AWARD NO. 498
CASE NO. CL-75-E

**SPECIAL BOARD OF ADJUSTMENT NO. 605**

PARTIES TO THE DISPUTE ) Transportation•Communications International Union

and

) Bangor and Aroostook Railroad



**QUESTIONS AT ISSUE:**

1. Did Carrier violate the February 7, 1965 Mediation Agreement, as amended January 28, 1981, when it reduced senior protected employes working in one department from the number of protected employes entitled to protective benefits and permitted junior protected employes working in other departments to retain their entitlement to protective benefits?

2. Shall Carrier now pay the protective benefit claims of senior protected employes K. J. Wehrle and M. A. Knapp for those months in which they were reduced from the number of protected employes entitled to protective benefits while junior protected employes were not reduced?

**OPINION OF THE BOARD:** Beginning in January, 1991, the Carrier experienced a decline in business which exceeded the five percent buffer set forth in Article I, Section 3 of the amended Job Stabilization Agreement so that the Carrier could furlough protected employees without affording them protective benefits. For example, in January, 1991, the Carrier's decline in business amounted to 20.7% which permitted the Carrier to reduce its forces by four protected clerical employees. During the ensuing months, the Carrier experienced similar declines in business permitting it to furlough, without protection, one or more protected clerical employees per month.

Claimants, who are both protected employees, were the junior employees on the seniority roster for the Purchases and Materials Department. The Carrier employs 26 protected clerks system-wide dispersed among four separate seniority districts. During various months in 1991, the Carrier furloughed one or both Claimants and suspended their protective benefits pursuant to Article I, Section 3. However, while Claimants were junior employees on their seniority district, employees with less seniority, but on other districts, continued to work and thus, continued to reap protective benefits. Stated differently, when Claimants' protection was suspended, employees with less system-wide seniority on other seniority rosters were neither furloughed nor denied protective benefits.

The thrust of the Organization's claim is that the Carrier should have furloughed the most junior protected clerical employees on its system as opposed to the junior employees on a seniority district (or districts) of its choice.

The parties amended the February 7, 1965 Job Stabilization Agreement on January 28, 1981. They revised the decline in business provision which is found in Article I, Section 3 as follows:

> In the event of a decline in the Carrier's business in excess of 5% in net revenue ton miles in any calendar month compared with the average of the same calendar month for the preceding two calendar years, the number of protected employes, excluding those whose protective status has been suspended, will be reduced to the extent said decline exceeds 5%. When the number of protected employes is reduced as provided for herein, the junior protected employes will not be entitled to protective benefits. Upon restoration of Carrier's business, employes entitled to protective benefits under this Agreement shall have such rights restored in accordance with the same formula within 15 calendar days. [Emphasis added.]

On its face, Article I, Section 3 is silent concerning whether the suspension of junior protected employees is to be accomplished on a system-wide basis or can be effected on a seniority district by seniority district basis with the Carrier having the discretion to choose which district or districts to furlough employees; provided the Carrier furloughs the most junior protected employees on each seniority roster.

We are not the first Board which has been asked to interpret language similar to or identical to the relevant sentence in Article I, Section 3. In *BRAC v. BN, Article 12 Board, Award No. 24 (Eischen)*, the Board found that the silence in the Agreement about whether protection for junior employees could be suspended on a system-wide basis versus a zone basis meant the Carrier could use either basis. In essence, *Award No. 24* held that since the definition of a junior employee was not set forth in the Agreement, the unmentioned item was left to the Carrier's discretion. The Article 12 Board observed that there was not any past practice evincing that the parties intended to preclude the Carrier from suspending protection under the decline in business formula on a point by point basis.

However, the same Referee deviated from the Article 12 Board precedent in a similar case. *BRAC v. Atchison, Topeka and Santa Fe Railroad (Eischen)*. In the *AT&SF* decision, the Arbitration Board barred the Santa Fe from following the Burlington Northern precedent because, on the AT&SF, a past practice had developed of suspending protective benefits exclusively on a system-wide basis. Thus, the Board concluded that, the past practice filled in the gap created by the silence in the Agreement and, by suspending protective status on a seniority district basis, the Carrier contravened the past practice.

Finally, *Special Board of Adjustment No. 608, Award No. 31, BRAC v. Southern Railway (Kasher)* ruled that the Carrier must suspend protection of junior employees on a system-wide basis since the decline in business formula is an equation which uses system-wide statistics.

These seemingly incongruous decisions have one commonality. When applicable, the result of the case turned on the particular practice on the property. In the absence of any past practice, the case result rested on attenuated circumstances (the *BRAC v. Southern* case). In this case, the Carrier came forward with probative evidence showing that it applied the decline in business provision during prior business declines as it did during the 1991 business decline. The Carrier's consistent practice endured from 1965 through the 1981 amendments and until 1990. Before January, 1991, the Organization never objected when the Carrier furloughed junior protected employees on a seniority roster basis. Each time the Carrier experienced a decline in business, the Carrier notified the Organization about the amount of the decline, how it calculated the decline and the names of protected employees who were being furloughed with a suspension of protective benefits. Many times in the past, the Carrier furloughed the most junior protected employee on a particular seniority roster even though the employee was senior to protected clerical employees on other rosters who continued working.

The Organization attempted to counter the Carrier's evidence of a past practice with a statement from the former General Chairman but the Organization never brought forward evidence that the former General Chairman or any of his predecessors formally objected to the Carrier's methodology even though they may have disagreed with it.

Therefore, the Carrier properly applied Article I, Section 3 in strict accord with the clear, continuous, notorious, open and lengthy (25 years) historical practice.

**AWARD**

1. The Answer to Question No. 1 at Issue is No.

2. Question No. 2 at Issue is moot.

Dated: July 24, 1995

John B. LaRocco
Neutral Member