DOCKET NO. 141 --- Decision by Referee Bernstein

American Railway Supervisors Association	)	
American Train Dispatchers' Association	)	
Brotherhood of Locomotive Engineers	)	
Brotherhood of Locomotive Firemen & Enginemen	)	
Brotherhood of Maintenance of Way Employes	)	
Brotherhood of Railroad Signalmen	)	
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees	)	
Brotherhood Railway Carmen of America	)	
Brotherhood of Sleeping Car Porters	)	
International Association of Machinists	)	
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers	)	Parties to the Dispute
International Brotherhood of Electrical Workers	)	
International Brotherhood of Firemen and Oilers	)	
Railroad Yardmasters of America	)	
Sheet Metal Workers' International Association	)	
Switchmen's Union of North America	)	
Transportation Communication Employees Union	)	
	)	
and	)	
	)	
Southern Railway System and	)	
Central of Georgia Railway Company	)	

QUESTION:

"(1) Whether the various arrangements described in the 'Statement of Facts' set forth below constitute 'ccordinations' within the meaning of Section 2(a) of the Agreement of May, 1936, Washington, D.C.?

"(2) If the answer to Question No. 1 is in the affirmative, are the carriers involved excused from complying with the terms of the Agreement of Play, 1036, Washington, D. C., by reason of the action taken by the Interstate Commerce Commission in Finance Docket No. 21400, 317 ICC 557, in which it imposed certain conditions for the protection of employees?

"(3) If the answer to Question No. 2 is in the negative, may the carriers involved place the said cocrdinations into effect prior to the time agreements comprehended by Sections 4 and 5 of the Washington Agreement have been reached following the posting of ninety (90) day notices and the holding of conferences as prescribed in Section 4 and 5 of the Washington Agreement?"

FINDINGS:

In late 1962 the Interstate Commerce Commission approved the Southern Railway System's acquisition of control of the Central Georgia Railway (and a subsidiary, Savannah and Atlanta Railway Company) by purchase cf Central's stock. Finance Docket No. 21400, 317 ICC 557. Although that order was to be effective in January 1963,

the Southern did not act upon it but sought reconsideration and clarification by the Commission of various aspects of the conditions imposed for the protection of employees. After reconsideration, the Commission issued a further "report" in which it granted some and denied others of the Southern's requests--none pertinent to this dispute. That order, dated June 10, 1963 was issued on June 14. On June 17 the abolition of jobs which is the subject of the claims in this proceeding began.

The major questions presented are:

(1) Were the job changes complained of the result of "coordinations" within the meaning of Section 2 of the Washington Agreement?

(2) Do Sections 5(2)(f) and 5(11) of the Interstate Commerce Act, and the employee protective conditions issued pursuant to the former, extinguish the applicability of the Washington Agreement, to which both Carriers are signatories, so that (3) the Carriers were relieved of their obligations to give notice to the Organizations of the intended alleged coordination and to negotiate implementing agreements before the coordinations could be put into effect?

The Carriers appeared specially before the Committee and the Referee solely to contest the Committee's jurisdiction. Initially they made no factual presentation other than that relating to various stages of the ICC Proceeding. At the Referee's invitation the Southern submitted comments upon this and related cases directed to the Committee's jurisdiction as a matter of law and the propriety of the remedies contained in the proposed opinion and decision; at my request, it is also commented upon some factual issues. At no time did the Carriers abandon their contention that the Committee lacked jurisdiction nor do I regard their acceptance of my invitation as a submission to the Committee's jurisdiction.

(a) The Claimed Coordinations - "Default judgments" are alien to the arbitration process. As I noted earlier in this proceeding, whether or not the adverse party appears, the Claimant must make a factual showing and demonstrate affirmatively that it is entitled to the relief sought. Innumerable exhibits established that most of the changes in operations protested here were the result of transferring Central work to Southern installations with the consequent abolition of the Central jobs. The proof is contained in exhibit after exhibit reproducing the Southern's and Central's own announcements. So, for example, Employee Exhibit No. 3-d, a Southern-Central bulletin, declares that: "Effective today [June 17, 1963] the yard and terminal operations of Central of Georgia at Chattanooga, Tennessee, are consolidated with those of Southern Railway and will constitute one common seniority district." Other exhibits of like nature also announce such "consolidated" operations or "transferred" work (e.g., Employee Exhibit No. 3-g). A few notices on the same date, or soon thereafter, omit such explanations for the abolitions. However, given the timing and abolitions of large numbers of jobs, which apparently had been necessary for Central's operations up to that time, the inference is reasonably clear that in all of the situations alleged to be coordination (except those discussed in detail in the succeeding passages) the Central of Georgia work was transferred to and coordinated with the Southern's . A prime facie showing was made and the Southern contested only the following specific instances:

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At the March 1966 executive session of the Committee, Carrier representatives challenged specific items of alleged coordination, viz., paragraphs numbered (2), (7), (8), (9), (10), (11), and (12) of the Organization Submission at pages 6 and 7 and those described in Organization Exhibits 3-x, 3-y, and 3 - 2, but did not adduce proof. The Organizations apparently took the position that the challenges came too late to be entertained. The Southern reiterated these challenges in a letter to me dated March 30. Thereafter I informed the parties that I did not wish to dispose of the matter on procedural grounds, i.e., either that the Carrier;' specific challenges came too late or that the Organizations had failed to adduce proof once the matters were put in issue. Hence in a series of letters and telephone conversations I requested both sides to submit statements to enable me to reach a resolution of the contested claims. I suggested a stipulated statement of fact, but that did not materialize. I also suggested that the parties might agree to defer resolution of such of the contested issues as they could agree upon lest it became necessary to hold a hearing, which I was reluctant to do in the face of the many demands upon the time of the parties in connection with this case. The parties were unable to agree. However, I have found their allegations, statements, and arguments adequate for the decision of some of the items. in controversy, The Carriers also urged that I not resolve any of the factual issues but confine myself to a decision on the question of jurisdiction, leaving the factual issues (if the Committee's jurisdiction was sustained by the courts) for a hearing subsequent to a final court disposition of that issue. But I felt unable to do this, as I explained, because (among other things) in an earlier case brought by a carrier; I decided both the challenge to the Committee's jurisdiction and the dispute as well. Here the Organizations seem equally entitled to a resolution of the major issues already before the Committee to the extent that they can be resolved. As to the item in controversy I find:

Organization Exhibits 3-x, 3-y, and 3-z.

Organization Exhibit 3-x is the Central of Georgia bulletin, dated January 21, 1964 (about six months after most of the changes effected as part of the coordination), abolishing one Blacksmith, six Electricians, eight Machinist, five Sheet Metal and seven Locomotive Supply, Engine Washer and Laborer positions at Central's Columbus Georgia Shop. Exhibit 3-y, Central of Georgia bulletin, dated January 30, 1964, re-established six of the abolished positions.

The evidence submitted shows that the positions abolished performed the periodic locomotive inspections required by the ICC and light and heavy running repairs on locomotives, after the January 21, 1964 abolitions and the January 30 partial restoration inspection work no longer was performed at this shop, except for a few switch engines; and the repair work consisted of light running repairs on fewer locomotives. The Southern explains that this reduced activity results from the purchase of new locomotives, the retirement of old ones "and upgrading of others." Hence, it argues, no substitution for the services formerly performed at this shop was necessary and that the reduced force was adequate to the slight amount of repair work still required. Employee evidence indicates that this may not wholly account for the changes in repair activity at Columbus. Unaccounted for, however, are the monthly, quarterly, semi-annual, and annual locomotive inspections which had accounted for 15 to 20 inspections a month at Columbus up to mid-June, 1963. But no showing was made that the January 1964 changes involved

transferring Central inspection work to Southern facilities nor was an affirmative showing made that identifiable repair work or facilities formerly located at Central's Columbus shop was transferred to Southern facilities. On this record I find that the jobs listed in Exhibit 3-x were not abolished as part of a coordination.

Exhibit 3-z is Central of Georgia bulletin dated January 21, 1964 furloughing nineteen Car Department employees engaged in car repair work. The record contains ample proof that although, as the Carriers assert, car repair work was reduced by selling off many old cars, Central of Georgia work of this category remained to be done and was thereafter performed at Southern facilities. Hence, I find that the furloughs covered by this bulletin were a result of coordination activity between the two Carriers.

Organization Allegations (2), (9), (10), and (11).

The Southern argues that a great deal of the maintenance work involved in these items was eliminated solely as a matter of economizing on Central of Georgia's operations and that the job abolitions were unrelated to any consolidation of the two Carriers' activities. But the Organizations allege that work performed by several hundred employees in the buildings formerly maintained by the Central of Georgia employees who lost their jobs was transferred to the Southern in what must be regarded as coordination of the two Carriers' activities and, as a result, a large portion of the former maintenance work involved in these allegations became unnecessary. On the record made it is not possible to resolve these issues satisfactorily. The Organizations made a prima facie case which was challenged by the Carrier only after the regular Committee procedure had led to tentative findings. Had the matters been put in issue on the property, a different and more comprehensive Organization showing might have been made. On the other hand, once the Carrier cast doubt upon some of the allegations, a proper resolution seems to require the submission of uncontested statements of fact or a full inquiry. In several other cases where factual issues arose during the consideration of the case, the parties submitted further information, either orally or in writing or in some combination, to the Committee and Referee. However, that procedure has not worked in this case because the parties are in substantial disagreement over the facts. I have decided that a hearing at this juncture of the case would be undesirable.

The parties would be unavailable for a hearing for a considerable time; such a hearing might prove fruitless if the Committee's jurisdiction were not sustained; and, it is common to leave for further proceedings issues which might be resolved by the parties in the light of the issues resolved or where factual matters are involved.

Organization Allegation (12)

The Organizations have not demonstrated that the abolition of the three Cooks' jobs was caused by coordination.

Organization Allegations (7) and (8) and
Carrier Allegations of no Adverse Effect

Although at the March 1966 meeting Carrier Committee members and thereafter the Southern contended that these occurrences did not constitute coordinations, its

later argument was that the employees affected were not adversely affected and thereby were not eligible for benefits. Its most recent communications to me give innumerable examples of individuals among those named in Carrier bulletins, which on their face show that the Central of Georgia work involved was the subject of coordination, whose compensation allegedly was not thereby impaired. These changes alone makes out a showing of violation of Sections 4 and 5 of the Washington Agreement.

The Carrier contends that the Organizations withheld information as to many individuals involved in the challenged acts which would show lack of entitlement to compensation because their post-coordination compensation equalled or exceeded their pre-compensation earnings. But the Organizations cannot properly be thus accused because the issue of individual entitlement was injected into these proceedings long after such an issue usually would have been raised in a Section 13 proceeding. Moreover, in this industry it is common to go to arbitration on the principal issues in controversy and to leave the detailed application of the rulings to later handling by the parties, with recourse to further arbitration if the parties cannot agree on how the decisions are to be applied.

In its latest communications the Southern objects to the decision (as it was presented in draft form) on the ground that some of the individuals in the other situations not contested by it as constituting coordinations did not suffer compensation loss, or were discharged for cause before or after the events in dispute, or died or resigned thereafter or settled their claims and signed releases. Before this set of contentions was made, Organization and Carrier Committee members agreed that the issue of the effectiveness of releases was not before us. Nothing in the decision directs compensation where it would not have been due in the absence of the coordinations which breached the Washington Agreement. Discharge for cause or total disability, for example, would end the right to such compensation. However, some retirements under the circumstances of these cases may have been less than wholly voluntary. The parties have ample means to resolve any such disputes that they cannot settle by negotiation in accordance with the practice in this industry and the procedures established under this Agreement. Therefore, it is not necessary to decide these Southern contentions at this stage of the dispute. All or many of them may wash out by agreement once the major issues are settled; if not, this Committee can pass upon them when they are presented in the regular fashion.

Except for the situations described in Employee Exhibit 3-x, and items (2), (9), (10), (11) and (12), all of the alleged coordinations are held to be coordinations within the meaning of Section 2 of the Washington Agreement. The question then arises whether the Agreement is applicable.

(b) The applicability of the Washington Agreement -

Acting under Section 5(2) of the Interstate Commerce Act,[1/] the ICC approved the Southern's acquisition of control of Central on condition that certain employee protective conditions, in substance the New Orleans Conditions, be afforded affected employees. These conditions apply the "Oklahoma Conditions" which although patterned after the Washington Agreement, differ from it in several major respects - the guarantee to employees deprived of employment is 100% of test period average earnings rather than 60% and the maximum duration of protection is four years rather than five - and a few minor ones; moreover, where the Washington Agreement would yield more "compensation," an employee is entitled to receive it. This pattern derives from the New Orleans Union Passenger Terminal Case, 282 ICC 271. In its first decision in that case (267 ICC 763) the Commission imposed protective conditions which would have expired four years from the effective date of its order, interpreting Section 5(2)(f) as imposing such duration as a maximum. However, the construction of the terminal was to take most of that period, thereby rendering the "protection" practically meaningless. The Supreme Court held that the four year period specified in Section (5) (2) (f) was not a maximum but a minimum and remanded the case to the Commission. In turn the Commission added the Washington Agreement compensation terms to those of the Oklahoma Conditions so as to extend the protection for a longer period. So, when the Commission has imposed the New Orleans Conditions up to the time of this case it has included the Washington Agreement specifically, making express mention, however, of only the monetary protections.

At issue is whether the non-monetary procedural aspects of the Washington Agreement must be observed when railroads affect coordinations after their corporate affiliation is authorized by the ICC and the Commission prescribe; conditions for the protection of employees Section 4 of the Washington Agreement require; advance notice of an intended coordination and Section 5 of the Agreement requires an agreement between carrier and union before a coordination may be put into effect. Dockets Numbered 70 and 57.

1/ It provides :

> As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers, prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees

The Washington Agreement came into being in May 1936; Section 5(2)(f) dates from September 1940. The history and purpose of each must be understood in order to determine their interrelation.

As noted in Docket No. 106, in the railroad industry the recognition and scope provisions of rules agreements commonly are regarded as defining jurisdiction and job "ownership" which prohibit the transfer of work from employees under one agreement to employees - even in the same craft - under another rules agreement. As a result, combining the work of employees of two carriers or shifting work from the employees of one carrier to those of another, the most common means of effectuating coordinations, could not be accomplished without incurring penalty payments to those employees who lost the work. As the savings to be achieved by reducing employment by the combination and rationalization of work of two or more carriers is a major purpose of railroad mergers and acquisitions, a means to overcome the barrier imposed by the rules agreements was necessary. The Washington Agreement serves that purpose - it permits such combinations and transfers of work under specified conditions - including notices of intended coordination, negotiated implementing arrangements, guarantees for employees whose earnings or employment are adversely affected and other benefits. The Agreement - although concluded under the threat of legislation unwelcome to both railroad management and organized labor - was a voluntary private collective agreement entered into by the major railroads and railroad labor organizations to enable the carriers to achieve mergers and to cushion their impact upon employees. Since 1936 many railroads have acceded to the Agreement so that its scope among carriers now is almost universal, although some few unions representing railroad employees are not signatories.

Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5(11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws - there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in

the procedures of the Railway Labor Act for modifying rules agreements - assuredly a fundamental and important change - was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time. 2/ Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them. (The Harrington Amendment was an unsuccessful attempt to get more than the Agreement gave employees; its rejection by Congress does not mean that where their national agreement applied they were to get less.) As noted many years ago by Referee Gilden in the opinion in Docket No. 27:

> The Transportation Act of 1940, of which Section 5(2)(f) of the Interstate Commerce Act is a part, was enacted with full knowledge and thorough familiarity with the terms of the Washington Agreement. There is no discernible manifestation of any Congressional design to emasculate it entirely or otherwise to thwart or subdue its potency. Actually, its legislative history reveals an affirmative willingness by Congress to permit the protective features embodied in the Washington Agreement to continue unimpaired alongside of those imposed by the statute on the Interstate Commerce Commission. . . .
>
> Implicit in the pronouncement made to Section 5(2)(f) to the effect that, notwithstanding the relief afforded in that provision and certain other sections, the Carriers and the authorized representatives of their employees could, nevertheless, thereafter enter into contractual arrangements for the protection of employee interests adversely affected by Carrier transactions, is the recognition that all existing prior understandings, arrived at by the sac principals, dealing with the identical subject, and similarly designed to serve the very same purpose, are also sanctioned.

In that case the Carriers argued that Section 5(2)(f) vi-tinted the Washington Agreement. The Referee rejected the contention, also noting that Carriers had not given any indication of withdrawing from the Washington Agreement.

In Docket No. 64 I rejected a similar contention by the Organization that an outstanding Commission order imposing the New Orleans conditions (which included the arbitration provisions of the Oklahoma Conditions), issued pursuant to Section 5(2)(f), precluded application of the Washington Agreement's procedure. I noted that the earlier ruling was made in the face of ICC conditions much like the Oklahoma Conditions. Ttie differences between those arbitration provisions and those in the ICC order in the Southern-Central case provide no reason for a different conclusion here.

2/ Note 2 *in* Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry.Co., (CAS, 1963) 314 F.2d 424, 432 is not persuasive on this point. Such comparisons may be indicative but are hardly dispositive of Congressional intent.

Carriers also argued that Docket No. 64 differs from this case because in the former the Commission expressly imposed the New Orleans Conditions which import the Washington Agreement. Docket No. 27 is not subject to such a distinction. In Docket No. 64 the Carrier argued that applicability of the Washington Agreement both under the authority of Docket No. 27 (deciding that Section 5(2)(f) and the Agreement coexist) and that the ICC-imposed conditions included the Washington Agreement. My decision was based upon the former ground.

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of its applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractual arrangement as harmonious with the ICC power to impose employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated.

After the Section 13 Committee's hearings and executive sessions the Southern submitted a memorandum citing, for the first time, 3/ authorities which arguably would lead to a different conclusion. While language in all of them indicates the broad scope of Section 5(11), the differing contexts and issues of the cited cases and this set of cases involving the Southern and Central of Georgia must be taken into account. Texas v. United States, 292 U.S. 522, 533-34 (1934) and Schwabacher v. United States, 334 U.S. 182, 200, 201 (1947) are hardly opposite. Kent v. CAB, (2d Cir. 1953) 204 F2d 263, is put forward for the proposition that federal agency power in carrier merger cases extends to overriding private collective agreements. The court there dealt with the CAB's power which it likened to that of the ICC; it also compared the CAB's power to override a collective agreement dealing with the normal subjects of such contracts with the way in which collective agreements take precedence over individual contracts of employment under the National Labor Relations Act--an example of how a court may blur innumerable differences which are apparent and important to those familiar with the many peculiarities of labor relations and agreements in different fields (to say nothing of the many differences in the applicable statutes) and parlay them into possibly unwarranted propositions. Among the many differences in the situations discussed in that case and this group of cases is that the last sentence of Section 5(2)(f) explicitly provides for the concurrent existence, and thereby operative effect, of private agreements providing employee protection and ICC-imposed conditions.

3/ I have received and considered all the material and arguments submitted by the parties no matter how late in the proceeding some of it was submitted. Certai material does not require extended comment, e.g., copies of letters from the Commission's Congressional Liaison Office, the Commission chairman and other commission officials purporting to show that certain parts of the Washington Agreement were not included in the Commission's orders. Their probative value

Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (8th Cir. 1963), 314 F.2d 424, dealt with a railroad merger situation in which the parties agreed that a somewhat modified version of the Washington Agreement provided "a fair and equitable arrangement for the protection of interests of such employees as provided in Section 5(2)(f) . . ." and the Commission adopted the agreed upon arrangements in its order approving the purchase of one carrier's facilities and rights by another looking to the coordination of some facilities. The acquiring carrier gave the required Section 4 notice and sought to negotiate an implementing agreement. The carrier sought arbitration when negotiations stalled in the face of a union contention that the coordination constituted changes in rules which could only be accomplished under the procedures prescribed by the Railway Labor Act for such changes. In this context the court held that Section 5(2)(f) displaced the requirements of the Railway Labor Act. Quite apart from the dubious reliance upon Kent v. CAB for that conclusion, the case does not present any conflict between Section 5(2)(f) and the Washington Agreement. Indeed it was a modified version of the Agreement concluded by the parties that was being enforced under Section 5(2)(f); no challenge to the last sentence of Section 5(2)(f), validating private employee protective agreements, was involved. (N.B.: The Court's caution that "We limit our decision to the peculiar factual situation of the present case." 314 F.2d at 434.) These cases, then, do not lead to the conclusion that Section 5(2)(f) displaces the Washington Agreement.

The Section 13 Committee has processed many cases involving the New Or-lean; and other conditions and innumerable implementing agreements under the Washington Agreement have been concluded despite the prior issuance of ICC orders imposing various protective conditions. This pervasive and consistent conduct is at odds with the Carriers' assertion that the Washington Agreement is a nullity.

Congress did override the Railway Labor Act when the dispute over firemen and crew consist did not respond to innumerable emergency boards and a presidential commission and threatened a national tie-up of rail transportation. Only then did the President propose and Congress reluctantly provide that a public agency (other than the Commission as originally proposed by the President) impose terms of employment. It approaches the absurd to entertain the notion that essentially the same thing happened sub silentio in the 1940 enactment of Sections S(i)(f) and 5(11) where no such crisis had existed, no bargaining stalemate had occurred, and no stoppage impended.

The background and purpose of the Washington Agreement and Section 5(2)(f) differ. The first is a voluntary national collective bargaining agreement which stems from the peculiar nature of railroad rules agreements--it is the key which unlocks the rules preventing transfer and consolidation of work. Section 5(2)(f) is a statutory requirement which comes into play when carriers seek governmental permission to merge facilities. It is the price imposed by government for such permission in the interest of balancing employee interests with those of carriers

and the public. 4/ In seeking that permission carriers do not seek relief from another private agreement; they accept the Commission's terms for the grant of government permission to take certain steps. While typically employee organizations intervene, they do so to avert actions which they believe will shrink employment opportunities and to maximize the protections afforded employees. The protective conditions granted often are superior in many respects to those in the Washington Agreement balanced off in some degree by somewhat more restrictive details. Because of this they usually have been accepted, even if more favorable conditions were sought from the Commission or the courts. No Commission action indicates an attempt to abrogate the Washington Agreement, although some of its conditions adopt the Washington Agreement with minor modifications. I doubt that the Commission could override the Washington Agreement if it wanted to; it can order higher benefits and impose them upon the carriers as the price of approving what they seek; but a more compelling showing of Congressional intention is required to obliterate a nationwide collective agreement not objected to by either management or labor - or, indeed any governmental agency - and supersede it with governmentally imposed conditions. More than two decades of conduct by railroad management and unions and by the Commission belie such a result. As the Commission noted in its announcement of February 17, 1964, (320 I.C.C. 377) in this case: it did not intend to supplant the Washington Agreement and, indeed, its protective orders have been patterned after that agreement. The Southern argues that the ICC (despite what it said in its 1964 statement) meant its arbitration provisions to displace those provided by Section 13 of the Agreement and offered the following quotation from the Commission (317 ICC 566):

> The possibility also exists that a carrier will refuse to accept arbitration procedures under paragraph 8 and require employees to invoke the provisions of section 13 of the Washington Agreement, which involves a permanent committee whose decisions may be subject to protracted delay after a claim is made. In our opinion, fairness and equity require adoption with some modification, as hereinafter set forth, of the condition urged by the association with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee.

This language seems to say that the Section 13 Committee arbitrament is available but might be too slow, hence the Commission was providing an arbitration provision thought to be superior. This is quite different from saying that the Section 13 Committee procedure was to be superseded. Moreover, it hardly seems likely that the Commission would have concerned itself with Section 13 if it did not believe that the remainder of the Washington Agreement applied, for otherwise the Section 13 Committee would have no authority to act.

4/ "Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the cost of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege." United States v. Lowden, 308 U.S. 225, 240 (1939) speaking of the predecessor provision Section 5(4)(b). The Court equated Section 5(4)(b) with the then pending bills which brought forth Section 5(2)(f).

Given the preferred position of collective bargaining in nationwide agreement which provides for negotiation of employment aspects of mergers, (and provides its own machinery for averting deadlocks (See Docket No. 70)) it seems entirely unlikely that the Washington Agreement was cast aside by Congress without specific mention of the fact. This conclusion is all the stronger for the fact that the notice and implementing agreement provisions have proved workable again and again in coordinations between carriers where ICC protective conditions had been issue.

Carrier Members urge that two court proceedings concerning this controversy have led the parties back to the ICC and that its decision should be awaited. In companion cases, 5/ the Court of Appeals for the Fifth Circuit declined to rule preferring to have the issue determined preliminarily by the ICC pursuant to the earlier remand of another case by the Supreme Court. The Supreme Court of the United States 6/ remanded the other case to the district court with instructions to have it remanded to the Commission with instructions "to amend its reports and order as necessary to deal with appellants' [a union's] request that Sections 4, 5, and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included. See United States v. Chicago, M. St. P. & Pac. R. Co., 294 U.S. 499, 511." (The cited case was decided in 1935, before the Washington Agreement, and does not deal with it; it does deal with the requisites of an appellate record where agency action is contested.) Both courts indicated they sought clarification of what the ICC had ruled and why. While the ICC's view of the impact of Sections 5(2)(f) and 5(11) undoubtedly would be influential with the courts, there is no certainty that the Commission will reach that issue. The Court's order seems to require the Commission to explain whether its conditions included certain parts of the Agreement or not and to explain the inclusion or omission; the issue before this Committee may not be dealt with by the Commission. The special history and experience of this Committee and the history of dealings by signatories to the Washington Agreement (some of whom played leading roles in the enactment of the 1940 provision) upon which this decision rests would seem to impart importance to the disposition of the issue of the interrelationship of the Agreement and Section 5(2)(f) in this proceeding. The Carriers raised the issue; the Committee is obliged to discharge its functions as best it can.

Southern's letter of July 12, 1966 submitted a copy of motion papers in Gary v. Midland Valley R.R. Co., Civ. No. 5995, (D.C.E.D. Okla) which include a memorandum by the attorney for some of the Organizations contrasting the New Orleans and Southern-Central conditions and declaring the inferiority, from the employees' viewpoint, of the latter to the former. However, even if that analysis is accurate, it does not reach the issue before the Committee - whether the Washington Agreement is vital and applicable despite Section 5(2)(f) of the Act and Commission orders issued pursuant to it. I did not construe the ICC conditions in my draft

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5/ Switchmen's Union v. Central of Georgia R. Co., 341 F2d 213 (1965); Brotherhood of Railway Clerks v. Southern R. Co., 341 F2d 217 (1965).

6/ Railway Labor Executives' Association v. United States 379 U.S. 199 (1964).

opinion nor in this final opinion. This opinion is addressed to the interaction of the Act, Commission orders and the Agreement. If the Commission decides that its orders comprehended the notice and implementing agreement provision; cf the Washington Agreement and if that decision is sustained, that would be one basis upon which the Agreement is applicable. That is not the basis of this ruling. Rather, the ruling that the Washington Agreement applies is that the background, purpose, and language of Section S(Z)(f) all maintain its operative force, as do the precedents and conduct of this Committee.

For all of these reasons; I conclude that the Washington Agreement was not abrogated "or modified by Sections 5(2)(f) or 5(11) or the ICC orders in Finance Docket No. 21400. Therefore, the Carriers viola-ted the Washington Agreement by putting coordinations into effect without observing the important requirements of Sections 4 and 5. They therefore must (1) compensate employees for any loss of regular compensation or fringe benefits and (2) must give the requisite notices and negotiate the required implementing agreements. Until that is done employees are entitled to fuli compensation and fringe benefits as if the jobs had not been abolished. Docket No. 106.

When implementing agreements are achieved Washington Agreement benefits will extend through September 15, 1968 (five years from 90 days after June 17, 1963 - the point in time when the Carriers, had they fulfilled their obligations, night have bee" able to expect that a" implementing agreement should have been achieved). Indeed, that presumption favors the Carriers. However, until they do negotiate such an agreement (or this Committee writes one in the event of a deadlock) the Carriers can hardly expect to pay the less than total compensation this Agreement allows to those who observe it. The effect of coordination upon any individual employees is to be determined as of the date such effect occurred. However, such a" individual will be entitled to the equivalent of undiminished earnings until a" implemen ting agreement is achieved, 7/ af ter which the allowances payable under the Agreement shall go into effect. They are tc be computed on the basis of the date of actual effect.

As to the portion of the decision ordering the Carriers to give the Section 4 notices and negotiate Section 5 implementing agreements, Carriers argue that such an order (1) exceeds the Referee's authority, (2) goes beyond the questions posed, and (3) is unrealistic in view of the many changes made since the cootdinations were in fact begun in June 1963. As to (1) and (2), the discussion in Docket No. 106 is pertinent. As to (3), the notices and implementing agreements, cf course, must take into account intervening events. But this is quite different from saying that where the parties have contracted tc agree upon implementation, a fait accompli by the Carriers deprives the Organizations of their contractual rights: The Organizations cay persuade the Carriers that other arrangements than those unilaterally made are desirable; in case of deadlock+ the Committee may be persuaded or prescribe some other arrangement. That the Carriers actions and resulting employee relocations, "releases," resignations and the like, may make implemen t ing agreements more difficult to arrange may be a fact or life, but it is no excuse for scrapping integral parts of the Agreement. The Agreement must be observed.

7/ The Carrier; will, of course, bc given credit for any wage or benefit payments employees had received.

DECISION:

The Carriers effected coordinations as particularized in the Findings on and after June 17, 1963 in violation of Sections 4 and 5 cf the Washington Agreement. They arc directed to pay full back pay (i.e., based upon the average compensation earned in the 12 months preceding the date of the changes and including all fringe benefits), including all subsequent increases in wages and fringe benefits, less actual wages and/or benefits received, to all employees affected by those unauthorized changes as if the coordination had not taken place until Section 4 notices arc served and Section 5 implementing agreements are achieved. The Carriers are ordered to serve the notices required by Section 4 and to negotiate the implementing agreements required by Section 5 of the Washington Agreement. The protective conditions under the Washington Agreement shall be in force through September 15, 1968.

DOCKET NO. 142 --- Decision by Referee Bernstein

Brotherhood of *Railroad* Trainmen	)	
	)	
and	)	Parties to the Dispute
	)	
Southern Railway System and Central of Georgia Railway *Co.*	)	

QUESTIONS:

"(a) The transfer of Southern Railway yard work at Hamburg Yard, Augusta, Georgia, to the Central of Georgia Yard at Augusta, Georgia, and the transfer of Southern Railway yard work at Columbus, Georgia, to the Central of Georgia at Columbus, Georgia, constitute coordinations cf separate railroad facilities and are subject to the terms and conditions of the 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 the intended coordinations 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 the Southern work with the Central work without agreement as contemplated and 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 and shall make whole a?? employees affected thereby as i f said coordinations had not taken place pending compliance with Sections 4 and 5 of the Agreement."

FINDINGS:

This is a companion case to Docket No. 141 and its description of events prior to July, 1963 apply here. The differentiating factors here are: (1) the Organization here is not a party Co that case; (2) its members were not affected until July 27, 1963; and (3) the alleged coordinations complained of concerned transfers of work from Southern to Central.

The factual recital provided by the Organization demonstrates that Southern jobs were purportedly abolished and their work transferred to and combined with Central operations soon after the ICC issued its "clarifying" report. The Carriers' letter of August 16, 1963 affirmatively asserts that Southern Yardmen's "work at [Columbus and Augusta] was transferred to and consolidated with Central's and . . . were adversely affected thereby." Hence I conclude that a coordination took place end Sections 4 and 5 of the Washington Agreement were violated if the Washington Agreement applies,

The Organization was not a patty to the court proceedings described in Docket NO. 141 in which I decided this Committee was not relieved nqt deprived of the authority to decide the controversy despite pendency of related issues before the ICC; a fortiori, there is no question that the applicability of the Washington Agreement is ripe for decision in this case. For the reasons s tated in Docke t No. 141, it is concluded that the Washington Agreement does apply to the claims and occurrences in this case.

The remedy must follow the pattern adopted in Docket No. 141 for the reasons set forth there.

DECISION:

The Carriers effected coordinations on and after July 27, 1963 in violation of Sections 4 and 5 of the Washington Agreement. They ate directed to pay full back pay (i.e., based upon the average 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 effected by those unauthorized changes until Section 4 notices ate served and a Section 5 implementing agreement is achieved. The protective conditions under the Washington Agreement shall be in force through October 26, 1968.

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

SECTION 13 COMMITTEE
AGREEMENT OF MAY 21, 1936, WASHINGTON, D. C.
(WASHINGTON JOB PROTECTION AGREEMENT)

PARTIES TO DISPUTE: The Atchinson, Topeka and Santa Fe Railway Company (Western Linos)
(formerly Gulf, Colorado and Santa Fe Railway Company)
St. Louis Southwestern Railway Company

and

Transportation-Communication Employees Union
(formerly The Order of Railroad Telegraphers)

QUESTION AT ISSUE: 1. When a coordination is made at a station whore, prior thereto, the force required by one Carrier is one telegraph service employe and one clerical service employe, and force required by the other Carrier is one telegraph service employe, does The Order of Railroad Telegraphers have the right to demand that so long as two or more employes are required following the coordination, such employes must be subject to the scope of the Telegraphers' Agreement, notwithstanding the fact that only one employe will be required to perform work covered by the scope of the Telegraphers' Agreement and the other employe will be required to perform only clerical work covered by the scope of the Clerks' Agreement?

2. If the answer to Question No. 1 is negative, does the assignment of force proposed by the Carriers constitute proper selection of forces insofar as employes represented by The Order of Railroad Telegraphers are affected?

FINDINGS: Notice to consolidate Carrier's separate station and agency forces at McGregor, Texas was properly given to Employes' representatives in accordance with the provisions of Section 4 of the Washington Job Protection Agreement of May, 1936. Employes were advised in conference that the Carriers intended to "retain an initial station force of one agent-telegrapher assigned to work seven days per week and one clerical employe assigned to work six days per week". Gulf, Colorado and Santa Fe Railway Company had an agent-telegrapher (J. O. Bledsoe) who worked seven days a week and a clerk (W. L. McLendon) who worked six days a week. St. Louis Southwestern Railway Company had only one agent-telegrapher (A. Doolittle) who worked six days a week. Carriers proposed that Bledsoe and McLendon be retained. Employes proposed that agent-

telegraphers Bledsoe and Doolittle be retained. Since this issue was first submitted to Section 13 Committee, the employment situation at McGregor station has changed. But the primary issue before the Committee, as framed in Question No. 1, remains.

It is a well established practice in the railroad industry that clerical work is performed by employes covered by the Telegraphers' Agreement who are classified as Agents, Agent-Telegraphers and Telegrapher-Clerks. Neither the scope rule of the Telegraphers' Agreement nor the scope rule of the Clerks' Agreement provide for exclusivity of clerical work. By custom, practice and tradition clerical work has been done by Agents, Agent-Telegraphers and Telegrapher-Clerks. There is no denial that Agent-Telegraphers employed by the two coordinating carriers performed clerical work.

The allegation that the work "performed by the Agent-Telegrapher for the St.LSW is work which may properly be performed by a clerical employe and was merely performed by the St. LSW agent-telegrapher because he was the only employe assigned to work at the St.LSW station" is immaterial. The test is that he did clerical work and that he worked under the Telegraphers' Agreement. That having been conclusively established, he is entitled to continue to perform that work as long as there is need for it. Carriers may not arbitrarily transfer that work to an employe covered by the Clerks' Agreement and place the Agent-Telegrapher in a less favorable employment position. Award No. 5 of Special Board of Adjustment No. 174, quoted by the Carriers, is not contrary to this principle.

Section 5 of the Agreement of May, 1936, Washington, D.C. provides that "any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected". No agreement was reached with the Telegrapher Organization. There is no evidence in the record that the Clerks' Organization approved or disapproved of the position of the Carriers or the Telegrapher Organization. In the absence of the latter showing, determination of the question before this Committee must be resolved solely upon the respective positions of the Carriers and the Telegraphers.

Assignment of employes made necessary by a coordinati[illegible] a mandatory subject of collective bargaining under Section 5 of the Washington [illegible] Protection Agreement. It has been established (1) that the Agent-Telegraphers had done clerical work at the McGregor station before the coordination, (2) that the Carrier sought to replace the Agent-Telegrapher with a clerical employe, and (3) that the clerical employe would be in a preferred position over the Agent-Telegrapher. Under all of these circumstances, it

is concluded that the Employes' position is more tenable and should prevail.

AWARD

For the reasons stated in the Findings, and upon the conditions existing in this case, the answer to Question No. 1 is "Yes".

Executed at Washington, D. C. this 29th day of April, 1969.

David Dolnick, Referee

SECTION 13 COMMITTEE
AGREEMENT OF MAY 21, 1936, WASHINGTON, D. C.
(WASHINGTON JOB PROTECTION AGREEMENT)

PARTIES TO DISPUTE: Southern Pacific Company
(Texas and Louisiana Lines)
St. Louis Southwestern Railway Lines

and

Transportation-Communication Employees Union
(formerly The Order of Railroad Telegraphers)

QUESTION AT ISSUE: 1. When a coordination of services and facilities at a terminal is made under the terms of the Agreement of May, 1936, Washington, D. C., which involves a transfer of telegraph services from a yard office to a joint telegraph office, does The Order of Railroad Telegraphers have the right to require that yard office clerical work now assigned to such telegraph force located in the yard office be transferred with the telegraph service and be handled by telegraph forces in the joint telegraph office?

2. Does The Order of Railroad Telegraphers have the right to require an increase in wage rates when a coordination is made?

3. If the answers to Questions 1 and 2 are negative, does the assignment of force proposed by the Carriers constitute a proper selection of forces to permit Carriers to proceed with the coordination?

FINDINGS: A "coordination" as contemplated by the Agreement of May, 1936, Washington, D. C. exists. Proper notice was given to the representatives of interested employes and conferences were held as provided in Section 4 of that Agreement.

At the time notice was served St. Louis Southwestern Railway Company "had one clerk-telegrapher on each of three shifts in its Austin Street Yard office". At the Southern Pacific telegraph office and interlocking tower at Belt Junction one telegrapher-clerk-towerman was employed on each of three shifts. Carriers proposed to coordinate all telegraph services at Belt Junction and the positions in that facility would be governed by an Agreement between the Southern Pacific and the Telegraphers. Carriers also proposed

to abolish the clerk-telegrapher positions at the Austin Street Yard office (Dallas Yard) and transfer the clerical work previously done by them to clerical employes at Miller Yard, who would not be represented by the Telegraphers.

Carriers argue that the clerk-telegraphers at the Dallas Yard performed little communication work; "an average of 2 hours 30 minutes on the first shift, 1 hour 05 minutes on second shift, and 1 hour 10 minutes on third shift". The rest of their work time was "consumed in performance of clerical work". There is no question that by custom, practice and tradition the clerk-telegraphers, at that location, became entitled to perform clerical work as long as the need continued. Carrier may not arbitrarily abolish the positions and transfer the clerical work to another location of the coordinating Carriers, to be performed by employes not covered by the Telegraphers Agreement.

A similar issue is fully discussed in Docket 144. The findings and conclusions therein reached are applicable to this case and are affirmed.

Section 5 of the Washington Job Protection Agreement provides that "any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected..." Only the "assignment of employes" is the subject of such an agreement. It includes the positions, the number of employes assigned, the location of the assignment, seniority rights and the organizations representing such assigned employes.

Rates of pay for the assigned employes is not a bargaining subject required under said Section 5. Schedule Agreements, or supplements thereto, provide for rates of pay. These are applicable to the agreed upon assigned positions. If no applicable rate exists the parties may negotiate within the provisions of the Railway Labor Act, as amended. This Committee has no power to fix rates of pay. Neither may either party insist on rate determination before a coordinating agreement becomes effective.

Employes cite Article VII (d) of the June 24, 1968 Agreement to support its position that rates of pay is a proper bargaining subject to effectuate a coordinating agreement. That provision reads as follows:

> "(d) Any pending proposals relating to inequity wage adjustments are hereby withdrawn and no such proposals will be served

prior to September 1, 1969...with the exception that if a carrier party hereto proposes a merger or coordination or a major technological change, the organization may, in relation thereto, serve and progress proposals for changes in rates of pay on an individual position basis based upon increased duties and/or responsibilities by reason of such consolidated merger, coordination or major technological change." (Emphasis added).

The Agreement of June 24, 1963 provides for wage increases, vacation benefits, holiday pay, etc. Nowhere is the Washington Job Protection Agreement mentioned. It is neither an amendment, a supplement, nor a modification of the May, 1936, Washington, D. C. Agreement. Article VII (d), above quoted, merely gives an organization the right to "serve and progress proposals for changes in rates of pay on an individual position basis based upon increased duties and/or responsibilities by reason of" a merger or coordination. The right to serve notice and to progress proposed rate changes under Article VII (d) are those rights permitted and contemplated under the Railway Labor Act, as amended, and not under Section 5 or any other provision of the Washington Job Protection Agreement.

AWARD

For the reasons stated in the Findings, the answer to Question No. 1 is "Yes". The answer to Question No. 2 is "No".

Executed at Washington, D. C. this 29th day of April, 1969

David Dolnick, Referee