ARBITRATION COMMITTEE
ESTABLISHED UNDER SECTION 11
OF OREGON SHORT LINE III LABOR PROTECTIVE CONDITIONS,
I.C.C. DOCKET NO. AB-36 (SUB. NO. 2)

In The Matter Of An Arbitration Between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES -and- CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY	ARBITRATION DECISION SEPTEMBER 27, 1982

The Brotherhood of Maintenance of Way Employes (hereinafter the Organization) and the Chicago and North Western Transportation Company (hereinafter the Carrier) are parties to several collective bargaining agreements which provide for protection of employees in the event that they lose their positions or suffer reductions in compensation as the result of the Carrier abandoning trackage.

In the Spring of 1981 the Carrier first gave notice to the Organization that it intended to abandon trackage in the states of Wisconsin, Iowa, Nebraska, Minnesota, and Illinois, pursuant to authority granted by the Interstate Commerce Commission. It was recognized by both parties that the Order of the I.C.C. was conditioned upon the Carrier's providing employee protection to the adversly affected employees under Section 4(a) of the I.C.C. determination. Thus, the provisions of Oregon Short Line III Conditions became applicable.

A dispute arose between the parties regarding the interpretation and application of previously agreed-upon seniority arrangements which had been negotiated and then made effective on August 1, 1974. The dispute involved the interface of these seniority provisions and the Oregon Short Line protective provisions.

The August 1, 1974 agreement between the Carrier and the Organization contained two Letters of Agreement dated respectively April 18, 1974 and May 30, 1974. They are being reproduced below in their entirety for purposes of comparison to and interface with the applicable provisions of the Oregon Short Line conditions.

"April 18, 1974

Gentlemen:

During the course of negotiations involving the consolidation of the existing Maintenance of Way Agreements, and particularly the conformation of seniority districts to operating division, question was raised as to the effect of such changes on the protective status of Protected employes under the February 7, 1965 Agreement.

Specifically, the question relates to the provisions of the February 7, 1965 Agreement and the interpretations thereof which relate to pre-existing seniority districts. As you know, in many cases the pre-existing seniority district is now divided between two, and in some cases three seniority districts. Occasions therefore may exist where an employe cannot work in his pre-existing seniority district solely because it is not a part of his present seniority district.

In order that this problem not arise, I propose we agree that for the purpose of the application of this portion of the February 7, 1965 Agreement we agree to substitute, for the pre-existing seniority districts, the zones as set forth in the new schedule agreement.

/s/"

"May 30, 1974

Gentlemen:

During the course of negotiation of the new Maintenance of Way Agreement you raised the possibility that the conformation of seniority

districts to Operating Divisions might result in the elimination and/or relocation of some existing sections, thereby depriving some employes of work and/or necessitating that some employes move or exercise their seniority in a lower class than would otherwise be the case.

I agree that this may exist, particularly at those points common to two seniority districts where the work has not heretofore been consolidated.

In order to reduce the adverse effect which may occur as a result of such conformation of districts I am willing to agree that if, as a result of such conformation the C&NWT in fact adjusts its sections at common points in a manner which would not have been permissible except for such consolidation and conformation, the C&NWT will provide, to individual employes adversely affected thereby, moving and transfer allowance and loss on sale of home provisions of the February 7, 1965 Agreement.

If as a result of such adjustment of sections, an employe is unable in the normal exercise of seniority in his seniority zone, to retain a position with a rate of pay equal to or exceeding the rate of his previous position, he shall be made whole for any rate differential. However, if he fails to exercise his seniority rights to secure another available position which does not require a change in residence to which he is entitled, and which carries a rate of pay exceeding that of the positon which he elects to retain, he shall thereafter be treated for the purpose of this section as occupying the position which he elects to decline. He will not be required to accept positions outside his seniority zone or on division or interdivision gangs.

Any such employe who is deprived of employment (who is unable to continue in service in his seniority zone) shall be protected in rate to be known as a furlough allowance. This furlough allowance will be payable for a period equivalent to the length of service of the employe involved, with a maximum period of 5 years."

Of additional significance is Rule 5 in the collective bargaining agreement which addresses Seniority Districts and which provides in its entirety as follows:

> "Rule 5 - Seniority Districts
>
> Each operating division will constitute a seniority district for B&B employes, and a separate seniority district for Track Department employes.
>
> Except for the Chicago Division, each Seniority District will be divided into Zones to be known as Zone A, Zone B, etc. An employe whose position is abolished or who is displaced through the exercise of seniority will not be required to displace into another zone of his seniority district, but will be privileged to do so. An employe desiring to stay within the zone encompassing the railroad territory of the job previously held by him will not suffer loss of seniority in higher classification under Rule 13 by displacing an employe in a lower classification within the zone; i.e., he will continue to hold all seniority theretofore attained within the entire seniority district. Seniority Districts are identified as follows:..."

As the dispute between the parties could not be adjusted, this Arbitration Committee was properly constituted under Section 11 of the Oregon Short Line III Conditions. The Committee met in Chicago, Illinois, received evidence and heard argument.

Position of the Organization

It is the position of the Organization that Rule 5 specifically stipulates that an employee whose position is abolished or who is displaced through the exercise of seniority will not be required to displace to another zone of his seniority district, but that he has a "privilege" to exercise such seniority. The Organization contends that in the instant case when employees had their positions abolished as the result of the Carrier's

abandonments that the adversely affected employees exercised their seniority in their respective seniority zones, which the Organization contends was the only obligation they had; and that then the dispute arose when the Carrier required such employees to leave their respective zones and to exercise their seniority throughout the entire seniority district. The Organization argues that such broad exercise of seniority was not the intent or purpose of the unambiguous language of Rule 5. The Organization contends that the employees adversely affected by the abandonments, upon exhausting their seniority in their respective zones, became protected employees under the Oregon Short Line III Conditions (OSL) and were entitled to dismissal or displacement allowances, as will be defined below, and that the Carrier violated their protected rights by forcing them to exercise seniority beyond the zones in which they were working on the days that their jobs were abolished.

The Organization argues that the Carrier's requirement that the adversely affected employees exercise seniority throughout their entire seniority districts before being entitled to any of the Oregon Short Line benefits flies in the face of the clear and unambiguous language of Rule 5 and the April 18 and May 30, 1974 Letters of Agreement.

Finally, the Organization contends that sound and logical reasoning must lead the Arbitration Committee to conclude that employees were not obligated to exercise their seniority beyond the zones in which they were working prior to the abandonments. In support of this point, the Organization points out that

while the seniority districts were being enlarged, additional zones were being added to place a reasonable limitation on the area to which an employee would be required to travel to protect his seniority. Obviously, the Organization argues, there would be no need for additional zones if it were not for the employees restrictive seniority therein and the need to limit the hardships incurred by the employees should they be required to exercise seniority over the larger district. This progression of restrictive zoning, the Organization argues, flows naturally from Rule 5 and the May 30, 1974 Letter of Agreement wherein it is stipulated that any such employee who is deprived of employment, and who is unable to continue in service in his seniority zone, shall be protected. Therefore, the Organization argues, the intent of the parties concerning Rule 5 was expressed in clear and unambiguous language. Thus, the Organization contends, an employee whose position is abolished or who was displaced through the exercise of seniority is not required to displace into another seniority zone. Following therefrom, the Organization argues that an employee unable to hold a position in his respective seniority zone is entitled to the protections prescribed in Sections 5, 6 and 9 of the Oregon Short Line III Conditions.

Position of the Carrier

It is the position of the Carrier that in order for employees to qualify for dismissal allowances or displacement allowances

under the Oregon Short Line III Conditions, and under similar protective conditions and agreements which have been in effect in the railroad industry for many years, employees are required to exercise seniority to the highest paying jobs available to them which do not require changes in places of residence, if such employees are able to hold a position without changing their points of employment or places of residence after being adversely affected. Further, the Carrier contends, if employees are able to hold any positions which do not require changes in places of employment and places of residence, such employees are not entitled to a dismissal allowance if they fail to exercise seniority to positions available to them in their seniority districts.

The Carrier argues that Rule 13 of the 1974 Schedule Agreement gives an employee the privilege of retaining seniority rights even when he fails to exercise seniority in a position outside the zone in which he was working at the time affected but that this fact does not entitle such employee to claim a monthly displacement allowance (guarantee) under Sections 5 or 6 of the Oregon Short Line III Conditions when such employee fails to exercise his seniority.

Additionally, the Carrier argues that the fact that it agreed in the letter of understanding of April 18, 1974 to waive this requirement for "protected" employees under

the February 7, 1965 National Job Stabilization Agreement does not constitute a waiver of the employee's obligations under the Oregon Short Line III Conditions or any other protective conditions or agreements concerning his exercise of seniority.

The Carrier contends that previous protective conditions or agreements (i.e. the Washington Job Protection Agreement, the Burlington Conditions and the Amtrak "Appendix C-1" Conditions) as well as prior decisions involving the interpretation of the Oklahoma Conditions, the New York Dock Conditions and other protective conditions and agreements, all establish a consistent principle that in order for an adversely affected protected employee to qualify for a displacement or a dismissal allowance that such employee must exercise his seniority to the fullest.

In the instant case, the Carrier contends that the claimants involved did not exercise their seniority to the fullest when they did not obtain the highest paying positions available to them within their seniority districts or failed to obtain positions available to them within their seniority districts.

OPINION OF THE COMMITTEE

As the result of several track abandonments in the states of Wisconsin, Iowa, Minnesota, Michigan, and other contiguous geographic areas, a substantial number of employees represented by

the Organization on section gangs, division maintenance gangs, and B&B gangs were subject to having their jobs abolished.

It appears from the record before this Arbitration Committee that the employees whose positions were abolished chose one of three options. Some of the employees determined to exercise their seniority to the highest paying positions available to them within their seniority districts. This group of employees are not before the Committee as claimants. However, there is an indication in the record that certain of these employees, who may have been required to "change their place of residence", will pursue with the Carrier claims for monetary benefits associated with such residence changes.

The second alternative, chosen by a group of claimants in this proceeding, involved employees who, unable to retain positions of employement in the seniority zones in which they were working on the day of their job abolishments, did not exercise seniority to other positions and considered themselves as deprived of employment and entitled to the payment of dismissal allowances, as that term is defined in the Oregon Short Line Conditions.

The third alternative, apparently chosen by another group of claimants to this proceeding, resulted when employees, deprived of their jobs as a result of the track abandonments in their seniority zones, exercised their seniority in their seniority districts but did not obtain the highest paying positions to which

their seniority would have entitled them. These claimants apparently considered themselves as entitled to displacement allowances, which would provide them with a monetary benefit based upon what they had earned during a specified test period as opposed to the presumably lesser rates of pay they were receiving in their newly-acquired positions.

It would be instructive here to reproduce certain definitions and sections from the Oregon Short Line III Conditions which will impact upon this Arbitration Committee's decision. They are as follows:

"Labor protective conditions to be imposed in railroad abandonment or discontinuance pursuant to 49 USC 10903, (formerly section 1(a) of the Interstate Commerce Act) are as follows:

1. Definitions.-(a) 'Transaction' means any action taken pursuant to authorizations of this Commission (ICC) on which these provisions have been imposed.

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

(c) 'Dismissed employee' means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

* * *

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

* * *

(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 therafter be treated for the purposes of this section as occupying the position he elects to decline.

* * *

6. Dismissal allowances. -(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective 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. Such allowances shall also be adjusted to reflect subsequent general wage increases."

When the above recited definitions and benefits are read in context, it becomes obvious that the claimants herein contend that they are either entitled to displacement allowances or dismissal allowances consistent with said provisions. In order for a protected employee to be considered "displaced" he or she must be placed in a worse position with respect to his compensation, and/or rules or working conditions. In order for a protected

employee to be considered "dismissed" that employee must be "deprived of employment" either because his position was abolished or he was displaced from his position by another employee who was exercising seniority rights.

However, in this Committee's view, the critical language from the excerpts above appears in the first sentence of Section 5 which states that a displacement allowance will be paid for a period of time as long as the adversely affected employee 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. Thus, it becomes this Committee's responsibility to determine whether employees, who did not exercise seniority within their seniority districts to any positions that they could have held or who did not exercise seniority to the highest paying positions that they could have held, are entitled to dismissal or displacement allowances under the above-quoted provisions. Simply stated, this Committee views the issue as whether the claimants involved must have exercised, as a normal exercise of seniority, their seniority throughout the seniority district in which they held rights in order to be entitled to protective allowances.

The Organization has raised a number of arguments which justify careful consideration. First, and most importantly, we must interpret the language of Rule 5, which specifically states that

"an employee whose position is abolished or who is displaced through the exercise of seniority will not be required to displace into another zone of his seniority district, but will be privileged to do so." This language, the Organization logically argues, makes exercise of seniority beyond the zone a privilege and not a requirement. We agree with the Organization that the language of Rule 5 does not mandate that an employee exercise his seniority beyond the zone in which he was displaced when his position was abolished or when the position of a fellow employee with greater seniority was abolished and that employee then displaced the claimant. However, the issue is not that simple. Superimposed by the 1981 track abandonments scenario was the introduction of a set of protective conditions (OSL) which afforded benefits to employees who were either defined as dismissed or displaced. In order to be dismissed, when one reads the plain definition in section 1 (c), an employee had to be "deprived of employment with the railroad" because of the abolishment of his position which resulted from the transaction. We are hard-pressed to conclude that an employee who has seniority, which he/she is able to exercise, can be considered "deprived of employment" in the terms and the context of Oregon Short Line III. The Carrier has presented strong argument

and rationale in pointing to the consistent and historic application of the terminology "deprived of employment." Those arguments have convinced this Committee that an employee who held seniority, for example, in the Lake Shore District and was working in Zone A of that District should not or could not be considered deprived of employment if he failed to exercise seniority into Zone B when his position in Zone A was abolished.

Turning to the definition of "displaced" and referring particularly to the first sentence in section 5 of the Oregon Short Line III Conditions, we see that any employee who has suffered a reduction in compensation would be entitled to an allowance as long as he is unable to achieve his previous rate of pay "in the normal exercise of his seniority rights under existing agreements." Thus, we are faced with a difficult question; that is, does the exercise of seniority within a single district between zones constitute the "normal exercise" of seniority; or can an employee properly contend that his normal exercise of seniority takes place exclusively within his home (the place of employment where he was working at the time of his displacement or job abolishment) zone?

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."

When Rule 5 is read in its full context, it is the view of this Committee that the "privilege" granted to employees whose jobs are abolished and who choose to exercise their seniority intra-zone is one that allows them to retain seniority in higher classifications. However, that privilege doesn't specify entitlement to protective benefits.

Accordingly, we must find that the Organization's strongest argument has to be rejected.

The Organization has also contended that the April 18 and May 30, 1974 Letters of Agreement logically established that employees in the craft or class were not required to exercise seniority beyond their home zone in order to be entitled to protective benefits. When this Committee reviews the entirety of the April 18, 1974 Letter of Agreement, it is clear that the purpose and application of this Letter of Agreement was directed only to a portion of the February 7, 1965 Job Stabilization Agreement. It is also clear that the Letter of Agreement of April 18, 1974 spoke to no other subject; particularly, it did not speak in anticipation of track abandonments which would occur seven years subsequent to the 1974 agreement and where there would be protective coverage for employees who were adversely affected in such circumstances.

Turning to the Letter of Agreement of May 30, 1974, this Arbitration Committee must once again reject the Organization's argument that such agreement indicates an understanding that employees would not have to exercise seniority within their entire seniority district in order to gain the protective benefits of the Oregon Short Line Conditions. The May 30, 1974 agreement is clearly written as an exception to the common rule, that is, the Carrier agreed that there was a possibility when seniority districts were being conformed to the Operating Divisions that a result might be elimination and/or relocation of some existing sections. Thus the Carrier agreed, where such a possibility existed, particularly at those points common to the two seniority districts, that in order to reduce the adverse affect in the circumstances of the conformation of seniority districts where such conformation at common points resulted in employees being adversely affected, that when an employee was unable in the normal exercise of seniority "in his seniority zone" to retain a position with a rate of pay equal to or exceeding the rate of his previous position, then the Carrier would make such an employee whole. It is interesting to note the language quoted by the Arbitration Committee in the preceding sentence. For it is apparent that when the parties wish to define normal seniority as being co-existent with the exercise of seniority within a seniority zone they used such specific language. This Committee therefore concludes that the May 30, 1974 Letter of Agreement was an agreement directed to a particular set of circumscribed events, conformation of seniority districts to operating divisions (with emphasis

upon the effect at common points), and was not an agreement which had application for all purposes of an employee's exercise of his seniority.

In light of the above Opinion this Arbitration Committee must deny the claims of the Organization.

AWARD: This Arbitration Committee, being properly constituted in accordance with Section 11, Arbitration of Disputes of the Oregon Short Line III Conditions, has considered all of the evidence and arguments of the parties and rules that the claims of the employees represented by the Organization shall be denied.

Signed this 27th day of September 1982 in Bryn Mawr, Pennsylvania.

J. D. Crawford, Carrier Member

H. G. Harper, Organization Member

Richard R. Kasher, Chairman and
Neutral Member