AWARD NO. 512
CASE NO. CL-183-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Transportation•Communications International Union

and

) Terminal Railroad Association of St. Louis

QUESTIONS AT ISSUE:

1. Did the Carrier violate the provisions of the February 7, 1965 Agreement as amended July 20, 1979 when it arbitrarily terminated protective compensation provided by the Agreement to Mr. C. D. Rogers, effective December 31, 1993, following its alleged determination that Carrier no longer would compensate Mr. Rogers because of his alleged failing to protect the extra-board?

2. Shall the Carrier now be required to compensate Mr. Rogers at his protected rate of pay in effect on December 31, 1993 and; further, continuing daily and in addition, reinstate vacation, sick leave, personal leave and health and welfare benefits until settled?

OPINION OF THE BOARD: Claimant, who holds a March 18, 1966 seniority date, is a protected employee under the February 7, 1965 Job Stabilization Agreement, as amended on this property on July 20, 1979.

In late 1993 and early 1994, Claimant was a furloughed protected employee attached to the extra list. By correspondence dated February 11, 1994, the Carrier's General Superintendent informed Claimant that he had forfeited his protective status under Article II of the February 7, 1965 Job Stabilization Agreement because he had consistently failed to protect the extra board. The General Superintendent asserted that, from October 1, 1993 through January 31, 1994, Claimant worked 23 days and laid off 20 days due to illnesses. In a letter dated February 14, 1994, the

General Superintendent clarified that Claimant's forfeiture of job stabilization protection became effective on January 1, 1994.

The Organization submits that Claimant would have been called to perform extra work or provide relief by filling vacancies on only five of the 20 days that he marked off ill. The Organization emphasizes that Claimant utilized proper procedures to mark down on each of the 20 days and that, during the four-month period, he never marked off once he was called.

On the other hand, the Carrier submitted evidence that Claimant missed seven work opportunities during the four-month period. Also, the Carrier stresses that Claimant's illnesses were undocumented suggesting that his excuse for marking down was bogus.

The Organization replied that, on one of the seven days, Claimant would have been unavailable because he would not have been rested after working the prior day. The Organization contends that the Carrier could have required Claimant to submit a physician's certificate to show satisfactory evidence of a bonafide sickness pursuant to Rule 51(c).

The Carrier responded that. since Claimant did not request sick leave when he made himself unavailable for extra work and thus, Rule 51 is inapplicable.

The issue is whether Claimant forfeited his entitlement to protective status for consistently failing to protect the extra list from October 1, 1993 through January 31, 1994.

The pertinent portion of Section 1 of Article II of the Job Stabilization Agreement provides: "A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee."

This Board, in Award No. 16, held that an extra employee who engages in a consistent pattern of refusing to accept calls to perform extra work without proper cause may lose protected status.

For two reasons, the record in this case does not contain sufficient evidence that Claimant engaged in a consistent pattern of refusing calls to perform extra work during the four-month period.

First, five or six missed calls over a four-month period does not necessarily establish a consistent pattern of unavailability.[1] While the Carrier relies heavily on this Board's Award Nos. 126 and 455, the facts in those cases are distinguishable. The protected employees involved in Award No. 126 failed to respond to calls an excessive number of times. Moreover, on many occasions, the railroad could not even contact the employees. In this case, five or six missed calls does not seem excessive when Claimant worked 23 days and presumably, Claimant was available but not called on many other days. Also, Claimant maintained contact with the Carrier. Claimant marked off before being called which shows that he was paying attention to his availability. In Award No. 455, the protected employee announced his intention not to perform any extra work. Claimant, herein, never made such an announcement. In this instance, since Claimant worked 23 days and missed, at most, six work opportunities, no consistent pattern of refusing calls emerges. The missed work opportunities were isolated instances.

Second, the record does not definitively reveal that the refusals were without proper cause. There is not any evidence that Claimant's illnesses were feigned. Certainly, if over a longer period

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[1] **The Carrier contends that Claimant missed seven work opportunities while the Organization asserts the Carrier would only have called him five times. Even if the Carrier is correct, the Organization showed that Claimant would not have been called for one of the seven opportunities.**

of time, Claimant had repeatedly marked down due to illness, the Carrier could rightly become suspicious of the veracity of Claimant's excuse. In this case, the record is void of any evidence concerning whether Claimant was truly ill. Award No. 16 permits a protected employee to occasionally mark off the extra list for proper cause.

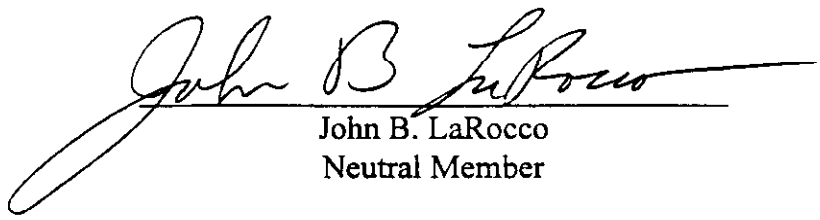
In sum, the Carrier improperly discontinued paying protective benefits to Claimant effective January 1, 1994. Claimant shall be made whole to the extent that he should have remained a protected employee subsequent to January 1, 1994.

AWARD

1. The Answer to Question at Issue No. 1 is Yes.

2. The Answer to Question at Issue No. 2 is Yes to the extent specified in our Opinion.

Dated: April 2, 1997



John B. LaRocco
Neutral Member