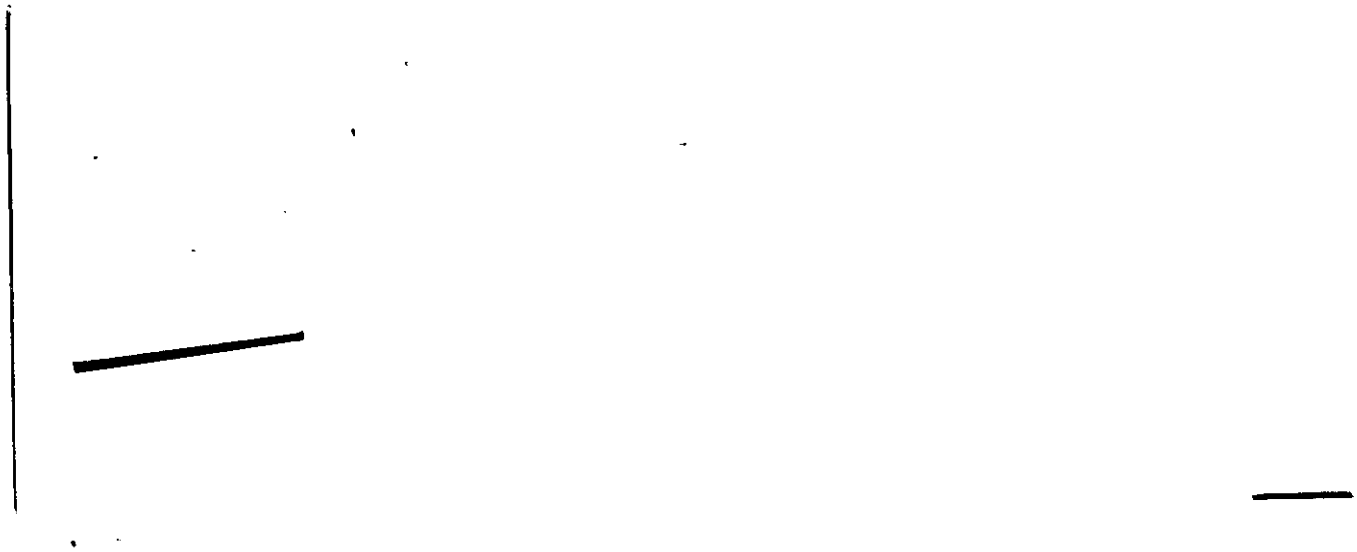

Award #1

MAY 21 1980

OSL

(1)

A W A R D

In the Matter of Arbitration)		
between)		
Chesapeake and Ohio Railway Company (Pere Marquette District))	Re:	Application of OSL III Labor Protective Provisions in an Agreement Account Abandonment of Cross Lake Ferry Service - ICC Docket No. AB-18 (Sub. No. 21)
and)		
The Brotherhood of Locomotive Engineers)		
and)		
The United Transportation Union - C-T-E)		

Before: Arthur T. Van Wart, Neutral Referee

Appearances:

Company

C. J. Schuler - Director, Labor Relations

D. T. Kelly - Manager, Labor Relations

Union

C. M. Moore - Vice President, BLE

L. Wotaszak - Vice President, UTU

Background

The Chesapeake and Ohio Railway Company (hereinafter referred to as "C&O" or "Carrier"), on or about March 18, 1975, sought and was ultimately granted authority under Interstate Commerce Commission (hereinafter referred to as "ICC" or "Commission"), Docket No. AB-18

(Sub. No. 21) for abandonment of its car ferry service across Lake Michigan operating between Ludington, Michigan and Milwaukee, Wisconsin. Carrier had originally also sought abandonment of the cross-lake car ferry service between Ludington, Michigan and Kewaunee and Manitowoc, Wisconsin as well. However, this portion of Carrier's request was denied by the Administrative Law Judge (ALJ) and which decision was adopted, or upheld, by the Commission in its Decision of June 25, 1979.

Said Interstate Commerce Commission, in its "Certificate and Decision" concerning the specified abandonment, imposed labor protective conditions as prescribed in Oregon Short Line Railroad Company - Abandonment Goshen, 360 I.C.C. 91 (1979). These conditions are hereinafter sometimes referred to as "OSL III" or "Oregon Short Line III."

Pursuant to the provisions of Section IV of Article I, of the "OSL III" labor protective conditions the parties met. They attempted in good faith to negotiate an agreement with respect to

an agreed upon application of the appropriate terms and conditions under said protective provisions. However, after the parties had failed to reach an agreement within the prescribed time period Carrier then advised the Employee Representatives that as a result of such impasse it was going to submit the dispute to arbitration pursuant to Article 1, Section 4 of I.C.C. Docket No. AB-18 (Sub. No. 21).

As a result an arbitration hearing was conducted at the Carrier's Office in Southfield, Michigan on April 18, 1980. The parties by submissions, oral and written testimony, presented their differing views. The hearing was concluded April 18, 1980.

Question at Issue: What provisions shall be contained in a Memorandum Agreement within the framework of OSL III "Labor Protective Conditions" imposed by I.C.C. Certificate and Decision in Docket No. AB-18 (Sub. No. 21) in the matter of the abandonment of car ferry service across Lake Michigan?"

The Interstate Commerce Comission, in its "Certificate and Decision", imposed labor protective conditions as set forth in Oregon Short Line Railroad Company - Abandonment - Goshen, 360 I.C.C. 91 (1979). They provide:

> "1. Definitions.- (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
>
> (b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.
>
> (c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or

the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7 (b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and Agreement or Decision - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement or forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1.) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances - (a) So long after a displaced employee's displacement as he is unable, in the normal 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 in the position from which he was displaced, he shall, during his protective period, 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 average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall 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 the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee f ls to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances. -(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate

notification, if his return does not infronge upon employment rights of other employees under a working agreement.

7. Separation allowance. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. - No employee of the railroad who is affected by a transaction shall be deprived during his protection period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be with the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with Three (3) years

aft. changing his point of em. oyment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad with 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes. - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article 1, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or contraversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thuse chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majoring vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. - (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall selected, and failing such agreement, either party may request the National Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to dimish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected."

CONTENTIONS
OF THE PARTIES

Carrier, under date of February 8, 1980, advised the interested General Chairmen, with copy of notice posted on the various employee bulletin boards advising therein of the intent to abandon car ferry service across Lake Michigan between Ludington, Michigan and Milwaukee, Wisconsin on or about May 12, 1980 and identifying the positions to be abolished as a result thereof. Carrier requested a conference pursuant to Section 4 of the OSL III Labor Protective Conditions.

Carrier asserts that as a result of their February 8, 1980 notice the prime and immediate impact of the abandonment will be felt by the employees at Jones Island providing service for and on the one yard engine.

Carrier avers in connection with the foregoing that there is no real disagreement between the parties as to the application of the OSL III protective conditions to the engine and train service employees on the abolished yard assignment at Jones Island on the Milwaukee side of Lake Michigan.

Carrier states that the primary dispute between the parties impinges on a proper determination of "adverse affect", if any, on C&O engine and train service employees at Ludington, Michigan. Ludington Yard, unlike Jones Island, which is a total boat operation, supports an around-the-clock yard crew operation as well as road crews. Such crews are not confined to boat movements. They perform yard and industrial switching, primarily at the Dow Chemical Plant, as well as other local yard service.

Carrier contends that when the Ludington - Milwaukee car ferry operation ceases, on or about May 12th, that while somewhat

less switching will be required, there will be no dimunition of around-the-clock yard service at Ludington as the yard and industrial operations will continue to be performed and that there still will be cross-lake ferry boat operations to Manitowoc and Kewaunee, Wisconsin.

Consequently, says Carrier, it could not, as requested by the Committees, agree that Carrier should "automatically certify" all men working the yard turns on the Ludington Yard Side for protective benefits under the ICC Order. Carrier avers that it rejected the concept of "automatic certification", for any or all Ludington Yard personnel because such request was unreasonable, that the labor conditions imposed by the ICC offered ample protection under its Order and that the Employees failed to present any rationale for "automatic certification" of Ludington Yard personnel for protective benefits.

Carrier asserts that the Committees were simply seeking a "windfall" of benefits to Ludington men without any showing of reduction in Ludington crews "as a result of the transaction". Hence, until or unless the Committees demonstrated an adverse affect on Ludington personnel, no rationale existed for Carrier to calculate, nor compute "test" averages for all Ludington Yard forces as proposed by the Committees.

In such circumstances Carrier considered the request of the Committees to be unreasonable and it therefore precluded any kind of an agreement being reached under Article 1, Section 4.

Carrier asserts that its proposed Agreement was reasonable and was point for point consonant with the criteria set forth in the Certificate and Order in Docket No. AB-18 (Sub. No. 21).

Such proposal, it avers, not only was reasonable, but should have been acceptable because it in no way deprived any employee of any right under the I.C.C. prescribed labor protective conditions or of any contractual right under a negotiated working agreement.

Lastly, Carrier argued that the question or issue of the status of the Milwaukee Road employees involved in the Jones Island yard engine discontinuance is not before this Referee for disposition.

The Brotherhood of Locomotive Engineers (BLE) pointed out that Carrier had offered the following proposals for an Agreement:

> "(1) - That an agreement be implemented providing protection conditions for the employees similar to those provided under protective provisions of the Rail Passenger Service Act.
>
> (2) - An Agreement providing for the protection of employees be deferred until such time that the work force is reduced at Ludington, and at that time meet with the Carrier to determine which employees, if any, are affected, and then negotiate for an implementation of an agreement."

The BLE offered the following proposals for an Agreement:

> "No. 1 - To certify all employees at Ludington, Michigan as of the date abandonment for protective provisions against loss of earnings, loss of job and provide for compensation for displacement allowance, dismissal allowance, moving allowance and other fringe benefits as provided for in Article 1, Section 8 of I.C.C. Finance Docket No. AB-18 (Sub No. 21).
>
> No. 2 - To provide for a guarantee of assignments equal to the number of assignments that are working at Ludington, Michigan prior to the abandonment of the car ferry service between Ludington, Michigan and Milwaukee, Wisconsin, for a period of six (6) years from date of abandonment.
>
> No. 3 - To provide a fund, to be financed by the carrier, to be calculated by the formula in paragraph (a) below, to be held in abeyance until such time that an employee or employees are affected and at that time such funds would be distributed at the discretion of the Brotherhood of Locomotive Engineers, to the effected employee.

(a) Funds necessary to finance fund above would be derived by an allowance by the carrier equal to four (4) hours compensation times (x) number number of days in each year times (x) number of members in a crew times (x) number of years."

The BLE contended that Carrier's proposal No. 1 is at best futile because it was their experience, in the administration of the protective provisions of the Rail Passenger Service Act was such as to conclude that the provisions of that Act are too difficult to administer. They averred that thereunder Employees who are due compensation are by-passed and the employees that are not due compensation, are compensated through the complicated procedures of the exercise of seniority.

The BLE argued that Proposal No. 2 of the Carrier would entail the fruitless task of luring the Carrier to the negotiating table and would provide little clout on the part of the Organization to perform this task. It would mean years of haggling and the end result would be employees that were adversely affected would be denied compensation at a time when their needs were the greatest.

BLE asserts that its proposal No. 1 would be the fairest and the simplest to administer. It would be the easiest from the standpoint that the employees at the bottom of the ladder would automatically be adversely affected as they were denied employment due to the lack of assignments. It would be fairest for identical reason.

BLE Proposal No. 2 says its advocate "would provide security to the point where the senior employees would be removed from the picture due to attrition and retirement".

Lastly, BLE oposal No. 3 would provic immediate, funds that would be available to the affected employees in a time when funds would be direly needed.

The BLE pointed out that there are five (5) yard assignments, plus the one relief assignment, at Ludington. All of such assignments performed duties relative to the servicing of the car ferrys with the exception of Assignment 101-A, which job is assigned solely to do the work at Dow Chemical and Harbison - Walker Refractories. The BLE approximated that roughly "70-75%"of the duties performed by the Ludington Yard Assignment, in the aggregate, are car ferry oriented. Thus, it asserts, if one of the three ports now serviced in Wisconsin is abandoned, then 1/3 of duties for the Ludington Yard assignment will be curtailed. Therefore the abandonment of car ferry service to Milwaukee is tantamount to reducing one or more yard assignments at Ludington, Michigan (which was approximated to be 25%).

The BLE asserted that Carrier has already instituted a "drying up" operated at Ludington, that they are servicing the three ports in Wisconsin with one (1) car ferry on what is an available basis in lieu of a need basis, that priority of service is shown for the ports at Kewaunee and Manitowoc, Wisconsin while the freight bound for Milwaukee accummulates and is simply held there and when the freight accummulates to a certain level it is then billed around Lake Michigan via Baldwin, Grand Rapids and Chicago.

They asserted that this methodology had resulted in one yard assignment being abolished earlier this year and that more will follow.

Thus, say the BLE, when such yard assignments are abolished it means that many employees will either be dismissed, or relocated

or their earnings will be drastically affected and there should be a concrete plan for their protection.

The United Transportation Union (UTU) alleged that Carrier had, in effect and fact, implemented Article 1, Section 10 of the Short Line Provisions as far back as eight (8) years. Said Section reads:

> "Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this agreement, this agreement will apply retroactively to such employee as of the date when he is so effected."

The UTU asserted that Carrier had operated a fleet of six and seven car ferrys, on schedule runs, at a profit, until a managerial decision was made to downgrade the service in anticipation of its application for abandonment.

The UTU pointed out that it would be impossible, at this late date, for the Organization to show retroactively the numerous employees who were displaced and adversely affected by Carrier contemplative action. It was alleged that at least thirty or forty yardmen and enginemen were required to leave their prior right seniority district and move their residence at their own expense without any compensation or protection whatever.

The UTU asserted that eight or ten years ago there were fifteen yard crews operating at Ludington Yard daily until Carrier diverted traffic around the Lake.

The UTU alleged that this Carrier, C&O, has a history of avoiding and denying emplcyee protection by diverting traffic in anticipation of a transaction and/or delaying re-arrangement of its forces after a transaction to circumvent employee protection set out in the governing laws.

The UTU contends that Carrier should be directed to fully protect the last few yardmen and enginemen under the Oregon Short Line III labor protective conditions both at the Port of Milwaukee, (Jones Island), with one crew defined as being one engineer, one fireman and four yardmen (yardmen have tag end relief days off), and at the Port of Ludington where five regular yard crews plus regular relief crews are presently working, which would represent approximately 7 engineers, seven firemen and twenty-one yardmen at Ludington.

The UTU, as did the BLE, argued that the prime work function of the Ludington crews, involved either directly or indirectly, related to car ferry loading and unloading, switching trains and making up loads for trains. They aver that such work will be eliminated with the abandonment of the car ferry service between Ludington and Milwaukee. The UTU asserts that while Carrier makes the flat statement "that no assignments will be abolished as a result of the car ferry service abandonment" they know in advance that such is a position taken by Carrier merely in an attempt to avoid its obligation to provide employee protection.

The UTU, in this connection, points out that Carrier is committed to run at least two boats in the summer to Manitowoc and Kewaunee, primarily for the passenger business, from Memorial Day to Labor Day. However, it is asserted, when Ludington yard crews are abolished at a later date, it will be the contention of the Carrier that such crews will be reduced because of a decline in business to Manitowoc and Kewaunee, Wi., and not because of the abandonment of the Ludington to Milwaukee service.

Further, the UTU contends that yard crews at Ludington will be abolished and/or cancelled on a sporadic basis and the employees

will be dismissed and/or displaced and placed in a worse position with respect with their compensation and rules governing their working conditions.

Consequently, they request that because Carrier has unilateral control and flexibility over its operation at Ludington that "all remaining yard crew employees must be certified as adversely affected employees and protected from loss of compensation for a period of six (6) years following the abandonment of the Milwaukee Car Ferry Service".

The UTU noted that Carrier testified before the Commission that it was costing them approximately 1 1/2 million dollars a year to provide service to the Port of Milwaukee. Hence, if no crews are abolished at Ludington then the cost of protection would be minimal compared to the savings claimed for the abandonment.

The UTU observed that the "Amtrak"protection plan, to wit - the chain or domino reaction method, might well be workable for the Milwaukee Railroad employees, following the abolishment of the Jones Island assignment if they exercise their seniority to the Milwaukee Road and/or the C&O employees if they bump onto the Michigan Division. Such plan could very well certify an employee protected when displaced in the movement from one position to another on the same crew at Kenosha, Wisconsin, or the brakeman who is bumped from head man to rear brakeman on the same crew at Grand Rapids - Saginaw. However, such employees are not "really" adversely affected as a result of the abandonment as will be the employees presently working at Ludington and Milwaukee who will be adversely affected and lose compensation.

The UTU, as did the BLE, proposes to protect the employees at Milwaukee and at Ludington by certifying as adversely affected

"all employees assigned at those points on the date of abandonment". Such employees would be protected as "dimissed" or "displaced" employees under the provisions of the Oregon Short Line III protection provisions for a period of six years.

In addition, says the UTU, Carrier should be required to also retroactively protect all the Ludington prior right yard forces under the requirements of Article 1, Section 10, who were required to move to another point as a result of the diversion of traffic for the past eight years.

The UTU reiterated that it is the intent of a protective agreement to provide protection for employees who are adversely affected by the loss of work as a result of the abandonment. Article 1, Section 4, they asserted, is intended to help negotiate an implementing agreement to determine who and how the employees will be adversely affected and placed in a worse position with respect to their compensation and rules governing their working conditions.

FINDINGS

The parties are before this Neutral Referee pursuant to the procedural requirements of Article 1, Section 4 of the Certificate and Decision by the I.C.C. in Docket No. AB-18 (Sub No. 21), decided February 14, 1980, in connection with The Chesapeake and Ohio Railway Company - abandonment of car ferry service across Lake Michigan between Ludington, Michigan and Kewaunee, Milwaukee and Manitowoc, Wi., reading in pertinent part:

"It is certified that the present and future public convenience and necessity permit abandonment of the above-described line, subject to the following conditions:

(1) Labor protective conditions shall be imposed as set forth in Oregon Short Line Railroad Co., - Abandonment Goshen, 360 I.C.C. 91 (1979); (2) the unilateral rate stipulation affecting the continuation of cross-lake mileages for rate making purposes is accepted and imposed in its entirety as a condition to the grant of abandonment here; (3) cross-lake routes will not be hereafter excluded by applicant from any new or reduced rates, and any existing exclusions shall be removed by applicant upon request by a bona fide shipper or consignee; (2) (sic) applicant shall maintain and advertise all cross-lake passenger service in existence via cross-lake routes retained: providing, however, that in the event of future abandonment of service at Manitowoc, WI, it is understood that protestant, Green Bay & Western Railroad, has acknowledged and agreed to construct and maintain at no expense to applicant a suitable automobile ramp, with appropriate support facilities, for the handling of passenger automobile traffic at the Kewaunee port; (5) applicant shall exercise all reasonable means to facilitate and expedite freight and passenger traffic cross-lake on all routes retained; and (6) applicant will forego initiation of any effort toward future abandonment of the Ludington-Kewaunee cross-lake service for a period of five (5) years from date of the decision served November 16, 1978, except for a substantial change in circumstances..."

In the aforementioned decision rendered by the Administrative Law Judge the factual "background" of the cross ferry operation under question was described in pertinent part:

"***Applicant currently operates three coal-fired steam vessels: the City of Midland, the Badger, and the Spartan. These vessels carry rail freight cars, passengers, and automobiles. During the non-tourist season, extending from approximately September to June, the vessels operate on a non-scheduled basis between the Michigan and Wisconsin ports. The volume of available traffic dictates the trips necessary and the ports to be served. At the present level of freight

traffic, one vessel is operated seven days a week and the second vessel five days a week. During the passenger season scheduled trips are made. In 1976 when three vessels were operating, service was available twice a day, seven days a week, between Ludington and Milwaukee and twice a day, five days a week, between Ludington and Manitowoc. There was no summer schedule between Ludington and Kewaunee although approximately one round trip per day was made. Due to damage to the hull of the Spartan, only two vessels remained in service during the latter part of 1976, one of which operated seven days a week and the other five days a week. In 1977 scheduled sailings were made to all three Wisconsin ports with two ships until August 1 when the third vessel was used through Labor Day.

The three vessels have capacities of 22 to 24 rail cars. The Midland can carry 520 passengers in the summer and 194 persons during the winter. The Spartan and the Badger, which are sister ships, can carry a maximum of 520 passengers in summer and 235 in winter. Rail switching service is provided by the C&O at Ludington and Milwaukee, by the Green Bay and Western Railroad (GBW) at Kewaunee, and by the Chicago and North Western Transportation Company (C&NW) at Manitowoc. The major commodities currently transported include chemicals, food, paper products and lumber.***"

In said Decision the operation conducted on the Milwaukee side of Lake Michigan was described (part):

"***At Milwaukee the C&O leases tracks, depot facilities, apron, and passenger and auto ramps from the City of Milwaukee. One switching crew is operated daily and three clerks are employed there. The Grand Trunk Western also operates a ferry service from Muskegon, Michigan to Milwaukee. Since April 1, 1975, the Grand Trunk has been permitted to dock its ferries at the C&O leased facilities at Jones Island, in Milwaukee. The C&O crew provides the land-rail transportation services for the Grand Trunk Western also. Cars unloaded from the C&O and GTW ferries in Milwaukee are interchanged to the Milwaukee Road (MILW) in the C&O yard at Jones Island or to the C&NW in the adjacent storage yard. The C&O holds itself out to originate or terminate cars within the Milwaukee switching districts but service is actually performed by the C&NW or the MILW. These railroads move cars to their ultimate destinations

> on connections with other railroads as well as moving eastbound traffic to the C&O at Jones Island for sailing on the car ferry.***"

Carrier and the BRT, in connection with Jones Island, entered into a memorandum agreement (BRT-C&O) effective February 25, 1958,:

> "***because of the establishment of our own switching service on tracks leased from the City on Jones Island, Milwaukee, Wisconsin, in connection with the concentration of our car ferry operations into and out of the port of Milwaukee at the Jones Island slip, also leased from the City of Milwaukee, yardmen employed and holding seniority in the Ludington yardmen's seniority district as of February 25, 1958, will have preference to employment in the seniority district to be established at Jones Island, Milwaukee, as of the date this Company provides its own switching service on Jones Island,***."

The 1958 agreement with BRT to cover operations at Jones Island, Milwaukee was followed by agreements reached October 1, 1960 between C&O and BLE and BLF&E on CMStP&P and C&NW (Exhibit "2") for engine assignments on the Jones Island crew; by agreement reached October 25, 1960 between C&O and BRT on C&O-C&NW-CMStP&P (Exhibit "3") for filling yardmen vacancies on the Jones Island crew; and by agreement reached November 1, 1960 with BRT-C&O to cover "transfer of certain yardmen from Ludington, Michigan to Milwaukee, Wisconsin". Carrier and the BRT (C&O-PM) reached another agreement, effective March 1, 1967 establishing Zone 9 at Jones Island under the Seniority Consolidation Agreement (December 27, 1961) for the PM District.

The parties, pursuant to the labor protective conditions imposed, - Oregon Short Line Railroad Company - Abandonment Goshen, 360 I.C.C. 91 (1979) (OSL III) -, after Carrier had given advice of a contemplated transaction, under date of February 8, 1980, that

as a result of the abandonment of the car ferry service across Lake Michigan between Ludington, Michigan and Milwaukee, Wisconsin, nine (9) employee positions would be abolished, met in conference commencing February 25, 1980 and attempted to negotiate an agreement with respect to the application of the terms and conditions of said OSL III labor protective provisions.

Failing to reach an agreement thereupon Carrier requested that the matter be moved into the next proscribed step or stage, to wit - arbitration.

Analysis of the conflicting position of the parties set forth in their written submissions and the oral presentations permits the conclusion that Carrier desires to restrict its obligation in providing protective provisions to those employees who are, or who may be, adversely affected by reason of the abandonment to be no greater than that provided in OSL III. The Employees, on the other hand, seek to have the conditions applicable to apply in the manner of the "Amtrak", or chain reaction, method to employees on the Milwaukee Railroad, while also granting automatic certification to all employees presently assigned at Ludington in lieu of the application of said chain effect to employees otherwise employed on the Michigan side of the Lake. The Employees offered as their Exhibit No. 3, an opinion from the Director of the Bureau of Unemployment and Sickness Insurance who expressed his views, in a letter, dated March 20, 1980, concerning the application of Section (C) of the OSL III conditions which appears to permit a reduction in a "dismissal allowance" to the extent that a dismissed employee who also is entitled to or receives benefits under an unemployment insurance law shall have such allowance reduced to the extent that such other earnings or benefits exceeds the amount

upon which his "dismissal allowance" was based.

The other matter raised, which was Employee's Exhibit "4," was introduction of the Brief of the Petitioners in Dockets 79-3778 and 80-3085 before the United States Circuit Court of Appeals, for the Sixth Circuit, dated March 31, 1980. The thrust thereof, in essence, was that the Administrative Law Judge erred, as had the Interstate Commerce Commission, in weighing the evidence presented, that the decision to permit abandonment of the ferry service was contrary to public convenience and necessity and the weight of evidence, that Carrier failed to prove its case, that operation of any one of the ferry routes is a burden upon it and that the decision authorizing the abandonment of the Ludington-Milwaukee cross-lake route should be vacated and remanded to the Commission for further proceedings.

In the instant case the authority of the Neutral Referee is circumscribed to conform to the labor protective conditions as imposed by the Commission in its Certificate and Decision decided February 14, 1980 in Docket No. AB-18 (Sub. No. 21) attached thereto as Appendix.

A review thereof makes it clear that the three proposals submitted by the Brotherhood of Locomotive Engineers are not in consonance with the so-called "OSL-III" - labor protective conditions imposed by the Commission. Hence, they are beyond the authority and competence of this Neutral Referee. Such proposals lend themselves solely to negotiation between the parties, which in this case failed. Consequently, they are not

matters that the Neutral Referee would be authorized to use as a proper basis for writing the provisions of an appropriate agreement between the parties.

The three parties to this proceeding were, at one time, in a better position to obtain through collective bargaining those things that each believed was most appropriate to any agreement acceptable to them. However, none are in that position now. All are subject to the constrictures of arbitration within the framework set forth herein.

As to the proposals offered by UTU, particularly requests made by them as similarly made by the BLE, to wit - the "automatic certification of the employees at Ludington, the Neutral Referee must find that such request is not in consonance with the "OSL III" protective provisions. Therefore, that request will not be included as part of the provisions to be contained in the Memorandum Agreement for the parties.

The purpose of this arbitration proceeding, taken pursuant to Section 4 of the OSL III labor protective conditions, is not to determine what is a "reasonable" agreement, for what is "reasonable" would have been at least agreed upon had the parties been successful in their negotiations. Rather, the test is whether the agreement drafted herein is appropriate and satisfies the imposed "OSL III" labor protective conditions.

The Neutral Referee commends both parties for their articulate and skillful presentation of the varying views which he has found helpful in formulating his conclusions on this dispute.

The Neutral Referee concludes that absent any stay on the authority to proceed under Section 4 of Article 1 of OSL III protective conditions he is duty bound to timely proceed therewith.

Despite the persuasiveness of the Employees contentions a review of the record finds them lacking as a deterrent to causing the Neutral Referee to move beyond those conditions expressly provided for by the OSL III conditions.

The so-called "down grading" or "Chicago plan" relied upon by the Employees is found to be wanting. The matter was thoroughly discussed before the administrative law judge who reviewed same and in affect dismissed same finding in pertinent part:

> "...considered, therefore, in this context of the then existing circumstances, it is not necessary to speculate upon C&O management's primary intent and purposes in crystalizing the Chicago Plan. A clear recognition of the facts clearly dictates the course of action the applicant pursued. To conclude, as do some of the protestants, that evolution of the Chicago Plan, in light of the hard facts faced by applicant at the time, viz., the loss of half its fleet and a calculated decision by management against the replacement or renovation thereof, constituted a deliberate down grading of the ferry service, is to either ignore or distort the facts and to give them a meaning not reasonably reconcilable with the balanced consideration of all the relevant evidence."

The Commission took no exception thereto. The contention is now before the Sixth Circuit Court of Appeals.

Nonetheless, we find that the purpose in pursuing this argument is to seek coverage for persons unnamed, unknown and unidentified and who, in all probability are no longer employed by this Carrier. Thus they are not even involved in the "transaction"

reflected as that term is defined within the OSL III conditions. Consequently, this matter will not be included in the decision to be submitted to the parties.

Nor do we find that a proposal to certify as adversely affected all employees on the date of abandonment at Ludington, Michigan to be consistent with the nature and type of protective provisions provided. Hence, if there is relief to be sought under Section 10 of Article 1, such should be sought under the provisions of Article 1, Section 11.

Therefore, we turn to the disposition of the issue placed before this Neutral Referee, to wit - the appropriate provisions to be contained in an agreement or a decision rendered by the Neutral Referee as applicable to the instant transaction.

The following and attached appendix, which by reference is incorporated herein and made part hereof, is the Neutral Referee's decision rendered pursuant to Article 1, Section 4.

Respectfully,

Arthur T. Van Wart

Issued at Baltimore, Maryland, May 12, 1980.

NEUTRAL REFEREE'S DECISION

PURSUANT TO ARTICLE 1, SECTION 4

OF THE APPENDIX TO DOCKET NO. AB-18 (SUB. NO. 21)

(1) The provisions of the collective bargaining agreement shall be applicable in the event of any rearrangement of forces as the result of abandonment of car ferry service between Ludington, Michigan and Milwaukee, Wisconsin.

(2) The labor protective conditions as set forth in Oregon Short Line Railroad Company - Abandonment Goshen, 360 I.C.C. 91 (1979) attached as Appendix to Docket No. AB-18 (Sub. No. 21) which, by reference hereto, are incorporated herein and made part hereof, shall be applicable in this transaction.

(3) In order that the provisions of the first proviso set forth in Article 1, Section 3 of the conditions contained in Oregon Short Line III may be properly administered, each protected employee who also is otherwise eligible for protective benefits and conditions under some other job security or other protective conditions or arrangements shall, within ten (10) days of being advised by Carrier of his monetary protective entitlement under the conditions set forth in Oregon Short Line III, elect between the benefits thereunder and similar benefits under such other arrangement. This election shall not serve to alter or affect any application of the substantive provisions of Article 1, Section 3.

(4) (a) Each dismissed employee shall provide C&O with the following information for the preceding month in which he is entitled to benefits no later than the fifth (5th) day of each subsequent month on a standard form provided by the Carrier:

1. The day(s) claimed by such employee under any unemployment insurance act.

2. The day(s) each such employee worked in other employment, the name and address of the employer and the gross earnings made by the dismissed employee in such other employment.

(b) In the event an employee referred to in this Section 4 is entitled to unemployment benefits under applicable law but forfeits such unemployment benefits under any unemployment insurance law because of his or her failure to file for such unemployment benefits (unless prevented from doing so by sickness or other unavoidable causes) for purposes of the application of Sub-section (c) of Section 6 of the Appendix, they shall be considered the same as if they had filed for, and received, such unemployment benefits.

(c) If the employee referred to in this Section 4 has nothing to report under this Section 4 account of their not being entitled to benefits under any unemployment insurance law and having no earnings from any other employment, such employee shall submit, within the time period provided for in Sub-section (a) of this Section 4, on the appropriate form annotated "Nothing to Report."

(d) The failure of any employee referred to in this Section 4 to provide the information required in this Section 4 shall result in the withholding of all protective benefits during the month covered by such information pending Carrier's timely receipt of such information from the employee.

(5) Coincident with the abolishment of the yard engine at Jones Island (Milwaukee) under the I.C.C. order and exercise of seniority by incumbent employees on the discontinued crew as required by the rules agreements, or other arrangements made by agreement for such employees, the several agreements, made by and between the parties, including those to which organizations on other properties may have been party, covering yard jobs at Jones Island, Milwaukee, shall be considered null and void and without practical effect in the case of employees represented by the operating crafts on C&O (PM).

(6) This shall constitute the required decision as stipulated in Article I, Section 4 of the protective conditions deriving from I.C.C. Docket No. AB-18 (Sub. No. 21).

(7) Prior to implementing the provisions of this decision, the company will provide a minimum of fifteen days' advance written notice.

Issued at Baltimore, Maryland, May 12, 1980 by Neutral Referee Arthur T. Van Wart