AWARD NO. 169
Case No. MW-10-E

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE) Delaware and Hudson Railway Company and Brotherhood of Maintenance of Way Employes

QUESTION AT ISSUE: Are the eighteen (18) crossing watchmen (identified in Attachment "A" to our notice to Messrs. Hiltz and Leighty and identified within the 'Employes' Statement of Facts" of the Employes' ex parte submission) entitled to be compensated at the rate of their compensation guarantee, as provided for in Article IV of the February 7, 1965 Agreement, on and subsequent to the date shown for each?

OPINION OF BOARD: Claimants in this case, who are Crossing Watchmen, each refused or failed to accept a temporary assignment as a Trackman. Although such assignments cross seniority lines, they do not cross craft lines. As each Claimant declined the assignment, Carrier removed him from the list of protected employees, pursuant to the February 7, 1965, Agreement.

Article II, Section 1, provides, in part, as follows:

> An employee shall cease to be a protected employee in case of his...failure to accept employment as provided in this Article.

Article II, Section 3, contains the following sentence:

> When a protected employee is entitled to compensation under this Agreement, he may be used in accordance with existing seniority rules for vacation relief, holiday vacancies, or sick

relief, or for any other temporary assignments which do not require the crossing of craft lines.

Each of the men involved was a protected employee, entitled to compensation under the Agreement. Each was required to accept the assignment, if it accorded with existing seniority rules, since it did not require crossing craft lines. Certainly, furloughed Trackmen, with seniority in that classification, must be called initially to fill vacancies if they are available and are required to be called under the rules. It would be improper under those circumstances to substitute a Crossing Watchman for a furloughed Trackman in filling a temporary assignment as Trackman.

The Employes' defense rested heavily upon this obligation of Carrier. While there were a number of furloughed Trackmen during the 1966-1967 period involved, no specific evidence was ever submitted to Carrier or to this Committee establishing that on the days involved in these cases furloughed Trackmen were actually available and required to be called pursuant to Article IV of the National Agreement of August 21, 1954. Carrier contends there was none.

In any event, a fundamental question is whether each Crossing Watchman, who seemingly had no knowledge of the availability of a furloughed Trackman on the particular day he was called, may properly invoke self-help and refuse the assignment rather than accept it and grieve Carrier's action. In industry generally rectification of an employer's wrongful act is through the grievance machinery rather than through the employee's refusal to perform an assignment.

Although Carrier asserts in this case that none of the furloughed Trackmen were required to be recalled, a letter dated December 10, 1968, which it submitted in a related case, MW-7-E (Award No. 66), indicated that there were furloughed Trackmen who had made themselves available to fill temporary vacancies. On five occasions in 1966 and 1967 furloughed Trackmen were compensated on days when Crossing Watchmen were improperly called to fill temporary vacancies. However, furloughed protected Crossing Watchmen were used for temporary vacancies as Trackmen on 54 occasions and there was no claim that furloughed Trackmen were available and required to be called on those occasions. It

is revealing that on the five occasions where claims were presented on behalf of furloughed Trackmen, the furloughed Watchmen who were assigned to the temporary vacancy did accept the assignment in contrast with the 18 occasions involving the Claimants.

Award No. 66 of this Committee held that three of the Claimants were properly removed from the protected list for refusing to accept temporary assignments as Trackmen. The present case involves their claims for compensation for subsequent dates, and for the first time evidence of physical incapacity is offered. The claims must be denied. Since Carrier's action was sustained in the earlier case, each of the three has lost his protected status. It cannot be restored for subsequent periods. There would be no terminal point in litigation if new evidence could be developed seeking to restore protected status, which had been previously denied on the evidence submitted.

Of the remaining fifteen Claimants nine flatly refused the temporary assignments, according to the memoranda of Track Supervisor Borst, which were submitted in evidence. Another Claimant, George Olekszulin, did fill the temporary assignment for two days but then failed to return to work and gave no reason for his continued failure to work. Mr. Olekszulin did not deny Track Supervisor Borst's allegations and at no time submitted any justification for his refusal to accept the assignment beyond the first two days. He also ceased to be a protected employee in accordance with Article II of the Agreement.

Joseph Osmanski was called by the telephone operator at Hudson to fill a track vacancy on May 11, 1967. According to Track Supervisor Borst, Mr. Osmanski refused to accept the assignment. Although Mr. Borst himself did not speak with Mr. Osmanski, the veracity of the Operator's report went unchallenged by Claimant on the property. It cannot therefore be challenged successfully on the ground of hearsay at this time.

In each instance Carrier acted with dispatch immediately upon learning that a protected Crossing Watchman had declined an assignment. It evidently did not investigate the reason for an employee's refusal to fill an assignment, even when reason was given. Although Article II, Section 1, states that an employee ceases to be protected if he fails to accept an assignment,

implicit in this obligation is that the failure must be without good cause. In four instances it is held that Claimants had adequate cause for their refusal to accept the offer of temporary employment on the specified occasion.

At the time that Claimant Joseph J. Paone refused to accept a temporary assignment as Trackman offered him by Mr. Borst on June 16, 1966, he gave no reason for his refusal. Indeed, he gave no reason during the initial progressing of the claim on the property. However, his claim along with those of the others had been held in abeyance pending disposition of case No. MW-7-E. The parties had agreed on January 11, 1968, that "within thirty (30) days following decision on Case MW-7-E, the parties will meet for the purpose of making an effort to dispose of" the pending claims. The parties duly met on June 5, 1969, and then for the first time reference was made to the physical disability of Mr. Paone.

Evidence of Mr. Paone's physical condition consists of a physician's letter dated May 28, 1969, which states that he underwent surgery on July 3, 1961, and is unable to perform manual labor. Although this letter had not been submitted prior to Carrier's decision to terminate Mr. Paone's protected status, it nevertheless was available during the discussion on the property. The belated submission of such evidence does not warrant imposing retroactive liability on Carrier; it did justify his restoration to protected status and compensation incident to that status, once Carrier was advised of the reason for Claimant's inability to accept the assignment.

On July 10, 1966, when Track Supervisor Borst called Martin B. Carey to offer him an assignment as a Trackman, Mr. Carey was not at home. Mr. Borst spoke to Mr. Carey's housekeeper. Mr. Carey neither worked the assignment nor communicated with Mr. Borst. But there is no evidence that he had ever received the message from the housekeeper. Apparently, Carrier made no effort to ascertain whether its single message on this one occasion had ever been received by Mr. Carey. Consequently there is no evidence that he refused an assignment. An employee's failure to report for work, when there is no evidence that he received notification of it, is not a basis for termination of protected status. The obligation to notify rests with Carrier, as does the burden to prove notification. Claimant was not required to prove that he was not notified.

According to Track Supervisor Borst's memorandum dated July 10, 1966, Clarence Pringle was offered a temporary assignment as a Trackman at Thompson, Pa. The memorandum states that Mr. Pringle worked on July 11, although he "did not return to work." The duration of the assignment is unknown. Mr. Borst wrote that Mr. Pringle "told me several weeks later that he was not able to do the work."

Unlike most of the others, Mr. Pringle had not refused the assignment out of hand. He did undertake it and ceased only because of claimed inability. Loss of protected status should not have been imposed under these circumstances. It was Mr. Borst's memo itself which set forth the reason why Mr. Pringle did not work beyond the one day. Thus Carrier knew and did not challenge Claimant's assertion. There is a difference between employees who on principle simply refuse an assignment and one who gives his reason for it. Since Carrier did not question it, the reason given for Mr. Pringle's failure to continue to work should have warranted continuation of his protected status.

John N. Andrejko was denied continuation of protected status when he refused a temporary assignment as Trackman on March 16, 1967. Track Supervisor Borst's memorandum stated that "Mr. Andrejko had worked the night before and refused to accept this temporary assignment."

Article II, Sections 1 and 3, do not presuppose that a protected employee loses that status if he fails to accept an assignment regardless of the reason for his failure. Nothing in the record indicates that Mr. Andrejko's explanation lacked validity or that it did not justify his declination of the assignment.

A W A R D

The answer to the Question with respect to 14 of the 18 Crossing Watchmen is No. The answers to the Question with respect to the others is as follows:

Martin Carey, Clarence Pringle, and John Andrejko are entitled to be compensated

at the rate of their compensation guarantee, as provided for in Article IV of the February 7, 1965, Agreement on and subsequent to the date shown for each.

Joseph J. Paone is entitled to be compensated at the rate of his compensation guarantee, as provided for in Article IV of the February 7, 1965, Agreement on and subsequent to June 5, 1969.

Milton Friedman
Neutral Member

New York, New York
December 24, 1969

AWARD NO. 169
(INTERPRETATION)
Case No. MW-10-E

PARTIES) Delaware and Hudson Railway Company
TO THE) and
DISPUTE) Brotherhood of Maintenance of Way Employes

QUESTIONS
AT ISSUE: I - (a) Has the Brotherhood of Maintenance of Way Employes correctly interpreted Award No. 169 as sustaining the claim that Claimant John Andrejko is entitled to compensation on and subsequent to December 1, 1966 and is he therefore entitled to now be compensated for the period extending from December 1, 1966 to and including March 15, 1967?

OR

(b) Has the Carrier correctly interpreted Award No. 169 as sustaining compensation claims for Claimant John Andrejko ONLY for dates on and subsequent to March 16, 1967 but not for any dates prior to March 16, 1967?

II - If neither of the above questions are susceptible to an unqualified answer, precisely what additional compensation (expressed in days or other time period) is Claimant Andrejko entitled to receive by virtue of Award 169?

OPINION
OF BOARD: In its submission of the claim for John Andrejko in Case No. MW-10-E, the Organization posed the question whether he, among a group of 18 Crossing Watchmen "identified in Attachment A," were entitled to compensation guarantee "on and subsequent to the date shown for each." Attachment A listed the date for each claimant. In Andrejko's case it was "12/1/66."

During the original correspondence on the property Carrier had noted that Claimant would be allowed pay for the period now in question "less the number of days he worked for the CNJ." It had been Carrier's position in the original case that Claimant had lost his protected status in March, 1967, by virtue of refusing an assignment as Trackman. Although the correspondence had been attached to the Organization's submission, no reference to it was made by the Organization. And Carrier's submission had merely noted an offer to pay Claimant for "time lost prior to March 16, 1967 in excess of time worked for the CNJ upon receipt of advice from the General Chairman as to time worked for the CNJ." Both parties' arguments were addressed to whether the 18 men had lost their protected status.

Award No. 169, in deciding that case, held that Claimant's protected status had not been forfeited. The Award said that he and two others "are entitled to be compensated at the rate of their compensation guarantee, as provided for in Article IV of the February 7, 1965, Agreement on and subsequent to the date shown for each." The date shown in the Organization's submission for Claimant was 12/1/66. Thus the Award held that he was entitled to compensation from that date.

Carrier now contends that since Award 169 was concerned solely with deciding the issue of Claimant's loss of protected status on March 16, 1967, when he failed to work as a Trackman, compensation for the period involved was not granted by that Award. It is true that issue was joined by the parties on the common thread connecting all 18 men, which was their assignments as Trackmen, and therefore the Opinion dealt with that question.

But it is also true that the Organization had sought compensation for a protected employee which had been withheld from him. A carrier's failure to pay compensation due under Article IV for any reason or no reason may be submitted to the Disputes Committee, as was this issue. If no argument is made to support the reason given for non-payment, or if the argument

is not deemed sufficient, or if it is not discussed in the Opinion, the specific direction to pay wages due from a certain date is no less final and binding.

The original claim did not seek compensation beginning in March, 1967, but beginning in December, 1966. That is how the claim was filed. Nothing in the record persuaded the Committee to modify the amount sought. Since the claim was upheld in its entirety, payment for the entire period when Claimant was denied compensation is due. The original Award must stand, and compensation is owed Claimant from December 1, 1966. The Organization's interpretation of the Award was correct.

A W A R D

The answer to Question No. I (a) is Yes.

Milton Friedman
Neutral Member

Dated: Washington, D. C.
January 27, 1972

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January 5, 1970

Subject: Dispute Committee No. 605
Award No. 169
(Maintenance of Way Case)

Mr. C. L. Dennis
Mr. H. C. Crotty
Mr. A. R. Lowry
Mr. C. J. Chamberlain
Mr. R. W. Smith

Dear Sirs and Brothers:

I am enclosing herewith a copy of Award No. 169 signed by Referee Friedman on December 24, 1969. This was a very complicated case but I doubt that any dissent will be written.

Fraternally yours,

G. E. Leighty

Chairman
Five Cooperating Railway Labor Organizations

Encl.

cc: Mr. L. P. Schoene
Mr. F. T. Lynch

GEL/np