Answer #4

(4)

ESTABLISHED PURSUANT TO
ARTICLE I SECTION 4 OF
OREGON SHORT LINE III CONDITION

PARTIES TO DISPUTE

DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY

AND

RAILWAY LABOR EXECUTIVES' ASSOCIATION

Pursuant to the procedures set forth in Article I, Section 4 of the Oregon Shortline III conditions the Denver & Rio Grande Western Railroad Company on May 5, 1980 requested that the National Mediation Board appoint a referee to resolve certain questions which D&RG identify as:

"some of the issues in dispute are whether or not the Oregon Short Line III conditions require...."

I Durango & Silverton Narrow Gauge Railroad Company to

(1) give notice to employees of the Narrow Gauge Line.

(2) offer employment to employees holding positions on Narrow Gauge Line on date of transaction (date of sale).

II The Denver & Rio Grande Western Railroad Company employees as a condition paramount for consideration for eligibility for "dismissed employees" or displaced employee status to hold positions on Narrow Gauge Line on date of transaction (date of sale).

III The Denver & Rio Grande Western Railroad Company to determine "dismissal allowances" or "displacement allowances" earnings during the last 12 months preceding date of transaction (date of sale).

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Initial Arbitration hearings were held on December 18, 1980 at Denver, Colorado. R.L.E.A.'s position was initially presented orally during the hearing. On December 19, 1980 R.L.E.A. submitted issues in writing and presented supporting argument.

Issues raised by R.L.E.A. are as follows:

1. Does the Arbitration panel have the jurisdiction under Article I, Section 4 of the Oregon Short Line III conditions to determine whether the order of the ICC in Finance Docket No. 29096 requires the D&S, as well as the RGW, to honor the Oregon Short Line III conditions?

2. Does the panel have the jurisdiction under Article I, Section 4 of the Oregon Short Line III conditions to determine that only those RGW employees who are actively employed on the D&S line on the date of sale, or who are "bumped" by such an employee, are "protected" employees under the Oregon Short Line III conditions?

3. Does this panel have the jurisdiction to interpret the language in Article I, Sections 5 (a) and 6 (a) defining displacement and dismissal allowances?

4. Can the carrier consummate the sale of the narrow gauge line once a decision is rendered on the above, or must an implementing agreement or arbitrated implementing arrangement be reached before any change is made in operations, services, facilities or equipment?

On December 29, 1980 D&RG filed a letter with the Arbitration panel protesting R.L.E.A.'s late filing of it's submission. D&RG contends the four issues presented there are not timely or presented within the time provided and required by Oregon Short Line III conditions and should not be considered by the Arbitration panel. On December 31, 1980 D&RG filed a brief in response to the issues presented by the Railway Labor Executives' Association.

BACKGROUND

The Durango & Silverton Railroad is a 45 mile narrow gauge line owned and operated by the Denver & Rio Grande Western Railroad Company (D&RG). The Interstate Commerce Commission by order issued on January 16, 1980 granted the Durango & Silverton Narrow Gauge Company the right to acquire and to operate the narrow gauge line. (Finance Docket No. 29096).

The Commission Order imposed the Oregon Short Line III protective conditions, the cost of which is to be borne by D&RG.

OREGON SHORT LINE III CONDITIONS, ARTICLE I, SECTION 4

4. NOTICE AND AGREEMENT OR DECISION.---(a) Each railroad contemplates a transaction which is subject to these conditions and may cause the dismissal or displacement or any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transactions 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 displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(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 when 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.

The narrow gauge railroad (D&S) is operated on a seasonal basis as a tourist attraction from approximately May 30th thru the month of September. During the balance of the year the Railroad's operations are closed down.

Employees who work on the narrow gauge line (D&S) hold seniority rights on the D&RG. Each year when the operations commence on the D&S various positions are filled from the ranks of the above employees. During the off season a small force is employed on a year-round basis engaged principally in maintenance service.

The Durango & Silverton Narrow Gauge Railroad Company has not served a written notice under Article I, Section 4 of the protective conditions.

The Denver & Rio Grande Western Railroad served such ninety (90) day notice and the D&RG and representatives of the employees met and attempted to negotiate an agreement with respect to the appropriate application of the terms and conditions under the employee protective conditions. The parties failed to reach an agreement and D&RG requested the National Mediation Board to appoint a referee as provided for in Article I, Section 4 of the Oregon Short Line III conditions.

On June 13, 1980 the Railway Labor Executives' Association filed a complaint before the Interstate Commerce Commission for injunctive relief seeking to have the Durango & Silverton Narrow Gauge Railroad Company enjoined from consummating the transaction authorized by the Commission unless and until D&SNG complies with Article I, Section 4 of the conditions which were imposed by F.D. No. 29096.

Answering briefs were filed by the defendants, D&SNG on October 24, 1980 and the D&RG on October 24, 1980. R. L. E. A. filed a reply brief of complaint on November 24, 1980. This complaint is presently pending before the Commission.

The above chronology of events is set forth since the complaint filed by R.L.E.A. and now before the Commission is in substance the same issue as that identified above as D&RG issue I placed before this Arbitration panel.

DISCUSSIONS OF ISSUES

I. The questions raised by D&RG's Issue No. 1 is pending before the Commission. The status and disposition of this issue is discussed in the decision below.

II. The question raised under Issue II above by D&RG involves two separate issues:

(a) Definition and application of the term "transaction".
(b) Status of employees subject to the conditions on date of "transaction" (date of sale).

D&RG expresses the opinion that the term "transaction" applies only to the initial sale of the property (transfer of ownership) and does not apply to changes in operations, rearrangement of work forces, "etc" which may come about subsequent to date of sale.

The R.L.E.A. contends the language as used by the Commission in defining the term "transaction" which reads: "Any action taken pursuant to authorization of this Commission in which these conditions have been imposed", calls for a broader interpretation and application.

R.L.E.A.'s position is that a "transaction" as implied by the conditions may take place at a time subsequent to the initial transaction (date of sale) and as a consequence trigger the protective period for "dismissed employee" or "displaced employee".

The second question raised under D&RG issue II above is the contention by D&RG that the condition paramount for consideration for eligibility of "dismissed employees" and "displaced employees" status, to hold positions on Narrow Gauge Line on date of "transaction" (date of sale).

The D&RG's position reflects that only those employees who are holding a position on date of sale or those who may become displaced by these employees qualify for protection under the conditions. As stated the D&S operation is seasonal thus if the date of "transaction" as interpreted by D&RG falls at the time of year when the operation is closed, (in this case it is anticipated to be January 1981) all seasonal employees who constitute the greater part of the work force will not come within the designation of protected employees.

R.L.E.A. contends that for this Arbitration panel to agree to D&RG's position would be tantamount to rewriting the protective conditions by reducing them which R.L.E.A. contends would be in violation of the clear intent of the Commission. R.L.E.A. also questions the authority of this panel to alter the conditions as ordered by the Commission.

III. The question raised by D&RG's Issue III relates to the basis of determining compensation during the last 12 months preceding date of transaction (date of sale).

D&RG contends that the 12 months test period in determining compensation for "dismissed employees" or "displaced employee" be calculated on compensation received by the employee during the last 12 months preceding the date of sale.

R.L.E.A. contends allowances are to be calculated by using total compensation received by the employee during the last 12 months in which he performed service preceding the date of his displacement or dismissal.

R.L.E.A. further alleges that this Arbitration panel established pursuant to Article I, Section 4 does not have the jurisdiction to interpret the language of Article I, Sections 5 and 6 of the protections as this authority is delegated to the Section 11 committee.

IV. R.L.E.A. in oral hearing on December 10, 1980 and in their written submission of December 19, 1980 submits:

> Can the carrier consummate the sale of the narrow gauge line once a decision is rendered on the above, or must an implementing agreement or arbitrated implementing arrangement be reached before any change is made in operations, services, facilities or equipment?

V. By letter dated December 29, 1980 D&RG protested against the panel's acceptance of R.L.E.A.'s written submission on issues and arguments, the contention being that it is untimely and violates the time limits of Article I, Section 4. R.L.E.A. during oral hearings on December 10, 1980 presented in substance the same issues and position. No objection or protest was entered by D&RG at the December 10th proceedings. The arbitrator concludes the written submission of R.L.E.A. dated December 19, 1980 and D&RG's reply submission dated December 31, 1980 are properly before the arbitrator for consideration.

DECISION OF ARBITRATOR

ISSUE I

The parties having agreed that D&RG's Issue No. I is outside the jurisdiction of this Arbitration panel are therefore directed to prepare a joint order to the Interstate Commerce Commission advising the Commission on the matter and forwarding same to the arbitrator for signature and transmittal to the Commission.

ISSUE II

DEFINITION OF TERM "TRANSACTION"

It is to be noted the term "transaction" was first used by the Commission in the New York Dock Ry. conditions.

The Court in New York Dock Ry. vs United States 609F 2d 83, 94 (2d Cir. 1979) in discussing the definitional provisions contained in the New York Railway conditions stated the following:

> "although this definition has no precise ancestor in either the "New Orleans conditions" (as clarified in Southern Control II) or in the appendix C-1 conditions, it is clear from the definition, that the goal which the I.C.C. had in mind was encompassed in its definition of "transaction" the same situations that were within the parallel "coordination" employed in the admitted blue print for all current employees protective packages, the WJPA. we do not believe that this goal is beyond the statutory authority conferred on the I.C.C. in formulating employee protective conditions pursuant to 49 USC Par. 11347. Nor do we believe that the I.C.C.'s attempt to achieve this goal strays so far from the mark that the term "transaction" needs any redefinition by us".

The I.C.C. in its report on Finance Docket No. 28250 (New York Dock Railway) stated:

> "Since Article I, Section 4 here is intended to incorporate the full protection of Sections 4 and 5 of WJPA, the term "transaction" should be redefined to set the notice, negotiations and arbitration provisions in motion in the same situation as does the term "coordination". We also note that the broad definition is necessary in the type of transaction for which approval is required under 49 U.S.C. Par. 11343 et seq. because the events actually affecting the employees might occur at a later date than the initial transaction yet still pursuant to our approval (consolidation of employee rosters et cetera. In all these situations, employees should be given notice and the right to negotiation and arbitration; therefore, we will modify the term "transaction" so that it will apply to any action taken pursuant to a Commission authorization upon which these conditions are imposed".
> (emphasis added)

The I.C.C. report in Finance Docket No. 29096 (Oregon Short Line III)conditions stated:

> "The term "transaction" in Article I, Section 1 (a) which triggers the applicability of the article I, section 4 notice and agreement provisions is redefined broadly like the term "coordination" was defined in the WJPA. Transactions means any action taken pursuant to authorizations of the Commission on which these provisions have been imposed. This will appropriately protect employees who may be adversely affected because of (but sometime after) consummation of the abandonment".
> (emphasis added)

In the opinion of the arbitrator what is stated above clearly defines the term "transaction" as being synonymous with the term "coordination" as used in WJPA.

The term "time of coordination" as used in WJPA is defined as:

> "the period following the effective date of a coordination during which changes consequent upon coordination are being made effective, as applying to a particular employee, it means date in said period when that employee is first adversely affected as a result of said coordination".

Based on the above it is clear that the term "transaction" as used in the Oregon Short Line III conditions also extend to actions taken pursuant to the I.C.C. order at a date later than the initial date of sale.

ELIGIBILITY FOR "DISMISSED EMPLOYEE" OR "DISPLACED EMPLOYEE"

The arbitration panel in its deliberation on this issue must accept and consider as a paramount fact the basic concept of Employee Protection Agreements or Protective Conditions imposed by the Commission as being designed as the terms indicate, to provide protection to employees against adverse effects flowing from transactions authorized by the Interstate Commerce Commission.

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The arbitrator finds; as a condition paramount for consideration for eligibility for "dismissed employee" or "displaced employee" status need not hold positions on Narrow Gauge Line on date of sale. However it is a condition precedent that for employees to avail themselves for consideration for eligibility for "dismissed employee" or "displaced employee" status that they hold employment rights on D&RG on date of sale.

The parties by their respective written submissions are in agreement that the questions concerning the interpretation of the language of Sections 5 and 6 of Article I are beyond the jurisdiction of this Arbitration panel.

Thus the issue placed before this Arbitration panel with respect to a determination of displacement and dismissal allowance is moot.

R.L.E.A. ISSUE IV

R.L.E.A. requests the Arbitration panel to determine whether the Carrier can consummate the sale of narrow gauge line following the "decision" rendered by this Arbitration panel.

Permission of sale was granted under I.C.C. Finance Docket No. 29096. To ask the arbitrator to nullify such sale would be tantamount to asking for administrative review of the above I.C.C. action which is beyond the authority of this arbitrator.

Notwithstanding, Article I, Section 4 (b) which provides;

> (b) "No change in operations, services, facilities or equipment shall occur until after an agreement is reached or a decision of a referee has been rendered".
>
> (emphasis added)

must be construed to protect the interests of the employees until such time as the mandatory provisions of Article I, Section 4 are concluded:

"Each transaction which may result in a dismiss[illegible] or displacement of empl[illegible]ees or rearra[illegible]ement of the forces shal[illegible] 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"

(emphasis added)

The parties have jointly agreed to remove from the jurisdiction of this Arbitration panel and remand to the Commission for decision the issue concerning the "rearrangement of the forces". Thus the mandate of Article I, Section 4 can not be resolved by "decision" of this arbitrator.

The arbitrator finds the "decision" here rendered on other issues does not set aside the binding application of Article I, Section 4 (b) therefore:

"No change in operations, services, facilities or equipment shall occur until after an agreement is reached or decision of a referee has been rendered".

Neil P. Spairs
Arbitrator

dated January 9, 1981
at San Francisco, Calif.