AWARD NO. 240
Case No. MW-12-E

SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO THE DISPUTE ) Erie Lackawanna Railway Company and Brotherhood of Maintenance of Way Employes

QUESTION AT ISSUE: Are Crossing Watchmen W. P. McCormick, J. R. Forgie, G. J. Logan, W. B. Bittles and Herbert Harrington entitled to reimbursement for the loss of earnings suffered during 1966 as a result of their furloughs in February or March, 1966?

OPINION OF BOARD: These claims of five Crossing Watchmen are for 1966. With respect to Claimants Forgie and McCormick, Carrier alleges that their protected status was lost as a result of their failure to accept offers of employment in 1967. What occurred in 1967 cannot determine whether or not employees are entitled to compensation as protected employees in 1966. The Forgie and McCormick claims accordingly must be sustained.

Carrier maintains that each of the other Claimants declined offers of work as Trackmen in 1966 and therefore, pursuant to Article II of the February 7, 1965, Agreement, ceased to be protected employees.

Claimant Logan swore on September 2, 1969, that while he "could not have qualified for track work had it been offered... to the best of my knowledge, I have never been requested to take track work nor have I ever received any notification to this effect..." Claimant Bittles swore on September 3, 1969 that he "did not, at any time, refuse work as a trackman, after being furloughed as a crossing watchman."

The then Assistant Chief Clerk in the Division Engineer's Office, Youngstown, Ohio, swore on April 8, 1970 that he had contacted Claimant Logan by telephone "on or about September 27, 1966, and asked him if he would accept work as a Trackman. Mr. Logan advised that he did not desire such work." A similar affidavit was dated April 9, 1970 concerning Mr. Bittles, who allegedly declined "due to his age (62) and not being accustomed to such work." These affidavits are the reasons given by Carrier that the protected status of the two Claimants was lost.

Objective evidence supporting the Carrier's contention that Mr. Bittles and Mr. Logan declined work as Trackmen is lacking, and there is no basis for giving greater credence to either set of the conflicting affidavits. The burden rests with the Carrier to establish the offer and the refusal of an assignment, and that burden has not been sustained.

There is no dispute that a letter was written to Claimant Harrington on August 9, 1966, which stated, as follows:

> Due to elimination of crossings, your former position as crossing watchman was abolished.
>
> We have positions open as trackmen at Leavittsburg, Ohio, and Greenville, Pennsylvania. Will you please advise if you are interested in any of these positions so that necessary arrangements can be made.

The General Chairman replied to that letter on August 31, advising that not only was Mr. Harrington unable to do Trackman's work, but an implementing agreement would be required for such an assignment.

Article II, Section 3 requires a protected employee to accept temporary assignments which do not require crossing craft lines. Section 2 requires him "to accept employment in

his craft offered to him by the carrier in any seniority district...as provided in implementing agreements..." Was the letter of August 9, 1966, a request that Claimant Harrington take a temporary assignment, or was it advice to him that permanent Trackman positions were available for which there must be an implementing agreement? The General Chairman's reply indicated that he regarded it as a permanent assignment requiring an implementing agreement. Carrier did not respond that the offer was for a temporary assignment. In any event, its letter was so ambiguous on the subject that it cannot be construed as a direction to take a temporary assignment pursuant to Article II, Section 3, which Claimant declined.

Finally, Carrier stated that Trackman work was available throughout 1966 for all Claimants, as evidenced by the number of permanent new employees who were hired. However, Trackmen and Crossing Watchmen not only are on different seniority rosters but they are covered by separate agreements. The fact that Trackmen were hired does not mean that Claimants automatically lost their protected status, unless it was by virtue of the operation of Article II, Section 1, which provides that employees cease to be protected only if they failed to retain or obtain a position available in the exercise of their "seniority rights." Because the rules enable Management to fill Trackman vacancies with furloughed employees from other departments does not impose an obligation on Crossing Watchmen to seek out the vacancies on such other rosters, or else lose protected status. Carrier may make temporary assignments of Crossing Watchmen to Trackmen's vacancies, and <u>then</u> unjustified refusal to accept the assignments would cause loss of protected status, in accordance with Award No. 66.

Consequently, the other three claims also must be upheld.

A W A R D

The answer to the Question is Yes.

Milton Friedman
Neutral Member

May 6, 1971
Washington, D. C.