REFEREE MEMORANDUM

SPECIAL BOARD OF ADJUSTMENT
No. 605

Chairman: Mr. J.B. LaRocco

BRS File Case No.: *9506-SP*
Carrier's File No.: SIGP 205-7-40
SBA Award No. 510

The record indicates that the Claimant began service with the Carrier on February 20, 1979. 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" prior to November 8, 1993, after which he was displaced because of a widespread reorganization of the Signal Department. The Claimant was forced to exercise his seniority to several positions until finally being temporarily furloughed on February 16, 1994.

The Carrier recognized that the Claimant was considered a Protected Employee and that he was displaced, however, alleged that he was not entitled to any benefits because the rearrangement and abolishment of numerous positions was due to economical conditions. The Carrier argued that this case simply involves a case of force reduction, therefore, Feb 7th was not applicable. Carrier also argued that the reorganization of its forces did not represent an "operational, organizational or technological change." Carrier ultimately asserted 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. 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."** The Agreement goes on to state that protected employee's shall not be placed in a worse position with respect to compensation, and that **"For purposes of determining whether, or to what extent, such an employe has been placed in a worse position with respect to his compensation, his total compensation and total time paid for during the base period will be separately divided by twelve."**

As noted in **BRS Exhibit's No. 1-A** and 1-B (Abolishment Notices, Bulletin Notices for New Positions and Signal Maintainer territorial changes) it becomes obvious that Carrier's imagined "Force Reduction" was in actuality, nothing more than a **"reassignment of forces."** The documentation shows that not less that twelve positions were abolished, sixteen new positions were established, and eight different Signal Maintainer territories were changed on January 15, 1993 and again on April 24, 1994. The record reveals that a total of five employees accepted voluntary furlough for a short period of time, because the only positions available were considered temporary and required relocation beyond thirty (30) miles.

Carrier additionally argued 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 controlled by an employee's length of service, and not the existence of an Technological, Operational or Organizational change. As evidenced, the Carrier has totally misread the Agreement. Article III, Section 1, states that the Carrier has the right to make technological, operational and organizational changes in order to transfer work and/or employees "in consideration of the protective benefits provided by this Agreement." As evidenced the Carrier has not transferred any employee's and/or transferred any work. In complete variance to that position, the Carrier also suggests that the Feb 7 Agreement allows it to make operational, organizational, and technological changes. Carrier's conflicting positions do not comply with the Agreement and make no sense.

The Carrier is correct that this case does not involve a "Technological, Operational or Organizational change" as that term is used in the February 7th Agreement. The Organization agrees with the Carrier. On that basis, there should be no disagreement that the Claimant as a protected employee,is entitled to the benefits enumerated therein.

While both parties recognize that Carrier's actions did not involve an operational or organizational change, Carrier's interpretation of Article III, Section 1, is incorrect, it states in part: that the Carrier has the right to **"transfer work and/or transfer employees, throughout the system which do not require the crossing of craft lines."** Assuming arguendo that Carrier's actions could be classified as an Operation, Organizational change, (and they are not), the Carrier is required to advise the Organization of such changes, and the Organization is then obliged to enter into an implementing agreement. As noted in Article III, Section 2, of the Agreement it states: **"Such notice shall contain a full and adequate statement of the proposed change or changes, including an estimate of the number of employes that will be affected by the intended change or changes."**

Article III, Section 5, describes the purpose and intent of entering into an implementing agreement, wherein, it states, as follows: **"The provisions of implementing agreements negotiated as hereinabove provided for with respect to the transfer and use of employes and allocation or reassignment of forces shall enable the carrier to transfer such**

protected employes and rearrange forces, and such movements, allocations and rearrangements of forces shall not constitute an infringement of rights of protected employes who may be affected thereby."

The Organization takes exception to Carrier's contention that the Claimant is not entitled to any benefits because of alleged "economical conditions." Exception is also taken to Carrier's innovative interpretation that an employee's protection is only activated if it involves some kind of "Modernization Transaction", and that these "Modernization Transactions" were some type of quid pro quo in exchange for Carrier's right to perform these kinds of transactions without RLA bargaining.

The February 7, 1965 Agreement is void of any language that alludes to unproven economical conditions, modernization transactions, or that some type of nexus must be established to identify a transaction. Evidently the Carrier is attempting to confuse the February 7 Agreement with some other type of employee protection provision involving a transaction such as; New York Dock, Oregon Short Line, etc,.

As can be noted the February 7, 1965 Agreement could be considered somewhat confusing to a layman, and Carrier's attempt to create non-existent loop holes by inventing meaningless catch phrases should be ignored.

Contrary to Carrier's contentions that this Case is simply a "Force Reduction", the February 7, 1965 Agreement contains specific procedures that are available for Carrier to avoid providing protection benefits. As noted in **Article I Section 3**, it describes a specific procedure and formula for determining a decline in business. While the Carrier asserts that it has suffered some loss of business, it is the Organization's position that the Carrier has exaggerated and fabricated that information. Again, it is noted in **Article IV, Section 6**, that: **"The carrier and the organization signatory hereto will exchange such data and information as are necessary and appropriate to effectuate the purposes of this agreement."** The Agreement mandates that this information be presented prior to the reassignment of forces, and the Organization takes exception to Carrier's attempt to present this questionable and speculative documentation for the first time at the arbitration hearing.

It is noted that the record of handling of this Case is void of any evidence to support any argument that Carrier's actions involved an operational, organizational change or for that matter a decline in business.

Carrier has attempted to argue that this case hinges on the decision of SBA 605, Award 497 (Zumas Decision). At the onset it must be noted that the BRS was not party to that dispute, even though the carrier attempted to drag us into the fray. As noted in that dispute the BMWE requested that Board require the Carrier to restore a number of furloughed protected employees. In the instant BRS case, we have no furloughed employees (except for voluntary furloughs). It is interesting to note that in the BMWE Case "Many of those employees have returned to work." The BMWE challenged carrier's position that the

work formerly performed by the furloughed employees had permanently disappeared. (Carrier never addressed this contention.)

The Board, in the SBA 605, Award 497 recognized that **"Interviews with some of Organization's members submitted as part of the Organization's post hearing brief indicate some existing maintenance crews are working considerable amounts of overtime in order to maintain the remaining track."** Award 497 also noted that a number of the furloughed employees had returned to work prior to the arbitration process.

Despite the fact that the work did not disappear or cease to exist, SBA 605, Award 497, incorrectly determined that: **"Since the Carrier envisions a permanent transformation in an attempt to contain costs (i.e. the disappearance of the work), the employee's services appear not to be needed in the foreseeable future."** The Award further held that "the maintenance work which was cut is likely to be permanent. 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 which it formerly engaged."

While Award 497 acknowledged that the BMWE employees were involved in considerable overtime and that a number of the furloughed employees had returned to work, and further acknowledged that the work in fact did not cease to exist, it held that the overtime worked by the employees was anecdotal and isolated. Award 497 then incorrectly determined that the **"employees here were furloughed on account of the disappearance of work which is very unlikely to reappear."**

While accepting Carrier's affirmative defense (without evidence) it went on to say that "No one or nothing else is performing the work of the furloughed employees; it simply is not being done."

In Award 497 the Carrier made a simplistic argument that since the employees cannot exercise their seniority, then there is no work to perform. The fallacy of Carrier's contentions was that the work never ceased to exist, only the positions. The Agreement does allow the Carrier to make force reductions in emergencies, however, it states that the work must cease to exist, or that it cannot be performed. It is obvious that carrier's position is far more anecdotal.

As noted in Award 497, the Carrier argued that it deferred some major capital improvement projects. The difficulty in accepting this argument in the BRS Case is that the Carrier failed to identify a single capital improvement project that involved the BRS or the Claimant.

The Carrier argued in the BMWE Case that "more than 3,000 miles of track are to be sold, leased or abandoned." While the Carrier made this prognostication, the record is void of any speculative undertaking that affected and/or could have affected the Claimant.

The Carrier argued in the BMWE Case that "more than 3,000 miles of track **are to be** sold, leased or abandoned." While the Carrier made this prognostication, the record is void of any speculative undertaking that affected and/or could have affected the Claimant. It is interesting to note that in the BMWE Case the Board recognized that the Carrier was **planning** to sell, lease or abandon 3,000 miles of track, however the Board incorrectly concluded that the this action had already taken place.

The Carrier also provided another anecdotal assertion that is was converting from double track to single track "over Donner Summit." Again, while this could be considered an affirmative defence, there is absolutely no evidence to support a nexus that would tie this situation to the Claimant. Additionally, it is the Organization's position that converting double track to single track could create additional work not less. Carrier also suggested that it had sold or leased some property in Oregon, however, again, the Carrier has failed to remotely tie that action to the case at hand.

As noted, Award 497 mistakenly determined that **"the protection created in the Feb 7 Agreement are, however, activated only by the sort of disemployment envisioned by the Agreement, that is: Technological, operational, or organizational improvements."** Contrary to this interpretation, having an operational organizational, technological change does not activate employee protection. That section of the Agreement merely contemplates that the Carrier can transfer work and/or employees. It has nothing to do with furloughs or force reductions.

Award 497 additionally provides a bogus interpretation of the Feb 7 Agreement, wherein it states that "The Feb 7 Agreement was an effort to protect railroad workers from the negative effects of modernization and operating efficiencies." Contrary to this interpretation, the Feb 7 Agreement was negotiated as an employment preservation agreement, however, the quid pro quo is that it allows the carrier to make technological, operation and organizational changes that involve the transfer of work and/or transfer of employees.

While Award 497 acknowledged that the remaining employees worked considerable overtime and that a number of the furloughed employees had returned to work, it determined that the **Kansas City Terminal** Award was right on point, wherein, it held that "the carrier is under no obligation to create work that does not otherwise exist." This conclusion is not analogous to the facts and circumstances present in this instant case.

It seems that Carrier's entire position is based on Award 497, wherein, it stated that "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.'" Notwithstanding the fact that Award 497 did not explain the rational behind this statement, the Carrier failed to illustrate its importance.

It is the Organization's position that Award 497 is palpably erroneous. SBA 605, Award 497 while being inaccurate and an aberration, does not address the facts and circumstances involved in this instant dispute. Award 497 is just plainly wrong and does not provide an accurate interpretation of the Feb 7 Agreement.

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

ORGANIZATION'S RESPONSE TO
CARRIER'S ORAL ARGUMENTS:
Supplemental Brief

(Arbitration Hearing 6/27/1996)

Carrier argued that "**these activities did not comprise a Feb 7 transaction to which Feb. 7 protection, including preservation of employment benefits and monetary (preservation of rate) benefits apply.**" They additionally argue that: "**this was not a Feb. 7 Transaction - it was not a technological, operational or organizational change - and Feb 7 benefits are therefore not applicable....that there must be an initial qualifying transaction.**" It is evident that the Carrier is mixing apples and oranges. The fallacy of Carrier's interpretation is that it is in conflict with the February 7 Agreement. Contrary to Carrier's interpretation that an employee does not become protected unless Carrier undertakes an operational, organizational, technological change, the Agreement provides an exception to providing benefits when a bonafide operational, organizational, technological change occurs.

It is evident that the Carrier is attempting to confuse the Board by introducing various interpretations of operational, organizational and technological changes as they are defined in the "**Article VII, November 16, 1971 Agreement**" (Changes of residence due to the technological, operational or Organizational changes), the "**Washington Job Protection Agreement**", "***New York Dock Conditions***", "***Oregon Short Line***" or some other type of employee protection authorized by the Interstate Commerce Commission. The fact is that the Feb 7 Agreement specifically defines an operational, organizational, technological change as the transfer of work and/or employees. It further states that in consideration of protective benefits it has the right to transfer work and/or employees.

Contrary to Carrier's misinterpretation of the Agreement, this dispute is not analogous to other types of employee protection agreements or conditions, there is no requirement or necessity to identify a transaction or establish a causal nexus as carrier argues. The protection provisions in the February 7 Agreement are based on an employee's years of service, not a transaction. As noted in the Agreement, an employee is considered protected and there are specific exceptions on how an employee becomes unprotected (none of which apply in this case). The Carrier is wrong that a qualifying transaction must be identified to established February 7 benefits.

The Organization also takes exception to Carrier's argument that "an employee who continues to work ...should not have any greater entitlement to protective benefits than an employee furloughed..." This interpretation makes absolutely no sense. Nowhere in the Agreement does it remotely suggest that employee protection benefits are contingent upon another employees employment status and that the existence of furloughed employees eliminates protection benefits for all employees.

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