Award #5

(5)

ARBITRATION
UNDER
ARTICLE I, SECTION 4, OREGON SHORT LINE III CONDITIONS

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY	
and	DECISION OF NEUTRAL REFEREE
RAILWAY LABOR EXECUTIVES' ASSOCIATION	

BEFORE: Peter Henle, Neutral Referee

APPEARANCES

For the Denver & Rio Grande Western Railroad Company:
KATHLEEN SNEAD, ESQ.
JOHN S. WALKER, ESQ.
Suite 900 Park Central Plaza
1515 Arapahoe Street
Denver, Colorado 80202

For the Railway Labor Executives' Association:
JOHN O'B. CLARKE, ESQ.
ERNEST W. DuBESTER, ESQ.
Highsaw & Mahoney, P.C.
1050 17th Street, NW
Washington, DC 20036

This case involves the application of the employment protection provisions set forth in the Interstate Commerce Commission (ICC) decision, Oregon Short Line III, to those employees of the Denver & Rio Grande Western Railroad (DRGW) affected by the sale of its 45-mile narrow gauge line between Durango and Silverton, Colorado.

There is no need here to recite what has become an extensive history of legal and administrative actions involving this sale. For the purpose of this decision, the essentials can be summarized as follows:

December 19, 1979 - ICC decision authorizing the Durango and Silverton Narrow Gauge Railroad (D&S) to acquire and operate the 45-mile line. In its decision, the ICC makes the proposed sale from the DRGW "subject to imposition of labor protective conditions described in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), with the costs to be borne by the Denver the Rio Grande Western Railroad Company." (Finance Docket 29096, p. 296) The Oregon Short Line III conditions referred to include, in Article I, Section 4(a), two important requirements: (1) a 90-day advance notice by the railroad of any transaction that would adversely affect employees, and (2) the reaching of an implementing agreement to set the ground rules for applying the Oregon Short Line III conditions between the railroad and representatives of its employees, either by negotiation or if necessary by arbitration, before any "change in operations, services, facilities, or equipment shall occur."

January 9, 1981 - Pursuant to a request from the DRGW, in accordance with Article I, Section 4(a) of the Oregon Short Line III conditions, arbitration was held to resolve certain issues in dispute over an implementing agreement between the DRGW and the Railway Labor Executives' Association (RLEA). On this date, Arbitrator Neil P. Speirs rendered his decision, reaching conclusions on certain issues, but on others no decision was offered because the issues were moot or were pending in a separate action before the ICC. In his award, Arbitrator Speirs stated:

> "The arbitrator finds the "decision" here rendered on other issues does not set aside the binding application of Article I, Section 4(b) (of Oregon Short Line III conditions) therefore:
>
> > "No change in operations, services, facilities or equipment shall occur until after an agreement is reached or decision of a referee has been rendered."

March 9, 1981 - RLEA earlier had asked the ICC to require the D&S to participate along with the DRGW in the labor-management negotiations to reach agreement implementing the Oregon Short Line III conditions. On this date, the ICC denied the union request and dismissed the complaint (Finance Docket 29389).

March 25, 1981 - Date of sale of the narrow gauge line from the DRGW to the D&S.

June 10, 1981 - In a petition filed March 27, 1981 with the ICC, the RLEA alleged that DRGW had violated the ICC-imposed Oregon Short Line III conditions by selling the narrow gauge line before an implementing agreement had been reached with the employees. The issue presented was whether the decision of Arbitrator Speirs represented "a final and conclusive decision" as required by Article I, Section 4 of the conditions. In its decision of this date, the ICC concluded that such a decision had not been rendered, stating the following:

> "In summary, we conclude that the referee had not issued a final and conclusive decision as required by Article I, Section 4 of Oregon III. A conclusive decision could not be reached by the referee until this Commission had ruled on whether D&S had to participate. Once our decision was reached, it was the responsibility of RLEA and D&RGW to either hold negotiations or call upon the services of a referee. Since the parties did not enter an agreement and the referee did not prescribe terms on this essential issue, there is no implementing agreement.
>
> The referee correctly directed D&RGW not to make any changes in its operation, services, facilities or equipment until a conclusive decision was made, or agreement negotiated, on the rearrangement of forces. D&RGW acted improperly in completing the sale."

In its order, the ICC directed the following:

> "2. RLEA and D&RGW are to enter negotiations or arbitration for the purpose of establishing an implementing agreement.
>
> 3. D&RGW shall treat and consider its employees as if the sale of the Silverton Branch line to D&S had not occurred until there is an implementing agreement." (Finance Docket 29096)

July 14, 1981 - RLEA requested the National Mediation Board (NMB) to appoint a neutral referee, in accordance with Article I, Section 4(a) of the Oregon Short Line III conditions, to determine the implementing arrangement for employee protection.

On July 23, 1981 this arbitrator was nominated by the NMB to serve as neutral referee to hear this dispute. On September 15 and 16, hearings were held in Denver, Colorado at which both the DRGW and the RLEA were given full opportunity to present evidence and views concerning the issues in dispute. Both parties presented draft language for an implementing agreement. The transcript of the hearings totaled 396 pages plus 4 DRGW and 12 RLEA exhibits.

Following the hearings, briefs were submitted by each party. These reached the arbitrator on October 16. The parties agreed to waive the specific time limits in section 4(a) of the Oregon Short Line III conditions, and the arbitrator agreed to render his decision within thirty days following receipt of briefs.

After full and careful consideration of all the evidence and argument, this decision has been prepared.

Distinguishing Features of the Sale

The Oregon Short Line III conditions were adopted by the ICC in February 1979, in effect providing employees adversely affected by rail line abandonments the same protection previously imposed in consolidation cases. The essential features of these protective provisions had been adopted in predecessor situations many times previously; in fact, they have their origins in the Washington Job Protection Agreement of 1936.

Despite this history, there seem to be few, if any, instances in which these protective conditions have been applied to a set of circumstances similar to those in this case. The more unique features of this transaction are the following:

(1) The object of the sale, the 45-mile narrow gauge line, although in earlier years an integral part of the DRGW system, at the time of sale had no connecting link with any other section of that system. In fact, the shortest distance between the narrow gauge railroad and the main body of the railroad was roughly 150 miles (Durango to Alamosa).

(2) Because the narrow gauge line has been operated almost exclusively as a seasonal tourist attraction (May to September), most of its employees were local residents who, although they maintained a year-round employment status with the DRGW, were actually working for the railroad three to six months of the year and on furlough status the remainder of the year. A relatively small workforce, largely maintenance employees, did work year-round.

(3) The sale was consummated prior to any implementing agreement between the DRGW and its employees regarding the application of any protective provisions to those employees affected by the sale. As a result, when the DRGW took certain personnel actions at the time of sale or shortly thereafter (notifying employees with seniority only at Durango that no work was available for them and offering other employees with wider seniority jobs at other locations), the individuals involved were forced to respond without knowing whether or when any employment protective provisions would apply to their individual situations.

The presence of these unusual circumstances complicated the task the parties faced in attempting to reach a voluntary implementing agreement. It similarly complicates the task of a neutral referee setting out to define such an implementing agreement. It is not enough simply to refer to the language of the Oregon Short Line III conditions since this

language does not by itself solve some of the issues now confronting the parties. Rather additional language must be included to resolve the special issues inherent in this transaction; otherwise, the parties in applying the referee's decision will receive adequate guidance leading in turn to further disputes in applying the decision to individual cases and eventually raising the same issues at another arbitration under Section 11 of the Oregon Short Line III conditions. This approach is fully consistent with the views of the ICC, as expressed in their June 10, 1981 decision:

> "The role of the referee comes into play when the parties fail to reach an agreement. When bilateral talks break down, the referee's decision becomes a substitute for a mutual agreement. Because his decision is 'final, binding, and conclusive,' and must be obeyed by the parties, the referee must render an opinion as to every issue or subject which would be discussed during bilateral negotiations between the carrier and employee representatives. The referee is to reconcile all disputes over which he has jurisdiction. Given the importance to reassignment and displacement, a referee should play a major role in formulating or devising a scheme for the rearrangement of forces where the parties have not been able to settle this matter."

At the same time, this arbitrator is not unmindful of his assignment and its relation to the Oregon Short Line III conditions. This assignment is not to prescribe a new set of employee protections; rather, the assignment is

to implement a given set of employee protection provisions under current circumstances. The Oregon Short Line III conditions have been applied for several years, their predecessors for decades. While the parties may by voluntary agreement add to or subtract from these provisions, the arbitrator is given no such license. It is only when special circumstances arise, not clearly addressed by the language of the protection provisions, that the arbitrator can and should provide his interpretation.

The following pages discuss the major issues in dispute between the parties regarding the appropriate language to be incorporated into an implementing agreement. The arbitrated implementing agreement is attached as an appendix.

Degree of Protection for Seasonal Employees

In this case, seasonally employed workers comprise a majority of the employees whose employment was related to the Durango-Silverton line. To what degree, if any, should they receive the protections of Oregon Short Line III conditions? It seems clear from a reading of the 1979 ICC decision that these conditions were written as applying essentially to year-round permanent employees. This also seems to be true of the various predecessor provisions,

including the Washington Job Protection Agreement. No reference is made to seasonal, part-time, or part-year employees. In fact, there seem to be few, if any, instances in which courts, administrative bodies, or arbitrators have ruled on this question.

The RLEA argues that these employees are entitled to the same protections as year-round employees, except that these protections would not apply to months in which they were traditionally not employed. The carrier contends that the status of furloughed employees (most seasonal employees were on furlough at the time of the sale) has not been affected by the transaction; these employees were on furlough before the sale and they continue to be on furlough after the sale. "At that point they are neither dismissed or displaced until such time as there might be need for their services."1/

It is clear, however, that had the sale not occurred, the carrier would have recalled all or practically all of these furloughed employees to work during the 1981 operating season. In fact, at the time of sale on March 25, 1981, several of these employees had already been notified to report to work on April 1, 1981. For others the recall date would have been later that month or in May. The sale of the line obviously did have an adverse effect on the employment opportunities of these employees, not merely for the summer of 1981, but probably for future summers as well.

1/ Transcript I, p. 114-115.

It is worth noting that furloughed employees fall into two categories: (1) those with "point" seniority, meaning that they are eligible to work only in the Durango area; and (2) those with district seniority, meaning that they are eligible to work at any assignment within the particular district in which they hold seniority rights. The first group obviously would, in all likelihood, never be recalled to work by the DRGW. A number of the second group were, in fact, recalled to work after the transaction, for the most part at Alamosa.

The RLEA has proposed an arrangement under which a furloughed employee would become eligible for protection as a dismissed employee if he did not have the seniority to obtain work at his home location (for those with "point" seniority) or at another work location with equivalent compensation (for those with district seniority). To become eligible, each furloughed employee would be obligated to exercise his or her seniority at a time in 1982 comparable to the date in 1980 at which he was called to work.

In reviewing this issue, it is well to refer to the decision by Arbitrator Speirs. He also was asked to determine this question. The issue before him was whether "as a condition paramount for consideration for eligibility for 'dismissed employees' or displaced employee status" employees of the DRGW were required "to hold positions on Narrow Gauge Line on date of transaction (date of sale)."

The arbitrator's decision was as follows:

> "The arbitrator finds; as a condition paramount for consideration for eligiblity for 'dismissed employee' or 'displaced employee' status need not hold positions on Narrow Gauge Line on date of sale. However it is a condition precedent that for employees to avail themselves for consideration for eligibility for 'dismissed employee' or 'displaced employee' status that they hold employment rights on D&RG on date of sale."

This arbitrator agrees with and accepts this conclusion, but some further consideration appears necessary to apply Oregon Short Line III conditions to seasonal (furloughed) employees. For example, it seems clear that the seasonal employees can be roughly divided into two groups. In a number of cases these individuals have been working for the carrier for many years. In any year they may be employed for as long as six months and this work may constitute the individual's main source of income. In other cases particularly the younger people, work with the DRGW has been concentrated in the traditional summer vacation months of June-August and provides earnings for further education or other activities. The second group obviously has a more casual relationship to their work and to the DRGW.

There is some doubt whether the Oregon Short Line III conditions are meant to apply to seasonal workers with only a casual and temporary job attachment. As previously

indicated, there appears to be no precedent in earlier rulings on this question, but a related document, the C-2 Appendix to the National Railroad Passenger Corporation Agreement between the Corporation (Amtrak) and the various railroad unions, does include a provision[2/] on this issue. It excludes from the protective provisions of the agreement discontinuance of seasonal service in operation 120 days or less. Although the language applies to service in terms of operations rather than service in terms of employment, it is nonetheless an indication that at least in this instance both railroad management and unions have recognized that employees involved in short-term operations can be excluded from basic employee protections.

In the attached implementing agreement, language is included entitling furloughed employees to protection, but only for employees who worked for the DRGW 120 days or more during 1980.

2/ The provision reads as follows:

ARTICLE VII

EXCEPTIONS

"Changes in employment caused by, but not limited to, any of the following conditions will not be considered a 'transaction' as defined in this Appendix:

(a) Discontinuance of seasonal Intercity Rail Passenger Service which has been in operation 120 days or less, provided, however, the Corporation shall notify the representative of any employe to be affected by the proposed initiation or discontinuance of such seasonal passenger service and the number and class and craft of employes to be affected."

There is one group of employees not on furlough who have worked seasonally on the Silverton line who deserve brief mention. These are the operating personnel--engineers, firemen, and trainmen--who hold regular work assignments on other parts of the DRGW system and who in the summer months, either by preference or by assignment, come to Durango to operate the trains on the line. From the evidence adduced at the hearing it appears that in some cases the Silverton line assignment was regarded as a "plum" because of the long hours and consequent opportunities for higher earnings. In such cases the more senior qualified employees bid for the right to transfer to Durango. In other cases, the assignment was not so highly regarded with the result that the job had to be assigned to qualified lower seniority employees. In neither case does it appear that the same individuals operated the trains on the line year after year. Moreover, unlike the shop and track maintenance crews, the assignments were essentially for briefer periods, the three summer months when the line was in operation.

These individuals would not be covered by the special provision relating to furloughed employees, nor is any special provision made for them in the arbitrated implementing agreement. Whether any of these employees is entitled to protection remains a matter for further determination under the language of the Oregon Short Line III conditions.

Claims Procedure

An orderly system for accepting, reviewing, and paying claims of employees is at the heart of an implementing agreement for Oregon Short Line III conditions. Fortunately the carrier and the RLEA have been able to agree on the major provisions of a claims procedure. Only two issues remain in dispute.

The first concerns a proposal by the RLEA that the carrier furnish, within ten working days of this arrangement, basic information on compensation and time worked for 1980 to all employees who performed service on the Silverton line in 1980. Normally, individual employees are required to file an application for a claim before the carrier is required to supply compensation and time data. The RLEA argues that its proposal is necessary in the case of the operating personnel who are widely scattered throughout the carrier's service. However, this does not seem a sufficiently urgent reason for requiring the carrier to provide data prior to the filing of a claim. This provision is not included in the arbitrated implementing agreement.

The second issue concerns the time interval for handling claims. It seems best that the carrier be allowed thirty days for all claims, rather than thirty days for displacement and dismissal allowances and ten days for separation and relocation benefits, as the RLEA has suggested.

Leave of Absence

Presumably many of the affected employees would most prefer to become employees of the new owner of the narrow gauge line, the D&S. Some of them already are, having accepted offers made after the sale. The question presented here is whether affected DRGW employees should be offered a leave of absence from the DRGW if they accept employment with the D&S.

The RLEA argues for such a provision, stating that such a leave of absence provision is common in other railroad mergers and sales and that it was written in as part of the C-1 conditions in the agreement covering the extensive transfer of railroad employees to Amtrak. Among the RLEA exhibits are several implementing agreements under C-1 conditions providing leave of absence to employees leaving a particular railroad for Amtrak. Some of these provide a one-year leave of absence; in other cases, the leave is for the length of the individual's protected period.

The DRGW for its part points out that there is no provision for a leave of absence in the Oregon Short Line III conditions. It argues, in addition, that the C-1 conditions cannot serve as a precedent because of the

special circumstances surrounding the origin of Amtrak. At that time Amtrak was dependent for its new labor force on transfer by employees from other railroads who had been responsible for passenger operations. The leave of absence provision in that situation was designed to provide a special compensation for the fact that the employees concerned would lose their dismissal allowance if they did not accept a position with Amtrak comparable to the one they had been occupying. In effect, these employees were being forced to transfer to Amtrak, and the leave of absence provided an arrangement whereby they might transfer back sometime in the future.

One further aspect of this issue is relevant. The ICC has expressly excluded the acquiring railroad, the D&S, from the implementing agreement. A leave of absence provision is certainly not expressly prohibited by the ICC order, but such a provision would indirectly involve the D&S since it would mean that any new D&S employee with previous employment on the DRGW would be free to quit at any time and reclaim his employment on the DRGW.

Under these circumstances and because no provision is made in Oregon Short Line III conditions for a leave of absence, such a provision is not included in the arbitrated implementing agreement.

Change of Residence and Moving Expenses

Several questions have arisen regarding the terms and conditions of a protected "change of residence" when an affected employee is transferred away from his previous work location.

First is the question of defining "change of residence" to make clear the conditions under which Article I, Sections 9 and 12 of the Oregon Short Line III conditions apply. Both parties agree that such a further definition is needed, and both essentially agree that the proper distance to use in testing whether a new work location authorizes a "change of residence" is whether it is 30 miles from the former work location and farther from the employee's residence than was his/her former work location. Both parties also agree that a permanently attached trailer should be included as a "residence". The carrier contends, however, that no protection should be provided for transfers within the employee's seniority district.

Article I, Section 9 reads in part as follows:

> "Any employee retained in the service of the railroad. . . 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. . ."

In view of the absence in this language of any limitation of the work transfer, the implementing agreement will not contain any reference to seniority district. Moreover, in the situation at hand, seniority districts embrace an extensive area, sometimes the equivalent of the entire state of Colorado, and it would be manifestly unfair to require a move over such long distances without reimbursement.

The RLEA suggests two additional modifications in the conditions applying to a change in residence: (1) employees owning a home may elect to waive the protection afforded by Article I, Section 12 and receive instead a sum equal to the closing costs in selling their home; and (2) employees changing residence should be entitled to a further allowance of $1,000 to cover other incidental costs of relocation. RLEA did demonstate at the hearing that similar provisions have been adopted a number of (perhaps many) agreements. However, such agreements were negotiated voluntarily in collective bargaining where concessions by one part are normally offset by concessions by the other. In the current case this arbitrator is reluctant to go beyond the level of protection set forth in Oregon Short Line III conditions which do not contain either of the RLEA proposals. Considerable protection is already provided to

employees required to change work location and residence in these conditions (Article I, Sections 9 and 12). While the RLEA provisions might well serve a useful purpose, they should not be imposed as part of an arbitrated implementing agreement.

Finally, disagreement arises over another related issue. The RLEA suggests a provision calling for agreement in advance by the employee involved in a change of residence and carrier regarding "the ways and means of transportation of relocating the employee, his family and his household and other personal effects, including the means of payment for such transportation." RLEA argues that such a provision is needed to give full force and effect to the language in Section 9.

The relevant language of Section 9 reads as follows:

> ". . . (the employee who is forced to move) . . . 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 (to) 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; . . ."

This language does require the agreement in advance regarding several aspects of the move. It also states that the employee should be reimbursed. It does not state specifically that agreement should be reached in advance regarding the method of reimbursement and the extent to which the carrier is responsibile for employee expenses. Additional language would help to clarify any doubts regarding the procedure to be followed. The DRGW has indicated it has no objection to the proposal providing it clearly applied to future moves, not to moving arrangements already made and undertaken. To this arbitrator it seems clear that past arrangements cannot be renegotiated "in advance." Language is included in the implementing agreement applying only to future moves, but any affected employees who have already moved to a new location as a result of the sale clearly still retain any protections provided by the Oregon Short Line III conditions.

Calculation of Base Compensation

Both parties agree that the language in Oregon Short Line III conditions regarding the method of calculating base compensation (in order to measure possible displacement or dismissal allowances) is ambiguous.[3/] It reads as follows:

3/ The parties agreed that this issue was a proper one to be resolved by this arbitration proceeding notwithstanding the decision by Arbitrator Speirs that this question was more properly the subject for a Section 11 arbitration. (Tr. I, 106-112)

> "Displacement Allowance: (Section 5a) 'Each displaced employee's 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.
>
> Dismissal Allowance: (Section 6a) 'A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protected period, equivalent to 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.'"

The ambiguity concerns the specific 12 months to be utilized in this calculation. The 12 months can be the actual 12 calendar months prior to the transaction providing the individual received compensation in at least one of them. Alternatively, the 12 months can be the 12 months prior to the transaction in each of which the employee received some compensation. The former is the carrier's view, the latter the RLEA's.

While this issue has little effect on allowance calculations for the regular, year-round employees, it does have greater applicability to the determination of allowances for the seasonal employees. Generally, the monthly allowance

amount under the RLEA proposal would be higher than the carrier proposal, but the total under the two systems would be roughly the same on an annual basis since the RLEA would provide allowances only for those months in which the employee received compensation in 1980. However, the net amount to the individual is likely to be higher under the RLEA proposal since a higher base would be established against which to record such offsets as unemployment benefits and outside earnings.

This is a difficult question to resolve. The language in Oregon Short Line III conditions is ambiguous. It was extensively discussed at the hearing. (Tr.I, 98-112, II, 148-152, 161-166) It seems logical to relate protection for seasonal employees to their normal period of employment. While the proposed RLEA language appears reasonable, a number of troubling issues would remain. Two of them are the following:

(1) Application of the proposal to employees with fewer than 12 months of compensated service. What about the employee who had worked only one or two seasons prior to the transaction? The RLEA proposed language appears to include only months of compensated service.

(2) Length of protective period. The proposed language does not clarify the application of Section 1(d) of Oregon Short Line III conditions, defining "protective period." A casual reading of the RLEA proposal leaves the impression that a dismissed or displaced employee working, for example, for six months in each of three years, might be entitled to receive his allowance for 36 months (six months in each of six years) since he was "in the employ of the railroad" for three calendar years prior to the transaction. This would constitute preferred treatment compared to year-round employees.

On balance, it seems best in this implementation agreement to measure the 12 months consecutively dating back from the date the employee is first deprived of employment as a result of the transaction.[4/]

The Question of Back Pay

This important issue arises as a result of the sale of the Silverton branch line before an agreement had been reached, by negotiation or arbitration, to implement the Oregon Short Line III conditions. Such action, according to the ICC, violated Section 4 of these protective conditions. The RLEA argues that under these circumstances employees have suffered losses since they were forced to make job

4/ With this conclusion it is unnecessary to consider the RLEA proposal to include in the calculation of base compensation only months in which the employee worked at least half the working days.

decisions without knowing whether and to what extent they would be eligible for protection. To compensate for such losses, the RLEA proposes that the DRGW be required to reinstate employees furloughed or otherwise deprived of employment following the sale and to provide back pay to such employees from the date they lost their pay status to the effective date of the new arbitrated arrangement. Seasonal employees would receive back pay for a time period comparable to the time worked in 1980.

The DRGW responds that any "make whole" action would, in effect, constitute a penalty against the railroad for action that it took in good faith, and that such a penalty was not authorized by the ICC decision of June 10, 1981. Moreover, the DRGW argues that any consideration of this issue "has nothing to do with the arbitration" and "outside the scope of the jurisdiction of not only a Section 4 proceeding, but a Section 11 proceeding." (DRGW Brief, p.22)

This issue of jurisdiction must be treated before any consideration can be given to the substantive aspect of this isue. The language of the ICC decision of June 10 casts some light on the jurisdiction issue. In examining the role of the neutral referee in these cases of an implementing argument, the Commission stated,

> "the referee must render an opinion as to every issue or subject which would be discussed during bilateral negotiations between the carrier and employee representatives. The referee is to reconcile all disputes over which he has jurisdiction. Given the importance of reassignment and displacement, a referee should play a major role in formulating or devising a scheme for the rearrangement of forces where the parties have not been able to settle this matter." (Finance Docket 29096, p. 4)

The central issue of this arbitration is the application of Oregon Short Line III conditions to a particular set of circumstances. A major provision in these conditions is the procedural requirement in Section 4(b) which states, "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." The RLEA proposal for "back pay" arises from the failure of the DRGW to observe Section 4(b) and the subsequent ICC decision of June 10 concluding that the DRGW had "acted improperly." The question of whether the DRGW is now liable for any losses suffered by affected employees seems to be a proper part of this proceeding, especially in light of the ICC decision.

Assuming, then, that the issue of "make whole" is properly before this arbitration, it is necessary to examine more closely the ICC decision of June 10 to determine

whether any such remedy should be incorporated into the implementing agreement. In that decision the ICC stated that the DRGW "violated Article I, Section 4 of Oregon III by consummating the transaction without an implementing agreement." (page 1) Moreover, in an explicit reference to the January 1981 award of Arbitrator Speirs, the decision states,

> "The referee correctly directed D&RGW not to make any changes in its operation, services, facilities or equipment until a conclusive decision was made, or agreement negotiated, on the rearrangement of forces. D&RGW acted improperly in completing the sale." (p.7)

Finally, the ICC ordered the DRGW "to treat and consider its employees as if the sale of the Silverton branch line to D&S had not occurred until there is an implementing agreement." Admittedly it is difficult to know exactly what the ICC had in mind when it approved this language. It left no further guidance; it did not indicate, for example, whether the DRGW should maintain any affected year-round employees on the payroll, even though the line had passed into other hands and the DRGW had no work for them. Nor did it indicate any action the DRGW should take regarding the seasonally employed workers who, in the absence of the sale, would have been called to work during the spring of 1981.

Despite the ambiguity of the language used, it is difficult to believe that the Commission intended the DRGW to take no action in response to this language.[5/] Yet it seems clear that no special action was taken regarding the affected employees as a group although in individual cases the DRGW and the employee reached agreement on certain protections.

In the view of this arbitrator, the language of the ICC order means, in effect, that the employees concerned should not be disadvantaged by the fact that the sale took place prior to the implementing agreement. Thus employees who were forced to make job decisions in the absence of an implementing agreement should be offered another opportunity to make that choice in the light of the implementing agreement and the protections of Oregon Short Line III conditions. Moreover, it seems appropriate that employees be reimbursed for any losses suffered between the date of sale (March 25, 1981) and the effective date of this arbitrated implementing agreement. Such payments should represent the compensation

5/ This is supported by another aspect of the ICC order. The Commission, in turning down the RLEA request for a cease and desist order to the two railroads to void the sale, specifically stated, "The purpose for which the cease and desist order is sought can be accomplished by another means without affecting D&S." (p.7) Thus the language in Order #3 (cited above) seems designed to achieve the same purpose as a cease and desist order; namely, to restore to all affected DGRW employees all employment opportunities prevailing prior to the sale of the Silverton line on March 25, 1981.

each employee would have earned had he remained on the job less the usual job-related deductions (railroad retirement taxes, etc.). This sum in turn should be further reduced by the amount of any outside earnings or unemployment benefits received during this time period. Seasonal employees with 120 or more days of service in 1980 should be entitled to similar payments, but only for a period of time comparable to their service in 1980. Changes in residence to new work locations during this period should be considered a relocation protected by the Oregon Short Line III conditions.

A final question is whether the "back pay" time period should be included in the employee's length of service for purposes of computing the length of the protective period to which he would be entitled. The RLEA favors such inclusion and the DRGW is opposed. The RLEA agrees, however, that such "back pay" payments should not be considered in calculating the various allowances for which these employees might be eligible nor should the time period involved be counted as part of the employee's protective period. Under these circumstances, it would be most consistent if the time period involved was also not included in the employee's length of service for computing his applicable protective period.

Finality of Arrangement

At the hearing the RLEA drew attention to the fact that it was then appealing the ICC decision of March 9, 1981 that excluded the D&S Railroad as a party to the implementing agreement. The case is currently pending before the U.S. 10th Circuit Court of Appeals. Both parties recognized that should the Court overturn or modify the ICC decision, all concerned parties should meet to discuss the appropriate procedure to follow in light of the court ruling, including possible modifications to this arbitrated arrangement.

Date of Arrangement

Agreement was reached at the hearing that the arbitrated implementing agreement would become effective ten days after the signing of this award. At the hearing the DRGW suggested that the protective period might be made retroactive to October 1 or even to September 1 (Tr. II, 203). However, with the "back pay" arrangements included in this award, such retroactivity becomes unnecessary.

Closing Comments

This decision is designed to provide the rationale behind the language of the arbitrated implementing agreement. It is recognized that no implementing agreement, even if

negotiated rather than arbitrated, could ever be completely responsive to individual case histories and situations. Thus additional disputes over such cases are bound to arise, and the Oregon Short Line III conditions anticipate this by providing a procedure (Section 11) to handle them. It is to be hoped that, with goodwill on both sides, such disputes can be held to a minimum.

Award

The text of the arbitrated arrangement to implement Oregon Short Line III conditions for employees affected by the sale of the Silverton line from the DRGW to the D&S is attached as an appendix.

Peter Henle
Neutral Referee

Date

R B I T R A T I O N APPENDIX

Under Article I, Section 4, Oregon Short Line III Conditions

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY	
and	ARBITRATED IMPLEMENTING ARRANGEMENT
RAILWAY LABOR EXECUTIVES' ASSOCIATION	

BEFORE: Peter Henle, Neutral Referee

1. DEFINITIONS

(a) "Employee" as used herein means any person who is employed by the Denver & Rio Grande Western Railroad Company (DRGW) in a craft or class represented by any of the labor organizations listed in Attachment A hereto who held seniority rights on the DRGW on March 25, 1981.

(b) "Change of Residence" as used herein and in the Oregon Short Line III conditions shall mean transfer to a work location which is located outside a radius of 30 miles of the employee's former work location and farther from his residence than was his former work location.

(c) "Twelve Months" as used herein and in the Oregon Short Line III conditions (Sections 5a and 6a) shall mean the most recent consecutive twelve months prior to the date the employee is displaced or dismissed as a result of the transaction in which in at least one of those months the employee received some compensation.

(d) "Residence" as used herein and in the Oregon Short Line III conditions shall include trailers so long as such trailers are on foundations and permanently attached to the land.

2. REARRANGEMENT OF FORCES

(a) any employee on furlough status on the date of sale (i.e., March 25, 1981), and who had worked on or in connection with the Silverton branch for 120 days or more during the 1980 operating season, shall exercise his or her seniority to obtain, if possible, a regularly assigned, or bona fide bulletined position within thirty (30) days of that date in 1982 on which such employee was recalled to active service on the Silverton branch in 1980. If such employee does not have the seniority to hold or to obtain a regularly assigned position or assignment which, if a change of residence is required, produces compensation equal to or exceeding that received by the employee in his last regularly assigned position or assignment (adjusted to reflect subsequent general rate increases), then such employee shall be considered to be a dismissed employee under the Oregon Short Line III conditions.

(b) If, following the effective date of his implementing arrangement, an employee is required under the provisions of the Oregon Short Line III conditions to change his point of employment which requires a change of residence, the employee and the carrier shall agree, in advance of such change in point of employment, upon the ways and means of transportation of relocating the employee, his family and his household and other personal effects, including the means of payment for such transportation.

3. CLAIMS

(a) The DRGW shall prepare and make available appropriate forms to permit affected employees to file claims for allowances under Article I, Sections 5, 6, 7, 9, and 12 of Oregon Short Line III conditions. Once such claims are filed, the DRGW shall within thirty days provide the claimants the total compensation received by the employee in the test period as defined in the Oregon Short Line III conditions and the total time for which he was paid during such test period.

(b) Within thirty (30) days from the date of this arrangement for all past months, and thereafter within thirty (30) days after the last day in the month for which a

claim is being made, any employee claiming a displacement allowance under Article 1, Section 5, or a dismissal allowance under Article 1, Section 6 of the Oregon Short Line III conditions must submit a claim for such an allowance to the DRGW by transmitting such claim to:

J. W. Lovett
Director of Personnel
Denver & Rio Grande Western
Railroad
P.O. Box 5482
Denver, CO 80217

Such claim shall be deemed submitted on the date that it is postmarked, if mailed and properly addressed, or on the date it is received by the DRGW office if transmitted by any other method.

(c) Within thirty (30) days from the date of this arrangement, all employees who were previously affected by this transaction and who were eligible to receive a separation allowance under Article 1, Section 7 or a relocation allowance under Article 1, Sections 9 and/or 12 of the Oregon Short Line III conditions, may elect to receive such allowance or allowances, as the case may be, by sending a written claim(s) for such allowance(s) to the appropriate carrier official listedin subsection (b) hereof, and in the manner set forth therein. All claims for separation or

relocation allowances for which an employee becomes eligible after the date of this arrangement, shall be filed within the respective time periods specified in Article 1, Sections 7, 9, and 12 of the Oregon Short Line III conditions.

(d) If a claim for a monthly displacement or dismissal allowance, a separation allowance, or a relocation allowance is to be denied, the carrier official shall, within thirty (30) days from the date such claim is submitted, so notify the employee in writing, giving a statement of the reasons for such action. A copy of the denial of such claim shall also be sent to the representative of such employee. If a claim is not denied in the time period and in the manner set forth above, the claim will be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar cases.

(e) A claim denied in accordance with the preceding subsection will be considered closed unless within ninety (90) days from the date of such denial of the claim, proceedings are instituted to resolve the dispute in accordance with Article 1, Section 11 of the Oregon Short Line III conditions.

(f) The time limits set forth above may be extended or shortened by agreement in any particular case or class of cases.

4. PERIOD FROM DATE OF SALE TO DATE OF ARRANGEMENT

(a) The DRGW shall immediately reinstate all employees furloughed or otherwise deprived of employment as a result of the job abolishment notices of March 25, 1981, and shall provide to such employees back pay for the period of March 26, 1981 to the date of reinstatement, inclusive, as well as reimbursement for any relocation and moving expenses incurred during the furlough period as a result of the loss of employment, including loss on the sale of residence, and all medical expenses or other normally covered items, which may have been incurred during the period of such unemployment without medical, hospitalization, or other insurance coverage. The back pay referred to above shall be calculated by using the displacement allowance formula in Article 1, Section 5(a) of the Oregon Short Line III conditions, and such pay shall be reduced by any pay received by the employee during the applicable time period from the DRGW or from other employment, and by any unemployment insurance benefit received by such employee except that the reduction for such unemployment insurance benefits shall be adjusted to deduct therefrom that amount, if any, which the employee is required to reimburse the insurance agency.

(b) The DRGW shall treat all employees who both (i) performed services for 120 days or more for the DRGW on the Silverton branch in 1980, and (ii) who were on furlough status on March 25, 1981, as if such employees had been returned to service on the date originally set for seasonal recall, if any, or, if no such recall notice had been given, on the same date in 1981 on which that employee had been recalled to service in 1980. The DRGW shall provide back pay calculated in the manner provided in subsection (a) hereof, to such employees from the date of constructive recall as provided above, to the same date in 1981 on which such employee was last actively employed in 1980. The carrier shall provide reimbursement for all relocation and moving expenses incurred as a result of the sale on March 25, 1981, including loss on a sale of residence, and all medical expenses or other normally covered items, which may have been incurred during the period specified above in which the employee, but for the sale, was without medical, hospitalization or other insurance coverage.

(c) The DRGW shall permit all employees who performed work on the Silverton branch in 1980 and who since March 25, 1981, were called upon to exercise their seniority to other locations on the DRGW system, to reexercise those

seniority rights. If such a previous exercise of seniority resulted in a change of residence, such relocation shall be considered to be a change of residence protected by Article 1, Sections 9 and 12 of the Oregon Short Line III conditions, and the DRGW shall compensate the employees accordingly; such relocated and subsequently compensated employees shall also be given the opportunity to relocate to their original point of employment or, in accordance with the terms of this arrangement, elsewhere on the DRGW system at the DRGW's expense. If, when previously called upon by the DRGW to exercise seniority, the employee failed to protect his or her seniority as required by the DRGW, the DRGW shall restore all lost seniority rights to such employee.

(d) Any retroactive protection given the employees under this section 4 shall not be considered in calculating the various allowances due to such employees or the length of the employee's protective period under Article 1, Section 1(d) of the Oregon Short Line III conditions, nor shall such retroactive protective periods reduce the otherwise applicable protective periods.

(e) Once this arrangement becomes effective, the carrier may abolish those positions reestablished in subsections (a) and (b) hereof, and may treat its employees as if the sale of the Silverton branch had occurred on that date.

5. DATE OF ARRANGEMENT

This arrangement shall be effective and shall be considered as being dated on the tenth day after this arrangement is issued by the Neutral Referee. Within five (5) working days thereafter, the DRGW shall send a copy of this arrangement by mail to the last known address of all employees who performed services on or in connection with the Silverton branch during 1980.

ATTACHMENT A

List of Organizations Participating Herein

Brotherhood of Locomotive Engineers

Brotherhood of Maintenance and Way Employees

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Allied Services Division)

Brotherhood Railway Carmen of the United States and Canada

International Association of Machinists and Aerospace Workers

International Brotherhood of Firemen & Oilers

United Transportation Union

LAW OFFICES
HIGHSAW & MAHONEY, P. C.
SUITE 210
1050 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

JAMES L. HIGHSAW
WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
JOSEPH GUERRIERI, JR.
CLINTON J. MILLER, III
ERNEST W. DUBESTER*
CHARLES A. SPITULNIK

* ADMITTED IN NEW JERSEY AND FLORIDA ONLY

November 17, 1981

AREA CODE 202
296-8500

Mr. Peter Henle
Arbitrator
Industrial and Labor Relations
3219 North Wakefield Street
Arlington, VA 22207

Re: Dispute Between RLEA and DRGW;
Arbitration Award, dated November 12, 1981

Dear Mr. Henle:

By this hand-delivered letter, the Railway Labor Executives' Association respectfully requests that you reconsider Section 1(c) and the 120 day limitation in Sections 2(a) and 4(b) of your award which was dated November 12, 1981.

The qualifying period unilaterally established in Sections 2(a) and 4(b) disenfranchises many employees who have had a regular, albeit seasonal relationship with the Silverton branch; it is unreasonable, arbitrary and contrary to the command in Article I, Section 4(a)(3) of the Oregon Short Line III conditions that the contrary decision of Neil P. Speirs on this very point was "final, binding, and conclusive" on the parties. By establishing a qualifying period to be eligible for protections, this arbitrator has exceeded his authority, for this neutral did not have the jurisdiction either to overrule the Speirs' award or to deprive employees of the protections which Congress has mandated be imposed in this case. Moreover, the qualification itself is arbitrary as having no rational connection to this transaction, and is ambiguous. If interpretated to mean 120 service days, not one furloughed employee will be protected. As it is, many other seasonal employees have been arbitrarily excluded from protection simply because their crafts worked only during the three month operating season.

The unwarranted modification in Section 1(c) of the award to the calculation of the test period base is also contrary to the Oregon Short Line III protections because it places employees in a worse position with respect to their employment than before the sale. Since employees who are receiving Oregon Short Line III allowances are ineligible for Railroad Unemployment Insurance Benefits, see, Railroad Unemployment Insurance Act, Sections 1(j), 4(a-1), the reduction of the test period base as applied in this case may well not even provide for basic daily needs, and is unnecessary since it was premised upon a misunderstanding of RLEA's proposal. The example given on page 24 of the decision is erroneous; that employee's protective period would be 18 months; thus giving him 18 consecutive months of protection, not 36 as in the example.

RLEA requests that this panel be reconvened as soon as possible, preferably in Washington, D.C., to hear RLEA's request to reconsider.

Sincerely,

HIGHSAW & MAHONEY, P.C.

John O'B. Clarke, Jr.

Attorney for the Railway Labor Executives' Association

JOBC:ssw
cc: Ms. Kathleen Sneed/via Federal Express

Peter Henle

Arbitrator
Industrial and Labor Relations

NOV - 1981

November 19, 1981

Mr. John O'B. Clarke, ESQ
Highsaw & Mahoney, P.C.
1050 17th Street, N.W.
Washington, D. C. 20036

Ms. Kathleen Snead, ESQ
Suite 900 Park Central Plaza
1515 Arapahoe Street
Denver, Colorado 80202

Dear Mr. Clarke and Ms. Snead:

This letter is in response to Mr. Clarke's letter of November 17 requesiming reconvening of the arbitration involving the Denver & Rio Grande Western and the Railway Labor Executives' Association. I have discussed this issue separately with each of you.

After full consideration, I am not acceding to Mr. Clarke's request. The hearing will not be reconvened. The decision and the arbitrated implementing agreement stand as originally issued.

Mr. Clarke did raise one issue which suggests a clarification is desirable. I have discussed this with each of you. The question is whether the "120 days" included in paragraphs 2(a) and 4(b) of the implementing arrangement refer to days of service or simply to calendar days. I regret that the award does not make this clear. For whatever value this may have to the kparties, let me state that at all times in my mind the "120 days" referred to calendar days. In the situation with which the arbitration is concerned, the 120 days would be calculated from the day on whichx the individual employee reported for work for the 1980 season.

Very ktruly yours

3219 North Wakefield Street • Arlington, Virginia 22207 • 703 536-7817