Award No. 352
Case No. CL-93-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE)

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
and
Western Warehousing Company

QUESTIONS AT ISSUE:

1. Did the Carrier violate the provisions of the February 7, 1965 Agreement when it failed and refused to compensate protected employes hereinafter named, when they were furloughed by the Carrier?

2. Shall the employes named herein now be paid in accordance with provisions of February 7, 1965 Agreement from date of furlough?

W. B. Peters	W. J. Page
P. J. McGeever	A. W. Borowiak
W. J. Lloyd	E. Richardson
J. M. Sliwinski	A. Kodykowski
C. L. Papciak	S. J. Perry
F. F. Swiercinski	K. J. Kocher
W. J. Trzeciak	J. E. Banister
J. S. Swiercinski	S. Palmisano
Ralph De Bartolo	B. J. Callaghan
O. J. Farrington	

3. Shall Respondent be required to pay each employe named above interest at the rate of five percent per annum, from date of furlough, on the month the wage is due them under the provisions of February 7, 1965 Agreement?

OPINION OF BOARD:

The Organization filed the instant Claim on behalf of the office and warehouse employees who were engaged in receiving, storing and distributing freight at the Chicago facility. The Carrier was a subsidiary of the Penn Central Transportation Company and operated two warehouses -- the one in Chicago and the other in Harrisburg. As a result of a total decrease in business at the Chicago facility, the Carrier closed that warehouse early in 1971, and furloughed the Claimants. Prior thereto, the parties had negotiated a substitute formula for that provided in Article I, Section 3 of the February 7, 1965 National Agreeement, inasmuch as the Carrier did not have data containing net revenue ton miles or gross operating revenue. Although the substitute formula is identical for both facilities, the one pertaining to the Harrisburg warehouse was executed on November 11, 1965; and the one applicable to the Chicago facility was consummated on September 1, 1966. The agreed substitute criteria is hereinafter quoted, viz:

"Section 3

"In the event of a decline in the business of the Company in excess of 5% in the average percentage of both inbound and outbound tonnage in any 30-day period compared with the average of the same period for the years 1963 and 1964, a reduction in forces may be made at any time during the said 30-day period below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent the said decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in inbound tonnage and percent of decline in outbound tonnage divided by 2. Advance notice of any such force reduction shall be given as required by the current Schedule Agreement. Upon restoration of the Company's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days."

In denying the instant Claim, the Carrier interposed a number of defenses -- procedural, as well as on the merits. One of the procedural defenses is directed at the failure of the Organization to discuss the instant Claim on the property. Although the Carrier concedes that the parties met in conference, it asserts that the discussion was centered only on the alternative Claim which arose out of an alleged violation of an Agreement negotiated on January 22, 1968, rather than the alleged violation of the February 7, 1965 Agreement and the substitute formula. Furthermore, the Organization is accused of raising a new issue before our Board which was not discussed on the property -- i.e., both facilities, Chicago and Harrisburg, should be treated as one entity.

In this posture, it is apparent that the parties met in conference and failed to reach an Agreement on the disposition of the matters pertaining thereto. We should not be placed in a position of determining what items were discussed at that conference, absent clear and convincing proof. Hence, we must assume that the Claim before our Board was discussed -- whether perfunctorily or in depth is beyond our powers of discernment. Thus, we are

compelled to reject the procedural attack on our jurisdiction and proceed to an analysis on the merits.

The substance of the Organization's thrust is directed primarily to the affirmation that both warehouse facilities comprised one entity and, therefore, any decline in business which would permit reduction in forces must include data pertaining to both facilities -- and not confined solely to the Chicago warehouse. In turn, the Carrier argues that separate Agreements for a substitute formula were negotiated; separate General Chairmen were involved; separate system committees were consulted; and separate Officers represented the Carrier. In essence, it was the intent of the parties to reach an Agreement for two separate entities and two separate Agreements were executed; and at separate intervals, as well as involving two separate seniority rosters.

Previously, we indicated that a substitute formula was executed for the Harrisburg facility on November 11, 1965. The correspondence exchanged between the Carrier and Harrisburg General Chairman during the negotiations for a substitute formula, in our view, gives credence to the Carrier's insistance that two separate entities were involved. In this regard, we quote a portion of a letter addressed to the Carrier from the General Chairman, viz:

> "Based on the information you have furnished, we concur. We would appreciate your preparing a proposed agreement setting forth this proposed criteria for the Harrisburg Division of this Company." (Employees' Exhibit No. 10 Pp2 of 2). (Underline added).

One other aspect requires further comment. It is the Carrier's position that where a facility is completely closed down, protective benefits are not applicable. In support of this argument, it cited the Organization's concurrence in said position as reflected by an affidavit submitted by the Organization in the U.S. District Court for the Northern District of Oklahoma, in a case involving the Tulsa Union Depot Company.

Before our Board, however, the Organization adamantly insisted that even if there were a 100% decline in business, the Carrier would still be required to retain at the minimum, 5% of its force, predicated on Article I, Section 3, viz:

> "In the event of a decline in a Carrier's business in excess of 5%---."

Necessarily, in construing said Section, we are required to give meaning to all the words contained therein and to draw the essence from the four corners of said Section. In the last sentence of Section 3, as well as in the substitute

formula, there is contained the following language, to wit:

> "Upon restoration of a Carrier's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days."

In a situation where a facility is completely shut down, how could the recall provision apply? Thus, it is evident that the parties did not contemplate a complete cessation when they negotiated Section 3 of Article I. In this posture, therefore, we are prepared to accept the interpretation which was presented in an analagous dispute by the Organization in the U. S. District Court for the Northern District of Oklahoma, supra.

Award:

The answer to the questions is in the negative.

Murray M. Rohman
Neutral Member

Dated: Washington, D. C.
April 18, 1973