NATIONAL RAILWAY LABOR CONFERENCE

1225 CONNECTICUT AVENUE, N.W., WASHINGTON, D. C. 20036/AREA CODE: 202—659-9320

WILLIAM H. DEMPSEY, Chairman M. E. PARKS, Vice Chairman
H. E. GREER, Director of Research J. F. GRIFFIN, Administrative Secretary D. P. LEE, General Counsel

October 24, 1973

Mr. Milton Friedman
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Mr. Nicholas H. Zumas
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Dr. Murray M. Rohman
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Gentlemen:

This will supplement our previous letters with which we forwarded to you copies of Awards of Special Board of Adjustment No. 605 established by Article VII of the February 7, 1965 Agreement.

There are attached copies of Award Nos. 365 to 370 inclusive, dated October 18, 1973 rendered by Special Board of Adjustment No. 605.

Yours very truly,

J. F. Griffin

cc. Chairman, Employees National Conference Committee (10)
Messrs. C. L. Dennis (2)
C. J. Chamberlain (2)
M. B. Frye (2)
H. C. Crotty (2)
J. J. Berta (2)
S. Z. Placksin (2)
R. W. Smith (2)
R. K. Quinn, Jr. (3)
M. E. Parks
J. E. Carlisle
W. F. Euker
T. F. Strunck

AWARD NO. 365
Case No. MW-15-E

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES) Lehigh Valley Railroad Company
TO THE) and
DISPUTE) Brotherhood of Maintenance of Way Employes

QUESTION
AT ISSUE: Are protected employes Stephen Yonki, William Zack, Paul Yonki, John Weiss, Henry Zianti and Andrew Mesaris entitled to be compensated at their respective rates of pay for all time lost from the time they were furloughed at the close of work on July 23, 1971, until they were restored to service?

OPINION
OF BOARD: Claimants did not file their claims on "PER-3" forms which, according to Carrier's highest officer, meant that the claims were not properly filed. This was the first time during the grievance procedure that such a statement was made. The Organization says it never agreed to the use of such forms and notes that the rules agreement merely requires claims to be in writing "by or on behalf of the employee."

Even though employees may have used PER-3 forms since 1965, as Carrier directed, the Organization contends that Carrier may not impose such a requirement without mutual consent. According to Carrier, its right to manage the business gives it the right here asserted.

There is no question about Carrier's right to manage, to direct, to issue instructions on procedures, and the like in connection with operating the railroad. However, grievance-handling is a mutual affair, an extension of the collective-bargaining relationship in which the two sides are co-equal, not superior and subordinate. The Organization cannot require Carrier to reply to its grievance on a particular form, and Carrier cannot require the Organization or the employees to file in a certain way, unless either the rules agreement or other agreements mandate it, so long as grievances are submitted in a way consistent with the rules agreement.

When a grievance procedure has been adopted mutually, specific requirements under it should also be mutually acceptable, not unilaterally imposed. Carrier naturally may require a claim to be clear and understandable and, if it is not, it may well fall for that reason. But Carrier may not deny a claim solely because, in its estimation, the wrong piece of paper was used, any more than it may tell the General Chairman how he must prepare his appeal if the agreement itself does not contain such a proviso.

Evidence of Organization acquiescence in the PER-3 forms is lacking, even though its use was directed by Carrier and many employees have followed the direction. There is, of course, nothing wrong with employees using the form. It may be a convenience for them as well. But it is not obligatory if they find a different method more feasible, and that method is not inconsistent with the agreement.

On July 23 Carrier's supervisor gave Claimants a letter which stated:

> It has been announced by the United Transportation Union that there will be a strike against the Norfolk and Western Railway Company effective Saturday, July 24, 1971, at 6:00 A.M.
>
> In the event that this strike takes place, you are hereby notified your position is temporarily abolished effective 6:00 A.M., July 24, 1971 and for the duration of that labor dispute, in accordance with the Force Reduction. Rule applicable under such emergency condition.

In its submission Carrier quotes Article VI of the February 10, 1972, National Agreement which is entitled "Emergency Force Reduction Rule." It provides that in cases of emergency, such as strikes, no notice is necessary "before temporarily abolishing position or making temporary force reductions...provided that such conditions result in suspension of Carrier's operations in whole or in part."

Force reductions of protected employees may be made under emergency conditions by invoking Article I, Section 4, of the February 7 Agreement. Where an emergency is the cause of a reduction in force or the abolishment of a position all requirements of Section 4 must be met, including the fact that there is a suspension of operations in whole or part (as in Article VI of the February 10, 1971 Agreement), and the work no longer exists or cannot be performed. These conditions were not met.

Carrier asserts that actually the notice was issued under Article I, Section 3, of the February 7 Agreement because there was a decline in business due to the emergency. Section 3 does provide that the required notice shall conform with the current schedule agreement but no reference to a decline in business was made in the July 23 letter. Indeed, Carrier itself was obviously uncertain as to what was being invoked. For in the denial made by the Engineer of Track on October 28, 1971, he wrote that "the claimants had at least 16 hours notice in accordance with the Agreement." This is the notice provision in Article I, Section 4, of the February 7 Agreement, and it does not appear in Article VI of the February 10 National Agreement.

To invoke Article I, Section 3, requires Carrier to assert and establish that there is a decline in business compared with 1963-1964, not an emergency which requires immediate furloughs or abolition of positions. Carrier's notice thus was purely one which required Article I, Section 4, conditions to be met, but they were not. While there was a strike, there was no proof whatsoever of an emergency causing suspension of Carrier's operations in whole or in part, or the disappearance of the work.

Thus the notice was improper. There was no emergency as defined in Section 4, which permits an immediate reduction in force, and a decline in business under Section 3 was not then asserted.

Subsequently, however, in a letter dated August 6, 1971, Carrier advised Claimants as follows:

> Consistent with Section 3 of the February 7, 1965 Stabilization Agreement, this is to notify you that due to continuing and anticipated decline in business of this Carrier, your position remains

abolished and your status as a Protected Employe is suspended and terminated.

Here, reference was being made to a decline in business for the first time. This necessitates a five-day notice. Consequently, Claimants who had been improperly furloughed on July 24 because the conditions permitting an emergency force reduction were not met, were properly being notified that five working days after August 6 they were being furloughed in accordance with Article I, Section 3. Claimants accordingly were entitled to pay up until August 6 and for five working days thereafter.

The Organization contends that Carrier never justified the decline in business at all, as required by Section 3. However, once Carrier supplied information on the base years and the current period, which was done on March 29, 1972, no specific exception to it was taken thereafter by the Organization. While a calendar-month period rather than the 30-day period involved was used, the Organization did not challenge that approach at the time. The failure to question the propriety or accuracy of the figures on the property leads to the conclusion that their adequacy was then being accepted, and that they did justify the furloughs.

In the absence of a challenge on the property to Carrier's data, the information furnished must be accepted here. On the property is where disputes, if any, over the substance and import of Section 3 data should have been crystallized. While the Agreement refers to "any 30-day period," which is not necessarily a calendar month, the Union can accept calendar figures if it wishes, or if it assumes that they adequately depict the decline in business. Thus the claims for days subsequent to the appropriate notice period are denied.

A W A R D

Claimants are entitled to be compensated only for time lost from the close of work July 23, 1971, until five working days after notice was given on August 6, 1971,

or until returned to work, in the case of Paul Yonki who was recalled August 11.

Milton Friedman
Neutral Member

Dated: Washington, D. C.
October 8, 1973