AWARD NO. 377
Case No. SG-35-E

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Central Railroad Company of New Jersey and Brotherhood of Railroad Signalmen

QUESTIONS AT ISSUE: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Central Railroad Company of New Jersey that:

(a) Carrier violated the February 7, 1965 Agreement when, on or about March 27 and 31, 1972, it abolished the positions held by Messrs. M. Hodor, W. Leindecker, T. Holden, R. Pittenger, E. F. Gillespie, E. Crowley, D. McGinley, E. Burkhardt, H. Rock, C. McTague, R. Reidy, H. R. Huber, W. A. Moser, P. Solshi, K. Horn, R. Lauer, and R. Fehnel--all on the Pennsylvania Division Seniority Roster--without (1) serving a notice pursuant to Article III, (2) making any attempt to negotiate an implementing agreement to provide for the transfer of employes or rearrangement of forces and, (3) retaining protected employes in compensated service thereafter.

(b) Carrier violated the Washington Job Protection Agreement of May 1936 when its operations in the State of Pennsylvania were transferred to and/or assumed by the Lehigh Valley Railroad Company, effective April 1, 1972, without an advance notice pursuant to Section 4, or an implementing agreement pursuant to Section 5.

(c) As a result of the foregoing, Carrier should now be required to restore all signal employes to the status they held immediately prior to the changes, compensate them for any and all loss of wages and other benefits from the time they were first adversely affected,

make no further changes unless and until proper notices are served and implementing agreements negotiated, and allow any and all benefits to which any signal employes may be entitled under any existing agreement such as--but not limited to--compensation, fringe benefits, moving and/or transfer allowances, separation allowances, etc. This to include the employes named in paragraph (2) above, and any other signal employe who has been or may be adversely affected by the chang.

OPINION
OF BOARD: Carrier is under the jurisdiction of the U. S. District Court, New Jersey. In 1971, it applied to the Court for the right to abandon its lines in Pennsylvania. It sought and was granted permission to file with the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act, as amended, for a certificate of present and future public necessity which would allow it to abandon such lines, constituting about 175 of the 591 miles of owned and leased lines.

On March 31, 1972, pursuant to an order of the Court, Carrier temporarily ceased operating its lines in Pennsylvania, continuing to operate in New Jersey. The abandonment became permanent following an order of the ICC. On April 1, 1972, the Lehigh Valley Railroad began operating over Carrier's former lines in Pennsylvania, by virtue of an ICC order to that effect.

As a consequence of the abandonment by Carrier a number of employees lost their jobs. They claimed the benefits of the Washington Job Protection and the February 7 Agreements.

A number of procedural and substantive questions have been raised by the parties. One issue is Carrier's contention that, aside from other considerations, the February 7 Agreement could not be effectuated in this case because of the "impossibility of performance." The February 7 Agreement contemplated that Carrier would continue to operate its business, rather than abandon its entire operation in Pennsylvania, Carrier argues. Thus, it was said, a fundamental, changed condition "excusing the promisor" from his obligation, because the subsequent non existence "of the resources necessary for the fulfillment o

According to Carrier, the discretionary nature of the abandonment sections of the Act permit the ICC to set aside pre-existing agreements between the parties which contain more liberal benefits than the Commission deems suitable. In support, a case involving another regulatory agency, the CAB was cited (Kent v. Civil Aeronautics Board, 204 Fed. 2d, 263), which held that "a private contract must yield to the paramount power of the Board to perform its duties under the statute." Consequently, Kent held that the Board's orders were not invalid because they conflicted with a collective-bargaining agreement. Under that analogy, the ICC, unhampered in abandonment cases by the mandatory requirements of Section 5(2)(f), certainly seems to possess the authority to set aside any portion of an agreement between the parties, including the February 7 Agreement and the Washington Agreement.

A primary question in this case is whether the ICC did set aside the February 7 Agreement, since all but three Claimants are protected under it; Claimants Horn, Lauer, and Fehnel would be entitled to the Washington benefits, at most, if that Agreement survived here. Its decision is not perfectly clear. Carrier contends that the ICC, not the Disputes Committee, should interpret an ICC order, if interpretation is required. The Organization holds that the February 7 Agreement is in effect, it is binding, and its conditions should be imposed on Carrier by the Committee.

Whether or not the February 7 Agreement is binding on Carrier is a matter for the Commission. While the Committee can interpret and apply the Agreement, it cannot overrule the Commission and award those conditions, if the Commission meant to withhold them in this case. Indeed, the Commission asserts its own power when it says (pp 123-124) that even if Carrier "assented to high-cost employee guarantees, we would refuse to impose the elaborate conditions referred to in the brief."

Yet, while certain conditions such as severance and vacation pay for all employees are provided by the ICC decision, there appears to be no definitive statement that some or all of other pre-existing protective guarantees are to be eliminated for those employees who were protected under them. Where so much is at stake for both employees and Carrier, it would be foolhardy to base this Award on language not absolutely explicit, when ultimate power of interpretation does not reside in the Disputes Committee but in another body.

This approach is in accord with two BRAC cases recently decided by the Disputes Committee in Awards No. 374 and No. 375, also involving Carrier's abandonment of its Pennsylvania lines.

If the Commission intended to make either or both job-protection Agreements applicable to protected employees, Carrier's obligations under them can easily be determined. If they were not intended to survive in this situation, then the Disputes Committee has no authority to grant protective benefits. For that reason Carrier's proposal to refer the question to the ICC for interpretation is upheld.

AWARD

The case is remanded to the parties so that they may obtain from the Interstate Commerce Commission a ruling as to whether employees were to receive the benefits of other Agreements, under the decision in Finance Docket No. 26659. The case is held in abeyance pending the interpretation sought.

Milton Friedman, Neutral Member

Dated: Washington, D. C.
March 22, 1974

> Pennsylvania abide by any agreement reached between CNJ employees and the employees of the acquiring carrier as to an equitable division of the remaining work; and (2) that we impose upon CNJ and the acquiring carrier or carriers appropriate protective conditions, in no event less than those required under the provisions of section 5(2)(f), and as are appropriate in this type of transaction. It also requests that any abandonment permitted herein should be conditional upon another carrier actually "taking over".

The ICC neither mandated the Section 5(2)(f) conditions nor made reference to the Washington Agreement's conditions as sought by the Organization here. Rather it held on Page 123:

> Imposition of protective conditions is not mandatory under the statute governing section 1(18) applications. However, they may be imposed in our discretion based upon the facts and circumstances under consideration. We affirm our earlier holdings herein that the applications of CNJ and LV are properly before us under the provisions of section 1(18). We reject the employees' arguments to the contrary.

As the foregoing indicates, Section 5(2)(f) and the Washington Agreement were not invoked by the Commission because it acted under Part I, Section 1, 18 and 20 of the Interstate Commerce Act, which provides:

> Section 18
>
> ...no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment...

Section 20

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

Thus abandonment, not coordination, was found by the ICC and under Paragraph 20 the Commission has the authority to fix "such terms and conditions as in its judgment the public convenience and necessity may require." This discretionary authority is far-reaching. It is magnified by comparison with the limitations on the Commission in Section 5(2)(f) which is couched in mandatory terms. That provision states that the Commission shall require certain protective arrangements so that employees will not be placed in a worse position."

The Commission has held that the Washington Agreement is not superseded by conditions which the ICC imposes in cases of joint actions sought by carriers. It has taken the position that Carriers must first comply with collective-bargaining agreements before the ICC-imposed conditions become effective. But there is no evidence that any of this pertains to abandonment cases.

In fact, the ICC originally disclaimed the power to fix protective conditions in such cases. But in 1942, in Interstate Commerce Commission et al. v Railway Labor Executives Association (315 U.S. 373, March 2, 1942), the U.S. Supreme Court held that under Section 1(18) of the Act, the Commission did have such authority in abandonments. What is significant in this Section of the Act is the absence of mandatory conditions like those found in Section 5(2)(f). Consequently the Commission has great latitude in determining what kind of benefits it chooses to bestow upon employees when an abandonment is involved.

the contract" created an objective impossibility to perform.

Aside from whether or not adequate resources are lacking to fulfill contractual obligations, the February 7 Agreement was executed under conditions where Carrier should have contemplated the possibilities emanating from its financial difficulties. As of 1964, the year in which the February 7 Agreement was being negotiated, Carrier had had a series of annual losses at least back to 1958. None was under $2,000,000. In 1964 it was over $8,000,000. While losses rose considerably in later years, it did not require any great acumen in 1964 to anticipate that eventually some stringent measures would undoubtedly be required. Obviously partial abandonment of those lines which were draining the Company's resources would come within those possibilities.

Moreover, the February 7 Agreement is a blanket grant of protection to qualifying employees, limiting protection only for specific reasons, as in Article I, Sections 3 and 4. Abandonment is unmentioned, although not long before the February 7 Agreement Carriers in 1964 had negotiated a protective agreement with the Shop Crafts, which specifically mentioned abandonment as one reason, among others, why Washington Agreement benefits would be paid. Thus, although the February 7 Agreement is just the opposite, granting benefits except where there is a named basis for relief, abandonment went unmentioned. Had Carriers intended that such an eventuality would justify suspending or terminating benefits, it could have negotiated it, along with the decline-in-business formula or emergencies. Given the blanket nature of the protective guarantees, intended exceptions should have been identified.

The Organization argued that Carrier improperly expanded the bases of its position in its written presentation submitted during the Committee's deliberations. Actually the detailed arguments in Carrier's written statement were largely the development of positions taken in Carrier's original submission, constituting more refined and analytical appraisals of earlier contentions on the Washington Agreement and the February 7 Agreement. As to the jurisdictional argument raised following the original submissions, if the Disputes Committee actually lacks jurisdiction it cannot be conferred by silence on the point at earlier stages of handling.

One of the major substantive questions is the applicability of the Washington Agreement. Section 2(a) of that Agreement provides:

> The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

Section 3 refers to two or more carriers which "undertake a coordination." Section 4 describes a requirement for notice to interested employees by "each carrier contemplating a coordination." None of this is present in the instant situation. There was no contemplation of a "coordination" with Lehigh Valley. Carrier's action was a unilateral one, prompted by an aim to survive, to be attained by divesting itself of a costly portion of the operation with approval of the District Court and the ICC.

As Carrier's submission notes, "CNJ had no voice in the utilization of these employes formerly on the Pennsylvania Division, no control over the plant, and no income from the operation in Pennsylvania." At the time that the ICC approved Carrier's abandonment of the Pennsylvania lines, the only relationship to Lehigh Valley was that the latter had an ICC order to operate over those lines. Page 102 of the ICC Opinion in Finance Docket No. 26659 states, in part, in denying the Organization's contention that a coordination was involved:

> Actually LV has not sought authority to purchase any portion of the properties of CNJ or L&NE. Conceivably, one or more appropriate lease applications may be required in the future and such would be considered on its own record.

In Finance Docket No. 26659 the ICC was requested by the UTU to apply the protective conditions set forth in Section 5(2)(f) of the Interstate Commerce Act, which is applicable to a coordination. The ICC opinion notes on Page 97:

> In view of its contentions and supporting arguments, UTU requests us to require the following: (1) That any carrier acquiring any portion of the CNJ's operations in