H. C. CROTTY
PRESIDENT

FRANK L. NOAKES
SECRETARY-TREASURER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AFFILIATED WITH THE A.F.L.-C.I.O. AND C.L.C.
GRAND LODGE
12050 WOODWARD AVE., DETROIT, MICHIGAN 48203
OFFICE OF
PRESIDENT
29

January 29, 1970

FILE SBA #605
General

Mr. J. J. Berta
704-06 Consumers Building
220 South State Street
Chicago, Illinois 60604

Dear Brother Berta:

Re: Awards of Special Board
of Adjustment No. 605

To enable you to bring your records up to date, I am enclosing signed copies of Awards 187 through 200. As you will note, Award 197 was rendered by the Committee without the assistance of a referee.

With best wishes, I am

Sincerely and fraternally yours,

H. C. Crotty
President

Enclosure

Award No. 187
Case No. CL-34-E

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express & Station Employes
and
Erie Lackawanna Railroad Company

QUESTIONS AT ISSUE:

(1) Mr. W. F. Heaney, an employe of the Erie Railroad, was involved in the coordination of the Passenger Stations of the former Erie Railroad and the Delaware, Lackawanna and Western Railroad at Jersey City and Hoboken, New Jersey, which occurred on or about October 13, 1956, including the ferry abandonment on February 19, 1958, as a part of such coordination; and as an employe "continued in service" is, therefore, entitled to be paid a displacement allowance under Section 6 of the "Agreement of May, 1936, Washington, D. C. "

(2) As an employe involved in the consolidation and "continued in service" Mr. W. F. Heaney is entitled to be paid a displacement allowance equal to the difference between his monthly earnings on any position he has held during the protective period as provided for in Section 6 and his average monthly earnings during the "test period" as defined in Section 6 (c).

OPINION OF BOARD: On October 13, 1956, facilities of the Erie Railroad and Delaware, Lackawanna and Western Railroad Company were coordinated. Between August 27, 1956, when the Interstate Commerce Commission approved the coordination and the effective date of such on October 13, 1956, Implementing Agreements were negotiated with the various Organizations involved therein. As Carrier was preparing to abandon the ferry service operated by Erie, it was compelled to desist due to litigation initiated by Northern Valley Commuters Association, which lasted until February, 1958. During the period of such litigation, Carrier was required to retain Claimant's position of Ferrymaster. However, on January 18, 1958, Claimant's position was finally abolished and he, thereafter, displaced on a number of positions. Although a position of Supervisory Clerk was bulletined on March 30, 1959, paying a higher rate of compensation, Claimant failed to bid for such and it was awarded to a junior employee, P. J. Roach.

Thus, two issues are presented for our consideration, namely, from what period of time does Claimant's five-year protective period start to run and the amount of compensation to be applied against Claimant which was earned by the junior employee, P. J. Roach, who bid into the supervisory position on March 30, 1959.

Both protagonists, in their efforts to pursuade us as to the validity of their positions, rely on Referee Bernstein's Decision rendered by the Section 13 Committee in Docket No. 67, involving the same parties. We should note, however, that while the Carrier adopts the substantive portion of the analysis contained in Docket No. 67, it disagrees with the final conclusion as stated in that Award. It is, therefore, incumbent upon us to attempt to reconstruct the basis for the deductions contained in that Docket, in order to determine the significance of the language espoused in the Decision.

Prior to our analysis of Docket No. 67, we would first quote for ready reference the applicable provisions of the Agreement of May 21, 1936, the Washington Job Protection Agreement.

> "Section 2(c). The term 'time of coordination' as used herein includes the period following the effective date of a coordination during which changes consequent upon coordination are being made effective; as applying to a particular employee it means the date in said period when that employee is first adversely affected as a result of said coordination."
>
> "Section 6(a). No employee of any of the carriers involved in a particular coordination who is continued in service shall, for a period not exceeding five years following the effective date of such coordination, be placed, as a result of such coordination, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such coordination so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination, except however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to

> which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline."

In Docket No. 67, the coordination became effective on October 13, 1956--of course, the similarity is apparent inasmuch as the same facilities were involved as those in the instant dispute. Voss, the Claimant, was continued in service until March, 1958, in the position he held at the time of coordination at the Erie's Jersey City passenger station. In March, 1958, he was appointed Ticket Agent at Paterson.

Based upon these facts, Referee Bernstein stated as follows:

> "The employee was one 'continued in service' who lost his position ' as a result of such (a) coordination. Section 6(a) makes it clear that' for a period (of) five years following the effective date of such coordination ' he shall not be' in a worse position with respect to compensation ' so long as he is unable by the exercise of seniority to obtain a position which produces as much or more compensation' ".
>
> "It is the first adverse effect of a coordination which makes the employee eligible for the benefits of Section 6 (See Section 2(c)). Thereafter the protection of the agreement is his for the specified five years in the ordinary case."
>
> "Decision: A. W. Voss is entitled to a displacement allowance for each month of a period of five years after March, 1958, in which his compensation for the number of hours equal to the average monthly time paid for during his test period (3/57 - 2/58) was below the average monthly compensation of the test period."

How do the facts in the instant dispute jibe with those in Docket No. 67.

1. October 13, 1956, a coordination became effective.

2. Claimant Heaney was continued in service due to litigation instituted by Northern Valley Commuters Association.

3. Claimant's job as Ferrymaster was abolished on January 18, 1958.

4. January 18, 1958, was the date of the first adverse effect of the coordination which made the employee eligible for the benefits of Section 6.

5. Thereafter, the protection of the Agreement is his for the specified five years in the ordinary case.

6. However, the facts in the instant dispute indicate that this is not the ordinary case. Therefore, we turn our attention to the Carrier's arguments concerning the litigation, as well as Claimant's failure to bid on the Supervisory Clerk position in March, 1959.

Previously, we mentioned that litigation was instituted by the Northern Valley Commuters in October, 1956, which was not terminated until February, 1958. The Carrier argues, therefore, that the employees should not benefit from such litigation, inasmuch as the Carrier was prevented from abolishing Claimant's position during this period. In support of this contention it cites Docket Nos. 2 and 13 of Arbitration Board No. 289.

We would be prepared to accede to the Carrier's thrust in this regard, if sufficient proof were included thereof. The record indicates that between August 27 and October 13, 1956, the Organization negotiated an Implementing Agreement with respect to the said coordination. Insofar as the 1956 coordination was concerned only the Commuters Association was a litigant, not the Organization. True, the Carrier alludes to the fact that "---this coordination was also involved in a litigation, created by the employes, which prevented Carrier from implementing its coordination plans for over 16 months." Thus, the impression is left that the Organization was a party to such litigation. However, we may not indulge in conjectures. We are aware that the Organization was a party litigant in the 1960 coordination ---but not to the 1956 coordination. We do not believe that the employees should be penalized for an act over which they had no control. Therefore, in our view, the delay caused by the litigation was not attributable to the Organization. Hence, it may not now be used to penalize Claimant.

What of the failure of Claimant to bid in to the higher rated position of Supervisory Clerk on March 30, 1959? Section 6 (a) requires that "he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline." Here, too, we find the parties in disagreement. The Carrier argues that all earnings of the junior employee should be held against Claimant, whereas the Organization contends that only the earnings of the junior which he received in the position of Supervisory Clerk should be applied against Claimant. Hence, any earnings received as Box Car Checker, Chief Clerk or Assistant Chief Clerk, may not be used for this purpose. In our view, the junior employee's earnings on those dates when he filled the position of Supervisory Clerk, as well as those dates on which he could have worked the Supervisory Clerk position, may be applied against Claimant.

We would note one additional remark. Numerous precedents were cited by the parties to substantiate their arguments. While we are prone, at times, to disregard precedent, we believe that in the instant dispute we are obligated to follow the precedent established in Docket No. 67. In this vein, it is our firm opinion that the conclusions reached herein are entirely consistent with the decision reached previously, involving the same parties, as well as the same coordination.

AWARD:

1. Claimant, W. F. Heaney, is entitled to be paid a displacement allowance under Section 6 of the Washington Job Protection Agreement.

2. In determining the displacement allowance to which W. F. Heaney is entitled to for each month of a period of five years commencing from January 18, 1958, the date of the first effect of the coordination, the earnings of the junior employee, P. J. Roach, on those dates when he filled the position of Supervisory Clerk, as well as those dates on which he could have worked the Supervisory Clerk position, may be applied against Claimant Heaney.

Murray M. Rohman
Neutral Member

Dated: Washington, D. C.
January 19, 1970