SPECIAL BOARD OF ADJUSTMENT NO. 605

AWARD NO. 435
CASE NO. CL-124-W

PARTIES TO DISPUTE:

KANSAS CITY TERMINAL RAILWAY COMPANY

- and -

ALLIED SERVICES DIVISION/BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO

QUESTIONS AT ISSUE:

1. Is Mr. E. F. White a protected employe and thereby entitled to compensation due a protected employe?

2. If the answer to the above is in the affirmative, is Mr. White entitled to payment for each day of January 7, 11, 12, 13, 14 and 15, 1982?

OPINION OF BOARD:

E. F. White entered service of Carrier on August 31, 1948 and worked thereafter for some 16 years on the Mail Handlers Roster under the BRAC Agreement. He was holding a regular assignment as Mail Handler on October 1, 1964, thus establishing his protected status and protected rate under the February 7, 1965 Agreement. He continued working as a Mail Handler until July 1, 1975 when the Terminal completely closed its Mail and Baggage Department after the U.S. Postal Service terminated a mail handling contract. The seniority which Claimant and some 200 other employes had accumulated in the Mail and Baggage Department was not then usable in any other seniority district or department, and therefore none of them could displace onto other employment with the Terminal. All were placed in furlough status, following which BRAC

and the Terminal disputed to impasse their entitlement to protective pay benefits under Artile IV of the February 7, 1965 National Agreement. That dispute resulted in the appeal of three (3) questions to this Committee, which were decided in Award No. 408, reading in pertinent part as follows:

AWARD NO. 408
Case No. CL-110-W

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes and Kansas City Terminal Railway Company

QUESTIONS AT ISSUE:

(1) Does the February 7, 1965 Agreement apply to the employes of the Baggage and Mail Department of the Kansas City Terminal Railway Company?

(2) Does the loss of a mail contract, between the U.S. Postal Service and the Kansas City Terminal Railway Company, nullify the provisions of the February 7, 1965 Agreement?

(3) Are the employes of the Kansas City Terminal Company who were employed in the Baggage & Mail Department and who qualified as protected employes under the provisions of the February 7, 1965 Agreement, entitled to continue receiving the benefits flowing from that Agreement until such time as they are deprived of those benefits under the express terms of such Agreement?

* * *

Although the facts in Award No. 352 of this Board are distinguishable from those now before us, this Board nonetheless considers the reasoning enunciated in Award No. 352 applicable to the instant dispute. There, the Board held that the parties did not contemplate a complete cessation of Carrier's business when they negotiated Section 3 of Article I of the February 7, 1965 Agreement. This Board concurs in the reasoning therein and deems it applicable to the instant case. Accordingly, when the Terminal Company completely closed their Mail and Baggage Department effective July 1, 1975, we hold that the protective provisions of the February 7, 1965 National Agreement were thereby inapplicable to those employees furloughed as a result of the closing of the Company's Mail and Baggage facility. It matters not that the Terminal Company is still a corporate entity engaged in other business separate and distinct from mail handling. The Claimants who were furloughed on June 23 or June 30, 1975 held seniority in the Mail and Baggage Department, and were at this time unable to exercise their seniority to positions in any of the other facilities maintained by the Terminal Company. In the light of this, this Board must find that the Terminal Company was not required to accord them the protective benefits required by the February 7, 1965 Agreement. Their work simply ceased to exist and there was no reasonable likelihood that they would ever be recalled to mail and baggage service as contemplated by Section 3 of Article I of the February 7, 1965 Agreement.

AWARD:

Question No. 1 answered in the affirmative.

Question No. 2 disposed of as per Opinion of the Board.

Question No. 3 answered in the negative.

Robert M. O'Brien
Neutral Member

Dated: Washington, D. C.
March 17, 1977

The decision in Award No. 408 was affirmed subsequently by the United States Court of Appeals for the Eighth Circuit in BRAC, et al. v. Kansas City Terminal, 587 F.2d 903 (1978), cert. denied, 441 U.S. 907. The furloughed former Mail Handlers, including Claimant, therefore received no protective pay benefits under the February 7, 1965 National Agreement. In a line of subsequent cases this Board reiterated the guiding principle of Award No. 408 that the February 7, 1965 National Agreement was intended to establish a quid pro quo relationship of protected pay benefits for qualified employes in exchange for the right to reasonable use of their services by Carrier. See Award Nos. 408, 409, 415, 425 and our recent Award No. (Case No. CL-119-W). A succinct statement of the Board's developing "law of the case" in such disputes is contained in Award No. 425 (Zumas) as follows:

. . . The Board agrees with Carrier that the guarantees provided were never intended as gratuities to able and qualified employees nor can they be considered in any form of a pension. Carrier is not required to maintain guarantees indefinitely when circumstances remove the possibility of any meaningful service in exchange for such guarantees. . . .

On the basis of the foregoing, it is clear that Claimant White was not entitled to receive protective pay benefits of the February 7, 1965 National Agreement during the period when he was furloughed but virtually "unemployable". For nearly six (6) years he remained in this situation and, as far as the record shows, performed no compensated service for Terminal until February 1981. Certain allegations of employment opportunities in 1979 and 1980 were advanced for the first time by Terminal in its submission to this Board, and thus come

too late properly to be considered on this record.

On February 24, 1981 Terminal posted for bid a temporary position of Vacation Relief & Utility Clerk. Claimant responded to this bulletin by submitting a bid which was accepted and he was assigned to that clerical position effective February 25, 1981. He worked that clerical job for nearly a year until January 5, 1982 when he was displaced by a senior employe whose position had been abolished during a reduction in force. Claimant reverted to furlough status for six (6) working days, before returning to service as a Yard Clerk on January 18, 1982. The record does not show whether he bid or displaced onto this latter position, only that he obtained it by exercising his seniority. He filed a claim for protective benefit pay for the six (6) days while he was on furlough in January 1982, but this was denied by Terminal. BRAC local officials therefore presented and pursued the present claim which Terminal denied at all levels, before it was appealed to this Board.

It must be conceded that Claimant did not establish a new protected status and protected rate by returning to active service in February 1981 and working as a Clerk for about one year before again being furloughed in January 1982. Nor can it accurately be stated that he was "recalled from a furloughed status" in February 1981 as the Local Chairman attempted to argue on the property. The latter argument implicitly attempts to invoke Article I, Section 3 which, as Carrier correctly points out, has been held generally inapplicable to a "complete abandonment" and specifically by Award No. 409 not to govern circumstances under which Mr. White, et al. assumed furlough status in July 1975. Indeed, the decision in Award No. 408 and other precedent decisions of this Board proceed from the premise that the literal express language of the Agreement did not address the problem. Therefore, those decisions proceed from the premise that considerations of equity and reason

indicate an intent of the parties to exchange protective pay benefits for the reasonable possibility of continued meaningful service by the protected employe The corollary, which proved dispositive in Award No. 408, et al., is that Carrier is not obligated to continue to pay protective benefits while circumstances render any service in accordance with a protected employe's seniority practically and effectively impossible. It is very important to note that in answering Questions No. 1 and 3 to Award No. 408, and in the companion case decided in Award No. 409, this Board carefully distinguished between the applicability of the February 7, 1965 National Agreement to such employes (affirmative) and their entitlement to continue receiving the benefits flowing from the Agreement while they were unable to exercise their seniority to position in any of the other facilities maintained by the Terminal (negative). This quid pro quo analysis utilized by the Board in Award No. 408, et al., was derived from Award Nos. 352 and 373, by way of the United States District Court for the Northern District of Oklahoma in Shambra, et al. v. BRAC, Frisco, et al. (C.A. No. 69-C-203). All of these cases have as a common thread the attempt of the respective tribunals to balance the interests and extrapolate the intent of the contracting parties in the context of situations not expressly dealt with by the provisions of Article I, Section 3 and Article IV, Section 5 of the February 7, 1965 National Agreement, as amended. Against this backdrop, the derivation of the distinction in Award No. 408 between protective status and protective benefits becomes clear, since the mentioned contract provisions do not extinguish protective status although they do permit a suspension of protective benefit payments for certain employes under certain conditions. As we read Award No. 408, the Board therein carefully avoided finding that the protective status of Claimants were extinguished or permanently lost on

July 1, 1975; while holding that Carrier's obligation to pay them protective benefits was suspended as of that date because it was determined that they could not offer in exchange the meaningful service or employability which is the recognized quid pro quo for entitlement to such benefits. So long as this condition of practical impossibility of meaningful service prevailed, then Claimant White was not entitled to receive protective benefits, even though he remained de jure a "protected employe" under the February 7, 1965 National Agreement.

The same logic and equitable balancing of interests which produced Awards No. 408, et al., however, demands a conclusion that when Claimant White exercised his seniority and began again providing meaningful service on February 25, 1981 he restored the balance, reinstated the quid pro quo relationship, and revived his suspended entitlement to protective pay benefits at his established protected rate under the February 7, 1965 National Agreement. Accordingly, his claims for protected pay benefits in January 1982 should have been honored.

AWARD

Question No. 1 is answered in the affirmative.

Question No. 2 is answered in the affirmative.

Dana E. Eischen

Dana E. Eischen, Chairman

Date: May 21, 1989