



B E F O R E  
SPECIAL BOARD OF ADJUSTMENT NO. 226

Dallas, Texas

AWARDS NOS. 41, 42, 43 and 44 (Consolidated)

THE ORDER OF RAILROAD TELEGRAPHERS

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY  
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

Each of the following claim is subject to the so-called "Burlington Conditions", included in a certificate of the Interstate Commerce Commission permitting the Chicago, Burlington and Quincy Railroad Company to abandon approximately 21.8 miles of a line of its railroad in southwestern Iowa (Ringgold County) and northwestern Missouri, (Worth County), decided November 1, 1944, in Finance Docket No. 14, 426, and cited at 257 I.C.C. 700:

Claim No. 78-138-22 )  
B. L. Denton, Claimant )

Award No. 41

STATEMENT OF CLAIM:

1. Claim of Agent-Telegrapher B. L. Denton that the Carrier has failed and refused to properly apply stipulated conditions agreed to by the parties and an Order by the Interstate Commerce Commission, in connection with the abandonment of the Carrier's Subdivision of the Wellington Branch of the Northwestern District, between Wellington, Texas and Altus, Oklahoma, which line was abandoned on or about July 31, 1958; and that
2. The Carrier shall now be required to pay B. L. Denton the difference between the monthly compensation she received and that which she would have received because of being adversely affected by reason of such abandonment.

Claim No. 82 )  
L. E. Hadaway, Claimant )

Award No. 42

STATEMENT OF CLAIM:

1. Claim of Telegrapher L. E. Hadaway that the Carrier has failed and refused to properly apply stipulated conditions agreed to by the parties and ordered by the Interstate Commerce Commission in connection with the abandonment of the Carrier's Mineola Branch subdivision on November 30, 1956; and that
2. The Carrier shall now be required to pay Mr. Hadaway the difference between the monthly compensation he received and that which he would have received on the position from which he was displaced by reason of such abandonment.

Claim No. 89 )  
L. V. Kays, Claimant )

Award No. 43

STATEMENT OF CLAIM:

1. Claim of Agent-Telegrapher L. V. Kays that the Carrier has failed and refused to properly apply stipulated conditions agreed to by the parties, and Order by the Interstate Commerce Commission in connection with the abandonment of the Carrier's Subdivision of the Wellington Branch of the Northwestern District, between Wellington, Texas and Altus, Oklahoma, which line was abandoned on or about July 31, 1958; and that
2. The Carrier shall now be required to pay L. V. Kays the difference between the monthly compensation he received and that which he would have received because of being adversely affected by reason of such abandonment.

Claim No. 97 )  
R. B. Dixon, Claimant )

Award No. 44

STATEMENT OF CLAIM:

1. Claim of Agent-Telegrapher, extra, R. B. Dixon, that the Carrier has failed and refused to properly apply stipulated conditions agreed to by the parties, and order by the Interstate Commerce Commission, in connection with the abandonment of the Carrier's subdivision of the Holden Subdivision of the Eastern District, between Sedalia, Missouri and Paola, Kansas, which line was abandoned on or about July 19, 1958; and that
2. Because of being adversely affected by reason of such abandonment, the Carrier shall now be required to pay R. B. Dixon the difference between the monthly compensation he received and that which he would have received if the abandonment had not occurred.

"BURLINGTON CONDITIONS". INTRODUCTION.

The "Burlington Conditions" prescribed for railroad abandonment cases consists of six serially numbered sections. Section 1 and 2 deal with "displaced employees" and "dismissed employees", respectively. The other four sections deal with miscellaneous benefits to employees in railroad abandonment cases. The four instant claims relate to "displaced employees".

Section 1 relating to "displaced employees" follows:

"If, as a result of the abandonment permitted herein, any employee of the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as the carrier, is displaced, that is, placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements,

"rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received by him in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of this abandonment (thereby producing average monthly compensation and average monthly time paid for in the test period). If his compensation in his retained position in any month is less than the aforesaid average compensation in the test period, he shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his retained or current position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position; provided, however, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any employee; provided, further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance, and provided, further, that no allowance shall be paid to any employee who fails to accept employment, with seniority rights, in a position, the duties of which he is qualified to perform. The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our certificate herein; provided, however, that such protection shall not continue for a longer period following the effective date of our certificate herein than the period during which such employee was in the employ of the carrier prior to the effective date of our certificate."

Feeling that we should acquire some background that would aid us in interpreting the "Burlington Conditions", hereinafter abbreviated as "B/C", we have read carefully the following cases (and others) decided by the Supreme Court of the United States:

1. United States v. Lowden, 308 U.S. 225
2. Interstate Commerce Commission, et al v. Railway Labor Executives et al (1942) 315 U.S. 373; 86 L.Ed. 904
3. Railway Labor Executives' Assn. v. United States et al., 339 U.S. 142, 94 L.Ed. 721

In the second cited case, 315 U.S. 373, (1942), the Supreme Court of the United States authorized the Interstate Commerce Commission, under applicable sections of

the Interstate Commerce Act, 49 U.S.C.A. 26,

"...to attach terms and conditions for the benefit of employees displaced by railroad abandonments..."

Prior to the above decision in 1942, the I.C.C. had attached terms and conditions for the benefit of employees displaced by railroad consolidations but it had declined to attach similar terms in railroad abandonments. It had declined on the ground that it did not have statutory authority so to do.

We do not say that the cases cited constitute controlling authority for our interpretation of the "B/C". But we do say that they disclose emphatically that the Supreme Court of the United States construed the pertinent statutory provisions of the Interstate Commerce Act, liberally, to effect benefits to railroad employees who would be "adversely affected" by abandonments and consolidations of railroad lines. Analogously, and logically, we feel it is therefore persuasive that we should, in turn interpret the provisions of the "B/C" to effect the purpose of orders of the Interstate Commerce Commission.

GENERAL FINDINGS "B/C".

As will be disclosed hereafter in the individual findings, the Carrier contends that an extra employee is excluded from the terms of the "B/C". That is to say, the Carrier contends that the terms of the "B/C" are never applicable to an extra board employee.

The Carrier also contends that a regularly assigned employee on an abandoned line, who is forced from his job by the abandonment, can not be "displaced, that is, placed on a worse position", as a result of the abandonment, at any time within the "protective period" except at the exact time the abandonment becomes effective.

At the outset therefore it is necessary to ascertain the practical meaning of the term "position" as it is used in two different senses in the text of Section 1 of the "B/C". Basically, the meaning of the term "position", as used here, is "relative place, situation or standing."

To illustrate, Section 1 of the "B/C", in prescribing employee protection in abandonment cases mentions, first, "the position from which he was displaced" and, secondly, "the position in which he is retained."

From a reading of Section 1 of the "B/C", as a whole, it is discerned that the "position" from which an employee is displaced in an abandonment case is not limited, necessarily, to the single assignment on which the employee was working at the time of the abandonment. The term "position", in this first sense in which it is used, comprehends as many assignments, including both regular and extra assignments, as an employee may have worked during the "test period". And the average monthly compensation of such "position" is the aggregate of his earnings during the "test period" divided by 12.

Similarly, the term "position" in the second sense in which it is used comprehends all assignments, one or more, both regular and extra assignments, on which an employee works during each monthly period within the "protective period". And the monthly compensation an employee receives in each monthly "retained position" is the

aggregate of earnings received by him from all assignments during each monthly "retained position."

It is noted therefore that an employee will have as many "retained positions" as monthly periods he works during the "protective period".

The foregoing examination of the clauses, first, "the position from which he was displaced" and secondly, "the position in which he is retained", discloses, we hold, that the "B/C" apply to "positions" of both regular and extra employees who are "displaced." They apply to such employees within the seniority district, whether employed on the abandoned line or elsewhere within the seniority district.

Each employee, regular or extra, has a "position" before the date of an abandonment. Each has a better, an equivalent, or a "worse position", from month to month, subsequent to an abandonment. The employee who is forced to take a "worse position" in any monthly period, as the result of an abandonment, is a "displaced employee". He qualifies for "a monthly displacement allowance" during the "protective period". The compensation actually earned by him in each monthly "retained position" shall be increased, if necessary, by a displacement allowance to make his compensation in each monthly "retained position" equivalent to his average monthly compensation in the "position from which he was displaced."

In its effort to effect a fully compensatory formula for the "displaced" employee, the Interstate Commerce Commission has also included the following provision in its rule for calculating the compensation for the "displaced" employee during each monthly period of the "protective period":

"...but if in his retained position he works in any month in excess of the average monthly time paid for in the text period, he shall be compensated for the excess time at the rate of pay of retained position."

Looking beyond the four individual claims here presented, it would not be a simple matter, always, to determine whether an employee has been placed in a "worse position" as a result of the abandonment. It may be observed, too, that a chain or chains of practical circumstances could arise by the exercise of seniority, as a result of the abandonment, which would create complex problems. But we do not find such possible administrative difficulties in the four individual claims before us. Moreover, administrative boards such as ours do not have authority to modify the basic rules established by the Interstate Commerce Commission in order to effect simplification in administration, to lessen imposed financial obligations, or for any other purpose.

There is a final general finding we should make: Upon examining each of the four claims incorporated in this consolidation of Awards Nos. 41, 42, 43 and 44, it is noted that each claimant requests only that the Carrier shall now be required to pay the claimant the difference between the monthly compensation he received and that which he would have received if he had not been adversely affected or "displaced" by the abandonment, in each case.

No evidence was submitted tending to prove how much monthly displacement allowance, if any, is owing by the Carrier under each claim. This is a matter of accounting between each claimant and his (or her) ORT representative, on the one hand, and

the Carrier, on the other hand. The Carrier is in possession of all records pertinent to a final calculation of the amount due, if anything, under each claim. In other words, the amount due, if anything, is subject to proof from the records of the Carrier. Our concern here has been to interpret the "Burlington Conditions", generally, and to decide whether they are applicable to each of the four individual claims submitted. We hold that they are applicable.

We shall now make additional findings, separately, in each of the four claims, as follows:

Claim No. 78-138-22     )  
B. L. Denton, Claimant )

Award No. 41

DENTON FINDINGS:

On February 17, 1958, the Interstate Commerce Commission issued its certificate approving abandonment of Carrier's line, the Wellington Branch, as mentioned in the claim, on the "same conditions" as the "Burlington Conditions" and authorized the abandonment to become effective on July 31, 1958.

On the date the abandonment became effective, namely, July 31, 1958, Mrs. B. L. Denton, senior extra employee, with seniority dating from July 5, 1943, was relieving the Agent-Telegrapher, Mr. E. Rivers, at Hollis, Oklahoma, a station on the Wellington Branch, which was included in the abandonment proceedings. Mr. Rivers had been off duty on account of sickness since December 21, 1957. At the time Mrs. Denton was forced to give up the position at Hollis on account of the abandonment she had been at Hollis for a total period of approximately seven months and ten days. After she was forced to leave Hollis she was reassigned to the extra board, whence she came to relieve Mr. Rivers at Hollis. After the abandonment of the Wellington Branch, Mr. Rivers did not return to service. He applied for and was granted retirement on annuity.

On May 13, 1958, more than two months in advance of the effective date of the abandonment, (July 31, 1958), and approximately three months after the Interstate Commerce Commission entered its order approving the abandonment, (February 17, 1958), the Carrier, under File PR-2026-NW, announced that Mr. Rivers, who had been off duty since December 21, 1957, on account of illness, intended to retire but that due to such illness Mr. Rivers had not relinquished his seniority rights.

On August 20, 1958, only 20 days after she had been forced to leave Hollis, Mrs. B. L. Denton notified the Carrier that her monthly earnings for the period of twelve months next preceding the abandonment amounted to \$413.06. On September 23, 1958, she requested reimbursement in the amount of \$17.49, on the ground that she had earned that much less monthly compensation than allowed by the "Burlington Condition." She continued to make similar monthly reports. Her requests for reimbursements, on the ground that she was "adversely affected" by the abandonment, have been consistently declined.

The Carrier's reasons for declining the claim are well summarized in its letter of May 21, 1959, addressed to the General Chairman of the Order of Railroad Telegraphers, as follows:

"Mrs. Denton was employed as extra telegrapher prior to, at the time of and subsequent to the abandonment. She was not therefore displaced as result of the abandonment, but continued to be employed and retained in the same position after the abandonment as before or extra telegrapher. The fact that her monthly compensation may be more or less subsequent to the abandonment, than prior thereto, does not necessarily mean that this is the result of the abandonment, or that she is entitled to protection against such loss under the abandonment authority, as this is characteristic of extra employees and due to various reasons other than the abandonment. Extra employees are not therefore adversely affected or entitled to monthly displacement allowance under the conditions prescribed in the abandonment authority." (Emphasis ours)

Mrs. Denton was an "employee", even though she was still formally classified as an extra employee when she was assigned to relieve Mr. Rivers at Hollis on December 21, 1957. She was "displaced" when she was forced to leave Hollis on July 31, 1958, that is, she was "placed in a worse position with respect to her compensation and rules governing her work conditions", as a result of the abandonment, according to her proof. She has offered to submit proof of the gravity of her "worse position" from month to month.

According to our interpretation of the "B/C" and the facts, it is immaterial whether Mrs. Denton was an extra employee or a regular employee at the time she was forced to leave Hollis on account of the abandonment. We feel justified in finding however that Mrs. Denton was, in fact, a regular employee when she was displaced at Hollis on July 31, 1958, as a result of the abandonment. She was the senior extra employee when she went to Hollis to relieve Mr. Rivers on December 21, 1957. When the abandonment of the Wellington Branch occurred, seven months and ten days later, she was still senior to anyone on the extra board. If the abandonment had not occurred, she could have bid Hollis in as a regular job upon the formal retirement of Mr. Rivers.

Several months before the abandonment, moreover, Mr. Rivers had, in fact, made up his mind, and had announced to the Carrier that he did not expect to return to service but would retire. The Carrier withheld formal bulletining of the agency at Hollis because, first, it knew the abandonment had been approved and the date for actual abandonment was near at hand and, secondly, it wished to deal generously with Mr. Rivers.

Therefore, if Mrs. D. B. Denton, with the cooperation of the Carrier, can now show that she has exercised her seniority rights correctly and has accepted employment as offered her, but while so complying from month to month during the protective period of the "Burlington Conditions" has, nevertheless, received less monthly compensation in her retained positions than her average monthly compensation, during the "test period", from the position from which she was displaced, she is entitled to a "monthly displacement allowance", and other benefits, if any accruing, under the terms of the aforesaid "Burlington Conditions."

Claim No.82 )  
L. E. Hadaway, Claimant )

Award No. 42

HADAWAY FINDINGS:

On August 17, 1955, the Interstate Commerce Commission issued its certificate approving the abandonment of Carrier's line the Mineola Subdivision, as mentioned in the claim, including by reference

"...the stipulated conditions for the protection of all employees who may be adversely affected by the abandonment." (Emphasis supplied).

On the date the abandonment became effective, namely, November 30, 1956, Mr. L. E. Hadaway, with seniority dating from July 12, 1952, was the regularly assigned Agent-Telegrapher at Alba, Texas, one of Carrier's stations on the abandoned Mineola Subdivision.

Immediately after the abandonment Mr. Hadaway, by admittedly correct exercise of his seniority, was assigned regularly to Swing Position No. 15 and worked this swing position until February 22, 1957. At that time the swing positions were rearranged and Mr. Hadaway was forced to the extra board. However, Mr. Hadaway was successful in earning monthly compensation in Swing Position No. 15 and in extra board assignments, until the month of September, 1958, equal to or exceeding the average monthly compensation he received in the position at Alba, from which he was displaced.

In his letter of October 3, 1958, addressed to the Superintendent at Waco, Mr. Hadaway submitted evidence tending to prove that for the month of September, 1958, his earnings had fallen below his "salary guarantee of \$324.50" by the amount of \$23.36. Similarly, he submitted claims for October, November and December, 1958, respectively.

Thus, for a total period of one year and nine months after the abandonment Mr. Hadaway was not "adversely affected" by the abandonment, which caused him to be displaced from his regularly assigned Agent-Telegrapher position at Alba.

The Carrier, in each of the four successive monthly claims, not only denied the amount claimed but denied that any amount whatsoever was due Mr. Hadaway under the terms of the "Burlington Conditions". It stated in each case:

"Our records show that upon abandonment of the Mineola Branch you immediately placed yourself upon a position paying equal or greater remuneration than the position from which you were displaced, therefore, for that reason you were not adversely affected by the abandonment, and are, accordingly, due no compensation."

Here and elsewhere in its presentation, the Carrier contends that a regularly assigned employee can not be "...displaced, that is, placed in a worse position..." except at the exact time of the abandonment. This is tantamount to saying that if a regularly assigned employee, who is forced from his position as a result of the abandonment, should be assigned to an equivalent or better job, regular or extra,



for only the first monthly period subsequent to an abandonment he would thereafter be disqualified for any additional monthly displacement allowance under the "B/C", regardless of how low his monthly earnings may be. Obviously, the Carrier's interpretation would greatly restrict the applicability of the "B/C".

It is prima facie that Mr. Hadaway would have remained on his regular Agent-Telegrapher "position" at Alba indefinitely or on an equivalent or better "position", if the abandonment had not occurred. He was "displaced" as a result of the abandonment when he was forced to a "worse position" than the "position" he held prior to the abandonment. The abandonment, clearly, was the proximate cause of his "displacement" to the "worse position" even though the displacement did not occur until one year and nine months after the date of the abandonment.

Therefore, if Mr. L. E. Hadaway, claimant, with the cooperation of the Carrier, can now show that he has exercised his seniority rights correctly and has accepted employment, as offered to him, but while so complying from month to month during the "protective period" of the "B/C" has, nevertheless, received less monthly compensation in his retained positions than his average monthly compensation, during the "test period", from the position from which he was displaced, he is entitled to a "monthly displacement allowance", and other benefits, if any accruing, as provided under the "Burlington Conditions."

Claim No. 89 )  
L. V. Kays, Claimant )

Award No. 43

KAYS' FINDINGS:

On February 17, 1958, the Interstate Commerce Commission issued its certificate permitting the abandonment of Carrier's Wellington Branch on the "same conditions" as the "Burlington Conditions", (257 I.C.C. 700), said abandonment to become effective July 31, 1958.

When the abandonment became effective, as foresaid, on July 31, 1958, Mr. L. V. Kays, the second senior extra employee, with seniority dating from June 28, 1944, was relieving the Agent-Telegrapher at Altus, Oklahoma, a station on the aforesaid Wellington Branch. He was an extra board employee at all the times herein mentioned.

On August 28, 1958, Mr. Kays wrote to the Superintendent at Waco, Texas as follows:

"My average earnings for the year ending August 1, 1958, was \$472.00 a month. According to the Burlington agreement, it appears to me I am due this compensation account abandon of the Wellington Branch.

As of the present I am unemployed and will be until September 1, 1958. Please handle and advise if you need any additional information."

Thereafter, on April 23, 1959, Mr. Kays wrote to the Superintendent, again, setting out in tabulated form his

"...earnings each month compared with the same month last year, which is due me under the protective conditions prescribed by the Interstate Commerce Commission under Section 1."

The above statements in support of the claim were denied by the Carrier on the general grounds that,

"...the compensation of extra employees is contingent upon many factors, which are in no way related to or connected with the abandonment. The controlling factor is the fact that he was not displaced, or placed in a worse position, as a result of the abandonment, but he remained in the same position after the abandonment with respect to his compensation and rules governing his work conditions."

It is self-evident, as a normal experience, that a regularly assigned employee is "placed in a worse position" with respect to his compensation and rules governing his work conditions when he is forced from his attained regular position to an inferior regular position or to the extra board. As a normal experience he would be expected to suffer a loss in earnings and inconvenience by change in his residence. Similarly, it is self-evident, as a normal experience, that an extra board employee is "placed in a worse position" with respect to his compensation and rules governing his work conditions when he is forced from his attained position on the extra board to a lower position on the extra board. He, too, normally, would be expected to suffer a loss in earnings and impaired working conditions.

We find that Mr. Kays, the second senior extra employee was forced to the fourth position on the extra board as a result of the abandonment. That is, he was "displaced" and forced to take a "worse position" on the extra board. The Carrier made no effort to disprove that Mr. Kays was forced from second to fourth position on the extra board. It rested its case solely on the contention that the "B/C" do not apply to extra employees.

If Mr. Kays, with the assistance of the Carrier, can establish from the Carrier's records that he has exercised his seniority correctly and accepted employment as offered to him, but while so complying at any time within the "protective period" of the Burlington Conditions has, nevertheless, received less monthly compensation than he received during the "test period" of the "Burlington Conditions", he is entitled to the benefits, or "protection", as provided by the terms of the "Burlington Conditions".

Claim No. 97 )  
R. B. Dixon, Claimant )

Award No. 44

DIXON FINDINGS:

On July 19, 1958, Carriers' track extending from Bryson, Missouri, to Paola, Kansas, a distance of 86.7 miles, was abandoned, subject to the so-called "Burlington Conditions".

On July 20, 1958, Mr. R. B. Dixon, Claimant, who was working as Telegrapher-Leverman at the Nevada, Missouri, tower, was displaced by Mr. D. M. Radford, formerly

Agent-Telegrapher at Louisburg, Missouri, a station on the abandoned line. Mr. Radford was senior to Mr. Dixon. On July 28, Mr. Dixon exercised seniority and was assigned to Relief Position No. 6. Relief position No. 6 was abolished on October 29, 1958. Mr. Dixon then "did not elect to exercise his seniority and displace any regularly assigned Telegrapher but reverted to the Extra Board".

Mr. Dixon, who, since his aforesaid displacement, has worked on the extra board filed claim for benefits under the "Burlington Conditions" on December 4, 1959.

The "Burlington Conditions" provides, in part,

"...that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance, and provided, further, that no allowance shall be paid to any employee who fails to accept employment, with seniority rights in a position, the duties of which he is qualified to perform..."

Carrier positively states:

"Claimant elected not to place himself at Baden which he was privileged to do in the exercise of his seniority rights under the existing agreements, rules and practices, and therefore failed to accept employment with seniority rights in a position, the duties of which he is qualified to perform, as required by the plain and specific provisions of the 'Burlington Conditions'...and any and all alleged loss in compensation sustained by claimant was the result of his own actions and failures and not the result of the abandonment."

Moreover, claimant delayed filing his claim for considerably more than one year.

For the above reasons the claim must be denied.

#### AWARDS

<u>Award No. 41</u> (B. L. Denton):	Claim sustained as per findings.	(BU-5053-22)
<u>Award No. 42</u> (L. E. Hadaway):	Claim sustained as per findings.	(BU-4624-22)
<u>Award No. 43</u> (L. V. Kays):	Claim sustained as per findings.	(BU-5054-22)
<u>Award No. 44</u> (R. B. Dixon):	Claim denied.	(BU--

/s/ Daniel C. Rogers  
Daniel C. Rogers, Chairman  
Attorney at Law  
211-212 Commercial Trust Building  
Fayette, Missouri

/s/ W. I. Christopher  
W. I. Christopher, Employee Member  
Deputy President, ORT  
3860 Lindell Blvd.  
St. Louis 8, Missouri

Carrier Member Dissents  
A. F. Winkel, Carrier Member  
Vice President - Personnel  
Missouri-Kansas-Texas Railroad  
Company  
Missouri-Kansas-Texas Railroad  
Company of Texas  
Dallas 2, Texas

Dallas, Texas

August 30, 1960

DISSENT OF CARRIER MEMBER  
TO AWARDS NOS. 41, 42, 43, AND  
PARTIAL CONCURRENCE IN AWARD NO. 44

The majority opinion recites that each of the four claims is "subject to" the Burlington Conditions (page 1) and that those conditions are "applicable" to each of the four claims (page 6). By these statements I assume the majority means that each claim is within the scope or purview of the Burlington Conditions. This is an erroneous conclusion.

The majority state that the four claims relate to "displaced" employees (page 2). B. L. Denton and L. V. Kayes were never "displaced" employees. L. E. Hadaway ceased to be a "displaced" employee when he bid in a position which paid him more than he received in the position from which he was displaced. R. B. Dixon was a "displaced" employee but forfeited his rights under the Burlington Conditions when he failed or refused to bid in a position which would have paid him more than the position from which he was bumped by D. M. Radford, a "displaced" employee.

The decisions of the United States Supreme Court cited by the majority (page 2) only sustained the power of the Interstate Commerce Commission to attach conditions. They did not specify what those conditions should be and they did not interpret or apply any such conditions. Furthermore, the Court held that the conditions should be attached for the benefit of "displaced" employees, Interstate Commerce Commission, et al. v. Railway Labor Executives, et al., 315 U.S. 373, 380, 86 L. Ed. 904, 910. This is not synonymous with employees "adversely affected," as implied by the majority (page 4).

The majority make the following erroneous general findings:

1. That the meaning of the term "position," as used in Section 1 of the Burlington Conditions, is "relative place, situation or standing" (page 4);
2. That the "position" from which an employee is displaced is not limited to the single assignment on which the employee was working at the time of the abandonment (page 4);
3. That the "position" from which an employee is displaced "comprehends as many assignments, including both regular and extra assignments, as an employee may have worked" during the test period of twelve months preceding such displacement (page 4);
4. That the average monthly compensation of the "position" from which an employee is displaced is the aggregate of his earnings during the test period divided by twelve (page 4);
5. That the "position" in which an employee is retained "comprehends all assignments, one or more, both regular and extra assignments, on which an employee works" during each monthly period within the protective period of four years (page 5);

6. That the monthly compensation an employee receives in each monthly "retained position" is the aggregate of earnings received by him from all assignments during each monthly "retained position" (page 5);
7. That an employee will have as many "retained positions" as monthly periods he works during the "protective period" (page 5);
8. That the Burlington Conditions apply to "positions" of both regular and extra employees who are "displaced," whether employed on the abandoned line or elsewhere within the seniority district (page 5);
9. That each employee, regular or extra, has a "position" before the date of an abandonment (page 5);
10. That such employee, regular or extra, has a better, an equivalent, or a worse "position," from month to month, subsequent to an abandonment (page 5);
11. That an employee who is forced to take a "worse position" in any monthly period, as the result of an abandonment, is a "displaced employee" and qualifies for a monthly displacement allowance during the protective period (page 5); and
12. That the compensation actually earned by an employee in each monthly "retained position" must be increased, if necessary, by a displacement allowance to make his compensation in each monthly "retained position" equivalent to his average monthly compensation in the "position" from which he was displaced (page 5).

The sum total of the foregoing findings is that every employee, regular or extra, whether employed on the abandoned line or elsewhere within the same seniority district, must be paid each month for four years after an abandonment a sum of money equal to such employee's average monthly earnings during the year preceding such abandonment. No such payments are required by the Burlington Conditions. Furthermore, the Commission recognized that no such blanket protection was contemplated when it declared that it must first determine from evidence before it that some adverse effect has been or probably will be suffered by an employee "of the type falling within the general conditions previously prescribed" in the Burlington case, St. Louis-San Francisco Ry.Co. Trustee Abandonment, 261 ICC 781, 788. And it was further recognized by the Commission when it held that a displaced employee who preferred not to exercise his seniority rights to a comparable position suffered a loss, if any, of his own choosing and not attributable to an abandonment, and that the second bumping of an employee by a displaced employee was not caused by an abandonment when the second bumping resulted from the abolishment of the position (not caused by the abandonment) which the displaced employee first acquired through the exercise of his seniority, Seaboard-All Florida Ry. Receivers Abandonment, 261 ICC 334, 335-336, 342.

The Burlington Conditions protect only two classes of employees, namely, those who are "displaced" and those who are "dismissed," each "as a result of the abandonment," Chicago, B. & Q. R. Co. Abandonment, 257 ICC 700, 704-705, Paragraph 1 and 2.

If an employee is "displaced," he must exercise his seniority rights under existing agreements, rules, and practices, "to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced," Paragraph 1. The "position" which the employee is obligated to seek through the exercise of seniority of necessity is a "regular" position because that is the only position which could be acquired by the exercise of seniority. Furthermore, a "regular" position is the only position which could produce, with certainty, "compensation equal to or exceeding the compensation" received by the employee in the "position" from which such employee was displaced.\* By the same token, the "position" from which an employee is displaced of necessity must be a "regular" position because only that kind of a position produces a fixed compensation which is the basis of the guarantee under the Burlington Conditions.\*\*

If an employee cannot procure such position by the exercise of his seniority, at the time of the abandonment, then "so long thereafter as he is unable, in the exercise of his seniority rights" to procure such position, he must be paid the prescribed monthly displacement allowance, Paragraph 1. There is no requirement that such employee be paid such monthly displacement allowance after he has procured, by exercising his seniority, "a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced." Thereafter, such employee is not within the scope or purview of the Burlington Conditions.

There is further evidence that the Commission did not intend to protect a displaced employee after he has procured another comparable position through the exercise of his seniority. Paragraph 4 of the Burlington Conditions provides that an employee retained in the service after an abandonment, and who is required to change the point of his employment and to move his place of residence within the protective period, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss not to exceed two days "provided, however, that changes in place of residence, subsequent to the initial change caused by the abandonment, which result from the exercise by the employee of his seniority rights shall not be considered as within the foregoing provision." Paragraph 6(a) of the Burlington Conditions provides protection

---

\* This was recognized by the Order of Railroad Telegraphers when it claimed no loss for displaced employees who "went on the extra board where their compensation depended on the particular assignment," St. Louis-San Francisco Ry. Co. Trustees Abandonment, 261 ICC 781, 784.

\*\* This was recognized by the Commission when it declared that an employee working on the extra board had no regular assignment, and when it ignored the claim of the Order of Railroad Telegraphers on behalf of an employee who was on the extra board while filling a temporary vacancy, Seaboard-All Florida Ry. Receivers Abandonment, 261 ICC 334, 335, 336, 342.

against certain "home" losses sustained by an employee who is retained in the service after an abandonment, and who is thereby required to change the point of his employment within the protective period, but it is expressly provided in Paragraph 6(b) that "changes in place of residence subsequent to the initial change caused by the consummation of the abandonment" and "which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition." The refusal of the Commission to require payment of such expenses and losses occurring after "the initial change caused by the abandonment" is in harmony with the refusal of the Commission to require the payment of a monthly dismissal allowance after an employee has procured, by exercising his seniority, "a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced," Paragraph 1.

In addition to the foregoing errors in the general findings, the majority erred in making the following individual findings to support the respective awards.

The majority state that Mrs. B. L. Denton was "re-assigned" to the extra board after she was forced to leave Hollis, Oklahoma (page 7). This is not correct. Mrs. Denton was an extra board employee at all times while she was relieving E. Rivers, the Agent-Telegrapher at Hollis, who had laid off on account of illness. When that position was abolished following the abandonment, Mrs. Denton merely returned to the extra board.

The majority states that Mr. Rivers, several months before the abandonment, "had, in fact, made up his mind, and had announced to the Carrier, that he did not expect to return to service but would retire" and that "the Carrier withheld formal bulletining of the agency at Hollis because, first, it knew the abandonment had been approved and the date for actual abandonment was near at hand and, secondly, it wished to deal generously with Mr. Rivers" (page 8). This is not true. Mr. Rivers merely indicated his intention to retire and, under the current working agreement, there was not and could not be an advertisable vacancy at Hollis until Mr. Rivers actually retired, which did not occur until after the abandonment.

The majority finds that Mrs. Denton "was, in fact, a regular employee when she was displaced at Hollis," apparently on the theory that she, being the senior extra board employee, "could have bid Hollis in as a regular job upon the formal retirement of Mr. Rivers" (page 8). This reasoning is fallacious because, when Mr. Rivers retired, the vacancy at Hollis would have been advertised as required by the current working agreement and other employees senior to Mrs. Denton and holding other regular positions, could have bid in the vacancy.

The majority find that Mrs. Denton was "displaced" from the position at Hollis. This is not true because Mrs. Denton was an extra board employee filling a temporary vacancy at Hollis, she never had any right to that position, and, after the abandonment, she was still an extra board employee.

The majority state that L. E. Hadaway was forced to the extra board when swing positions were "rearranged" (page 9). The quoted word leaves an erroneous impression. When Mr. Hadaway was displaced at Alba, he bid in Swing Position No. 15 which produced "compensation equal to or exceeding the compensation" he received at Alba. Thereafter, Swing Position No. 15 was abolished as part of a general

force reduction, which was not caused by the abandonment, and Mr. Hadaway went to the extra board. This latter change in service was not within the scope or purview of the Burlington Conditions for the reasons stated in the preceding analysis of those Conditions.

The majority find that L. V. Kays was relieving the Agent-Telegrapher at Altus, Oklahoma, "a station on the aforesaid Wellington Branch," when the abandonment became effective (page 11). This finding is erroneous because it implies, contrary to the fact, that Altus was on the line which was abandoned. The abandonment commenced outside the city limits of Altus, which is on the line of railroad extending from Wichita Falls, Texas to Forgan, Oklahoma.

The majority state that "a regularly assigned employee is 'placed in a worse position' with respect to his compensation and rules governing his work conditions when he is forced from his attained regular position to an inferior regular position or to the extra board" (page 11). This erroneously implies that Mr. Kays, admittedly "an extra board man at all times," nevertheless was a "regularly assigned employee" while filling a temporary vacancy at Altus. The statement is also erroneous for the reasons stated in the preceding analysis of the Burlington Conditions and in the foregoing objections to statements of the majority with respect to the claim of Mrs. B. L. Denton.

The majority state that "an extra board employee is 'placed in a worse position' with respect to his compensation and rules governing his work conditions when he is forced from his attained position on the extra board" and that Mr. Kays was "displaced" (pages 11-12). These statements are erroneous for the reasons stated in the foregoing objections to statements of the majority with respect to the claim of Mrs. B. L. Denton and for the reasons stated in the preceding analysis of the Burlington Conditions.

For each and all of the foregoing reasons, I dissent to Awards Nos. 41, 42, and 43.

I concur in Award No. 44, which denies the claim of R. B. Dixon, but the denial should also be predicated upon the failure or refusal of Mr. Dixon, when he was displaced at Nevada, Missouri, to displace a junior employee at Baden Yard in St. Louis, Missouri, on a position which would have paid him more than he received at Nevada, instead of displacing a junior employee on Swing Position No. 6 which paid him less than he received at Nevada.

Dated September 25, 1960.

s/ A. F. WINKEL

A. F. Winkel, Carrier Member  
Vice President - Personnel

Missouri-Kansas-Texas Railroad Company  
Missouri-Kansas-Texas Railroad Company  
of Texas  
701 Commerce Street, Dallas 2, Texas