

ARBITRATION BOARD
OREGON SHORT LINE EMPLOYEE PROTECTIVE CONDITIONS

In the matter of an Arbitration between)	
UNION PACIFIC RAILROAD COMPANY)	
and)	FINDINGS
)	AND
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	AWARD

QUESTION AT ISSUE:

"Does the Carrier have the right to suspend protection payments for KO&G employees declining to work off their home seniority district territory?"

BACKGROUND:

The employees who are the subject of this dispute are represented by the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization" or the "BMWE") for the purpose of collective bargaining with the Union Pacific Railroad Company (hereinafter the "Carrier").

It is undisputed that the employees are "displaced employees" as that term is defined in the Oregon Short Line Conditions (Oregon Short Line R. Co. - Abandonment - Goshen, 360 I.C.C. 91 (1971)), hereinafter the "OSL Conditions." The OSL Conditions were imposed by the Interstate Commerce Commission (hereinafter the "Commission" or the "ICC") in Finance Docket No. 30800, et al, when it approved trackage abandonment applications which had been filed by the Carrier, including abandonment of almost all of the rail lines on the Kansas, Oklahoma and Gulf Railroad (hereinafter the "KO&G").

Section 1(b) of the OSL Conditions defines a "displaced employee" to be as follows:

"(b) 'Displaced employee' means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions."

Section 5, Displacement Allowances, of the OSL Conditions reads

in part here pertinent as follows:

"(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

* * * * *

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

In addition to holding seniority rights on the KO&G Seniority District, the employees have a right to seniority for positions on the Texas District Tie Gang, one of several district tie gangs created by agreement between the parties on March 19, 1981.

It is essentially application of the terms of this March 19, 1981 Agreement that gives rise to the dispute here at issue.

The March 19, 1981 Agreement provided for the establishment of district tie gangs on the Carrier's Western, Southern-Texas, and Eastern Districts. In part here pertinent the Agreement reads as follows:

"2. The gangs will be established by advertisement bulletins to all classifications listed above having seniority on the district where the gangs are to be established. Successful applicants will retain all seniority rights established in other classes, and will, effective on the date of their assignment, establish District Tie Gang Seniority.

3. If the gang complement is not filled pursuant to Article 2, then newly employed men will be assigned and they will acquire a seniority date on the District Tie Gang on the day their pay starts in the class for which hired. It is understood that men newly hired for a higher classification will acquire the same seniority

date for all lower ranking positions on the District Tie Gang of the same classification. They also will establish seniority in the same classification on the Division designated by the employee at the time of employment.

4. After the initial establishment of the District Tie Gangs pursuant to Articles 2 and 3, a separate seniority roster will be compiled for each District and thereafter all new positions and/or vacancies will be first bulletined to employees on the respective gangs of that District. If not filled, then the position(s) will be bulletined to the District pursuant to Article 2 above. If, after following the procedure provided in this Article 4 no bids are received from qualified employees, the bulletin advertising the vacancy or new position will be either cancelled or filled pursuant to the provisions of Rule 11, paragraph (b) of the Basic Agreement between the parties.

5. It is understood that employees will be required to exhaust all seniority in their classification on the District Tie Gangs before being permitted to return to a position on their division.

Employees holding District seniority prior to the effective date of this agreement will retain that seniority separate and apart from this agreement and will not forfeit that seniority as a result of the operation of section 5 of this agreement.

6. (a) It is recognized by MoPac that costs of travelling from home to the work site have increased. In order to defray that cost, MoPac will pay each employee assigned to the gang a travel allowance of Two Dollars (2.00) for each day that he fulfills his assignment during the month. ...

* * * * *

(c) It is understood that if agreement is reached on Section 6 notices that are presently pending with the Carrier that request travel time and mileage allowances for employees travelling to or from the work site, the General Chairman will have the option of selecting the provisions of either this Section 6 or those negotiated in the National Agreement."

Rule 11(b) of the basic Agreement, which is referenced in Article 2 of the aforementioned District Tie Gang Agreement, reads:

"When vacancies bulletined under this rule are not filled by reason of no bids from qualified employees, the

position will be filled by (1) appointment of the senior unassigned employe in that classification, (2) appointment of the senior qualified employe, from the next lower classification, or (3) the hiring of a new employe, in that order. When a position is thus filled it will be done by assignment bulletin in the same manner as is done when it is filled with an employe bidding on same in response to a bulletin. The assignment bulletin will show that such assignment is being made by reason of no bids having been received and the employe so assigned if he does not already have seniority in that seniority district will establish seniority in the classification embracing the position to which he is assigned dating from the date his pay starts on such position. This in no way affects the rights of the carrier of the employes insofar as filling temporary vacancies and filling vacancies pending expiration of bulletin as provided in these rules."

As noted above, Article 6 of the March 19, 1981 District Tie Gang Agreement prescribes that employees covering positions on a tie gang will be paid a travel allowance from their home to the work site. There is no question that stipulated travel allowance of two dollars per day has meantime been increased in negotiations by the parties.

Inasmuch as the employees were on furlough at the time this dispute arose, Rule 23(b) of the basic Agreement is here noted to read as follows:

"(b) Furloughed employees must return to service in the seniority class in which recalled within ten (10) calendar days after being recalled by certified mail at the last address of record. Failure to report will result in forfeiture of seniority rights in such class and all lower classes of groups in which seniority is held, unless satisfactory reason is given. Satisfactory reason for failing to report has reference to sickness or other reasons over which the employe has no control."

The dispute was precipitated by the following letter which the Carrier's Director of NPS wrote to the employees on August 17, 1991:

"Under the terms of an agreement dated March 19, 1981 between the BMWE and the Missouri Pacific Railroad, you have seniority rights to jobs bulletined on the Texas District Tie Gang Roster 4800.

There are vacancy bulletins presently open for bid on the phonemail recorder, there will also be vacancies advertised on September 6, 1991. To bid on these vacancies you may call 1-800-877-8220 and select Option

2 for the Texas District Tie Gang. If you need help bidding please call Naomi Larsen at 1-800-877-1010 Option 2 then Option 05."

Thereafter, on September 19, 1991, the Carrier's Manager-Protection Administration sent the following letter to the employees:

"Reference Mr. A. A. Zabawa's letter dated August 27, 1991 regarding jobs bulletined on the Texas District Tie Gang Roster 4800.

This is to advise you that effective September 16, 1991 your protection has been suspended for failure to bid on the above mentioned jobs. Your protection will be reinstated when this department has been advised that you have been assigned and reported to a regular position."

On October 31, 1991, General Chairman L. W. Borden of the BMWE wrote the Carrier's Assistant Director-Labor Relations, Mr. R. D. Rock, as follows:

"Time is being claimed on behalf of 'all employes' of the KO&G that had their protection benefits cut as a result of letter of September 19, 1991, from Manager Protection Administration K. G. Heaton, copy attached. Claim is for all benefits lost beginning September 16, 1991, and continuing until benefits are restored.

Carrier is in violation of provisions of the Oregon Short Line Agreement. Employes are not required to bid on any such jobs as a condition of receiving OSL protection benefits."

When positions on the Texas District Tie Gang were abolished effective November 6, 1991, the Carrier resumed payment of the job protection allowances for the displaced employees of the KO&G. Thus, the issue in dispute involves a claim for protection payments for the period September 16, 1991 to November 6, 1991, as well as the question of whether the Carrier has the right to suspend protection payments for KO&G employees who decline to work off their home seniority district, or, principally, on the Texas District Tie Gang.

When the parties determined that they were not able to mutually resolve the dispute, it was agreed to place it to this Board pursuant to the dispute procedures set forth in the OSL Conditions. In addition to presenting ex parte submissions, the parties offered extensive oral argument at the Board's hearing and, at the request of the Board, communicated additional information as related to certain arguments which had been made to the Board.

POSITION OF THE CARRIER:

The Carrier maintains that the employees have seniority rights in both the KO&G Seniority District and the Texas District Tie Gang and that the employees are thereby obliged to exercise all such seniority to available or vacant positions so as to be eligible for protective benefits as displaced employees in application of the OSL Conditions.

Thus, it is the position of the Carrier that the issue goes to the obligation of the employees pursuant to Section 5(b) of the OSL Conditions, supra, to exercise seniority rights to positions which produce compensation equal to or exceeding the compensation which had been received in the positions from which they had been displaced, and not requiring a change in residence, or be treated for the purposes of job protective compensation as occupying such positions.

The Carrier contends that the change of residence restriction set forth in Section 5(b) of the OSL Conditions, supra, should not be viewed as an issue in this particular dispute. It says it draws this conclusion from the fact that the March 19, 1981 Agreement prescribes that employees on tie gangs be paid a travel allowance for going from their homes to the tie gang work sites.

The Carrier says that the overall intent of the March 19, 1981 District Tie Gang Agreement was to give employees on the pre-existing seniority districts, including, as here, employees on the KO&G Seniority District, seniority rights on the tie gangs. At the same time, the Carrier says, this new seniority was reinforced by an obligation on the part of the employees to work on the tie gangs pursuant to the force assignment provisions of above mentioned Rule 11(b) of the basic Agreement.

The Carrier does not deny the contention that the force assignment provisions of Rule 11(b) have not heretofore been applied to KO&G employees. However, the Carrier says the reason Rule 11(b) had not previously been applied to KO&G employees was that the Assignment Clerks in the Gang Movement Bureau "simply never thought of using KOG employees when there were unfilled vacancies on the District Tie Gang," and, further, that "the clerk who handles assignments for the District Tie Gang does not handle assignments for the KOG, and therefore, the KOG employees simply escaped her notice."

The foregoing comments of the Carrier with respect to Rule 11(b) notwithstanding, the Carrier submits that in the instant case when it determined that there were vacancies on the Texas District Tie Gang that the KO&G employees were properly sent letters on August 27, 1991 "advising them to bid openings on the Texas District Tie Gang." Thus the Carrier maintains that when it found the employees had declined to bid for the Texas District Tie Gang vacancies that it properly provided for the suspension

of their protective allowance benefits for that period of time that the employees failed to exercise seniority to the Texas District Tie Gang.

The Carrier also asserts that it has been a practice for KO&G employees to work on various gangs off the KO&G, offering that only nine of the 18 protected KO&G employees have "refused to utilize their existing seniority rights to obtain jobs beyond the geographic limits of the KO&G."

In regard to application of Section 5(b) of the OSL Conditions to the dispute, the Carrier directs particular attention to that language which relates to the failure of displaced employees to exercise seniority rights to secure positions to which they are "entitled" under the working agreement. It submits there is no question that employees on the KO&G have a right to positions on the Texas District Tie Gang. Therefore, the Carrier says, even assuming, arguendo, that a question exists as to the manner in which a seniority right is utilized with respect to positions on the Tie Gang that the bottom line is that the employees may be properly treated as entitled to such positions in application of the OSL Conditions.

The Carrier submits that awards of past boards of arbitration support the principle that employees must exhaust seniority to the fullest throughout the seniority district or districts in which they hold such rights in order to remain eligible for a displacement allowance.

The Carrier therefore asks that the question at issue be answered in the affirmative and that for purposes of computing protection payments that employees be treated as occupying the positions which they elect to decline.

POSITION OF THE ORGANIZATION:

The Organization contends that the Carrier did not have the right to remove the employees from protection pay. It says that the Carrier has wrongfully concluded that these KO&G employees have seniority on the former Missouri Pacific, or, as the Carrier has offered, seniority on the Texas District Tie Gang.

The Organization submits that seniority on a tie gang is only attained after an employee has bid for and been assigned by bulletin to a position on a tie gang, i.e., the date the employee first takes a position on a tie gang. Thus, the Organization maintains that absent such action on the part of the employees that the carrier is abusing its discretion by trying to force the employees to the tie gang positions, or positions outside their home Seniority District.

In this same connection, the Organization contends the reason the employees were not force assigned to positions on the tie gang is because the Carrier had apparently recognized that the employees had never in fact established seniority on the tie gang, thereby negating any application of Rule 11(b).

Furthermore, the Organization argues that if the employees did in fact have seniority on the Texas District Tie Gang that the Carrier would have been obliged to have recalled them to service under Rule 23(b) of the basic Agreement, supra, but that it did not do so.

Additionally, the Organization argues that Section 5(b) of the OSL Conditions does not require employees to attain seniority rights to positions beyond the seniority district in which they had held seniority at the time they were adversely affected.

The Organization also says that even assuming, arguendo, it was to be held that the employees have seniority on the Texas District Tie Gang that the exercise of any such seniority would essentially require the employees to be subject to a change in residence, or a condition in application of Section 5(b) of the OSL Conditions which would preclude the Carrier from using the positions on the tie gang as offsets against a protection allowance. In this same regard, the Organization asserts that the Carrier has never moved employees from the KO&G Seniority District to other parts of the former Missouri Pacific Railroad or to other parts of the merged system, much less 1,000 miles so as to work on the Texas District Tie Gang.

Lastly, the Organization argues that because some KO&G employees may have voluntarily taken jobs elsewhere or elected to establish seniority on the Texas Tie Gang does not serve to overcome the fact that those employees who elected not to do so have a right to confine or restrict an exercise of their seniority to the KO&G Seniority District for the duration of their protective period.

The Organization, as with the Carrier, cites decisions of past boards of arbitration as being in support of its contentions.

The Organization asks that the question at issue be answered in the negative and that the Board find that the employees are entitled to protection allowances during the period the Carrier disallowed their protection pay starting from September 16, 1991 through November 16, 1991 at the rate of not less than their test period average.

FINDINGS AND OPINION OF THE BOARD:

The OSL Conditions, in Sections 5(a) and 5(b), clearly prescribe that in order to be entitled to benefit of a monthly displacement

allowance that a protected employee is required "in the normal exercise of seniority rights" under existing collective bargaining agreements to obtain a position producing compensation equal to or exceeding the compensation received in the position from which displaced and which does not require a change of residence. This referenced exercise of seniority includes, in the Board's view, all contractual seniority rights not requiring a change of residence.

In regard to interpretation or application of the phrase, "in the normal exercise of seniority rights," this Board is persuaded, as was the arbitration board in a dispute which involved this same Organization and the C&NW Railroad (Referee Richard R. Kasher), that we must look to the manner in which seniority is generally or normally exercised in the railroad industry. In its findings and award the BMW- C&NW OSL Conditions arbitration board held as follows:

"There is insufficient evidence in the record for this Arbitration Committee to conclude that the 'normal exercise of seniority' by Organization members on the Carrier's property is restricted to a single zone within a seniority district. We are better convinced that the normal exercise of seniority, as those terms are generally understood in the railroad industry, would require an employee to exhaust his seniority within his seniority district before he could be either considered 'displaced' or 'deprived of employment.'"

In this same connection, it is noted that many past arbitration boards in resolving disputes concerning an entitlement to protective allowances have held that employees are required to exercise seniority rights under existing agreements, rules and practices to positions which may be in: 1) another seniority district; 2) covered by a different schedule agreement; and, 3) a different craft.

Here, the collectively bargained agreement rules in effect at the time the ICC imposed the OSL Conditions, and when the employees came to be adversely affected, included the March 19, 1981 District Tie Gang Agreement, supra. This Agreement permitted and currently permits employees on the regular district rosters, including, as in this dispute, employees holding seniority on the KO&G Seniority District, the opportunity to attain and accumulate seniority on a district tie gang roster separate and apart from their home district seniority. Article 2, supra, provides that employees who are the "successful applicants" for positions will establish seniority as of the date of assignment to the district tie gang.

This March 19, 1981 Agreement also prescribed, in Article 3, that if at the time the tie gangs were established a sufficient number of employees from the regular seniority districts failed to bid

for the district tie gang positions bulletined at that time, then newly employed persons would be assigned to such positions. This same Article 3 provided that the newly hired employees would be given a seniority date on the district tie gang roster on the day their pay started, and, further, stipulated that they would be placed on a regular district seniority roster of their choice.

Although Articles 2 and 3 of the March 19, 1981 Agreement cover the establishment of district tie gang seniority rosters, nothing in those articles or elsewhere in the Agreement required, or currently requires, employees holding seniority on the regular district rosters to attain seniority on a district tie gang roster on other than a voluntary basis. This manner in which employees may attain a seniority standing on a district tie gang roster notwithstanding, the Board recognizes, as will hereinafter be discussed, that Article 4 of the Agreement, *supra*, does however make provision for employees on the regular district seniority rosters to be force assigned to cover positions on the district tie gangs.

In regard to the bulletining and filling of new positions and vacancies on a district tie gang, Article 4 of the March 19, 1981 Agreement first prescribes that the following actions be taken by the Carrier:

"After the initial establishment of the District Tie Gangs pursuant to Articles 2 and 3, a separate seniority roster will be compiled for each District and thereafter all new positions and/or vacancies will be first bulletined to employees on the respective gangs of that District. If not filled, then the position(s) will be bulletined to the District pursuant to Article 2 above."

While the above-quoted portion of Article 4 invokes and directs attention back to Article 2, it is evident in reading Article 2 that it essentially provides that employees may elect to bid on open positions, and that if do so bid on the tie gang positions that they will be given a seniority date as of the effective date of their assignment to such a position. In other words, those employees who elected not to establish seniority on the district tie gang rosters at the time the district tie gang rosters were first established are extended additional opportunities to attain seniority on the district tie gang rosters. These employees are not, however, required by Article 2 to attain seniority on the district tie gang rosters.

Article 4, as more specifically relates to the circumstances of the case here before the Board and thus application to the OSL Conditions, further prescribes that if, after positions have been advertised to employees who do in fact hold seniority on the district tie gang roster and to employees on the regular seniority rosters, a position or positions remains open, that such position or positions may then be filled by force assignment. In this

regard, Article 4 states as follows:

"If, after following the procedure provided in this Article 4 no bids are received from qualified employees, the bulletin advertising the vacancy or new position will be either cancelled or filled pursuant to the provisions of Rule 11, paragraph (b) of the Basic Agreement between the parties."

That a question may exist as to why employees from the KO&G were not force assigned to Texas District Tie Gang positions in the past does not, in the opinion of the Board, constitute reason to conclude that they are not in fact subject to Rule 11(b) in application of the March 19, 1981 Agreement. Certainly, those options which existed relative to the exercise of seniority before imposition of the OSL Conditions must be viewed in light of the protected employees being entitled to benefit of a protective allowance and thereby the conditions related to eligibility for a monthly displacement allowance.

Prior to being determined protected employees under the OSL Conditions employees may have elected, for example, not to exercise a contractual right to positions account a number of reasons. In doing so, they may have sustained a loss of work opportunities or compensation. For the most part, decisions of this nature had little or no financial impact upon the Carrier. The Carrier was not obligated to compensate those employees who elected not to exercise their seniority. That is not the circumstance under the OSL Conditions.

While the OSL Conditions protect covered employees against lost work opportunities, or reduced and lost compensation as a result of the implementation of an ICC authorized transaction, they do so only to the extent that employees exercise seniority to the fullest under existing working agreements which do not require a change in a place of residence. In other words, that privilege which an employee may have to determine when and to what positions they would exercise seniority does not exist in application of the OSL Conditions. That is, unless the protected employee is willing to forego the benefit of their protective allowance and be treated for the purposes of Section 4(b) of the OSL Conditions as occupying the position they elect to decline.

As indicated above, the March 19, 1981 District Tie Gang Agreement specifically provides that employees may be force assigned to district tie gang positions pursuant to Rule 11(b) of the Basic Agreement. This provision, as the Board understands it from hearings in this case, was necessary to assure that there would be sufficient employees to fill the district tie gang positions. The force assignment of employees is accomplished in an inverse order of seniority when more senior employees fail to bid for a position.

In any event, it would seem to the Board that before employees of a regular seniority district within the confines of the territory of the district tie gang are subject to force assignment that the Carrier must first provide for the force assignment of employees who do in fact hold seniority on the district tie gang roster on which the vacancy exists. Therefore, the KO&G employees involved in this dispute would be subject to force assignment only after all employees currently on the Texas District Tie Gang roster had been forced assigned, and then, only force assigned if they were the most junior of all employees among the separate or individual seniority rosters which fall within the geographical confines of the Texas District Tie Gang.


In regard to the question as to whether work on a district tie gang may be properly viewed as requiring a change of residence. There is no question that some work on the Texas District Tie Gang will require employees of the KO&G Seniority District to work a considerable distance from their home terminal seniority district or place of residence. The fact remains, however, that when the March 19, 1981 Agreement was negotiated that the parties did not view such a circumstance as requiring an employee to make a change of residence. The parties instead agreed to recognize the performance of work on a district tie gang as being of a temporary or limited nature, and agreed that employees covering assignments on the district tie gangs be paid a travel allowance. Therefore, that some employees may view any necessary travel to cover a district tie gang position as a hardship is not a matter which this Board may treat as overcoming the intent of the March 19, 1981 Agreement that work on a district tie gang entitled employees to a travel allowance as opposed to a change of residence or relocation allowance.

Turning now to the period during which the employees had their protective allowances suspended. It does not appear that in seeking to have the employees take action to either voluntarily attain seniority rights on the Texas District Tie Gang or in being subject to force assignment pursuant to the March 19, 1981 District Tie Gang Agreement, that the Carrier had first provided for the recall of the employees from furlough pursuant to Rule 23(b), supra, of the Basic Agreement.

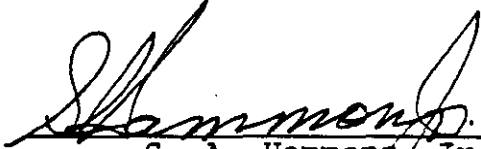
Furthermore, the Carrier has not shown that the vacancies which it purported to exist on the Texas District Tie Gang remained to be filled after it had exhausted the procedures of the March 19, 1981 Agreement as relates to the first use of those employees on the Texas District Tie Gang seniority roster who already hold seniority on such a roster. Certainly, those employees who are currently on the Texas District Tie Gang roster have a right and responsibility to cover positions and vacancies over employees who do not in fact have a seniority standing on such a roster but are otherwise subject to force assignment to open positions in the application of the provisions of the March 19, 1981 District Tie Gang Agreement.

AWARD:

The Question at Issue is disposed of as set forth in the above Findings and Opinion of the Board. The Carrier did not have the right to suspend protection payments for KO&G employees during the period September 16, 1991 to November 6, 1991 for the reasons stated above. However, the Carrier may suspend such protection allowances for employees declining to work on the Texas District Tie Gang should the declination of such work follow the Carrier having exhausted the procedures set forth in the March 19, 1981 District Tie Gang Agreement, and as considered or interpreted in the Findings and Opinion of the Board, with respect to the use of employees who currently hold seniority on the Texas District Tie Gang.


Robert E. Peterson, Chairman
and Neutral Member


A. C. Hallberg
Carrier Member


S. A. Hammons, Jr.
Organization Member

Omaha, NB
May 16, 1992