AWARD NO. 509
CASE NO. SG-67-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Brotherhood of Railroad Signalmen

and

) Southern Pacific Transportation Company

QUESTIONS AT ISSUE:

A. Carrier violated Attachment 'F' of the current Signalmen's Agreement (February 7, 1965 Agreement) when on or about September 13, 1993 it implemented organizational changes which resulted in Claimant S.A. Kusanovich being placed in a worse position with regard to his compensation and denied him payment of his guaranteed rate.

B. Carrier should now be required to calculate the Claimant's protected rate, in accord and with Article IV, Section 2 of Attachment 'F', and compensate the Claimant the difference between his actual compensation and his protected rate, beginning September 13, 1993." **Carrier's File No. SIGP 205-7-22. General Chairman's File No. SWGC-755. BRS File Case No. 9492-SP.**

OPINION OF THE BOARD: Claimant is a protected employee within the definition of the February 7, 1965 Job Stabilization Agreement, as amended (Attachment F). On September 13, 1993, Claimant was displaced from his position of Signal Maintainer, headquartered at Salinas, California, as a result of the abolition of another Maintainer's position. Claimant exercised his seniority to displace onto a Signalmen's position at Morgan Hill, California.

The Organization contends that Claimant was entitled to be retained in service and not placed in a worse position with respect to his compensation and working conditions pursuant to the February 7, 1965 Agreement. The Organization submits that a protected employee's eligibility for benefits is only limited by the exceptions enumerated in Articles I and IV of the February 7, 1965

Agreement. Last, the Organization argues that Claimant's entitlement to protective benefits is not contingent on the Carrier first engaging in an operational, technological or organizational change but, the Organization alternatively argues that the Carrier did implement an organizational change.

The Carrier submits that Claimant was involved in a chain of displacements emanating from a system-wide furlough of approximately 1,500 employees.[1] According to the Carrier, the huge force reduction was a desperate measure brought on by severe budgetary constraints. Relying heavily on the decision of Special Board of Adjustment No. 605, Award No. 497, the Carrier contends that inasmuch as the massive downsizing did not constitute a technological, operational or organizational change, Claimant is not entitled to benefits under the Job Stabilization Agreement.

Award No. 497 stated in pertinent part:

> It is clear from the record and of facts of which arbitral notice may be taken that the Carrier's rail operations have suffered a series of substantial economic setbacks. In an attempt to control its losses, the Carrier legitimately exercised its business judgment and management rights by deciding to reduce costs of operation as well as seeking to enhance revenues. This reduction in costs included the cessation [sic] certain capital improvements, the liquidation of capital assets, the abandonment, sale, or lease of certain rail lines, the reduction in maintenance work except to the extent that maintenance was safety-related. The attempt to reduce costs also included a cut back in employees at all levels and in all sectors of the Carrier's work force, including senior management. The persuasive and credible evidence in the record shows that the maintenance work which was cut is likely to be permanent. The Carrier is not likely to reestablish the double tracks it has converted to single tracks; or to recover the tracks it has sold or abandoned; to recommence tie production; or a host of similar capital improvement or creation activities in which it formerly engaged. These facts compel this Board to conclude that the

[1] **While the record is vague, less than a handful of signal employees were furloughed and the record does not reveal how many furloughed employees were protected employees. Claimant was not furloughed.**

employees here were furloughed on account of the disappearance of work which is very unlikely to reappear. The evidence presented by the Union about overtime worked by certain gangs is anecdotal and isolated. There is insufficient evidence to show that such situation exists system-wide.

The reason for the employees' furlough is crucial because it is well established that the cause of the furlough is intimately related to the employees' entitlement to protection benefits. The plain language of PEB Nos. 160 and 161 makes clear that the February 7 Agreement was an effort to protect railroad workers from the negative effects of modernization and operating efficiencies. It was not, however, a blanket protection against all furloughs for whatever reason. The downgrading, dislocation, or disemployment that was the concern of the PEBs were those resulting from technological or organizational changes. This is the theme to which the Carrier returned again and again in its presentation, and correctly so. The parties to the February 7 Agreement, including the Organization and Carrier here, entered into a contract, which in the law is a bargained for exchange. In exchange for financial protection for its members, the Organization accepted the loss of employment for some of those same members through the modernization of the Carrier's operations by technological, operational, or organizational improvements. Numerous awards correctly have termed this a "quid pro quo."

The protections created in the February 7 Agreement are, however, activated only by the sort of disemployment envisioned by the Agreement, that is: Technological, operational, or organizational improvements. The furloughs in this case are not the product of those sorts of improvements, but are the result of the elimination of the work that the furloughed employees performed. The work of the employees furloughed here was not eliminated by an operating efficiency; it was eliminated because of the financial exigencies as the Carrier legitimately determined them. No one or nothing else is performing the work of the furloughed employees; it simply is not being done.

This principle underlies the Carrier's argument regarding the failure to exercise seniority by the furloughed employees. Using the capacity to exercise seniority as a measure of whether or not there is work available to perform, the Carrier correctly shows that the

> absence of a position to which to exercise seniority proves that the work performed no longer exists. This is in keeping with the findings of the awards cited by the Carrier. It also follows from a separate analysis that the Carrier is entitled to the use of the services of its employees. That reasonable use is part of the quid pro quo of the provision of protection benefits. In the absence of the ability to reasonably use its employees, the Carrier is not required to provide the protection portion of the bargain. Since the Carrier's financial circumstances and plans lead it to conclude that its lack of ability to reasonably use the furloughed employees is permanent, then the furloughed employees' lack of capacity to provide their portion of the bargain is also permanent. The holding in Kansas City Terminal makes it clear that the Carrier is under no obligation to create work that does not otherwise exist. Finally, this Board will not upset the conclusion reached in Award No. 180 that Article I, Section 5 is designed to protect employees, not positions. Similarly, Article I, Section 5 is not tied to Sections 3 and 4 as the Organization argued, but operates independently.

The Board in *Award No. 497*, went on to conclude:

> In sum, the February 7 Agreement created a specific protection for employees negatively affected by modernization and/or operating efficiencies. The case before this Board does not involve a technological, operational, or organizational improvement or change. (Although there may have been changes in operations due to the elimination of capital improvements or lines, a change in operations is not necessarily an "operational change.") Rather, the Carrier discontinued the performance of certain work in order to reduce costs. The work performed by the furloughed employees ceased to exist; that circumstance makes this furlough one of the sort for which protection is not available under the February 7 Agreement. For all of these reasons, the Organization's claim cannot be sustained.

The Carrier urges this Board to strictly follow and affirm the holdings in *Award No. 497.*

Contrary to the Organization's argument, Claimant's right to protective benefits is triggered only when he is adversely affected by some Carrier activity which constitutes or is associated with

an operational, organizational or technological change. Article III, Section 1 clearly ties the Carrier's right to transfer work to the occurrence of one or more of the three enumeraterated changes.

After carefully reviewing the record, we find that the Organization has fallen short of showing that the Carrier implemented an organizational change. We cannot infer from the sparse evidence before us that work was consolidated or there was a change in the method of performing the work. The abolishment of a position is frequently associated with an organizational or operational change but cutting off a job, standing alone, does not constitute such a change. Absent more evidence, this Board must infer that some signal work ceased to be performed. [*See Award Nos. 408 and 480.*]

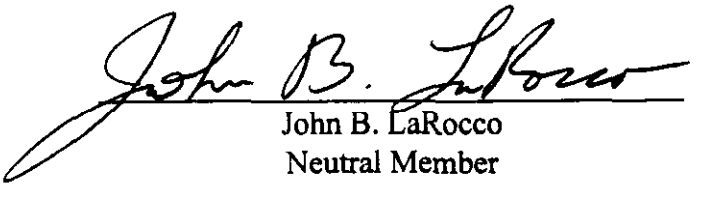
In reaching our decision, we did not rely on, endorse or overrule *Award No. 497.*

Our decision is restricted to this property and this particular record.

AWARD

The claim is denied.

Dated: September 24, 1996



John B. LaRocco
Neutral Member

ORGANIZATION'S DISSENTING OPINION'S

Award's 503-B, 509 and 510

Special Board of Adjustment No. 605

NA 2/7/65
SBA-605

The purpose of submitting the following documentation and dissent is to clarify the record regarding Special Board of Adjustment (SBA) Awards 503-B, 509 and 510. The aforementioned Cases involve an interpretation of the February 7, 1965 (Employment Security) Agreement.

At the onset exception is taken to the Arbitrators irresponsible note on page 2 of Award No. 503-B, wherein, he stated that **"It is difficult to conceptualize the existence of any scope rule violation when the work in dispute was performed by covered employees represented by the Organization."** Notwithstanding the arbitrators obvious inability to comprehend scope rule violations, this aspect of the Case was not properly before him and serious exception is taken to an attempt to provide an opinion when he lacked the authority to do so.

As noted, that instant Case was originally submitted before the National Railroad Adjustment Board (NRAB) for adjudication. The NRAB held in Third Division Award 30722 that the dispute should be submitted to SBA 605 for a determination regarding a question of jurisdiction. The Neutral Member of SBA 605's sole responsibility was to address the provisions of the February 7, 1965 Agreement. The Neutral Member had no right or privilege to fashion his own brand of judgement concerning the validity of a Scope Rule violation, that question is still before the National Railroad Adjustment Board.

With regard to SBA Award No's 509 and 510 the factual circumstances are similar. In both Awards the Neutral Member noted and implied that "The Organization vigorously contends that this Board's decision in *Award No. 497* was palpably erroneous." It is interesting to note that in Award No. 509 the Neutral Member stated that "In reaching our decision, we did not rely on, endorse or overrule *Award No. 497.*" However, it is also interesting to note that the Award contains nearly three pages of quotes from SBA Award No. 497.

Since the Neutral Member directed attention to SBA Award No. 497 and casually noted that the Organization's exception to that decision, it is necessary for those reviewing these Awards to have the opportunity to review the Organization's rational for concluding that *Award No. 497* is "palpably erroneous."

The following documentated "Referee Memorandum's" should be considered a part of the entire record.

Respectfully Submitted,

C A McGraw

C.A. McGraw, Vice President - BRS
Organization Member SBA - 605

Enclosures:

cc: Messrs.	**S.E. Crable**	**(3)**
	R.A. Scardelletti	**(10)**
	M.A. Fleming	**(2)**
	W.D. Pickett	**(2)**
	I. Monroe	**(2)**
	B. Feld	**(1)**
	J.B. LaRocco	**(1)**

SPECIAL BOARD OF ADJUSTMENT

No. 605

BRS File No. 9492
Carrier File No. SIGP 205-7-22
SBA Award No. 509

The record indicates that the Claimant began service with the Carrier on June 21, 1978. Pursuant to "Article I, Section (1) of the February 7, 1965 Agreement as amended on June 4, 1991, the Claimant is considered a **"Protected Employee."** As noted in "Article IV, Section 2 of the Agreement, it states that **"...employees entitled to preservation of employment shall not be placed in a worse position with respect to compensation than that earning during a base period comprised of the last twelve months in which they performed compensated service immediately preceding the date of this Agreement."**

The record denotes that the Claimant held a position of "Signal Maintainer" at Salinas, California prior to September 13, 1993, after which he was displaced because of a widespread reorganization of the Signal Department. The Claimant was forced to exercise his seniority onto a Signalman's position at Morgan Hill, California

As noted in this instant Case the Carrier never denied the Organization's Claim, in fact the only correspondence from the Carrier indicates their willingness to hold the Case in abeyance.

Based on the record we can only assume that the Carrier thinks the Claimant is not entitled to any benefits. We don't know their reasons, what their contention's are. We can just as easily assume that they agree with the Organization and just forgot to pay the Claimant as requested. Since one assumption is just as viable as the other, we opt for the latter.

The record indicates that the Claimant was considered a Protected Employee and that he was displaced, however alleged that he was not entitled to any benefits because his abolishment was due to economical conditions and the elimination of his position did not represent an "operational, organizational or technological change." Carrier also argued that Claimant's exercise of his seniority rights was voluntary.

The fact is that the Claimant, as a protected employee, was placed in a worse position with respect to his compensation, by being forced to displace to a lower-rated position and ultimately being furloughed. The Agreement reveals that a Protected Employee **"will be retained in service subject to compensation ... unless or until retired, discharged for cause, or otherwise removed by natural attrition."**

Contrary to Carrier's contention that the Claimant is not entitled to any benefits because of alleged "economical conditions", the Agreement does not contain any exceptions that support Carrier's position. As noted the Agreement does contain an exception covering declines in business and establishes a formula for calculating that decline. The record however, is void of any evidence or contemplation by the Carrier, that this section of the Agreement was applicable.

Carrier argues that the abolishment of Claimant's position was not considered an "Operational, Organizational, or Technological Change" therefore, the Claimant was not entitled to the benefits of the February 7, 1965 Agreement. Contrary to Carrier's opinion, the latchkey for receiving benefits is not controlled by the existence or non-existence of an Operational, Organizational change. Whether an Operational, Organization change was present or not does not negate the benefits enumerated in the Agreement. The Agreement does indicate that the Carrier has the prerogative of effectuating Operation, Organizational changes, however, as noted in Article III of the Agreement, the parties shall enter into an implementing agreement prior to the implementation of such changes.

In Article IV, Section 6, it states that **"The carrier and the organization signatory hereto will exchange such data a information as are necessary and appropriate to effectuate the purposes of this agreement."**

Respectfully Submitted,
C.A. McGraw, Vice President - BRS
Labor Member SBA-605