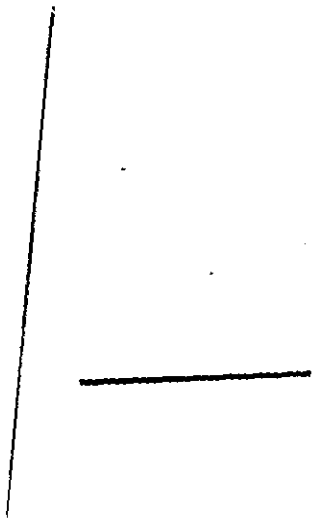

Award #6

(6)

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

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND UNITED TRANSPORTATION UNION	DECISION OF NEUTRAL REFEREE

BEFORE: Peter Henle, Neutral Referee

APPEARANCES:

For the Chicago and North Western:

M. Humphrey, Director of Labor Relations (Operating)
Konrad Rayford, Staff Officer

For the United Transportation Union:

Gerald R. Mahoney, General Chairman
Donald Markgraf, Vice General Chairman

SUMMARY OF THE FACTS

This case involves the application of the employment protection provisions set forth in the Interstate Commerce Commission (ICC) decision, Oregon Short Line III (OSL III), to those employees of the Chicago and North Western (C & NW) affected by the following five abandonment cases:

Cannon Falls to Red Wing, Minnesota
Flint Junction to Camp Dodge, Iowa
Gypsum to Evanston, Iowa
Alton to Orange City, Iowa
Mason City to Kesley, Iowa

In each of these five cases, the Carrier applied to the ICC for authority to abandon the line. At the June 22 hearing, the most recent information regarding the status of each case was as follows:

Cannon Falls to Red Wing - ICC decision decided May 13, 1982 (service date May 25, 1982) authorizing abandonment to be effective June 25, 1982. Subsequently, this order was postponed by the ICC in a decision dated June 7, 1982 pending possible sale to a private firm.

Flint Junction to Camp Dodge - ICC decision decided May 11, 1982 (service date May 24, 1982) authorizing abandonment 30 days from service date.

Gypsum to Evanston - ICC certificate and decision decided December 11, 1981 (service date December 17, 1981) authorizing abandonment 30 days from service date.

Alton to Orange City - ICC certificate and decision decided February 9, 1982 (service date February 12, 1982) authorizing abandonment 30 days from service date.

Mason City to Kesley - ICC certificate and decision decided May 19, 1982 (service date May 21, 1982) authorizing abandonment 30 days from service date. Subsequently, in a decision decided June 7, 1982, the ICC postponed the certificate and decision pending possible purchase of the line by a private firm.

In each case, the ICC order authorizing abandonment included the requirement that the Carrier observe the employee protection provisions set forth by the ICC in the OSL III decision.

There is no need to relate in detail the procedural steps that have been taken by the Carrier and the Union in this case. It is sufficient to note that in December 1981 the Carrier gave notice to its employees of its intention to seek approval for abandoning these five lines. Later, in January 1982 certain discussions took place between the parties to determine whether they could reach an agreement applying the OSL III conditions to these five abandonments. When, in the judgment of the Carrier, such agreement was not attainable, it applied on February 18, 1982 to the National Mediation Board for the appointment of a neutral referee to hear the dispute and render an award, in accordance with Article I, Section 4 of the OSL III conditions. Subsequently, the undersigned was appointed by the Board, and on June 22, 1982 in Chicago at the offices of the Carrier a hearing was held at which both parties were represented and had full opportunity to present arguments. Each party at the hearing submitted to the neutral referee an extensive, well-documented submission summarizing its position with respect to the application of the OSL III conditions to these five abandonment cases.

THE CARRIER'S POSITION

The Carrier submitted proposed language for an implementing agreement of three sections: (1) relates the agreement to the OSL III conditions and attaches a copy of the conditions; (2) covers "displaced" and "dismissed" employees under the OSL III conditions, and (3) states that the agreement constitutes a resolution of all outstanding issues under Article I, Section 4 of the conditions but does not affect the operation of Section 11.

In support of its proposed implementing agreement, the Carrier reviewed the procedural steps it followed in bringing the case to arbitration, stating that it has complied with the procedural requirements of Article I, Section 4 and thus the case is properly before the neutral referee.

The Carrier argues that the neutral referee in this instance is limited to applying the specific language of the protections provided by OSL III conditions. In its view,

> "The scope of the arbitrator's authority is to frame a decision which applies the terms and conditions of the OSL conditions imposed by the ICC, and the arbitrator has no authority to expand or limit any of the substantive protective provisions, nor does the arbitrator have the authority to accede to the employee's demands which are more generous than those imposed by the ICC." (Carrier's statement, p. 7)

Thus, the Carrier opposes including in the implementing agreement two proposals made by the Union. These relate to (1) the designation of 30 miles as the distance to determine whether an affected employee 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" (Article I, Section 9; similar language in Section 12) and (2) payment of a lump sum in lieu of being reimbursed for any loss suffered in the sale of a home under Article I, Section 12. The Carrier argues that including these provisions would go beyond the language of the protective provisions in OSL III and therefore lies outside the scope of the authority granted to the neutral referee.

With respect to a March 15, 1982 implementing agreement between the parties (pertaining to an earlier abandonment) the Carrier denies that this is applicable to the current situation since it was the product of collective bargaining and because the provisions of that agreement "were agreed to by the parties in an environment where both the employees and the Carrier could weigh their entire relationship and evaluate concessions and compromises which might be made in order to reach an agreement acceptable to both sides." (Carrier's statement, p. 16)

THE UNION'S POSITION

The Union, at the hearing and in its statement, made two major points, one procedural and one substantive.

The procedural point is concerned with the validity of the arbitration proceedings in advance of any final ICC authority to abandon the five lines. The Union points out that in two cases (Cannon Falls to Red Wing, MN and Mason City to Kesley, Iowa) the ICC at the time of hearing had not issued a final confirmation order permitting the abandonment. In the Union's view, any arbitration in these cases would be "premature" and should be held in abeyance pending an abandonment confirmation. (Union statement, pp. 12-13).

With regard to those cases in which the ICC has issued an abandonment confirmation, the Union argues for an implementing agreement similar to the agreement signed by the Carrier and several Union representatives on March 15, 1982 with respect to an earlier abandonment (Rhinelander to Washburn, Wisconsin and Oelwein, Iowa to Randolph, Minnesota). The only change the Union would make in applying this earlier agreement would be to delete article 5 pertaining to possible future abandonment cases. The language the Union would retain includes provisions which would (1) set 30 miles as the distance to determine whether an affected employee 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" (Article I, Section 9 with similar language in Section 12; and (2) authorize payment of a lump sum settlement of twelve percent (12%) of the "fair value" of an affected employee's home in lieu of benefits provided under Article I, Section 12(a)(i) of OSL III conditions.

DISCUSSION AND OPINION

The points at issue in this case are not many. Both parties have the same basic objective; namely, to apply the provisions of OSL III in abandonment cases. However, they disagree on two questions: (1) Does the arbitrator have authority to issue an award regarding the two cases for which the ICC has not given the C & NW a certificate for abandonment? and (2) In setting forth an implementing agreement, should the two provisions desired by the Union be included, or as the Carrier suggests, are these provisions beyond the scope of the arbitrator's authority?

On the first question the facts are clear. In two cases the ICC has not given final authority for abandonment. The Carrier argues that it has followed the various procedures set forth in Article I, Section 4 of OSL III in giving notice to the employees, negotiating with the union, and requesting a neutral referee. The Union does not

dispute this but argues that the procedures should not have been invoked (or at least the arbitration should not have been held) prior to receiving ICC final approval.

On this point it is pertinent to refer to exact language of Article I, Section 4. Its opening sentence starts as follows:

> (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 the use of the word "contemplating", the language not only permits but expects railroads to initiate the procedure in advance of actual approval by the ICC. Nor in the remainder of the section is there any prohibition or caution in proceeding with arbitration prior to the final ICC approval of the abandonment. This conclusion is strengthened by a recent ICC decision where this procedural question was highlighted in a case dealing with a purchase of one railroad's assets by another. In the course of this decision, the ICC discussed this specific procedural issue as it affects abandonments and concludes: "Thus, changes required

to increase efficiency and productivity may be negotiated or imposed through binding arbitration prior to Commission approval in the context of abandonments."[1/]

Thus, it is proper that this arbitration be concerned with all five abandonment cases. At the same time, it should be made clear, as both parties recognized at the hearing, that any arbitrated implementing agreement cannot become effective unless and until the ICC gives final authority to the abandonment. This point will be included in the text of the implementing agreement in the two cases in which final ICC authority has not yet been given.

1/ The full discussion of this issue by the Commission is as follows:

> "In Oregon III we adopted for abandonment proceedings the arbitration provisions of New York Dock. We noted that either party may invoke arbitration and that a party could require, in the absence of agreement through voluntary negotiations, that a decision by a referee be rendered within 90 days of notice to the union. The purpose of our adoption of the rigid timetable was to insure that abandonment of unnecessary rail lines would not be delayed unduly by lengthy periods of negotiation. We noted that if a carrier notified the employee representative of its intentions at the same time it published its notice of intent to abandon pursuant to 49 C.F.R. 1121.31, the necessary agreement or decision would usually be achieved prior to issuance of a certificate authorizing abandonment. Oregon III, 360 I.C.C. at 95. Thus, changes required to increase efficiency and productivity may be negotiated or imposed through binding arbitration prior to Commission approval in the context of abandonments." (ICC decision Southern Railway Company-Purchase-Kentucky and Indiana Terminal Railroad Company decided February 23, 1982, Finance docket 29690, pp. 6-7).

The second question is more substantive. The Union favors and the Carrier opposes inclusion of the following two provisions:

> "1. In the application of Article I, Section 9 and 12 of the Oregon Short Line III employee protective conditions, the words 'change the point of his employment' are defined as 'change to a new point of employment which by highway mileage is a greater distance than 30 miles from the geographic center of the yard, terminal or consolidated terminal which is his point of employment.'
>
> 2. An employee who owns his own home, who has satisfied all conditions required under Article I Section 12 and who, therefore, is entitled to 'be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value', may elect in lieu of benefits under Article I Section 12(a)(i) to accept a payment equal to twelve percent (12%) of the 'fair value' of his home. Exercise of this election shall not deprive the employee of 'moving expense' benefits under Section 9 of these conditions."

In the Carrier's view, these provisions go beyond the level of benefits set forth in OSL III and therefore should be excluded from the arbitrated agreement. In support the Carrier cites three earlier arbitration decisions in which the arbitrator has been careful not to incorporate union demands for benefits going beyond OSL III conditions.[1/]

1/ Similarly, see Denver and Rio Grande Western Railroad Company and Railway Labor Executives Association, Arbitration under Article 1, Section 4, Oregon Short Line III Conditions, November 12, 1981, pp. 8-9, 17, 19-20.

In its behalf the Union points to the fact that the identical language of these provisions was included in a March 15, 1982 agreement between the parties implementing OSL III conditions in an earlier abandonment case (Rhinelander to Washburn, WI and Oelwein, Iowa to Randolph, MN).

It is helpful to examine the two provisions separately. The first, the so-called "30 mile proposal" essentially defines and clarifies otherwise ambiguous language in the OSL III conditions. It merely provides a measuring rod to separate out those changes in employment location which would trigger eligibility for certain benefits from those outside the scope of these benefits. The 30-mile standard has been included in previous arbitrated implementing agreements (see Illinois Central Gulf Railroad Company and United Transportation Union, January 17, 1981, pp. 4, 6). It will be included in this award.

The other provision sought by the Union is of a different character. This does not provide a completely new benefit; rather, it is an alternative to a benefit under OSL III. However, no such alternative lump sum benefit to compensate for the sale of a residence is included in OSL III conditions. Thus, the presumption must be that the union request should be denied. However, a unique factual situation is present in the current case. In none of the

previous arbitrated implemented agreements has the arbitrator been faced with a situation in which only a few months earlier the Union's requested language had been jointly agreed to in a similar abandonment case. In all these previous arbitrated awards, the disputed language was simply a union proposal strongly opposed by the carrier.

Another fact seems relevant here. The Carrier's statement refers to a union demand for a lump sum settlement equal to 25% of the fair market value of the affected employee's home (Carrier's statement, p. 17). Thus, the 12% figure now proposed by the Union and already included in the March 15, 1982 agreement is not the Union's original request but rather the result of collective bargaining between the parties.

The role of the neutral referee in OSL III cases is, and perhaps has to be, somewhat ambivalent. He is not empowered to develop a new set of employee protections; his function is to apply the conditions in OSL III. On the other hand, he is responsible for facing the issues raised by the parties. The ICC itself has made this quite clear:

> "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.
>
> * * * *
>
> The referee must make his plan clear, even if it means adopting verbatim a plan agreed to by the parties before the negotiations broke down on other issues." (ICC decision, Durango and Silverton Narrow Gauge Railroad Company--Acquisition and Operation, Decided June 3, 1981, p. 4)

It is quite true that any arbitrator must be quite cautious about incorporating the results of collective bargaining into an arbitration award implementing OSL III conditions. This is particularly true when the collectively bargained product involves other parties, applies to a different set of circumstances, or occurred in earlier years. However, if, as in this situation, the two parties were the parties to the collectively bargained product which applied to a quite similar set of circumstances only three months prior to the hearing date, the arbitrator would be quite remiss if he ignored such collectively bargained results. This is clearly consonant with the ICC's view of the arbitrator's role. The provision regarding a lump sum benefit will be included in this award.

In addition to the two provisions discussed above, the award will incorporate two more general provisions, based on language previously agreed to by the parties, with modifications suggested by the language submitted by the Carrier.

AWARD

The texts of the arbitrated arrangements to implement the employee protective provisions of OSL III in the five C & NW abandonment cases are attached as an appendix. Separate documents are included for each of the five cases.

Peter Henle

July 15, 1982
Date

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

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND UNITED TRANSPORTATION UNION	ARBITRATED IMPLEMENTING ARRANGEMENT

WITH RESPECT TO: Abandonment to line between Cannon Falls, MN to Red Wing, MN

1. The labor protective conditions set forth in Oregon Short Line Railway Company - Abandonment Goshen, 360 ICC 91 (1979) (hereinafter referred to as Oregon Short Line III) as specifically amended or revised by this agreement shall apply to this transaction. A copy of the Oregon Short Line III conditions is attached hereto.

2. In the application of Article I, Section 9 and 12 of the Oregon Short Line III employee protective conditions, the words "change the point of his employment" are defined as "change to a new point of employment which by highway mileage is a greater distance than 30 miles from the geographic center of the yard, terminal or consolidated terminal which is his point of employment."

3. An employee who owns his own home, who has satisfied all conditions required under Article I, Section 12 and who, therefore, is entitled to "be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value", may elect in lieu of benefits under Article I, Section 12(a)(i) to accept a payment equal to twelve percent (12%) of the "fair value" of his home. Exercise of this election shall not deprive the employee of "moving expenses" benefits under Section 9 of these conditions.

4. This agreement resolves all issues under Article I, Section 4 of the Oregon Short Line III Labor Protective Conditions pertaining to the above stated abandonment, but does not revise or amend the procedures for arbitration of disputes as provided in Article I, Section 11 thereof.

5. This agreement becomes effective only at the time an ICC certificate of abandonment for the above stated line becomes effective.

APPENDIX
A-2

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

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND UNITED TRANSPORTATION UNION	ARBITRATED IMPLEMENTING ARRANGEMENT

WITH RESPECT TO: Abandonment to line between Flint Junction, Iowa to Camp Dodge, Iowa

1. The labor protective conditions set forth in Oregon Short Line Railway Company - Abandonment Goshen, 360 ICC 91 (1979) (hereinafter referred to as Oregon Short Line III) as specifically amended or revised by this agreement shall apply to this transaction. A copy of the Oregon Short Line III conditions is attached hereto.

2. In the application of Article I, Section 9 and 12 of the Oregon Short Line III employee protective conditions, the words "change the point of his employment" are defined as "change to a new point of employment which by highway mileage is a greater distance than 30 miles from the geographic center of the yard, terminal or consolidated terminal which is his point of employment."

3. An employee who owns his own home, who has satisfied all conditions required under Article I, Section 12 and who, therefore, is entitled to "be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value", may elect in lieu of benefits under Article I Section 12(a)(i) to accept a payment equal to twelve percent (12%) of the "fair value" of his home. Exercise of this election shall not deprive the employee of "moving expenses" benefits under Section 9 of these conditions.

4. This agreement resolves all issues under Article I, Section 4 of the Oregon Short Line III Labor Protective Conditions pertaining to the above stated abandonment, but does not revise or amend the procedures for arbitration of disputes as provided in Article I, Section 11 thereof.

APPENDIX
A-3

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

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND UNITED TRANSPORTATION UNION	ARBITRATED IMPLEMENTING ARRANGEMENT

WITH RESPECT TO: Abandonment to line between Gypsum, Iowa to Evanston, Iowa

1. The labor protective conditions set forth in Oregon Short Line Railway Company - Abandonment Goshen, 360 ICC 91 (1979) (hereinafter referred to as Oregon Short Line III) as specifically amended or revised by this agreement shall apply to this transaction. A copy of the Oregon Short Line III conditions is attached hereto.

2. In the application of Article I, Section 9 and 12 of the Oregon Short Line III employee protective conditions, the words "change the point of his employment" are defined as "change to a new point of employment which by highway mileage is a greater distance than 30 miles from the geographic center of the yard, terminal or consolidated terminal which is his point of employment."

3. An employee who owns his own home, who has satisfied all conditions required under Article I, Section 12 and who, therefore, is entitled to "be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value", may elect in lieu of benefits under Article I, Section 12(a)(i) to accept a payment equal to twelve percent (12%) of the "fair value" of his home. Exercise of this election shall not deprive the employee of "moving expenses" benefits under Section 9 of these conditions.

4. This agreement resolves all issues under Article I, Section 4 of the Oregon Short Line III Labor Protective Conditions pertaining to the above stated abandonment, but does not revise or amend the procedures for arbitration of disputes as provided in Article I, Section 11 thereof.

APPENDIX
A-4

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

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND UNITED TRANSPORTATION UNION	ARBITRATED IMPLEMENTING ARRANGEMENT

WITH RESPECT TO: Abandonment to line between Alton, Iowa Orange City, Iowa

1. The labor protective conditions set forth in Oregon Short Line Railway Company - Abandonment Goshen, 360 ICC 91 (1979) (hereinafter referred to as Oregon Short Line III) as specifically amended or revised by this agreement shall apply to this transaction. A copy of the Oregon Short Line III conditions is attached hereto.

2. In the application of Article I, Section 9 and 12 of the Oregon Short Line III employee protective conditions, the words "change the point of his employment" are defined as "change to a new point of employment which by highway mileage is a greater distance than 30 miles from the geographic center of the yard, terminal or consolidated terminal which is his point of employment."

3. An employee who owns his own home, who has satisfied all conditions required under Article I, Section 12 and who, therefore, is entitled to "be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value", may elect in lieu of benefits under Article I, Section 12(a)(i) to accept a payment equal to twelve percent (12%) of the "fair value" of his home. Exercise of this election shall not deprive the employee of "moving expenses" benefits under Section 9 of these conditions.

4. This agreement resolves all issues under Article I, Section 4 of the Oregon Short Line III Labor Protective Conditions pertaining to the above stated abandonment, but does not revise or amend the procedures for arbitration of disputes as provided in Article I, Section 11 thereof.

APPENDIX
A-5

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

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY AND UNITED TRANSPORTATION UNION	ARBITRATED IMPLEMENTING ARRANGEMENT

WITH RESPECT TO: Abandonment to line between Mason City, Iowa to Kesley, Iowa

1. The labor protective conditions set forth in Oregon Short Line Railway Company - Abandonment Goshen, 360 ICC 91 (1979) (hereinafter referred to as Oregon Short Line III) as specifically amended or revised by this agreement shall apply to this transaction. A copy of the Oregon Short Line III conditions is attached hereto.

2. In the application of Article I, Section 9 and 12 of the Oregon Short Line III employee protective conditions, the words "change the point of his employment" are defined as "change to a new point of employment which by highway mileage is a greater distance than 30 miles from the geographic center of the yard, terminal or consolidated terminal which is his point of employment."

3. An employee who owns his own home, who has satisfied all conditions required under Article I, Section 12 and who, therefore, is entitled to "be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value", may elect in lieu of benefits under Article I, Section 12(a)(i) to accept a payment equal to twelve percent (12%) of the "fair value" of his home. Exercise of this election shall not deprive the employee of "moving expenses" benefits under Section 9 of these conditions.

4. This agreement resolves all issues under Article I, Section 4 of the Oregon Short Line III Labor Protective Conditions pertaining to the above stated abandonment, but does not revise or amend the procedures for arbitration of disputes as provided in Article I, Section 11 thereof.

5. This agreement becomes effective only at the time an ICC certificate of abandonment for the above stated line becomes effective.