Award #2

OSL

A W A R D

In the Matter of Arbitration

between

The Chesapeake and Ohio Railway Company
(Pere Marquette District)

and

Great Lakes Officers' Organization

RE: Application of OSL III Labor Protective Provisions in an Agreement Account Abandonment of Cross Lake Ferry Service - ICC Docket No. AB-18 (Sub. No. 21)

Before: Arthur T. Van Wart, Neutral Referee

Appearances:

Company

L. W. Evans - Manager-Labor Relations

Union

James F. Schouman, Esq. - Counsel

Willard D. Wissner, Secretary-Treasurer

Background

The Chesapeake and Ohio Railroad Company, hereinafter referred to as "C&O" or "Carrier," sought authority, on or about March 18, 1975, of the Interstate Commerce Commission to abandon its Lake Michigan Car Ferry Service between Ludington, Michigan on the one hand, and, Kewaunee, Manitowoc and Milwaukee, Wisconsin on the other.

An Administrative Law Judge (ALJ) rendered the initial decision dated October 27, 1978 which authorized abandonment of car ferry service between Ludington, MI and Milwaukee, WI. However, Carrier was denied

the authority to abandon car ferry service between Ludington, Michigan and Kewaunee and the ports of Manitowoc, Wisconsin.

The initial decision, served November 12, 1978, imposed those conditions for the protection of labor as set forth in Docket No. AB-31 (Sub. No. 5). Grand Trunk Western - abandonment of Lake Michigan Car Ferry Operations, served June 12, 1978 (GTW conditions).

One of the exceptions taken to said decision was whether the Judge erred in applying the GTW conditions for the protection of labor instead of Oregon Short Line R. Co. - abandonment - Goshen, 354 I.C.C. 584 (1978) as modified (Oregon Short Line III).

The Interstate Commerce Commission, hereinafter referred to as the "Commission" or "ICC" issued a decision, June 25, 1979, adopting the ALJ's findings. However, it substituted the same labor protective conditions as prescribed in Oregon Short Line Railroad - Abandonment - Goshen, 360 I.C.C. 91 (1979), in lieu of the set of employee protective conditions previously fashioned by the ALJ. The applicable employee protective conditions are hereinafter referred to as either "Oregon Short Line III" or "OSL III."

Carrier, on February 8, 1980, addressed Mr. Willard D. Wissner, Secretary-Treasurer, Great Lakes Officers' Organization, attaching thereto copy of a notice which had been placed on various employee bulletin boards advising therein of Carrier's intent to abandon its car ferry service between Ludington, Michigan and Milwaukee, Wisconsin, on or about May 12, 1980 and proposing conference dates for discussion in connection therewith.

Question at Issue

What provisions shall be contained in a memorandum of agreement within the framework of OSL III "Labor Protective Conditions" imposed by I.C.C. certificate and decision in Docket No. AB-18 (Sub. No. 21) in the matter of abandonment of car ferry service across Lake Michigan.

Contention of the Parties

Carrier contends that the Organization's pursuance of an argument that "it had dried up the business across Lake Michigan by rerouting traffic via Chicago" and had so admitted thereto during the ICC hearings and thus was in violation of Article 1, Section 10, of OSL III protective provisions is not a subject matter properly before this Neutral Referee.

Carrier alleges that such argument had been previously raised before the ICC. It was found wanting there. The contention represent a device to inflate the number of employees and/or former employees who might be entitled to protective payments and that such was an effort to seek a "windfall" of benefits.

Carrier argues that any dispute as to the applicability of Section 10 must be resolved under Article 1, Section 11 which specifically therein excludes the instant proceeding.

It avers that the only dispute before this Board is what provisions shall be prescribed by the Neutral Referee within the framework of OSL III as being applicable to the instant transaction.

It contends that its proposals for an agreement were reasonable and in consonance with the criteria set forth in the ICC certificate and Order in Docket No. AB-18 (Sub. No. 21).

The patties pursuant Article 1, Section 4 of OSL III met and attempted in good faith to negotiate an agreement. They soon reached an impasse. Thereafter,Carrier advised the Union Representatives of the failure to reach agreement within the prescribed thirty (30) day period and advised of Carrier's intent to submit the matter to arbitration pursuant to Article 1, Section 4 of the OSL III conditions.

Carrier wrote the National Mediation Board (NMB) identifying the matter and, pursuant to Article 1, Section 4, of the OSL III labor protective conditions, requested that it appoint a Neutral Referee. This Neutral Referee was advised, April 14, 1980, that:

> "The National Mediation Board has nominated you to sit with the Chesapeake and Ohio Railway Company and certain of its employees affected by ICC Docket No. AB-18 (Sub. No. 21) for the abandonment of car ferry service across Lake Michigan between Ludington, Michigan and Milwaukee, Wisconsin. Protective conditions were imposed as set forth in Oregon Short Line Railroad Company Abandonment Goshen, 360 I.C.C. 91 (1979).
>
> Provisions 360 I.C.C. 91 (1979) state that the decision of referee shall be final, binding and conclusive..."

The arbitration hearing was held in Carrier's office at Southfield, Michigan on April 29, 1980. The parties by written submissions, oral testimony, cross examination, and presentation of exhibits were afforded full opportunity for the presentation and explanation of their differing viewpoints. Said hearing was closed on April 29, 1980. Pursuant to Article 1, Section 4, of the OSL III provisions, the decision of the Neutral Referee is required to be submitted within thirty days from April 29, 1980.

The Organization Representative, both during discussions held on the property and before the Neutral Referee, contended that Carrier had "dried up the business" across Lake Michigan by rerouting traffic via Chicago. The ultimate purpose thereof, they alleged, was to down grade the service business in anticipation of a potential abandonment. Thus, they say, Carrier was in violation of Section 10 of Article 1 of the imposed protective provisions reading:

> "Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits which he otherwise would have been become entitle to under this appendix, this appendix will apply to such employee."

The Organization alleged that Carrier had anticipated abandoning the Milwaukee service as early as 1970. In support thereof, they introduced excerpts of inner company correspondence purporting to show this concept therein. They seek coverage under OSL III provisions for unnamed and unidentified individuals employed by Carrier some 8 or 9 years ago, but who have since left Carrier's service.

Additionally, the Organization argued that in reducing its boat operations Carrier had thereby diminished the potentiality and availability of a higher classification for employees and consequently adjustments should be made for any protective allowances for which these employees may be entitled.

Lastly, the Organization introduced correspondence, dated March 20, 1980, from the Director of the Bureau of Unemployment and Sickness Insurance, Railroad Retirement Board, to a Vice President of BRAC. The particular thrust thereof, pertinent here, was that a fully protected

employee would not need to and could not be required to claim unemployment benefits.

Findings

The parties are before this Neutral Referee pursuant to the procedural requirements of Article 1, Section 4 of the Certificate and Decision rendered by the I.C.C. in Docket No. AB-18 (Sub. No. 21). Said Decision concerned the abandonment by The Chesapeake and Ohio Railway Company of its car ferry service across Lake Michigan between Ludington, Michigan and Milwaukee, Wisconsin.

It read in pertinent part:

> "It is certified that the present and future public convenience and necessity permit abandonment of the above-described line, subject to the following conditions:
>
> (1) Labor protective conditions shall be imposed as set forth in Oregon Short Line Railroad Co., - Abandonment Goshen, 360 I.C.C. 91 (1979); (2) the unilateral rate stipulation affecting the continuation of cross-Lake mileages for rate making purposes is accepted and imposed in its entirety as a condition to the grant of abandonment here; (3) cross-lake routes will not be hereafter excluded by applicant from any new or reduced rates, and any existing exclusions shall be removed by applicant upon request by a bona fide shipper or consignee; (2) (sic) applicant shall maintain and advertise all cross-lake passenger service in existence via cross-lake routes retained: providing, however, that in the event of future abandonment of service at Manitowoc, WI, it is understood that protestant, Green Bay & Western Railroad, has acknowledged and agreed to construct and maintain at no expense to applicant a suitable automobile ramp, with appropriate support facilities, for the handling of passenger automobile traffic at the Kewaunee port, (5) applicant shall exercise all reasonable means to facilitate and expedite freight and passenger traffic cross-lake on all routes retained; and (6) applicant will forego initiation of any effort toward future abandonment of the Ludington-Kewaunee cross-lake service for a period of five (5) years from date of the decision served November 16, 1978, except for a substantial change in circumstances..."

In the aforementioned Decision, rendered by an I.C.C. Administrative Law Judge, October 27, 1978, the factual "background" of the cross ferry operation under question was, in pertinent part, described:

> "***Applicant currently operates three coal-fired steam vessels: the City of Midland, the Badger, and the Spartan. These vessels carry rail freight cars, passengers, and automobiles. During the non-tourist season, extending from approximately September to June, the vessels operate on a non-scheduled basis between the Michigan and Wisconsin ports. The volume of available traffic dictates the trips necessary and the ports to be served. At the present level of freight traffic, one vessel is operated seven days a week and the second vessel five days a week. During the passenger season scheduled trips are made. In 1976 when three vessels were operating, service was available twice a day, seven days a week, between Ludington and Milwaukee and twice a day, five days a week, between Ludington and Manitowoc. There was no summer schedule between Ludington and Kewaunee although approximately one round trip per day was made. Due to damage to the hull of the Spartan, only two vessels remained in service during the latter part of 1976, one of which operated seven days a week and the other five days a week. In 1977 scheduled sailings were made to all three Wisconsin ports with two ships until August 1 when the third vessel was used through Labor Day.
>
> The three vessels have capacities of 22 to 24 rail cars. The Midland can carry 520 passengers in the summer and 194 persons during the winter. The Spartan and the Badger, which are sister ships, can carry a maximum of 520 passengers in summer and 235 in winter. Rail switching service is provided by the C&O at Ludington and Milwaukee, by the Green Bay and Western Railroad (GBW) at Kewaunee, and by the Chicago and North Western Transportation Company (C&NW) at Manitowoc. The major commodities currently transported include chemicals, food, paper products and lumber.***" (Underscoring supplied)

With respect to the Ferry Vessels' operation, the Decision reflected the following in part:

> "***As previously stated applicant's existing car ferry fleet consists of three coal-fired vessels, The City of Midland 41, the Spartan, and the Badger. The City of

Midland was built by Manitowoc Shipbuilding Company and completed in 1941. The Spartan and the Badger were built by the Christy Corp., and were completed in 1952 and 1953, respectively. The ships were built to the following principal dimensions:

	City of Midland	Spartan/Badger
Length	406'	410'6"
Beam	58'	59'2"
Molded Depth	23'6"	24"
Speed	18 mph/15.6 knots	18 mph/15.6 knots
Capacity-Freight	24-26 cars	24-26 cars
Autos	45-47	17-18

According to a letter from the C&O, dated December 19, 1977, directed to all parties of record, the following table is taken to show the dollar investment, accrued depreciation, depreciated or book value, and the salvage value for each of the three vessels:

Vessel	Salvage Value	Ledger Value	Acc.Depr.	Depr. Val.
#21	$ 70,000	$ 2,285,796	$1,612,629	$673,167
#22	80,500	2,333,905	1,620,698	613,208
#31	41,275	1,453,946	902,249	551,697

At the present time all three vessels are operational. The vessels carry a normal crew of 55 which is increased to 65 during the summer passenger season in order to handle increased automobile and passenger traffic. Mr. William Klemm, Superintendent Steamships, indicated that these were the lowest crew counts with which the vessels could be safely operated. Although the Coast Guard requires only 27 crewmen, the C&O feels that it would have to reduce services such as the dining room and snack bar to reduce the crew any further.***"

The analysis of the conflicting positions of the parties as set forth in their oral and written presentations may be briefly summarized as being, (1) that Carrier desires to restrict its obligation under OSL III to only those present employees who are, or who may be, adversely affected by reason of the instant transaction and that such obligation shall be no greater than that as stipulated in OSL III;

(2) the Organization contends, primarily, that Carrier should also take care of those employees who, as a result of Carrier's rerouting of traffic via Chicago, have lost their jobs, and secondarily that Carrier should not be permitted to commence the transaction until after the appeal before the Sixth Circuit Court of Appeals is decided.

The Neutral Referee is impelled to conclude that his authority flows from and is circumscribed by the labor protective provisions imposed by the Interstate Commerce Commission in its Certificate and Decision decided February 14, 1980 in Docket No. AB-18 (Sub. No. 21) attached thereto as an appendix. The labor protective provisions set forth in Oregon Short Line Railroad Company - Abandonment, Goshen, 360 ICC 91 (1979) read:

> "1. Definitions. (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.
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> (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.
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> (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.
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> (d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such

employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7 (b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

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 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 discplacement 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:

(1.) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2.) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3.) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4.) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(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.

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.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(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.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

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 allowance shall be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. Separation allowance - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits - No employee of the railroad who is affected by a transaction shall be deprived during his protection period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed three (3) working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this Article 1, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of the intent by that party to refer a dispute or contraversy to an arbitration committee, each party shall, within 10 days, select one member of the committeee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or

the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within ten (10) days, the parties shall then within an additional ten (10) days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within ten (10) days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal - (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined

as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within thirty (30) days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within ten (10) days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who has made a request under Section 1 or 2 of the Article II fails without good cause within ten (10) calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10 day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforced to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within thirty (30) days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits

> applicable to transaction as defined in Article I of this appendix. In making such changes, it is not the intent, of this appendix, to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under Section 565 of Title 45.
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> 2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

It is clear that the many contentions, written and orally, offered by the Organization are matters that are either being heard in another forum,to wit - the Sixth Circuit Court of Appeals, or are such as to lend themselves solely to negotation between the parties. The parties hereto had, as required, engaged therein and failed. Hence, this proceeding places constrictions on what the Neutral Referee may consider within the framework of OSL III protective provisions.

The purpose of this arbitration proceeding is not to determine what is a "reasonable" agreement or decision. What is "reasonable" is that which the parties could have, but did not, agree upon. Here, the test is whether the Neutral Referee's decision (agreement) written herein is appropriate to the transaction involved and satisfies the imposed "OSL III" labor protective conditions.

The Neutral Referee commends and thanks both parties for their skillful and articulate presentation of their varying views which he found helpful in the formulation of his decision in the instant dispute.

Absent any stay on the Referee's authority, he is duty bound under Article 1, Section 4, to proceed with rendering a decision in the matter placed before him.

Despite the persuasive arguments offered, the Neutral Referee has no authority to move beyond the record and those conditions expressly provided for by the "OSL III" conditions.

The rerouting of traffic via Chicago, or "down grading" or the so-called "Chicago Plan" here relied upon by the Organization is found to be wanting. This matter was thoroughly discussed before the Administrative Law Judge. He reviewed same and, in effect, denied same finding in pertinent part:

> "...considered, therefore, in this context of the then existing circumstances, it is not necessary to speculate upon C&O management's primary intent and purposes in crystalizing the Chicago Plan. A clear recognition of the facts clearly dictates the course of action the applicant pursued. To conclude, as do some of the protestants, that evolution of the Chicago Plan, in light of the hard facts faced by applicant at the time, viz., the loss of half its fleet and a calculated decision by management against the replacement or renovation thereof, constituted a deliberate down grading of the ferry service, is to either ignore or distort the facts and to give them a meaning not reasonably reconcilable with the balanced consideration of all the relevant evidence."

The Commission upheld such conclusion. It took no exceptions thereto. Last, but not least, this argument is now before the Sixth Circuit Court of Appeals. Hence, if there is any relief to be sought in arbitration it must be accomplished via Article 1, Section 11.

As to that point raised involving application of the Railroad Unemployment and Insurance Act (RUIA) the Referee takes cognizance of the fact that BRAC entered into an agreement without, as here, the necessity of going to arbitration under Section 4. While absent benefit of knowledge of the rationale involved in reaching the Agreement wherein certain quid pro quo may have been exchanged for the language

adopted on this subject we construe that aspect of the Agreement to be in consonance with Carrier's proposal thereon. Hence, for administrative reasons to facilitate uniform application of similar rules such provision shall be included in the Neutral Referee's decision.

I turn now to the disposition of the issue placed before this Neutral Referee, to wit - the appropriate provisions to be contained in an agreement or decision rendered by the Neutral Referee within the framework of the OSL III labor protective conditions covering the contemplated transaction of which advice has been given the employees affected and the organization. The following and attached appendix, which by reference, is incorporated herein and made part hereof, is and represents the Neutral Referee's decision as to the appropriate and applicable provisions covering the designated transaction and are rendered pursuant to Article 1, Section 4.

Respectfully,

Arthur T. Van Wart,
Neutral Referee

Issued at Falmouth, Massachusetts, May 16, 1980.

APPENDIX

NEUTRAL REFEREE'S DECISION

PURSUANT TO ARTICLE 1, SECTION 4

OF THE APPENDIX TO DOCKET NO. AB-18 (SUB. NO. 21)

(1) The provisions of the collective bargaining agreement shall be applicable in the implementation of the transaction involving abandonment of car ferry service between Ludington, Michigan and Milwaukee, Wisconsin.

(2) The labor protective conditions as set forth in Oregon Short Line Railroad Company - Abandonment - Goshen, 360 I.C.C. 91 (1979) attached as Appendix to Docket No. AB-18 (Sub. No. 21) which, by reference hereto, are incorporated herein and made part hereof, shall be applicable in this transaction.

(3) Exercises of seniority and related matters resulting from implementation of this Memorandum of Agreement will, if possible and required, be handled in advance thereof through conference.

(4) In order that the provisions of the first proviso set forth in Article 1, Section 3 of the conditions contained in Oregon Short Line III may be properly administered, each protected employee who also is otherwise eligible for protective benefits and conditions under some other job security or other protective conditions or arrangements shall, within ten (10) days of being advised by Carrier of his monetary protective entitlement under the conditions set forth in Oregon Short Line III, elect between the benefits thereunder and similar benefits under such other arrangement. This election shall not serve to alter or affect any appliation of the substantive provisions of Article 1, Section 3. Should any employee fail to make an election of benefits during the period set forth in this Section 4, such matter shall, if necessary, be resolved through conference between management and the duly authorized representative.

(5) (a) In order that the provisions contained in subsection (c) of Section 6 of the OSL III protective benefits can be properly applied, each dismissal allowance applicable to a dismissed employee shall be supplemental to the unemployment benefits provided by the Railroad Unemployment Insurance Act (RUIA) which are payable thereunder.

(b) It is contemplated herein that during any RUIA claim period for which a dismissed employee is entitled to benefits under both the Appendix (OSL III) and RUIA, the Carrier shall supplement the

benefits provided under the Act and received by the employee to the extent of the difference in benefits provided under the Act and those provided in the Appendix.

(c) It is further contemplated herein that to the extent that the benefits provided in the Appendix are supplemental to those under RUIA, dismissed employees entitled to RUIA benefits will file for such benefits. In the event, however, it is subsequently determined that such employees are not entitled to RUIA benefits as contemplated herein and that such benefits must be recovered pursuant to applicable law, the protective benefits provided to such dismissed employee in the Appendix will be applied fully by the Carrier without the necessity of the dismissed employee having to file for RUIA benefits.

(d) Each dismissed employee shall provide C&O with the following information for the preceding month in which he is entitled to benefits no later than the fifth (5th) day of each subsequent month on the Carrier provided standard form.

1. The day(s) claimed by such employee under any unemployment insurance act.

2. The day(s) each such employee worked in other employment, the name and address of the employer and the gross earnings made by the dismissed employee in such other employment.

(e) In the event an employee referred to in this Section 5 is entitled to unemployment benefits under applicable law but forfeits such unemployment benefits under any unemployment insurance law because of his or her failure to file for such unemployment benefits (unless prevented from doing so by sickness or other unavoidable causes) for purposes of the application of Sub-section (c) of Section 6 of the Appendix, they shall be considered the same if they had filed for, and received, such unemployment benefits.

(f) If the employee referred to in this Section 5 has nothing to report under this Section 5 account of their not being entitled to benefits under any unemployment insurance law and having no earnings from any other employment, such employee shall submit, within the time provided for in Sub-section (a) of this Section 5, on the appropriate Carrier provided form annotated "Nothing to Report."

(g) The failure of any employee referred to in this Section 5 to provide the information required in this Section 5 shall result in the withholding of all protective benefits during the month covered by such information pending Carrier's receipt of such information from the employee.

(6) This shall constitute the required decision as stipulated in Article 1, Section 4 of the protective conditions deriving from I.C.C. Docket No. AB-18 (Sub. No. 21).

(7) Prior to implementing the provisions of this decision, the company will provide advance written notice. However, if it becomes necessary that Carrier defer implementation of the transaction, now scheduled for June 1, 1980, the representatives will be advised of the necessity to defer implementation as well as to when such transaction will be effectuated.

Issued at Falmouth, Massachusetts, May 19, 1980 by Neutral Referee Arthur T. Van Wart.