DOCKET NO. 136 --- Dispute Pending

Brotherhood of Railway and Steamship Clerks )
)
vs. )
)
Memphis Union S tation Company ) Parties to the Dispute
Louisville & Nashville Railroad Company )
Missouri Pacific Railroad Company )
Southern Railway System )
St. Louis-Southwestern Railway Company )
Illinois Central Railroad Company )

QUESTION:

(a) The transfer of station work and services from the Memphis Union Station Company to the Louisville and Nashville Railroad Company, the Southern Railway System, the St. Louis-Southwestern Railway Lines and the Illinois Central Railroad Company is a coordination of separate railroad services and facilities and subject to the terns and conditions of the Washington Agreement.

(b) The Carriers violated the terms and condition; of the Washington Agreement when they failed to furnish a Section 4 notice of intended coordinetidn and failed and refused to apply the terms and conditions of the Agreement for the protection of the employes affected by the coordination.

(c) The Carriers violated the terns and conditions of the Washington Agreement when they coordinated Memphis Union Station work with Louisville and Nashville work, Missouri Pacific work, Southern work, St. Louis -Southwes tern work and Illinois Central work without an agreement for the selection of forces from the employes of all the Carriers involved as required by Section 5.

(d) The Carriers shall now be required to restore the status quo and apply all the terms and conditions of the Agreement to the coordinations involved.

DECISION:

Dispute pending.

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DOCKET NO. 137 --- Decision by Referee Bernstein

Transportation-Communication Employees Union )
)
and ) Parties to the Dispute
)
The Georgia Railroad )

QUESTION:

"Are A. J. Sangster, Billy Hadaway and all other employees, including those assigned to the extra board or reduced from the extra board, who were affected by the coordination of the separate train dispatching offices in Atlanta, Georgia, of

Atlanta and West Point Railroad Company - The Western Railroad of Alabama and Georgia Railroad, entitled to protection of Section 6 of the Washington Agreement to the extent applicable under the formula prescribed in Section 6(c) thereof, and other applicable protective provisions as provided in the Implementing Agreement of January 5, 1962?"

FINDINGS:

In anticipation of the merger of dispatching facilities the Carrier and the Atlanta and West Point Railway Co. negotiated an Implementing Agreement with the Organization under the Washington Agreement. The two issues presented are: (1) Are employees in extra status prior to merger eligible for Section 6 displacement allowances? and (2) If the answer to (1) is yes, are the lessened post-coordination earnings of claimant Billy Hadaway due to abnormal coordination-caused inflated earnings prior to the coordination and, if so, is he thereby not eligible for a displacement allowance?

(a) The Extra Issue - For the reasons more fully set forth. in Docket No. 108, the answer to (1) is "yes, employees in extra status prior to merger who are continue; in that category are eligible for Section 6 allowances." It is noteworthy that the average test period hours of the only Claimant for whom such data was furnished was 159 a month; even if all of the overtime hours worked in November and December 1951 (the only ones I find which may possibly fill within the category "unusual and inflated") were subtracted., extra Telegrapher Hadaway would have averaged 187 hours of work a month prior to coordination, an amount not always equaled by regular position holders.

(b) The "Inflated Earnings" Issue - Having decided that extra Telegraphers are eligible for Section 6 displacement allowances, the sole remaining issue is whether Mr. Hadaway's earnings were abnormally high because of the coordination before it was effectuated so that in the months after coordination, when his earnings fell below his test period earnings, the deficit was caused not by the normal effect; -- diminished work oppertunities due to increased efficiency -- of a coordination but by reversion to an ordinary pattern of employment. Even if this were so, the Organization argues that nothing in the Agreement warrants ignoring or excluding them. Essentially this was the issue in Docket So. 62, where I held that an employe who had frequently held a second position because the Carrier was not filling vacancies in anticipation of a coordination was not entitled to a displacement allowance when the only attempted proof of post-coordination adverse effect consisted of earnings lower than the pre-coordination test period average thereby achieved. Both Carriers and Organization object to different aspects of Docket No. 62 - those which are disadvantageous - and applaud, or at least accept, other aspects.

I have been given no persuasive reasons for changing the analysis of the Agreement presented in that case. Intensive reconsideration leads me to reaffirm its major principles and expand on certain aspects of it.

It still seems sound to test "adverse effect" in part by comparing test period average earnings with post-coordination actual earnings and to treat a deficit as presumptively the result of a coordination. This is so because the Section 6 (a) basic guarantee is against worsened compensation and actual savings effected by a merger and their impact upon employees are so difficult to trace in complex situations

where so many variables interact. Such a showing is properly subject to rebuttal that the lowered earnings demonstrably result from a cause other than the elimination of jobs or rationalization of work. This second stage properly derives from the provisions of Section 1 which declares that Carriers do not insure earnings against all hazards, but only those stemming from coordination.

Employees also argue that by not filling jobs before coordination the Carrier is able to save twice - first by not employing someone to fill a job and thereby avoiding a guarantee to him and second by eliminating the unusual overtime worked prior to coordination by whoever mans the unfilled job when measuring whether he has been adversely affected. To do as the Organization urges would be to make carriers guarantors of their pre-coordination total payrolls. But the Agreement is designed to protect employees against reduction of their normal earnings. While in railroad arbitration there is an observable tendency to hew as literally as possible to agreement language (a course urged in this case by the Unions), resort to purposive interpretation seems necessary if the proper balance between Sections 1 and 6 is to be approximated. Hence, I reaffirm the holding of Docket No. 62 that where abnormal earnings occur in the test period which are caused by anticipation of a coordination, such earnings are to be ignored in determining whether an employee has suffered a decrease in compensation attirbutable to the coordination's effects. Parenthetically, I note that the individual employee has the full benefit of the pre-coordination additional earnings and is no worse off than any other employee in regard to post-coordination employment.

In this case, Mr. Hadaway's test period earnings are claimed to have been inflated by (1) "abnormal" relief work for abnormal periods of sickness by regular employees; (2) abnormal relief work for an operator who relieved dispatchers who were training to qualify as dispatchers on the other coordinating Carrier as required by the Implementing Agreement. As to the allegedly abnormal sickness, Mr. Hadaway relieved on jobs usually manned by two employees who were absent for many months due to sickness. But such relief work is one usual way in which men working extra catch work, so that it can hardly be called extraordinary. As to (2), the relief work performed by Mr. Hadaway occasioned by this was concentrated, says the Carrier, in October, November and December 1961 and January 1962. However, as the Carrier states, some overtime is to be expected. That worked during October 1961 and January 1962, 16 hours in each out of total employment of 160 and 124 hours, was not out of line with the pattern of Claimant's overtime in other months of the test period. November and December 1961 present a somewhat different picture. In each month overtime totalled 72 hours (for $279.72 in overtime payments) out of total hours worked of 176 and 168 hours. This compares with an average of 13-½ hours of overtime (for an average of $51.50) worked in the seven other months in which he worked overtime. Taken as a rough measure, overtime in excess of this average if shown to be caused by this peculiar set of pre-coordination circumstances may properly be ignored in computing Mr. Hadaway's test period average. That only some of the test period overtime should be excluded -- and only when shown to be excessive and directly due to the impending coordination -- is shown by the fact that after the coordination Mr. Hadaway's earnings exceeded the test period average (computed without any subtraction) in five of the succeeding thirteen months and that in two other months the guarantees claimed (deficit of earnings vis-a-vis guarantee) were but $10.60 and $29.98.

DECISION:

Claimants, extra employees prior to coordination who were continued in service in that category, were eligible for displacement allowances if they can show loss of earnings attributable to the coordination. Carrier improperly denied eligibility on the ground that Claimants were extra board or extra men. In computing test period averages, it is proper to exclude overtime earnings in excess of average overtime if directly attributable to increased pre-coordination work opportunities caused by the impending coordination.

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DOCKET NO. 138 --- Decision by Referee Bernstein

Transportation-Communication Employees Union )
)
and ) Parties to the Dispute
)
Erie-Lackawanna Railroad Co. )

QUESTION:

"Is Mr. L. H. Hunt's claim for benefits for the period August 1962 to January 1963, inclusive, barred by the September 11, 1961 Letter Agreement?"

FINDINGS:

On September 11, 1961 the Organization and the Carrier entered into an Implementing Agreement and, on the same date, executed a Memorandum Agreement. The latter specified that compensation claims by employees claiming to be adversely affected by the 1961 merger must be filed on an agreed form "within 60 days following the last day of the calendar month in which compensation loss is claimed."

Mr. L. H. Hunt claims such a loss for the period August, 1962, through January 1963. The Carrier denied that claim on the ground that the requisite form was not timely filed. The Organization counters with the assertions that although the General Chairman requested test period earnings on November 12, 1962, the Carrier improperly neglected to provide them as assertedly required by the Implementing and Memorandum Agreements until April 3, 1963 and that this five months' delay excuses the failure to file the claim on the specified form within GO days of the end of August 1962. These facts are not in dispute. In addition, tic Organization claims that this Claimant -- 2nd others -- did not receive individual written notification of the claim requirements as called for by the Agreement; but the Carrier asserts thnt the required documents were mailed to all of the employees in the unit. Both could be correct. But I find it unnecessary to resolve the factual dispute for the reasons which appear Inter.

The following are the pertinent excerpts from the parties' agreements:

(1) The Implementing Agreement provides:

ARTICLE IV

1. If as a result of the merger an employee is displaced or deprived of employment, upon written request of the employee or his representative to the Superintendent, the carrier she.11 promptly furnish to such employee, with copy to his General Chairman, a statement showing total compensation received by such employee and his total tine paid for during the last twelve months in which Se performed service immediately preceding the date on which he is displaced or deprived of employment.

(2) The Letter Agreement provides:

1. The Erie-Lackawanna Railroad Company will furnish the General Chairman and employee as quickly as possible after the date of written request, information as to total compensation paid (calculated in accordance with Section 6 of Washington Agreement) to involved employees, as soon as it is known what employees are affected.

2. Any employee who is adversely affected and claims compensation loss will be required to file such claim with Superintendent on form similar to sample attached herewith within sixty (60) days following the last day of the calendar month in which compensation loss is claimed, . . . Failure to submit claim within time limitations prescribed herein will bar the claim unless such failure to submit can be proved to be due to circumstances beyond the control of the employees making said claims.

The agreed form calls for: specification of the month for which claim is made; earnings from the Carrier, other Carrier payments, other employment and unemployment compensation for that period; and the dates on which unavailable for service. All of these items are pertinent to the computation of benefits. However, the form does not specifically call for test period earnings, a computation which is thoroughly reliable only if prepared from the Carrier's own records. Item 6 is "Basis upon which claim is made:" followed by blank lines for the statement on that point.

The issue? to be resolved are (1) whether the alleged failure to provide the Claimant with a copy of the form and Letter Agreement excused the late filing and (2) whether the Carrier's failure to provide test period earnings soon after the November request excused the late filing in the form required (which apparently occurred after test period earnings were provided in April 1963).

It is not possible to resolve the factual issue of actual receipt of the Letter Agreement by the Claimant, although it is entirely possible that he received it in 1961 (for there is no reason to believe it was not mailed to all to whom it was due) but did not note its significance o r contents sfficientlv to recall the receipt when his statement (the candor of which I do no: ques tion) was made in 1964. It also is possible that the mail miscarried. However that nay be, a full ten months elapsed between the execution of the Agreement (9/61) and the claimed adverse effect 8/62). Practically all of the claims filed during that period were on the required form. It

wide-spread use and the generally high level of informedness as to employment matters among railroad employees give reasonable assurance that the Claimant had actual notice of the requirement, which was the purpose of requiring that copies of the Letter Agreement be sent to employees in the unit; his representatives surely did. Early in the life of the Agreement failure to conform with the prescribed procedure would be another matter if there were a question about the employees' receipt of the Agreement. After almost a full year, it *stretches* the imagination to conclude that affected employees were unaware of the requirement, to which the Carrier quite clearly has attached great importance.

Ths next question is whether the nature of the claim is such, or the form or the two Agreements are so structured, as to require test period earnings from the Carrier before timely filing can be required of the claiming employee.

The parties are in disagreement as to the relevance of test period earnings to a claim for displacement allowance. The Organization contends that a showing of worsened compensation is an essential element in determining adverse effect; they assert that the decision in Docket No. 62 supports this view. There I said about eligibility for displacement allowances:

> In the normal and usual case, applying the. formula of Section 5(c) will show whether an employee is "in a worse position with respect to compensation." In other words, if an employee drops below the "average compensation" (all earnings) for a period equal to or less than the "average monthly time paid for" he makes out a prima facie case that he is in a worse position than before the coordination.

The Carriers (while endorsing the result in that case and the reasoning that the test period was abnormal and hence lessened earnings in relation to it did not show a worsened position caused by the coordination) assert that the formula of Section 6(c) for computing displacement allowances (roughly the difference between the pre-coordination test period average and the post-coordination earnings for comparable periods of work) has no relation to a determination whether employees involved in a coordination are in a worsened position because of it. The interpretation of Sections 6(a) and 6(c) [and G (b) as well, in my judgment] is pertinent to how an employee is to judge whether he can make a probably valid claim for a displacement allowance ; if a comparison with the test period average is an essential element ih determining eligibility, he must have that information *to* make *a* claim; if it is irrelevant to establishing eligibility, he need not know it in order to make a claim.

The starting point, once more, is Section 6(a)[1]. It guarantees that

> no employee . . . involved in a coordination who is continued in service shall, for a period nor 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 and rules governing working conditions than he occupied at the time of such coordination . . .

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1. The Carriers contend that the next six paragraphs (including this one) go beyond the necessities of this case. However, they explain the relationship of test period earnings to "displacement". The other issues discussed are pertinent to ascertaining the relationship.

In part the Carrier position is based upon its contention that "position" means regular position so that it is the loss of that position by abolition or bumping relating back to an abolished position that establishes "displacement." This view of "position" has been rejected. (Docket No. 108). Moreover, the Carriers would apply the test of Section 7(c) to Section 6; considering the great difference in language employed, it seems incorrect to read the specific definition of Section 7(c) into Section 6(a). Rather the latter guarantees to all employees in a coordination that their "compensation" and rules governing working conditions "shall not be worsened" for a period not exceeding five years following the effective date of such coordination."*

But it does not come into play until the individual's compensation is worsened, requiring a comparison of his compensation before and after he is first adversely affected.

When he is "first adversely affected" could mean (as urged by Carriers) when he loses a "position" by abolition or bumping, which, however, need not reduce his earnings. Such an interpretation would be inapplicable to those without bulletined positions who are, however, continued in service and receive the protection of Section 6(a). As to these, only worsened compensation could be the test. In addition "adversely affected" would seem to require some actual detriment--that might be the loss of overtime on his own position or extra work on another, Actual earnings detriment would be the signal of "adverse effect." The other factors support this conclusion. ***Section 6(b)*** provides that the protection of Section 6(a) will be made by a "displacement allowance." A "displaced employee" is one who is "entitled to such an allowance," which would seem to mean actually entitled rather than possibly entitled at some future time when another factor of eligibility (worsened compensation) would be necessary. Furthermore, under Section 6(c) the displacement allowance is determined by averaging the compensation of the individual "during the last twelve (12) months in which he performed- service immediately preceding the date of his displacement" and subtracting his post-coordination compensation--the difference is the displacement allowance. This seems to make "displacement" and "adverse effect" equivalent. The Carrier members (and the Organization members, other than the Clerks: reckon the test period as the twelve months in which the employee performed service immediately preceding his worsened compensation. So that the test period and the period prior to the individual's "time of coordination" (i.e., date of his adverse effect) are the same.

In sum, in order to determine whether he is adversely affected the employee continued ***in service must know*** his test period earnings.

In addition, the Implementing and Letter Agreements seem to contemplate that relation: the specific provisions that test period earnings will be supplied are

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* While the question is not directly concerned here, there is the problem of delay caused by Organization obstinacy (as in Docket No. 119); in such a situation the effective date should be the 90th day after notice. The Organization cannot have the benefit of both its delays and a full five years guaranteed. The starting date is not the effective date of an ICC order; when the Agreement was entered into in 1936 the ***ICC*** did not have its present functions as to mergers--hence its actions can hardly be taken to govern a contract term predating these functions by more than four years.

followed by provisions containing the form filing requirement. Moreover, an employee would have no occasion to make a claim unless his compensation were lower. After all, he is seeking additional "compensation."

For this reason, Chc Carrier's failure promptly to provide test period earnings as requested in the November 12, 1962 letter, which also supplied the date of claimed adverse effect, excused the Claimant from filing a claim on the required form for the period for which a prompt reply would have enabled him to file. Hence, the November 12 request, if answered any time up to November 29, would have enabled him to file a valid claim for the months of October and September 1962 (it would have tome within 60 days of the last day of the month for which claim was made). In no event could a timely claim have been made for August 1961--and failure to file a timely claim for that month is not excused by any Carrier action or inaction.

The essential purpose of the claim form and the 60 day requirement is to put the Carrier on notice of its liability and to enable it to ascertain on a fairly current bas is what it is with some definiteness--once the forms are processed, The November 12, 1961 letter advised the Carrier of the names of those believing themselves to be adversely affected (including the Claimant) and the months which their claims covered. The letter lacked some of the data required to compute benefits, if any were in fact due. The Carrier could simply have sent copies of the forms to have them comp le ted. For some reason or other it did not ascertain the test period averages for some of those named in the letter, (including the Claimant) until March or April, and supplied the information in a letter dated April 3, 1963. Under the circumstances it is herd to see how the failure to file fuller information than that contained in the November letter prejudiced the Carrier. If claimant had a valid claim it should not be blocked by minor non-conformance unless the Carrier shows some real damage, which it could have readily averted by supplying forms once it was on notice of the claim.

DECISION:

Mr. H. L. Hunt's claim for benefits is barred for August 1962 because it was untimely filed. The claims for September 1962 and the months following were timely because the November 1362 letter gave actual notice of the claim, the Carrier has shown no damage due to the omissions of some information, end it failed to request more adequate information. Further, the Carrier's failure to provide test period earnings disabled the Claimant from making a timely claim for the months beginning with September 1962 because test period earnings are an essential element in establishing eligibility for a displacement allowance under Section 6 of the Washington Agreement.

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DOCKET NO. 139 --- Decision by Referee Bernstein

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express end Station Employees

and

St. Louis Sou thwes tern Railway Ccapany

Parties to the Dispute

QUESTIONS

"(1) Was Sidney Green affected by the January 1, 1962, St. Louis Southwestern-Southern Pacific Company (Texas and Louisiana Lines:, Dallas, Texas, coordination?

"(2) If the answer to Item (1) is affirmative, shall the Carrier now be required to afford Claimant Green the protective benefits of the Washington Agreement and the July 31, 1961, Implementing Agreement covering the Dallas coordination."

FINDINGS:

The Carrier (the "Cotton Belt") and the Southern Pacific Company (Texas and Pacific Lines) effectuated a coordination pursuant to an Implementing Agreement with the Clerks effective January 1, 1962. The Claimant was a furloughed employee both before and after the coordination. Carrier's detailed and earnest argument that a furloughed employee is ineligible fcr Section 6 benefits was fully considered; the reasons for its rejection are stated in the opinion in Docket No. 106.

As a furloughed employee the Claimant worked extra repeatedly during the year preceding the coordination (1961); he earned just over $4,042 with the Carrier. The Carrier stated without contradiction that a regularly assigned employee in his category working full time in 1961 earned $4,460; here then is another instance of the substantial job relationship enjoyed by many who work in a furloughed or extra capacity. And as the opinion in Docket No. 127 shows, this Carrier, despite its contrary contention, did have a furlough and extra "list." The fact of coordination, the drop in Claimant's seniority rank, and his lessened earnings make a prima facie case that the Claim&t was affected by the coordination and entitled to the protection of Section 6.

In argument the Carrier warned that although Mr. Green was furloughed and earned somewhat more than $4,000 in 1961, other "standby" claimants worked less or not at all in 1961 and some never held regular positions but only worked as extras at all periods of their employment. Although some information was presented about these individuals, the individual claims were not contested before me and I cannot pass upon them. Their disposition will be governed by the principles of this decision and any others which are relevant (e.g., Docket No. 103 (Part III of "Findings")) dealing with the eligibility of employees furloughed substantial periods before coordination

The Carrier also argues that the decisions of the Acme Freight Forwarding Compa and the Southwestern Transportation Company and Southern Pacific Transport Company to discontinue having the Cotton Belt perform their warehouse work caused the reduction of earnings claimed by these in Claimant's situation; it cites this as non-coor nation cause of lost earnings.

However, these discontinuances took place in 1963. If their occurrence coincided with the first post-coordination reduction of income experienced by claimants then eligibility for Section 6 benefits might not be established. See Docket No. 109. If Claimants had reduced earnings prior to that time then their Section 6 eligibility remained unimpaired. Dockets Numbered 67 and 129. Hence the Carrier's explanation does not negate coordination - caused impairment of earnings and consequent eligibility for Section 6 benefits.

DECISION:

Claimant Green, a furloughed employee both before and after the coordination to which the Carrier was a party, was eligible for the benefits of Section 6 of the Washington Agreement.

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DOCKET NO. 140 --- Decision by Referee Bernstein

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| Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees | ) | |
| and | ) | Parties to the Dispute |
| Southern Railway Company<br>Central of Georgia Railway Company<br>Illinois Central Railroad Company | ) | |

QUESTION AT ISSUE:

"Claim of the System Committee of the Brotherhood that:

"(a) The transfer of Central of Georgia Railway Company clerical work from the Illinois Central Railroad Company Freight Agency, Mechanical and Store Department facilities, Birmingham, Alabama, to Southern Railway System facilities are subject to the terms and conditions of the Washington Agreement of May 1936, Washington, D. C.

"(b) The Carriers violated the terms and conditions of the Washington Agreement when they 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 the employees affected by the coordination.

"(c) The Carriers violated the terms and conditions of the Washington Agreement when they coordinated Central of Georgia work with Southern work without an agreement for the selection of forces from the Carriers involved as required by Section 5.

"(d) The Carriers shall now be required to restore the status quo and apply all the terms and conditions of the Agreement to the coordination involved."

FINDINGS:

The-dispute in this case arises out of the several transactions described and discussed in Docket No. 141; Southern and Central of Georgia make the same contention that the Section 13 Committee is without jurisdiction. The description and discussion in the opinion in Docket No. 141 of the background and contentions on this aspect of the case apply equally here. Hence I conclude that the consideration of the merit; is in order. Despite the non-participation of Southern and Central on the merits, the Organization must make affirmative showing the violations alleged did occur and that Claimants are entitled to the relief sought.

The violations alleged hers concern work performed by the Illinois Central for Central of Georgia which was transferred to Southern as a result of Southern's acquisition of control of Central of Georgia in 1963. Had the work been performed by Central of Georgia employees the transfers would constitute "coordinations" and would require Section 4 notices and Section 5 agreements to be consummated; and the benefit provisions of the Agreement would apply. The issue is whether the adversely affected employees of Illinois Central (who performed the work for Central of Georgia) can claim. these protections. Illinois Central asserts that it is not a carrier party to the acts of unification, consolidation, etc. and so it does not come within the definition of "coordination" in Section 2(a); and its employees are not those of a "carrier involved" within the meaning of Section 6(a) or a "carrier participating in a . . . coordination" within the meaning of Section 7(a).

That position is sustained by the results and opinions in Dockets Numbered 51 and 47 in which claims of employees of carriers performing the work withdrawn and transferred to another carrier were denied,

In Docket No. 59 I reluctantly followed those rulings as precedents noting, however, that I thought the arguments in favor of the claims were more meritorious.

The Organizations contend that subsequent court and ICC rulings on similar provisions of Section 5(2) (f) of the Interstate Commerce Act -- including ore concerning the very sane transaction involved in Docket Number 51 -- further vitiate, indeed des troy, the precedent value of the rulings in Dockets Numbered 51 and 47. In Railway Labor Executives Assn. v. United States (D.C.E.D.Va. 1963) 216 F. Supp. 101 (52 LRRM 2800) the court overturned an ICC determination that Section 5(2) (f) did not apply to C & O employees who performed work for the Seaboard which the Seaboard withdrew and had performed elsewhere. The court's second ground for rejecting the ICC ruling was that the Seaboard's acquisition of alternative facilities was a "transaction involving" the C & O although that carrier was not a direct party to the transfer of work. The ICC reached a result inconsistent with Docket No. 51 in 295 ICC 457 (1957) and 312 ICC 676 (1961); a three judge court rejected an attack on the Commission order granting protection to employees of the carrier performing the services although it was not a direct party to the consolidation. Louisville and Nashville R.R. Co. v. United States (D.C.W Ky. 1965) 244 F. Supp. 337, affirmed U. s._____, USLW 3284 (February 21, 1966).

In my judgment these cases, involving the judgment of two courts and the Commission dealing with similar language of Section 5 (2) (f) warrant overruling Dockets Numbered 51 and 47. As I stated in Docket No. 59:

. . . the question is whether the transfer of the work and services formerly performed through one facility (C & EI Bureau) to another facility (the C & WI Bureau) and combined with the work and services of the latter is a "coordination." A major factor is that the employees who lost the work are employees of the C & EI and not employees of the Erie and the Wabash whose operations and services were combined with those of the C & WI.

As an original proposition I would have no hesitancy in deciding that this was a coordination and that the employees were due the benefits of the Agreement. Operations and services formerly performed through one facility were combined with operations and services of another carrier. As a result employees lost jobs. The fact that the Erie and the Wabash obtained the performance of these operations and services through the employees of other Carriers under contract arrangements should not be controlling. It makes good law and good sense that what cannot be done directly cannot be done indirectly.

Mad Erie and Wabash employees been performing the work which was combined with that of the C & WI there undeniably would have been a coordination and those employees adversely affected would have been eligible for the benefit; Of the Washington Job Protection Agreement. This seems co be the general kind of situation in which the Agreement was meant to operate. Here Carriers combine their operations and services with those of another Carrier in the interests of economy and efficiency. It is the purpose of the Agreement to facilitate such coordination ard, also, to cushion its impact upon employees.

The decisions of two prior cases lead to a contrary conclusion. In the Atlanta Joint Terminals Case (Docket No, 51, Award No. 5 = = Referee Gilden) and the CNW case (Docket No. 47, Award No. 6 = - Referee Gilden) it was held that employees of carriers which were not immediate parties to the coordination were outside the protections of the Agreement and that as tc the carriers who lost the contracted work there was no ccordinatien. Such interpretations seem to be more formalistic than realistic.

To continue to accord Dockets Numbered 51 and 47 precedent value would be to distort the Agreement and make it inharmonious with parallel provisions of the Act. Employees of carriers performing services under contract would be denied benefits accorded those doing the same thing directly for a carrier party to a coordination. The unfairness of such results is manifest; the potentiality for abuse is clear.

As indicated (but not held) by JudgeBryan in the C 6 0 Seaboard case, the carrier for whom the work is performed and which transfers the work is the appropriate employer to bear the financial burden of the protective conditions. In this case, Southern (which would be in that position) night have argued that the interpretation of the Washington Agreement governing this kind of situation should not be changed without notice and that it was entitled trely upon the interpretation of the agreement in Dockets 51, 47 and 59; and I would have agreed. However, it did not rely on these interpretations for it based its actions on the premise that the Washington Agreement was not applicable to this coordination and that only the ICC imposed conditions governed. Under the circumstances it was not led to the actions it took by virtue of earlier interpretations of the Agreement. Hence it is appropriate to order it to observe the Washington Agreement as interpreted here in relation to the adversely affected employees of the Illinois Central.

DECISION:

(1) The trtnsfcr of the work performed by Illinois Central for Central of Georgia to Southern was a "coordination;"

(2) Central of Georgia and Southern violated the Washington Agreement by failing to give Section 4 notices to Illinois Central and other affected employees and to negotiate an implementing agreement before putting the coordination into effect;

(3) Southern is directed to pay full beck pay (i.e. based upon the average of compensation earned in the 12 months preceeding the dares 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 16, 1968.

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