Court at least as much respect as does the United States Court of Appeals. Moreover, the Referee's announced reason for refusing the carriers' request is as unsound as it is arrogant. Under his erroneous view that no order of the Commission can supersede the application of the Agreement, he has ignored the possibility that the Commission's Order may exclude the application of §§4 and 5. In such event, the Commission's Order obviously must prevail under §5(11) of the Act. Otherwise the statute and the Orders of the Supreme Court and the Interstate Commerce Commission would have been rendered futile by the Referee's decision. Implicit in the Supreme Court's remand of the case to the Commission to decide whether §§4 and 5 of the Washington Agreement shall apply to adverse effects upon employees resulting from the approved transaction, was the recognition that under §5(11)

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1 An identical holding was made in Brotherhood of Railway Clerks v. Southern Railway Co., 341 F. 2d, 217 decided at the same time.

of the Act, such decision by the Commission will be plenary and exclusive, and will govern whether those sections apply. The Referee's holding that the sections apply regardless of what the Commission may decide was a misguided attempt at usurpation of non-existent authority.

The Referee cites, as precedents for his assumption of jurisdiction and attempt to apply the Agreement, his own decision in Docket No. 64 and an early decision of another Referee in Docket No. 27. Apart from the fact that neither of those cases involved a Commission order expressly relieving the Commission of jurisdiction - a difference which the Referee has failed to perceive - the various subsequent decisions of the Federal Courts holding the law to be contrary to the rule followed in those dockets destroy the validity of the latter as precedents.

As the Referee has indicated, the carriers appeared specially to contest the Committee's jurisdiction, in the light of (a) the order of the Commission specifically removing such jurisdiction, (b) the statute and numerous Court decisions giving precedence to the Commission orders under §5 of the Act, and, subsequently, (c) the pendency before the Commission, at the direction of the Supreme Court, of the question whether §§4 or 5 of the Agreement shall be applicable to the employees in question. As seen, they specifically requested the Committee to defer all determinations of fact until the questions of jurisdiction and of the applicability of §§4 and 5 of the Agreenent had been settled. When the Referee announced his tentative purported decision on the merits, as well as on jurisdiction, the carriers, without abandoning their position on jurisdiction or on the applicability of those sections, alleged, and submitted proof in the form of representative examples, that the "evidence" upon which the organizations' claims were exclusively based inherently failed to support the inferences which the Referee had tentatively

proposed to make from it. The carriers offered to present the complete facts to show the factual invalidity of the claims submitted by the organizations, and specifically requested a hearing on the facts for that purpose. The Referee, notwithstanding his protestations that default judgments are alien to the arbitration process, arbitrarily restricted the areas In which the carriers might even make written objections to his tentative decision, and denied their request for a hearing, on the grounds that they had had opportunity to present the facts at the time of their initial contest of the jurisdiction.

One of the many advantages of the arbitration process is that its informality and flexibility facilitate the ascertainment of all the pertinent facts, as compared with more formal procedures. But no procedural technicality must be permitted to prevent its getting at all the facts, To deprive any party of a requested opportunity to present material facts not theretofore made available to the Committee, on the hypertechnlcal procedural ground that it had failed to present such facts while making its bona fide contest of the jurisdiction on bases such as were here advanced, Is to abuse the arbitration process and destroy its efficiency. In taking such action in these cases, the Referee has deprived the carriers of a fair hearing and the Committee of the-acts necessary to fair decision on the merits, wholly apart from its lack of jurisdiction,

One of the cases (Docket No. 140) involves still another instance where the Referee has disregarded the language of the Agreement, as well as the decision of the Interstate Commerce Commission, in favor of what he thought they should have provided - namely, protection for employees of a carrier not Involved in any "coordination," as defined in the Agreement.

-Three prior decisions (Docket Nos. 51, 47, and 59 - the 1st named by the sane Referee) had held that the Agreement does not cover employees of a railroad from which work is withdrawn by a second railroad and transferred to a third railroad. In Rocket No. 140. the Referee has now refused to follow those precedents, on the ground of decisions of two District Courts that Section 5(2)(f) applies under certain circumstances to employees of a non-participating railroad from which work is withdrawn.

His decision cannot stand. Section 5(2)(f) covers all "results" of a merger transaction. The Agreement, on the other hand, expressly limits Its coverage to "coordinations," which §2(a) defines as "joint action by two or more carriers whereby they unify /etc./ their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities" (emphasis supplied). No such "coordination" took place. Moreover, the employees allegedly affected were not employees of a "carrier involved" within the definition of §6(a) of the Agreement or a "carrier participating in a . . , coordination" within the meaning of §7(a). The Referee also has overlooked entirely two other facts which were called to his attention, and which conclusively destroy his ruling. First, the Interstate Commerce Commission expressly held with respect to the transaction relating to these dockets that in circumstances precisely similar to those presented in this Docket, even !%(2)(f) did not cover such employees. Southern Railway Company - Control - Central of Georgia Railway Company, 317 I. C. C. 557, X7-568. Second, on judicial review that ruling was specifically upheld by the same Federal Court which had decided the earlier case relied upon by the Referee, on the ground that the same construction placed upon its prior decision by the present Referee was untenable. Railway Labor Executives'

Association v. United States (D. C. E. D. Va. 1964) 226 F. Supp. 521, 525. The following language of the Court in disposing of that question was equally applicable in this docket:

> "/5/ Frisco's Birmingham yard is manned by Frisco employees whose seniority rosters and interchangeable assignments are intermingled with other Frisco employees whose duties have nothing to do with the yard operation. Central's withdrawal from Frisco's Birmingham yard may have been an economical loss to Frisco and some of Frisco's employees may have been affected as a result thereof, but the withdrawal does not sufficiently touch the transaction here under discussion to warrant 5(2)(f) protection. Further, it could have been unilaterally accomplished at any time on six months' notice independent of Commission approval."

The Referee's decisions in these dockets have mutilated the specific limitations in the Agreement, have recklessly abandoned precedent, have misapplied judical decisions dealing with wholly different factual situations, and have disregarded the Commission and judicial decisions which destroy, both legally and factually, the precedents upon which he has relied. His irresponsible handling of Docket Nos. 140, 141 and 142 threaten the efficacy of the Committee. They cannot stand.

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The Carrier Members of the Section 13 Committee for reasons of which the above discussion is illustrative hereby record their dissent to Awards 103; 106; 108; 115, 121; 122; 125; 127; 128; 129; 131; 133; 135; 137; 138; 139; 140; 141, and 142.

December 16, 1966

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THE OHIO STATE UNIVERSITY
COLLEGE OF LAW
1659 NORTH HIGH STREET
COLUMBUS, OHIO 43210

January 9, 1967

Mr. W. S. Macgill, Chairman
Carrier Members
Room 474, 517 West Adams Street
Chicago, *Illinois 60606*

Mr. G. E. Leighty, Chairman
Employee Members
3360 Lindell Boulevard
St. Louls, Missouri

Gentlemen:

I have received the Carrier Members' General Dissent. I do not deem it appropriate to respond in any detail. The Referee who handled the assignment before mine may properly have decided otherwise in view of the general brevity of his opinions. My long and detailed opinions, which seemed appropriate to the length end complexity of the parties' arguments and our ❑ utual discussions, I am content to have speak for themselves. However, a few observations do seem appropriate.

I will never understand by what warrant a party to a dispute regards himself 23 free to make abusive comments when the provocation to do 30 Is that he failed to be persuasive. The matter is all the more unintelligible in thls setting, because tbe cases were painstakingly considered and the arguments of the parties were heard at *greet* length and repeatedly, both orally asd in writing, so a3 to insure that the parties had ample opportunity topresent their views and that I bad ample opportunity *to* understand their positions fully. The Committee's procedure insured that all members had time not only to argue initially but also to address themselves to the, proposed decisions and awards.

It should be noted that the Dissent's descriptions Of the decisions is not always accurate and on occasion is incomplete - for example the incomplete quotation Out of context Of a passage from page 7 of Docket 106.

Suffice it to say that most of what was presented in the Dissent was presented, rather more intelligibly and in even greater detail, during the extended proceedings. I understood quite well the arguments made; what I sometimes failed to understand were the conclusions urged to flow from these arguments. In all of the 33 pages of the Dissent, I find only

one comment which indicates any lapse on my part (the first full paragraph on page 19). But the point was a very minor one; the argument to which it was eddressed was the Carrier attempt to readinto the protective agreement use of the word "displacement" the meaning of the same term in its rules agreement. The conclusion that the rules agreement provision is addressed to 8 problem different from that involved in coordinations remains valid. For some reason, *Carrier* representatives did not point out the mistake when the draft decision was before the Committee for comment.

Perhaps it is pertinent to note that after I presented my tentative views to the Committee, the very views descanted upon in the Dissent, both Organizations and Cerrlers requested me to make a ruling in Docket Number 119 which otherwlsa went beyond my authority as Referee. Also it shouid be made clear that far from limiting the Carriers' opportunities to be heard in the Southern cases, I initiated the 'request for comments and evidence to 'be submitted by the absent Carriers and provided weeks of time for their submission and, indeed, made additional requests and afforded additional opportunities *'for* the Carriers to submit comments and evidence. *On* the basis of some of the evldecce submitted in response to my invitation I ruled in favor of the Carriers on some issues. Where the record was inadequate to make a determination at this juncture, particular issues were left open for further proceedings (if the parties cannot settle them).

The broad scale attack upon many of the decisions obscures the fact that the major issue contested within the Committee, which consumed a very large *part of* our time and attention, was the "extra issue" to which the 33 page Dissent allocates not quite one page. This is not to caii into question the genuiness of Carrier representatives' disappointment in not prevailing *on* many of the other points discussed in the Dissent. But lt shows how post-award controversy may fail to resemble the actual dispute and deliberations preceding the award.

May I take this occasion to wish you and your colleagues a happy new year.

Sincerely yours,

Merton C. Bernstein

Merton C. Bernstein

co: National Mediation Board

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
AFL—CIO—CLC

C. L. DENNIS International President

File 469-2-11

Subject: Washington Job Protection Agreement - Awards - Section 13 Committee

Circular No. 49-69

July 7, 1969

ALL RAILROAD GENERAL CHAIRMEN

Dear Sirs and Brothers:

On June 12 Referee Dolnick handed down decisions in the following dockets which he had heard on April 29 and 30:

Docket No.	Parties	Submitted by	On
149 & 150	Brotherhood of Railroad Trainmen vs. Erie Lackawanna Railroad Company	Union	S-lo-65
155	Brotherhood of Locomotive Firemen and Enginemen vs. Erie Lackawanna Railroad Company	Union	S-18-65
157	The Railroad Yardnasters of America vs. Erie Lackawanna Railroad Conpany	Union	l-6-67
159 6 160	Railroad Yardmasters of America vs. Erie Lackawanna Railroad Co.	Union	3-14-67
1.63	Switchman's Union of North hnerica vs. Southern Pacific Company and Chicago, Rock Island and Pacific Railway Co.	Union	9-14-67
165	Brotherhood of Railroad Trainmen vs. St. Louis-San Francisco Railroad Co.	Union	3-5-68

For your information and records, I an enclosing a copy of Referee Dolnick's decisions in these cases. You will note that the Carrier representatives wrote a dissent in connection with Docket No. 163.

Sincerely and fraternally,

E. L. Dennis

International President

cc: Grand Lodge Officers
Regional & District Representatives
Organizers