DOCKET NO. 125 --- Decision by Referee Bernstein

Lighter Captains' Union, Local 996, I.L.A., AFL-CIO)
and)
Erie-Lackawanna Railroad Company) Parties to the Dispute

QUESTION:

"Interpretation of Section 1 of the Agreement of May, 1936, Washington, D.C., relative to an employee being deprived of his employment as a result of 'other causes,' and his right to continue receiving a coordination allowance that had already been established.

"Interpretation of Section 7, (c), 2, of the 'Washington Agreement,' relative to an employee being deprived of his employment and entitled to a coordination allowance. Also, that portion of Section 7, (d), pertaining to an employee who is deprived of his employment within three years from the effective date of the coordination. Further, interpretation of Section 7 (j), referring to the five specific contractual reasons for the cessation of an established coordination allowance.

"Interpretation of Section 12 of the 'Washington Agreement', relative to the carrier's rearrangement of its forces, during the time that it was in the process of, and anticipating a merger."

FINDINGS:

This case must be read with Dockets Numbered 103 and 109.

(a) The same allegation is made of a violation of Section 12 based upon the same occurrences; the disposition -- denial -- is also the same here.

(b) The May and August 1962 claims of Captain Murphy are denied for the reasons set forth in the "findings" (a) in Docket No. 109.

(c) Three other Lighter Captains claim "adverse effect," one starting in June and two in August 1963 and subsequent months. As in Docket No. 109, the Carrier asserts that the reduction in work opportunity for the Claimants was due to decreased lighterage traffic in New York Harbor. The pattern demonstrated in Docket No. 109 for 1962 was repeated in the months in 1963 for which claim is made here with the difference only that in 1963 the decrease in tonnage handled was even more drastic as compared with the same months a year earlier; and in each instance there also was a drop in tonnage from the months preceding.

(d) One other claimant, Captain Highland, presents another problem. On his behalf the Organization sought a "coordination allowance" for the period

January 1 through January 27, 1963. The Carrier denied the claim on the ground that his loss of earnings was due to a strike by the ILA during that period. It argued that his losses were due to a reason other than the coordination and hence Section 1 is applicable.

In fact, Captain Highland had already received Section 6 allowances for prior periods. (The Organization's references to this as a "coordination allowance" underlines the confused terminology involved in this set of cases; that aspect is discussed in Docket No. 103, and the discussion is pertinent here.) As Docket No. 67 declares:

> The five year protection period for a displaced employee would make little sense and provide little protection if each subsequent loss of earnings in the period had to be directly related to the coordination. It is the first adverse effect of a coordination which makes the employee eligible for the benefits of Section 6 (See Section 2(c)). Thereafter the protection of the Agreement is his for the specified five years in the ordinary case. (Emphasis in original)[1]

No contention is made that the strike occurrence makes this other than "the ordinary case." But such a contention would not be persuasive in view of the showing that other Lighter Captains did some non-struck work during the period and that Captain Highland's place on the seniority roster was substantially lowered by the merger of the rosters, to say nothing of the effect of the coordination itself. Perhaps it is worth emphasizing that the other Claimants in this case and in Docket No. 109 had demonstrated no adverse effect when the new factor--reduced tonnage handled by the Carrier-coincided with the first months in which adverse effect was claimed. But Captain Highland had already demonstrated adverse effect which thereafter presumptively is accountable for diminished earnings for the full protective period.

DECISION:

(1) Section 12 of the Agreement was not violated and the relief sought on that claim is denied;

(2) The claims of Captains Robinson, Giordini, Dittmar and Murphy are denied because the alleged worsening of their compensation occurred a substantial period after the coordination was effected and was directly traceable to decreases in the Carrier's tonnage handled by lighter, scow, and barge. Hence the coordination has not been shown to be the cause of the Claimants worsened position.

(3) The claim of Captain Highland is sustained. Having established eligibility for a Section 6 allowance, the January 1963 strike did not cancel eligibility for the reasons stated in Docket No. 67 in view of the fact that others in his classification worked during the strike period.

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1. The rationale for and continued vitality of that holding is discussed in the opinion in Docket No. 129.

DOCKET NO. 126 --- Withdrawn

Pennsylvania Railroad Company)
Lehigh Valley Railroad Company)
) Parties to the Dispute
vs. ,)
)
Brotherhood of Railway and Steamship Clerks)

QUESTION

1. Should the Carriers' proposal for the select?& and assignment of employes set forth in Sections 1 (a), (b), (c), (d) and 2 (a) cf the proposed agreement (attached hereto as Exhibit "D") be adopted for effectuating the consolidation o f Pennsylvania and Lehigh Valley accounting facilities, services and operations?

2. In the event it is determined that the Carriers' proposals concerning the selection and assignment of employes should not be adopted in their entire ty, or if it is determined that other matters contained in the proposals of the parties (Exhibits "D" and "E") must be included in the implementing agreement required by Section 5 of the Washington Agreement, what revisions or additions should be adopted for effectuation of this consolidation?

DECISION:

Withdrawn.

DOCKET NO. 127 --- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks,)
Freight Handlers, Express and Station)
Employees)
vs.) Parties to the Dispute
)
St. Louis Southwestern Railway Company)

QUESTION:

"(1) Shall affected employees who have insufficient seniority to obtain and. retain a regular assignment in the coordinated operation be paid a Section 6 Displacement Allowance in these protective period months in which they perform service?

"(2) If the answer to question (1) is in the affirmative, shall the Carrier now be required to pay Claimants Carson Bell; J. C. Booker; Z. F. Burford;

J. E. Hargis; John Luke; Sam Miles; O. J. Peppers; J. U. Rodgers; G. B. Tillery, Jr., and J. W. West, a displacement allowance for the math of January 1952, and each subsequent month thereafter in which they perform service in the protective period, rather than a combination displacement-coordination allowance which is now being paid?"

FINDINGS:

Without dispute twenty-six employees who had held regular positions lost them due to the coordination of Cotton Belt and Southern Pacific facilities at Dallas and were unable to obtain other regular positions. Sixteen of them elected to take Section 9 allowances by resigning, an option open only to employees eligible to receive a Section 7 "coordination allowance" as employees "deprived of employment." The ten remaining furloughed* employees performed extra work as it became available, The controversy here revolves around Section 7 (h) which provides:

> If an employee who is receiving a coordination allowance returns to service the coordination allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a coordination allowance. During the time of such reemployment however, he shall be entitled to protection in accordance with the provisions of Section 6.

The Organization claims that in any month in which the furloughed employees performed extra work they were entitled to Section 6 allowances for the entire month. However, the Carrier interprets Section 7(h) to mean that the Section 6 and Section 7 allowances are to be prorated and a combination of both paid depending upon the proportion of the working days of the month in which the employee was working and not working.

Section 6(c) declares that "Each displacement allowance shall be a monthly allowance determined . . ." [and the formula follows.] In effect the employee receives a guarantee that his post-coordination compensation (earnings plus allowance) will be no less than his test period average compensation. Section 7 (a) provides for a "coordination allowance . . . which . . . shall be a monthly allowance" equal to 60% of the average compensation in the twelve months in which the employee worked preceding displacement.

The Carrier argument turns upon what it claim; is the literal meaning of "the time of such reemployment" in Section 7 (h) which it takes to mean the days actually worked. The Organization counter; that (1) both Section 6 and Section 7 allowances are "monthly allowance" [s] and so cannot be prorated and (2) in Docket No. 9 the Committee, without referee, held that in these circumstances Section 6 governed compensation and rejected a carrier contention that a combination of sections was to be used.

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* A furloughed employee, under the rules involved here, is one who formerly held a regular position (who has extra work available to him); an extra employee is one who works extra as opportunity offers but never has held a regular position. Only furloughed employees are involved in this case. The Carrier asserts that it hcs no furlough or extra list. But Rule 15 refers not only to "furloughed and extra employees" but to "furlough and extra list" as well, (See Section 15-4 and 15-5).

The Carrier here argues that Docket No. 9 involved a regulated extra list and "thus the telegraphers in that case were not furloughed. The number of men were regulated to conform with work available." For that reason, it is argued, the Committee "evidently" decided that the claimants there "were not" deprived of employment. But neither party in Docket No. 9 adverted to the rules provision for adjusting the extra board to the needs of the service. On the contrary, as a review of the record of that case shows, the Carrier in Docket No. 9 argued that the extra list was unduly enlarged so as to prevent forfeiture of seniority; so, the Carrier declared, "the practice [under the then applicable rules] was to maintain a greater number of employees on extra lists than was necessary to protect the service . . . . Under this practice a telegrapher could remain on the extra list for months or years without performing any service whatever. . ." Such a situation does not add up to a regulated extra board.

Nor is there any hint in the argument of the parties or the Committee disposition in that case that Section 6 was applicable via Section 7 (h). The Carrier's argument here is that the former regular employees who were unable "to obtain and retain a regular assignment but . . . revert [ed] to and perform service from the extra list" were Section 7 employees who where called to service came under Section 6 "while actually working."

The parties in Docket No. 9, in the agreed statement of facts, recited the situation of one employee whose situation was "illustrative of the principle upon which the parties are in disagreement." The statement reported that for several months after the coordination no employee was affected. A position was abolished and its holder bumped Mr. Hull; Mr. Hull obtained another regular position for several months, but was bumped and went to the extra list in mid-November 1937. In mid-January 1938 he again obtained a regular position for about a month; again he went to the extra list. The agreed statement recites that the parties agreed that Section 6 applied so long as Mr. Hull was in a regular position; "they are in disagreement as to whether Section 6, Section 7, or a combination of both sections, applies during the periods Mr. Hull was unable to retain a regular position and reverted to the extra list." It was this disagreement that was resolved by the Committee's decision that Section 6 alone applied.

Section 7(c) may seem to have applied, as the Carrier argued, because Mr. Hull lost a position when bumped by a senior employee. But it was held that Section 6 applied; the only possible explanation is that by virtue of his status as an extra employee he was regarded as "continued in service" and therefore coming within Section 6.

Carrier members argued here that the record in Docket No. 9 does not show a month which is comparable to the situation here: when some days were worked as an extra and other days the employee was idle and thus arguably in a Section 7 status. However, in December 1937 Mr. Hull was in the extra category for the entire month; the decision is clear that for that month a Section 6 allowance and only a Section 6 allowance was due him. The probability is that he did some work during the month as an extra and that is the implication of the agreed statement (see p.2).

The major difficulty in Carrier's position here is that, despite the apparent agreement of the Carrier and Organization that 16 of the 26 men were within Section 7

when parted from their regular positions (although in argument the Organization casts some doubt as to how agreeable it was to this characterization), under the precedent established by Docket No. 9 the employees' rights were not governed by it but by Section 6.

The Carrier argues, in this case and Docket No. 139, that the Organization cannot have the advantage of sixteen resignations with Section 9 allowances, which were proper only if the employees were eligible for Section 7 allowances, and reject Section 7 as inapplicable to those to whom the very same thing happened -- loss of a regular position and reversion to the furlough list. Without contradiction the Carrier paid allowances of $93,000 to those it and the Organization agreed could be separated under Section 9. I would agree that if the Carrier suffered financial detriment by this arrangement any excess payments might be returnable or deductible from the other benefits payable under this Agreement, I invited the Carrier to present evidence or agreement on this point; but, after I advised it that I would not overrule Docket No. 67 as it suggested in Docket No. 139, it did not do so. It seems rather questionable that such a showing can be made in this case. The Section 9 allowances are the equivalent of from three to twelve months' pay, depending upon the individual's length of service in comparison with the Section 6 guarantee of 100% compensation for five years. To be sure, the latter is reducible by actual earnings. Judging from the fact that the ten employees who retained their employment relationship have substantial claims and that apparently there were many days when they did not work, Section 6 claims are substantial in this group. Had this group been twenty-six rather than ten employees, Section 6 allowances would be quite large for the sixteen and larger for at least some of the remaining ten than they have been.

The Carrier may feel that inasmuch as the parties seemed to be proceeding on a mutual agreement that Section 7 was applicable it is entitled to insist upon the application of Section 7(h). I am unsure that the agreement was so complete. But, Section 7(h) would seem not to yield a different result. All of the formulas for benefits in this Agreement are cast in terms of "monthly allowance" or monthly payments. The formulas, especially for Section 6 allowances, indicate that compromises were struck and that the allowances are at best an approximation of what each employee should get. So, for example, the schedule of eligibility and benefits under Section 7 are:

Length of Service	Period of Payment
1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 "	12 "
3 " " " " 5 "	18 "
5 " " " " 10 "	36 "
10 " " " " 15 "	48 "
15 yrs. and over	60 "

The grossness of these categories argues against their being subdivided into fractions measured in days. Given the terminology and the rough justice the allowances were to perform, it seems quite unlikely that there was any intention that allowances be made on a daily basis. Moreover, Carriers produced not one instance where such an apportionment has been made during the almost three decades of the Agreement's existence.

DECISION:

The Claimants, regular position holders who reverted to Carrier's furlough list by virtue of the coordination, are eligible for Section 6 benefits and not a combination of Section 6 and Section 7 benefits as a matter of interpretation of Section 6 (a) and (c). If Section 7 (h) were applicable the result would be the same.

DOCKET NO. 128 --- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees	)	
and	)	Parties to the Dispute
Joint Texas Division of Chicago: Rock Island and Pacific Railroad Company - Fort Worth and Denver Railway Company and Houston Belt and Terminal Railway Company	)	

QUESTION:

"Claim of the System Committee of the Brotherhood that:

"(a) The closing of the Joint Texas Division of Chicago, Rock Island and Pacific Railroad - The Fort: Worth and Denver Railway City Ticket Office at Houston, Texas on June 30, 1963 and the transferring o i the workinvolved thereat to the Ticket Office of the Houston Belt and Terminal Railway is a coordination of separate railroad facilities and subject to the terms end conditions of the Agreement of May 1936, Washington, D.C.

"(b) The Carrier violated the terms and conditions of the Washington Agreement when it failed to furnish a Section 4 Notice of intended coordination and failed and refused to apply the terms and conditions of the Agreement for the protection of employees affected by the coordination.

"(c) The Carrier shall now be required to apply all the terms and conditions of the Agreement tc the coordination involved."

FINDINGS:

The Carriers operated a City Ticket Office in Houston which it closed on June 30, 1963. As in Docket 106, there was a Terminal Ticket Office which immediately showed a great increase in sales even though the Carriers' total sales in Houston declined in comparison with the corresponding month of the preceding year. The sole difference between this case and Docket No. 106 is that the Carriers had no ticket facilities available to it in Houston other than the CIO and the Terminal Ticket Office. The disposition of this case is governed by Docket No. 68 and Docket No. 106.

DECISION:

(a) The discontinuance of the Joint Texas Division of the Chicago, Rock Island and Pacific Railroad - The Fort Worth and Denver Railway City Ticket Office at Houston, Texas and the transfer of its operations and services to the Houston Belt and Terminal Railway Ticket Office constituted a "coordination."

(b) The lack of a notice of coordination and an agreement between the Organization and the non-application of the benefit provisions of the Washington Agreement constituted violations of the Washington Agreement.

(c) The Carrier is directed to pay full back pay (i.e. based upon the average of compensation earned in the 12 months preceding the dates of the changes and including all fringe benefits and improvements in pay and fringes since that time), less actual wages and/or benefits received, to all employees affected by those unauthorized changes until Section 4 notices are served and a Section 5 implementing agreement is achieved. The protective conditions under the Washington Agreement shall be in force through September 29, 1968.

The Carriers are further directed to serve the required notices and negotiate the required agreement.

DOCKET NO. 129 --- Decision By Referee Bernstein

Lighter Captains' Union, Local 996, I.L.A.) AFL-CIO)
and)
Erie-Lackawanna Railroad Company) Parties to the Dispute

QUESTION:

"Interpretation of Sec. 1, of the Agreement of May, 1955, Washington, D.C. relative to the termination of established coordination allowance during the protective period."

FINDINGS:

The 12 Claimants, Lighter Captains, first were adversely affected in April and June, 1961 shortly after the implementation of the coordination. The Carrier paid them Section 6 displacement allowances (once again described as "coordination allowances" in the Organization submission), because they lost regular positions and reverted to extra status, in any month thereafter in which their earnings fell below their test period monthly average. However, these payments were discontinued in June and July 1963.

At issue is whether the Carrier was justified in not continuing the payment of displacement allowances on the ground that the decreases in Claimants' compensation were attributable to dramatic decreases in lighterage tonnage handled in New York harbor by the Carrier. As in Docket No. 125, it claims that Section 1 permits the discontinuance because the losses were caused "by other causes (than coordination) not within the contemplation of the parties" in making the Washington Agreement.

As noted in Docket No. 125, the rationale of Docket No. 67, decided in 1961, is at odds with such an application of the Agreement.

The Washington Agreement strikes a balance between the interests of carriers to merge facilities and services so as to effectuate economies and the interests of employees not to bear the full brunt of such changes. Although the Agreement is remarkably well constructed, it necessarily made compromises; in order to make the Agreement workable, some general categories had to be constructed which would cover a variety of situations.

At the outset in Section 1 the parties declared their intent to "provide allowances" to employees "affected by coordination" but that the benefits "are to be restricted to those changes in employment . . . solely due and resulting from such coordination."

It also declares in Section 6 that "no employee . . . who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation . . ."

I held in Docket No. 67 that once an employee is demonstrably adversely affected the protection of Section 6 remains his for the ensuing period (up to the close of the five years specified).

The reasoning was that "the five year protection period for a displaced employee would make little sense and provide little protection if <u>each</u> subsequent loss of earnings in the period had to be directly related to the coordination." Impliedly once an employee is adversely affected the five year guarantee applies. Any other construction would make the Agreement administratively awkward and perhaps unworkable. If every subsequent loss during the five years had to be traced strictly to the coordination, a logical necessity would be a showing as to the position the employee would have been in without the coordination. So, where two carriers merge facilities and seniority lists, a showing of adverse effect would

require proof as to what each carrier's business would have been (e.g., how the lessened tonnage would have divided between the two merged carriers), what their methods of operation would have become if not combined and how these would have affected each claimant (e.g., where the claimant stood on his former seniority list, how it would have changed due to deaths, retirements, resignations, and discharges, and what his employment and earnings would have been, taking into account the rates it would have been paying if the merger had not taken place). Of course, the Agreement does not require such impossible showings. Rather it constructs a comparatively simple test: displacement (not just any displacement, but one brought on by the coordination) and impaired compensation (as measured, rather roughly, by comparing test period average monthly earnings with those for the month for which claim is made). The benefit is the difference between the old average and the post-coordination actual earnings if the latter falls below.

In this case, the Claimants demonstrated adverse effect immediately after the coordination came into effect. Their impaired earnings stemmed from two causes: merged operations which reduced the number of boats and personnel required to perform the total work of the combined Carriers and, for some, the lowered seniority position brought on by including Captains from the other formerly separate Carrier on the new dovetailed seniority list with the result that their relative opportunity for employment was reduced. This situation continued throughout the ensuing two years and Section 6 benefits were paid whenever their compensation fell below the test period average.

The Carrier shows that reduced tonnage (about 25% as compared with the same months in prior years) reduced work opportunities. But, it does not show what the effect on these claimants (already shown to be adversely affected by the coordination) would have been as compared with the uncoordinated operations. For the coordination reduced work opportunities more than the 25% drop in tonnage and the relative work opportunities of some on the seniority list was reduced more than 25% depending upon how many Captains from the other Carrier were inserted ahead of them on the seniority list.

Having already established their Section 6 eligibility, that eligibility can be presumed to continue for the duration of the protective period. (A total lack of work for causes beyond the control of the Carrier might present a different case --but that issue is not before me.) As a practical matter, where--as in Docket Nos. 109 and 125--the first claim of adverse effect occurs a substantial period after the coordination and coincides with the demonstrable decrease in tonnage handled, the policy of Section 1 seems to me to require a finding that the employees' reduced compensation is not due to the coordination but stems from the Carrier's diminished business. Such a scheme seems to harmonize the competing purposes of the Agreement in a practical manner. Alternatives to this method of applying the Agreement appear to make it almost impossible for one party or the other to prove its case because employment changes are affected by so many factors. Thus if Section 1 is read to preclude benefits unless 100% of the employees' loss can be shown to stem directly from the coordination, employees could almost never establish eligibility. On the other hand, if at any time following a coordination an employee who is continued in service has compensation below the test period average he thereby establishes Section 6 eligibility, a carrier could never successfully assert Section 1. Both sections must be given meaning in a reasonable and ungrudging way

if this Agreement is to serve its purposes without being bogged down in lengthy proceedings.

As noted in Docket No. 108, Carriers argue that the decision of the Committee in Docket No. 17 weakens, indeed destroys, the precedent value of the holding in Docket No. 67 (point 3). As further noted there, I agree that Committee decisions without a referee constitute even stronger precedents than decisions by referees. (Perhaps it should be observed that I have no recollection, and nothing in the transcript shows, that Docket No. 17 was claimed to be pertinent when I was considering the issue in Docket No. 67. Had it been put in issue, I surely would have considered and discussed it.)

The Committee held in Docket No. 17:

> Neither the closing of the agency in Howard nor the transfer of the telegrapher position at Walsenburg to the Colorado and Southern [events subsequent to the D&RGW and Santa Fe coordination at issue in the case] was the result of, or related to, the Palmer Lake coordination and they will not enter into the compensation calculation as used by either party.

Carriers contend that this means that where Section 6 payments are being paid any reductions in compensation attributable to other subsequent causes are not to be included in the computation of the Section 6 allowances. (They argue that this reasoning also applies in Dockets Numbered 125, 135, and 139.) The detailed explanation of how the decision was meant to apply (no evidence was presented on how it was applied) is more ingenious than convincing.

The holding of Docket No. 17 quoted above is not entirely clear by itself. The record of the case reveals that the Carrier contended for the very proposition it urges here that the Claimant's losses attributable to the subsequent non-coordination shutdown at Howard and the transfer of the Walsenburg second trick position should be excluded from the computation of the allowances governed by Section 6. Twice in its submission the Carrier argued that the compensation losses caused by those two Post-coordination occurrences "must be taken into consideration."* (The Carrier argued that the language of Section 1 called for such a ruling.) But the Committee held that those occurrences "will not enter into the compensation calculation as used by either party." When the contention is matched with the decision, the decision seems to reject the Carrier contention. Hence the Committee's holding in Docket No. 17 does not undermine the holding in Docket No. 17. To the extent that it can be deciphered, it probably supports Docket No. 67; at any rate, the effect claimed for it by Carriers is dubious, at best. Hence Docket No. 67 applies and requires that the claims be sustained.

DECISION:

The Carrier violated the Agreement when it discontinued Section 6 allowances for which the Claimants had theretofore established eligibility on the insufficient ground that a later occurring factor, a drop in business, was the cause of the drop of Claimant's earnings below their test period average.

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* Carrier Submission dated May 4, 1972, at page 6.