award #3

(3)

ARBITRATION COMMITTEE ESTABLISHED UNDER SECTION 4
OF THE OREGON SHORT LINE CONDITIONS

UNITED TRANSPORTATION UNION (C.T.E.) -and- ILLINOIS CENTRAL GULF RAILROAD	OPINION AND AWARD December 19, 1980

On September 10, 1979, the Illinois Central Gulf Railroad (hereinafter the Carrier) secured authority to abandon a portion of its line. The involved trackage extended 45.3 miles, from milepost 22.8 near Walnut Grove, Mississippi, to milepost 68.1 near Wells, Mississippi. In authorizing the abandonment, the Interstate Commerce Commission imposed the Oregon Short Line employee protection provisions, which are commonly referred to as Oregon III.

By letter dated September 25, 1979, the Carrier advised the United Transportation Union (hereinafter the Organization) of its intention to abandon the trackage. Such notification is required pursuant to Section 4 of Oregon III, in the event the involved transaction " ... may cause the dismissal or displacement of any employees, or rearrangement of forces ... ". The September 25, 1979 letter stated that the Carrier expected no displacements as a result of the abandonment. Therefore, the advice contained in the letter was offered without prejudice to the Carrier's position that neither notice nor an implementing agreement were required.

Thereafter, the parties corresponded and met on various dates between October 1, 1979 and February 19, 1980. During that period the Organization took the position that it believed displacements would in fact occur, and that an implementing agreement was therefore required. By letter dated November 14, 1979, the Carrier indicated its willingness to enter into an agreement similar to ones entered into in connection with previous abandonments, but did not concede that such an agreement was necessary. That proffered agreement was not accepted by the Organization. Another Carrier letter dated January 22, 1980, described the operational changes which were expected to flow from the abandonment. Two through freight assignments formerly operating between Louisville and Jackson via Union would thereafter operate between Louisville and Jackson via Newton. An existing local performing service between Newton and Union would thereafter also operate between Union and Walnut Grove. Finally, a switch engine operating out of Jackson would service Wells.

The parties arrived at an interim understanding on March 6, 1980. It was agreed that questions concerning the need for an implementing agreement and its contents would be arbitrated, and that any agreement

resulting therefrom would apply restroactively to the date of the abandonment. The abandonment would occur April 3, 1980, but the two through freight assignments referred to above would not set out or pick up cars between Jackson and Newton while the issue under consideration in this proceeding was being arbitrated.

A hearing was held on July 3, 1980, in the Carrier's offices in Chicago, Illinois, at which all members of the Arbitration Committee were present. The Organization and the Carrier presented detailed written submissions with supporting documentary exhibits, and both parties were afforded the opportunity to orally argue their respective positions.

The Committee must first address the question of whether an implementing agreement is required. The Carrier has stated that dismissals, displacements or rearrangement of forces have occurred as a result of the abandonment. The Carrier also contends that the Oregon III provisions are similar to, and derive in part from, the so-called Amtrak Appendix C-1 provisions. An award by Referee Harold M. Weston is cited, which was rendered in a case involving the Brotherhood of Locomotive Engineers, the Burlington Northern, Amtrak, and the Milwaukee Railroad. In that award it was held that no implementing agreement was required pursuant to Appendix C-1 when Milwaukee enineers operated Amtrak passenger trains over an eleven (11) mile portion of the Burlington Northern. The facts and circumstances referenced in that award can be distinquished from those in the instant case. We first note that Referee Weston concluded his decision by stating:

> "This conclusion is based on the specific facts of this case, including particularly the absence of bad faith on the part of the Carriers, the relatively small amount of trackage involved, the large volume of work available in the seniority district in question and the lack of proof that any BN engineer actually sustained damage as the result of the transaction."

The Carrier has presented no data which would persuade the Committee to invoke the principle of de minimus, i.e. no data which demonstrates that the abandoned trackage is insignificant or trivial when compared to the remaining trackage in the involved seniority district. Of even greater weight is the Appendix C-1 language underlying Referee Weston's reference to the absence of proof that BN engineers had been adversely affected. The C-1 provisions reference transactions "which <u>will</u> result in a dismissal or displacement of employees or rearrangement of forces", and he was able to conclude that such results had not and would not occur. By contrast, the applicable language in Oregon III references transactions "which <u>may</u> result in a dismissal or displacement of employees or rearrangement of forces." The fact that employees have not been affected by an abandonment during a given period does not necessarily preclude their being affected in the future. This is particularly true in the instance case, where there is uncertainty with respect to possible changes in the Carrier's operation after this award is rendered, when setting out and picking

up cars between Jackson and Newton is no longer prevented by the March 6, 1980 understanding. The Committee therefore concludes that an implementing agreement pursuant to Section 4 of Oregon III is required.

While this Committee concurs in the Organization's position that an implementing agreement is required, it also concurs in the Carrier's position that the scope of the agreement is limited. Section 4 of Oregon III refers to " ... reaching agreement with respect to application of the terms and conditions of this appendix ... ". The levels of benefits have been established by the appendix. The implementing agreement properly deals with the means by which such levels are to be afforded, but may not raise or lower them unless the parties have so agreed. The Carrier has correctly pointed to Section 2 of Oregon III which preserves provisions of existing collective bargaining agreements, Section 11 of Oregon III which provides the proper forum for the adjudication of disputes involving the interpretation, application or enforcement of Oregon III provisions (other than those contained in Sections 4 and 12),and Section 13 of the Merger Protective Agreement which provides the proper forum for the adjudication of disputes arising pursuant to that Agreement. All of these serve to circumscribe this Committee's authority.

In Section (1) of its proposed agreement, the Organization seeks the certification of all employees in the involved seniority districts as having been adversely affected as a result of the transaction, and as having therefore achieved protected status. Section 11 of Oregon III which was referred to above provides, in subsection (e), a procedure whereby it may be determined whether or not a given employee was "affected by a transaction." While the Committee is not insensitive to the Organization's concern regarding the issue burden of proof, a matter explicitly addressed in Section 11 may not be resolved by recourse to a Committee established pursuant to Section 4.

In Section 2 of its proposed agreement, the Organization proposes that no employee may be required to change his point of employment subsequent to the transaction. The Committee does not believe that this proposed restriction is permissible given Section 6 (d) of Oregon III, which states:

> "The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's ... failure to return to service after being notified in accordance with the working agreement ...".

Oregon III contemplates that a dismissed employee may be required to perform service at any location to which he may be recalled pursuant to the applicable collective bargaining agreement.

Section 3 of the Organization's proposed agreement concerns travel time and auto allowances. As was previously stated, the Committee must reject any provision which seek to increase benefits above the level already established.

Section 4 of the Organization's proposed agreement defines a "change in residence" as a move in excess of twenty-five (25) miles from the former work location. Adopting this definition might well lead to instances in which employees would be considered to have been required to change their residence when they exercised seniority to a work location nearer their residence than was their former work location. This result can and should be avoided, and a definition of "change in residence" would facilitate the implementation of the Oregon III provisions. The Committee therefore adopts the following definition, which is contained in the agreement attached to this award:

> "A change in residence is required when an employee is required to change the point of his employment as a result of the transaction by a distance greater than twenty-five miles, provided his new point of employment is father from his residence than was his old point of employment."

The remaining sustantive provisions in the Organization's Section 4 exceed the benefit levels of Section 9 of Oregon III and thus will not be adopted by this Committee.

Sections 5 and 6 of the Organization's proposed agreement seek to modify and/or increase displacement allowance benefits. Section 5 of the Organization's proposal would nullify Section 5 (b) of Oregon III which provides that employees may be treated as occupying higher paying positions for which they failed to bid in accordance with their seniority. Section 6 would restrict the definition of a voluntary absence to a failure to perform service on one's regular assignment. Such a restriction is not appropriate since an employee's "average monthly compensation" may well include earnings accruing from a variety of assignments.

Section 7 of the Organization's proposed agreement and Section 3 (d) of the Carrier's proposed agreement provide for claim forms and the establishment of time limits. The Carrier seeks to adopt the time limits of the applicable schedule agreement. The Committee believes it is appropriate to retain provisions which have the virtue of having been negotiated by the parties; thus, the Carrier's Section 3 (d) with slight modifications has been incorporated into the agreement attached to this award.

Section 8 of the Organization's proposed agreement and Sections 2 and 3 (a) of the Carrier's proposed agreement both depart from the literal provisions of Sections 5 and 6 of Oregon III regarding the computation of displacement and dismissal allowances. The Organization desires to base the test period on the twelve months prior to the transaction rather than the twelve months prior to the date of dismissal or displacement as provided by Oregon III. Pursuant to Oregon III, a month may only be included in the test period if the employee performed service during said month. The Organization proposes to exclude any month from the test period in which service was performed less than fifty (50) percent of the time, and further proposes to increase earnings for months in which no earnings accrued for seven (7) consecutive days or more. The Carrier proposes computing dismissal

and displacement allowances by dividing the test period compensation by thirteen (13), to produce a figure applicable to a four (4) week period rather than a month. This implementation on a four (4) week basis is readily accommodated by the Carrier's payroll system. The division by thirteen (13) in fact tends to enrich the employees, since there are slightly more than thirteen (13) four (4) week periods in a year. Ordinarily, the Committee would be willing to accept a provision such as that proposed by the Carrier, which affords employees adequate protection while substantially easing administrative burdens. However, the Organization's proposed Section 8 explicitly calls for a division of test period earnings by twelve (12). Since the parties are unable to agree, the attached agreement contains neither of the proposals discussed in this paragraph, and Sections 5 and 6 of Oregon III are to be implemented on the basis of their literal language.

Section 9 of the Organization's proposed agreement and Section 4 of the Carrier's proposed agreement both address the question of election of benefits, a matter covered by Section 3 of Oregon III. While the Committee feels it redundant to restate the provisions of Section 3 in an implementing agreement, the attached agreement does contain the Carrier's proposal that the election be made within thirty (30) days of dismissal or displacement.

While the attached agreement contains certain provisions proposed by the Carrier, the Committee has refrained from including other provisions which merely restate the provisions of Oregon III. If, however, the parties wish to incorporate other substantive terms from Oregon III in their implementing agreement, in the belief that such repetition of conditions will aid employees in their understanding of their rights, this Committee would approve such action.

The attached implementing agreement constitutes the award of this Committee.

Richard R. Kasher

RICHARD R. KASHER
Neutral Referee

Bryn Mawr, Pennsylvania
December 19, 1980

ILLINOIS CENTRAL RAILROAD and UNITED TRANSPORTATION UNION

IMPLEMENTING AGREEMENT
ENTERED INTO PURSUANT TO
SECTION 4 OF THE
OREGON SHORT LINE CONDITIONS

Section 1

This agreement implements the protective conditions provided for employees who are displaced or dismissed as a result of the abandonment of that portion of the Pearl River District between Wells and Walnut Grove, Mississippi as provided for in ICC Docket No. AB-43 (Sub-No. 52F) dated September 10, 1979.

Section 2

An employee who believes that he has been displaced or dismissed, and who files a written request with the Superintendent, will be furnished a written statement of the test period earnings used to develop his displacement or dismissal allowance.

Section 3

A displaced or dismissed employee shall use the claim form provided by the Carrier to claim the benefits to which he may be entitled.

Section 4

The time limit rule of the applicable schedule agreement shall apply to claims for protective benefits.

Section 5

A change in residence is required when an employee is required to change the point of his employment as a result of the transaction by a distance greater than twenty-five (25) miles, provided his new point of employment is farther from his residence than was his old point of employment.

Section 6

An employee entitled to elect between the benefits provided under this agreement and benefits provided under another agreement shall make such election within thirty (30) days after the date he is displaced or dismissed.