

Award  
#16

ARBITRATION COMMITTEE  
ESTABLISHED UNDER SECTION 11 OF  
OREGON SHORT LINE III LABOR PROTECTIVE CONDITIONS IN  
INTERSTATE COMMERCE COMMISSION DOCKET NO. 30338

In the Matter of Arbitration Between	)	
	)	
UNITED TRANSPORTATION UNION	)	
	)	FINDINGS & AWARD
and	)	
	)	
GRAND TRUNK WESTERN RAILROAD COMPANY	)	

QUESTION AT ISSUE:

Claim of the United Transportation Union that: "Various claimants as listed on September 27, 1983, October 10, 1983 and October 23, 1984 are entitled to full back pay since the Carrier has failed to comply with the provisions of Oregon Short Line."

BACKGROUND:

The Interstate Commerce Commission (ICC) in Finance Docket No. 30338, dated December 12, 1983, approved application of the Grand Trunk Western Railroad (Carrier) to abandon 0.8 miles of track beginning west of Jefferson Street and extending to the end of the line at Rodd Street in the City of Midland, Michigan.

In its decision, the ICC related that the Carrier had sought an exemption under 49 U.S.C. 10505 from the requirements of 49 U.S.C. 10903 et seq., and stated:

"A rail abandonment requires Commission approval under 49 U.S.C. 10903. However, under 49 U.S.C. 10505 the Commission shall exempt a transaction from regulation if it finds that (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) either (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny of the proposed abandonment in a formal proceeding is not necessary to carry out the rail transportation policy. Exemption will minimize the need for Federal regulatory control over the rail transportation system, expedite regulatory decisions, foster sound economic conditions in transportation, promote a safe transportation system, reduce regulatory barriers to exit, and encourage efficient management.

This transaction is of limited scope, since the proposed

abandonment involves only 0.8 miles of track. Regulation is not necessary to protect shippers from an abuse of market power since this abandonment will not affect service, rates, divisions or routing ability of the shipping public.

Our initial review of the proposal indicates that exemption will not significantly affect energy consumption or the quality of human environment...

Under 49 U.S.C. 10505(g) we may not use our exemption authority to relieve a carrier of its obligation to protect the interests of employees. Therefore, this exemption is conditioned upon the employee protective provisions embodied in Oregon Short Line R. Co. -- Abandonment -- Goshen, 360 I.C.C. 91 (1979)."

Thereafter in its Order, the ICC stated:

"1. We exempt from the requirements of 49 U.S.C. 10903 et seq. the abandonment by Grand Trunk Western Railroad Company of the described 0.8 mile segment of line in City of Midland, MI, subject to the employee protective conditions in Oregon Short Line R. Co. -- Abandonment -- Goshen, 360 I.C.C. 91 (1979).

2. Notice shall be published in the Federal Register.

3. Petitioner shall notify the Commission within 30 days of consummation.

4. This decision shall be effective on January 18, 1984.

5. Petitions to stay must be filed by December 29, 1983, and petitions for reconsideration must be filed by January 9, 1984."

As concerns a further abandonment of trackage, the Carrier, on August 30, 1984, filed with the ICC Abandonment Notices under Ex Parte 274 (Sub-No. 8), Exemption of Out of Service Rail Lines, 336 ICC 885 (1983), for the following line, which Carrier stated has handled no local traffic for two years prior to the date of notice, and on which line there are located no active shippers:

"Finance Docket AB-31 (Sub-No. 20X)

Portion of former Michigan Central Mackinaw Branch (Bay City Belt) between M.P. 0.0 and M.P. 4.0, a total of 4.0 miles of line in Bay County, Michigan."

In the notice attached to its letter to the ICC, the Carrier set forth, among other statements, the following:

"This abandonment is authorized by the decision of the Interstate Commerce Commission in its Ex Parte No. 274 (Sub-No. 8), Exemption of Out of Service Rail Lines, 366

ICC 885 (1983) printed also in 48 Federal Register 27548 (June 16, 1983), which exempts abandonment of rail lines which have handled no traffic for two years prior to the date of notice. The attached affidavit of J. L. McNutt [General Manager Transportation] demonstrates that no local traffic has moved to or from the subject line for at least two years prior to August 21, 1984. No complaints have been filed or decided during this period involving the subject line.

The interest of railroad employees will be protected by Oregon S. L. - Abandonment, 360 I.C.C. 91 (1979), conditions."

On February 21, 1985, the Carrier again advised the ICC that it was exercising the authority granted it by the decision of the ICC in its Ex Parte No. 274 (Sub-No. 8), Exemption of Out of Service Rail Lines, 366 ICC 885 (1983), to abandon a portion of the former Michigan Central Saginaw Branch between M.P. 92.5 and M.P. 98.6, a total of 6.1 miles, effective at midnight on April 25, 1985. In this regard, the Carrier attached to its notice an affidavit from its General Manager Transportation which stated that no local traffic has moved to or from the subject line for at least two years prior to February 25, 1985. The Carrier also stated that a portion of this line was subject to prior trackage rights for the Chesapeake & Ohio Railway, and that that portion has been offered, for sale, to the C&O Railway.

The Carrier also stated in its notice: "The interest of railroad employees will be protected by Oregon S. L. - Abandonment, 360 I.C.C. 91 (1979), conditions."

In this latter regard, the Oregon Short Line III Conditions state in pertinent part, the following:

"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 the 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 of 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:

\* \* \* \* \*

(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."

An additional question advanced to the Board concerns a determination as to whether the Winkler-Lucas Lead on the Saginaw Branch could be properly taken out of service by the Carrier absent abandonment or exemption from abandonment authority from the ICC.

#### POSITION OF THE UTU:

The UTU maintains that the Carrier proceeded with abandonment of the above mentioned lines of track in complete disregard of the labor protective conditions as imposed by the ICC, and that the abandonments have adversely affected certain employees which it represents.

In regard to the Midland, Michigan trackage abandonment, the UTU says that contrary to Carrier contentions that the abandonment did not take place until January 18, 1984, that the Carrier took the 0.8 miles of track in question out of service on September 27, 1983, and thereafter physically removed the track on or about October 10, 1983.

In support of its position, the UTU offered into evidence copy of Carrier Bulletin No. 5-9-87, dated September 26, 1983, which stated: "Effective immediately, all trackage west of Mileage 17.2, Midland, Midland Subdivision, is out of service. Crossties have been installed at Mileage 17.2."

The UTU also introduced copy of a hand written switching list which indicated that a freight car destined to a customer on that portion of the track here in question had to be returned to Bay City, Michigan for unloading since the track had been taken out of service. The UTU says that it was then necessary the shipment be trucked over to the customer.

As concerns those employees who it contends were adversely af-

affected by the Midland trackage abandonment, the UTU states the crew on the assignment at the time the trackage was taken out of service, i.e., September 27, 1983, was composed of Yard Conductor DePeal and Yard Brakemen Lawrence and Kolka. When the track was purported to have been physically removed on October 10, 1983, the crew, according to the UTU, was composed of Yard Conductor Brown and Yard Brakemen DePeal and Lawrence.

On the effective date of abandonment as set forth in the ICC Decision, i.e., January 18, 1984, the crew, according to the UTU, consisted of Yard Conductor Brown and Yard Brakemen DePeal and Lawrence.

As to the manner in which it claims the employees were adversely affected, the UTU says that when it had been necessary in the past to service a customer on the now abandoned portion of the track at Midland, that it took a crew about one hour to go down and back and that such service was usually performed on an over-time basis.

In regard to the abandonment of a portion of the former Michigan Central Railroad Mackinaw Branch (Bay City Belt), the UTU says that contrary to the Carrier contention that no service remained to be performed on the trackage in question, that after the effective date of abandonment, but prior to the trackage being physically removed, the track was used by the Carrier to handle cars to and from a contractor (Midwest Bridge), who was constructing a bridge in Bay City.

The UTU states there are two groups of employees involved in this portion of its claim. On the date of abandonment, i.e., October 21, 1984, the UTU says the regular employees assigned to the Bay City Yard assignment were Yard Conductor Stepanski and Yard Brakemen Maze and Yax. Furthermore, the UTU submits, on this same date an extra assignment was called and manned by Yard Conductor Brown and Yard Brakemen DePeal and West.

As concerns the abandonment of other former Michigan Central Railroad trackage on the Saginaw Branch (Paines Spur), the UTU states that such trackage was abandoned in place without notice to the interested employees or the UTU. It does not identify any employees as having been allegedly adversely affected by the abandonment.

In regard to the Winkler-Lucas Lead, the UTU asserts that the track is out service and that several customers are not being or cannot be serviced on this section of track. It states that it is concerned that the Carrier is going to "dry up" traffic and then go to the ICC and say that it is abandoning this portion of the line since no service has been performed on it for two years.

The UTU does not identify the customers no longer being serviced, nor does it name those employees allegedly adversely affected by the Carrier action involving the Winkler-Lucas Lead.

## POSITION OF THE CARRIER:

It is Carrier's position that the claims should be dismissed, if not denied, for what it maintains has been the failure of the UTU to have met the necessary burden of proof in support of its generalized contentions with respect to each of the abandonments.

The Carrier also contends that any claim premised on the fact that it had not served notice on what are termed interested employees, or the UTU, for the purpose of reaching an implementing agreement with respect to application of the Oregon Short Line Conditions is without merit. In this connection, the Carrier reads Article 4, "Notice and agreement or decision," of the Oregon Short Line Conditions as providing that a carrier contemplating a transaction may give notice and enter into an implementing agreement, thereby making the service of a notice or the entering into of an implementing agreement other than mandatory applications of the Oregon Short Line Conditions. The Carrier therefore says that since the trackage abandonments did not result in a dismissal or displacement of employees or rearrangement of forces, there was no need for a notice or an implementing agreement.

Turning to the specifics of each abandonment, the Carrier states that although there was an abandonment of 0.8 mile of track in the City of Midland, Michigan, the action taken was essentially to avoid the costs of repairing or renewing several rail-street crossing and to permit the City opportunity to pave the street crossings. It states that such action was taken with no objection from business representatives, apparently since the amount of traffic handled on such portion of trackage was extremely minimal. The Carrier further states that any affect upon the compensation of employees was of an insignificant nature since it continues to operate a local assignment to service active customers on this line from a new team track which it constructed approximately one mile east of the abandoned George Street Team Track, or the location of one of the crossing which had been abandoned.

With respect to abandonment of four miles of track on the former Michigan Central Mackinaw Branch (Bay City Belt), the Carrier maintains that no local traffic had been handled on the abandoned portion of the line in the two years immediately preceding the abandonment action. In this same regard, the Carrier says that although the four miles of track have been abandoned, a yard crew is still maintained at Bay City and continues to serve the three industries located on the Belt via Chesapeake & Ohio Railway trackage, albeit over a more time consuming route which naturally evolves into a more costly method of operation. Insofar as the amount of traffic handled is concerned, the Carrier states that it amounted to but 44 carloads in 1984; 45 carloads in 1985.

In response to UTU statements relative to cars handled for a contractor on the Bay City Belt, the Carrier states: "As a contractor (Midwest Bridge) was constructing a bridge in Bay City this contractor was accepting cars on this trackage at MP 0.1 in early

1985. Team track delivery for this contractor at this location was to have ceased on or about April 9, 1985 however; three (3) more cars were handled to this location. The last of these cars as indicated on Waybill (Attachment #2) for GN 61033 was consigned in care of Brown Brothers Company [with a Waybill date of August 7, 1985]."

The Carrier also submits that notwithstanding its position that the Bay City Belt abandonment was properly effected and such actions have not adversely affected any employees, it did, under date of April 9, 1985, forward to the UTU a proposed agreement regarding such abandonment, but that to date the UTU has refused to enter into such agreement. The agreement was proposed, the Carrier states, without prejudice to its position that no agreements are necessary under the Oregon Short Line Conditions.

In regard to abandonment of 6.1 miles of trackage of the former Michigan Central Railroad Saginaw Branch (Paines Spur), the Carrier submits that by letter dated February 27, 1985 it had advised the UTU, together with all other labor organizations, as follows of such abandonment:

"Attached is copy of Notice of Exemption Abandonment before the Interstate Commerce Commission covering 6.1 miles of trackage between MP 92.5 and MP 98.6, Paines Subdivision.

Carrier is not aware of any employees that will be adversely affected by this abandonment.

Please acknowledge receipt of this letter."

The Notice of Exemption Abandonment as attached to the above letter showed the abandonment to be effective April 25, 1985.

The Carrier also submits that it had proposed the following draft of agreement to the UTU, without prejudice to its position that no agreement was necessary, with respect to the Paines Spur track abandonment:

**"AGREEMENT BETWEEN THE  
GRAND TRUNK WESTERN RAILROAD COMPANY  
AND THE  
UNITED TRANSPORTATION UNION**

with respect to: Abandonment Paines Subdivision MP 92.5 and MP 98.6

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

2. This agreement resolves all issues under Article I, Section 4 of the Oregon Short Line III Labor Protective



Conditions relating to the above stated abandonment.

3. This agreement to become effective on only at the time an ICC certificate of abandonment for the above stated becomes effective."

As also concerns the Paines Spur abandonment, the Carrier states that no industries are located on this portion of trackage and that the assigned yard crew at Saginaw has not been affected by the abandonment. Moreover, the Carrier says that this trackage, which it had initially attained from the Penn Central, has not been physically removed since it is currently being used by and is up for sale to the Chesapeake & Ohio Railway Company.

Lastly, as concerns the Winkler-Lucas Lead, the Carrier states that one end of this track has been placed out of service, but that the customer on this track continues to be serviced by the Saginaw Yard assignment. It submits the one end of the track was placed out of service in a manner not unlike that which governs the taking out of service of any other yard track for any number of reasons.

#### FINDINGS AND OPINION OF THE BOARD:

As concerns the abandonment of trackage in Midland, Michigan, we think it clear from the record as presented and developed that the Carrier knew or should have known that a condition precedent to abandonment of such operations or services in pursuance of the ICC's Decision in Finance Docket No. 30338, decided December 13, 1983, required notice be posted to interested employees and that registered mail notice be given to representatives of such interested employees, including the UTU. The change in operation and services not only took active track out of service, but provided for the subsequent servicing of customers or shippers located on the abandoned track from a newly constructed team track about one mile distant from the abandoned trackage.

That the Carrier may have had reason to believe that the impact upon the employees affected was de minimus, did not, in this Board's opinion, relieve Carrier of its obligation to protect the interests of the employees as otherwise imposed by the ICC in Finance Docket No. 30338.

Therefore, we believe those employees who may have had the extent of their compensation affected by reason of the Midland trackage abandonment are entitled to be considered "displaced employees" as that term is defined in the Oregon Short Line Conditions, i.e., "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."

The monthly displacement allowance for the affected employees is to be calculated and provided for as stipulated in Article I, Section 5, "Displacement allowances," of the Oregon Short Line Conditions. The displacement allowance payments are to be

retroactive to the date the employee was affected and continue until appropriate notice is served and an implementing agreement reached pursuant to Article I, Section 4, of the Oregon Short Line Conditions, but in no event for a period that would extend beyond the "protective period" specified in Article I, Section 1(d), of such Conditions.

Insofar as who this Board finds should be properly considered displaced employees with respect to the Midland trackage abandonment, we believe it should include those employees who were working on the yard assignment when the Carrier took the track out of service on September 27, 1983 in anticipation of abandonment authority from the ICC.

Although we find merit to the claims of the above employees, the Board fails to comprehend how it could be properly held, as the UTU urges, that employees who were working on the assignment on either the date the track was physically removed (October 13, 1983) or the date the ICC indicated the abandonment to be effective (January 18, 1984), are to also be considered as adversely affected. We think these employees knew or should have known that the track had already been taken out of service and that their compensation might be adversely affected by reason of the anticipated transaction should they voluntarily exercise seniority to the assignment in question.

In regard to the Carrier abandonment of portions of the former Michigan Central Railroad Mackinaw Branch (Bay City Belt), we think the Carrier was obligated to have served notice to the interested employees and their representatives relative to such intention. The fact that no service had been performed on the portion of track abandoned for two years prior to its notice of Exemption of Out of Service Rail Lines to the ICC did not relieve the Carrier of this responsibility.

Here, it is to be noted that the ICC held in Finance Docket No. 30338, supra, that notwithstanding the transaction was of limited scope, that it may not use its exemption authority to relieve a carrier of its obligation to protect the interests of employees. Further, the Carrier in notifying the ICC of the abandonment of a portion of the Bay City Belt trackage specifically stated: "The interest of railroad employees will be protected by Oregon S. L. -Abandonment, 360 I.C.C. 91 (1979)."

In the circumstances, this Board is unable to agree with the Carrier contention that it was not obliged to serve notice upon the interested employees and the UTU. We think the ICC imposition of protective conditions must be recognized as presuming that notice is to be provided interested employees and their representatives so that the latter may make determinations independent of the carrier as to whether there is an adverse affect upon employees as a result of a transaction. Certainly, the mere fact that no industries remained to be served did not necessarily mean that the trackage being abandoned had not been used by employees for other operating purposes, e.g., handling train movements to service other industries or to regularly set out cars during a

switching move.

The Board's views as above with respect to notice requirements notwithstanding, we believe that if, in conjunction with the serving of a notice, or thereafter, it is determined that no employee is adversely affected by reason of an abandonment, and no employee or representative of the employees can show cause as to why it should be held there would be an adverse affect, that it is not necessary there be an implementing agreement so as to affect the authorized abandonment.

In the instant Bay City Belt dispute we think it was necessary, however, there be both a notice and an implementing agreement since it may be presumed there would be an impact on the compensation of employees on the Bay City Yard Assignment, albeit minimal, by reason of the employees having to admittedly take a more time consuming route to service those same industries which it had been servicing prior to the track abandonment. Here, the Board is mindful that an adverse affect could result from an affected employee being required to work more or less than the equivalent number of test period average hours to earn compensation equal to or greater than test period earnings calculated in application of Article I, Section 5, of the New Orleans Conditions.

Accordingly, it will be the Board's determination that those employees who occupied regular positions on the Bay City Yard Assignment on the date of abandonment as noticed by the Carrier to the ICC (October 21, 1984) are entitled to be considered as "displaced employees" under the Oregon Short Line Conditions. The displacement allowance payments, if any, are to be retroactive to the date the employees were affected and continue until appropriate notice is served and an implementing agreement reached pursuant to Article I, Section 4, of the Oregon Short Line Conditions, but in no event for a period that would extend beyond the "protective period" specified in Article I, Section 1(d), of such Conditions.

Those employees who occupied an extra assignment on this same date are not, however, considered displaced since there is no showing that their work opportunities and compensation was governed by other than the rise and fall of business conditions as opposed to work on an assignment which regularly used the abandoned trackage.

As concerns the abandonment of other former Michigan Central Railroad trackage on the Saginaw Branch (Paines Spur), since the record shows that Carrier had in fact given notice to the UTU under date of February 27, 1985, and the UTU has not meantime shown cause as to why it should be held that employees it represents have been adversely affected, we believe it must be concluded that the Carrier has fulfilled the requirements of the Oregon Short Line Conditions with respect to this particular abandonment.

In regard to the Carrier having placed one end of the Winkler-

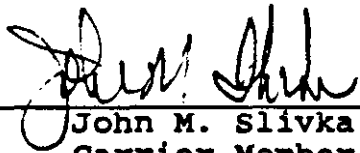
Lucas Lead out o service, we do not find any dispute has been fully joined. Therefore, this Board has no alternative but to dismiss the alleged dispute with prejudice.

AWARD:

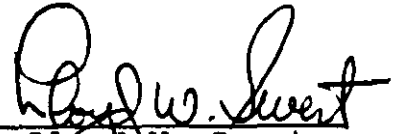
The Questions at Issue are disposed of as set forth in the above Findings and Opinion of the Board.



Robert E. Peterson, Chairman  
and Neutral Member



John M. Slivka  
Carrier Member



Lloyd W. Swert  
Organization Member

Detroit, MI  
July 2, 1986