

Air and #10

10

IN THE MATTER OF ARBITRATION BETWEEN

SOO LINE RAILROAD COMPANY

AND

UNITED TRANSPORTATION UNION

)
:
)
:
)
:
)
:
)

OPINION OF THE

CHAIRMAN

AND

AWARD OF THE

ARBITRATION COMMITTEE

NOMINATED BY THE NATIONAL
MEDIATION BOARD

CASE NO. 10662 & 10662 (Cont'd.)

SUBJECT: CLAIMS FOR PROTECTION UNDER OREGON SHORT
LINE CONDITIONS - ABANDONMENT

ARBITRATION COMMITTEE

CHARLES W. NELSON, CARRIER MEMBER
HOWARD G. KENYON, UNION MEMBER
PATRICK J. DUFF, IMPARTIAL CHAIRMAN

HEARING HELD AT MINNEAPOLIS, MINNESOTA
JANUARY 22, 1985

A P P E A R A N C E S

FOR THE CARRIER:

James G. Bender
Director, Labor Relations

FOR THE ORGANIZATION:

J. E. Beyer
General Chairman

AUTHORITY

By letter dated November 7, 1984, the undersigned Arbitrator was notified by the National Mediation Board of his nomination as Chairman of the Arbitration Committee appointed to hear and decide an unresolved dispute pursuant to Section II of the Appendix to the Decision of the Interstate Commerce Commission (ICC) in Oregon Short Line Railroad Company - Abandonment Goshen, 360 ICC 91 (1979), between the SOO LINE RAILROAD COMPANY (Carrier or Company) and the UNITED TRANSPORTATION UNION (Organization or Union). On Tuesday, January 22, 1985, the Arbitration Hearing was held at the Company Offices, Minneapolis, Minnesota. Both Parties presented testimony, written evidence, briefs and oral arguments in support of their respective positions. The record was closed at the conclusion of the Hearing and the matter in controversy is now ready for final determination.

FACTUAL BACKGROUND

On September 27, 1977, the Carrier made application to the ICC for authority to abandon approximately 49 miles of railroad north of Baraga, Michigan - Baraga to Houghton, Houghton to Calumet and Houghton to Lake Linden, MI. Beginning in March of 1978, hearings were held on the Company's abandonment request. During those proceedings, Administrative Law Judge Fitzpatrick directed those in opposition to the proposed abandonment (The Union, Michigan Department of Transportation (MDOT) and various shippers in the area to be affected) to submit proposals to the Carrier for a negotiated settlement.

The Union proposed that the Carrier establish a "Road Switcher" assignment at L'Anse, MI. This type of assignment is without benefit of initial and final terminal delays, switch rules, automatic release rules, car-scale additive and doubling rules. The intended purpose of this Union proposal was to enable the Company to reduce its operating expenses by permitting more operational flexibility. On July 18, 1978, both the Carrier and Organization executed an agreement which established the "Road Switcher" assignment.

By final decision dated August 27, 1979, the ICC granted the Company authority to abandon only 30 of the originally requested 49 miles from Hancock to Calumet and from Dollar Bay to Lake Linden, MI. That partial abandonment decision was made "subject to the conditions for the protection of railway employees prescribed by the Commission in AB-36 (Sub-No. 2) Oregon Short Line R. Co. - Abandonment Goshen 360 ICC 91 (1979)".

The Carrier later again petitioned the ICC for approval to abandon the remainder of the originally requested trackage north of Baraga, MI. On October 27, 1981, the ICC issued a decision granting the requested complete abandonment between Baraga and Calumet and Lake Linden, MI. However, MDOT then offered to subsidize the train operation north of Baraga for one year in the amount of \$242,000.00 and the offer was accepted by the Carrier and train service continued there.

Shortly thereafter, on November 13, 1981, the "Road Switcher" assignment at L'Anse was abolished and the Carrier maintains that this decision was made as a result of declining business conditions in the 8th Subdivision. An assignment was then established to work out of the Marquette crew board. Approximately six months later this assignment was also abolished and the 8th Subdivision north of Baraga thereafter was serviced by an extra crew called from the Marquette board on a trip by trip basis, as needed, since there was no regularly assigned service. On September 30, 1982, the MDOT subsidy expired and it was not renewed. The ICC issued a final decision dated September 29, 1982, effective October 1st, which authorized the Carrier to proceed with the abandonment and this was immediately done.

On October 8, 1982, G. E. Warner, Company Director of Labor Relations, sent the following registered letter to General Chairman J. E. Beyer of the Union:

Dear Sir:

Enclosed is a copy of the Notice given by the Soo Line Railroad Company of its intention to abandon its operations north of Baraga, Michigan. By decision of the Interstate Commerce Commission served October 27, 1981, the Soo Line was authorized to abandon operations north of Baraga, Michigan. By decision served November 12, 1981, the Commission postponed issuance of the certificate of abandonment because the Michigan Department of Transportation (MDOT) had notified the Commission of its intention to subsidize operation of the line in accordance with the Interstate Commerce Act and Commission regulations relating thereto. In a subsequent decision served February 2, 1982, the Commission prescribed subsidy terms, which resulted in MDOT subsidizing operations until September 30, 1982. MDOT has advised that the subsidy will not be renewed. By decision served October 1, 1982, the Interstate Commerce Commission has authorized the Carrier to proceed with the abandonment. Such abandonment is subject to the conditions for the protection of employees as discussed in Oregon

Short Line Railroad Company - Abandonment Goshen, 360 I.C.C. 91(1979).

This Notice is sent to you pursuant to the protection conditions noted above. Under those conditions, you have five (5) days from receipt of this Notice to request that negotiations be held for the purpose of reaching agreement with respect to application of the terms and conditions of the protection conditions noted above, and to agree upon a place to hold negotiations. If you so desire, we propose that negotiations be held at our offices, Room 320, Soo Line Building, Minneapolis, Minnesota, with the first meeting on Wednesday, October 20, 1982, at 10:00 A.M. Please advise if negotiations are desired, and whether the time and place proposed are agreeable.

By letter dated October 13, 1982, General Chairman Beyer responded to Director of Labor Relations Warner advising that the Association desired to negotiate an agreement providing protection benefits for employees adversely affected by the abandonment. The Parties promptly began negotiations and executed a Memorandum of Agreement (MOA) dated January 17, 1983 which specified that the labor protection conditions of Oregon Short Line would apply to employees affected by the abandonment and provided a procedure for processing their claims.

Nine workers submitted claims which allege that they were adversely affected by the Carrier's rearrangement of forces in anticipation of the abandonment and/or they were directly affected in an adverse manner by the actual abandonment itself. The Claimants are: Brakeman B. J. Olds, Jr.; Conductor P. E. Olivier; Conductor C. H. DesJardins; Conductor J. R. Green; Brakeman F. P. Potvin; Brakeman J. R. L'Huillier; Brakeman J. D. Rule, Jr.; Brakeman G. C. DesJardins and Brakeman G. H. Haupt. The claims were regularly processed, in accordance with both the Oregon Short Line Conditions and the MOA of January 17, 1983. The Carrier denied all of the claims that

are here in dispute on the basis that said employees had not suffered any loss of earnings as a result of the abandonment.

The Parties on May 25, 1983, met and discussed pending claims and the Union requested that the Company certify all Marquette employees as affected. The Company responded that the operation had not changed except for the amount of mileage and asserted that the Claimants would need to elaborate on the factual circumstances of how they were adversely affected. The Parties met again in January and May of 1984 regarding the unsettled claims but both the Carrier and Organization maintained their prior positions and no settlement was reached. Ultimately, the dispute was referred to this Arbitration Committee.

CONTENTIONS OF THE PARTIES

Union Contentions

The Organization submission contends that:

- 1) The Carrier did intentionally divert traffic and discourage shippers;
- 2) The Carrier did rearrange its forces in anticipation of the transaction;
- 3) The Carrier did fail to post the "90 day notice" prior to the transaction; and
- 4) In the handling on the property, the Carrier has failed to produce any probative evidence to prove that the Claimants were not adversely affected by the "transaction."

Carrier Contentions

The Company denies any violation of the applicable protective conditions. It argues that the Union has failed to meet its burden of proof and that any decreased earnings resulted from causes other than the abandonment and thus are not compensable under the Oregon Short Line protective conditions. The Carrier requests that all claims be denied.

PERTINENT PROVISIONS OF INTERSTATE COMMERCE COMMISSION DECISION

No. AB-36 (Sub-No.2)

OREGON SHORT LINE RAILROAD AND THE UNION PACIFIC
RAILROAD COMPANY-ABANDONMENT PORTION GOSHEN
BRANCH BETWEEN FIRTH AND AMSON, IN BINGHAM
AND BONNEVILLE COUNTIES, IDAHO

DECIDED: February 9, 1979

1. No. AB-36 (Sub-No.2) reopened to modify the employee protective conditions.
2. Employee protective conditions to be imposed in railroad abandonments or discontinuances pursuant to 49 U.S.C. 10903 (formerly section 1 (a) of the Interstate Commerce Act) shall be the same as those imposed in consolidations, mergers, and control proceedings under 49 U.S.C. 11344, 11345, and 11346 (formerly sections 5(2) and 5(3) of the Interstate Commerce Act). The conditions include sections 4 and 5 of the Washington Job Protection Agreement of 1936 as they are modified in New York Dock By - Control - Brooklyn Eastern Dist.

(The specific Labor protective conditions to be imposed in railroad abandonment or discontinuance pursuant to 49 U.S.C. 10903, formerly section 1(a) of the Interstate Commerce Act) are set forth in an Appendix to Oregon. These are well known to the Parties and need not be repeated here.)

DISCUSSION AND FINDINGS

Article I, Section 1. (a) of the Oregon protective conditions defines *Transaction* as "any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." We find as a fact that the abandonment of that portion of the rail line authorized to be effective October 1, 1982 qualifies as a transaction. However, the establishment of the "Road Switcher" at L'Anse was the result of the mutually negotiated agreement of the Parties, dated July 18, 1978, and its abolition or discontinuance by the Carrier was authorized by Section VII of that agreement which provides "Nothing in this Agreement shall be interpreted as . . . prohibiting the Carrier from discontinuing an assignment established under this Agreement." We find as a fact that the abolition of the Road Switcher at L'Anse was not a *transaction* within the purview of the Oregon Conditions.

Article I, Section 1. (b) defines *Displaced Employee* as "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." The key question to be resolved is: Were the Claimants employees who have been placed in a worse position with respect to their compensation as a result of the transaction (abandonment)?

Crucial to the resolution of this dispute is the question of burden of proof. The Carrier asserts that the Organization has the burden while the Organization claims that the burden belongs to the Carrier. Article 1, Section 11., (e) of the Oregon

Appendix provides "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." Prior cases have further defined the appropriate burden of proof applicable to the New York Dock Conditions, which were adopted in Burlington Northern Railroad and also were adopted in Oregon. Arbitrator David Dolnick, in a Burlington Northern case explained principles which are equally apposite here. He stated:

"To sustain the claim, Employees must show by a preponderance of acceptable, clear and convincing evidence that the Claimant is either a "displaced employee" or a "dismissed employee" as a result of a "transaction" as defined in Article I, Section 1 of the Merger Protective Agreement. Employees must show that the Claimant has suffered a loss of earnings or that he has been furloughed because of a "transaction" resulting from the merger. The mere fact that the Claimant has, since the merger, suffered a loss of earnings or was furloughed is not enough to entitle him to displacement allowances or to dismissal allowances or to any other compensation provided for in the said Merger Protective Agreement. Employees must show that such loss of earnings or furlough resulted from a "transaction" as defined in Article I, Section 1 of the Merger Protective Agreement. In their submission to this Board, Employees admit that "adverse effect must be shown by the Organization." But this adverse effect must also arise out of a "transaction."

"To sustain the claim, Employees must first prove that Claimant's displacement or dismissal is a direct result of a "change in operations, services, or facilities on the railroad pursuant to the merger authorized by the Commission's Order."

The majority of members of the Arbitration Committee adopt the definitive explanation of the pertinent burden of proof set forth by Neutral Dolnick in the Burlington Northern case as equally applicable to the present dispute. We shall evaluate the claims on this basis.

A review of the claims indicate that the majority of Claimants predicate their case on the vague assertion that they sustained a "difference in earnings" for October 1982 and thereafter in comparison with what they are entitled to receive under the Oregon Conditions. The Carrier rejected this on the basis that such claims were not supported "by schedule rule or agreement". The mere fact that a Claimant has sustained a loss of earnings since the abandonment is not enough proof to entitle him to supplemental compensation under Oregon Conditions. There must be some evidence produced which could connect any financial loss with the transaction (abandonment). If any reasonable probability of such nexus is proved then the Carrier has the burden of proving that loss of earnings was due to other causes than the abandonment, such as reduced consumer demand. Here the Association relies on mere assertion without any substantiating proof of a nexus between the abandonment and any loss of earnings sustained by Claimants. It is not even clear from the evidence adduced that Claimants Potvin, C.H., DesJardins, G.C. DesJardins, L'Huillier, Green, Olivier, Rule and Haupt actually sustained any loss of earnings for any reason during the time periods in question. If any such economic loss occurred it constituted a factual matter that Claimants were obliged to prove by credible evidence. In addition, the Union had the obligation to establish a link between any loss and the abandonment. The evidence presented by the Organization failed to adequately support its burden of proof. We find as a fact that these claims were properly denied by the

Carrier and such action did not violate either the Oregon Conditions or the agreement of January 17, 1983.

A substantial portion of the claim of B.J. Olds, Jr. is based upon Article 1, Section 10 of the Oregon Appendix. It reads:

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.

Mr. Olds, a Brakeman, claims that during the months of November 1981, January 1982, February 1982, March 1982 and April 1982 his earnings were less than what he earned in the same month one year earlier. To succeed in such claim, this Arbitration Committee must be convinced that the Carrier rearranged or adjusted its forces in anticipation of the abandonment which later occurred, on or about October 1, 1982. The weight of the credible evidence presented fails to support such a contention. During the period beginning about October 27, 1981 when the ICC conditionally approved the abandonment request and the MDOT furnished the subsidy, the Carrier made strenuous efforts to create economic viability in the trackage north of Baraga, MI. The Company presented persuasive evidence that inadequate revenue resulted from its bona fide effort to revive this geographic segment of train service. Unfortunately all efforts ultimately were unsuccessful. The claim of B. J. Olds is predicated on the unproven assertion that the activities of the Carrier during this period were motivated by an anticipation of abandonment. No proof was offered to support this

theory and the Arbitration Committee cannot assume that the activities of the Carrier had the purpose or effect of depriving Mr. Olds of benefits to which he otherwise would have been entitled under the Oregon Appendix. No proof was offered by the Union which would establish that such a plan or scheme existed.

With regards to Mr. Olds' claim for lost earnings after the abandonment, the same principles set forth above for the other Claimants are applicable. We find as a fact that all claims of B. J. Olds were properly refused by the Carrier.

A final comment is necessary concerning compliance with applicable time limits. Article 1, Section 4 of the Oregon Appendix requires the Carrier to "give at least ninety (90) days written notice of such intended transaction". In the present case an unique fact situation prevailed. The original ICC conditional approval of the abandonment was issued October 27, 1981, but due to the MDOT subsidy, which promptly was granted, the Carrier continued to operate the disputed train service. After the one year subsidy expired and was not renewed, the ICC on September 29, 1982, granted final approval of the Company's abandonment request. The Carrier issued the required notice October 8, 1982 which was after the abandonment was implemented. This delay caused no damage to the Association or affected members of the work force. The Parties negotiated a Memorandum of Agreement effective January 17, 1983 which acknowledged that the ICC had imposed the Oregon Protective Conditions and the MOA also established a mutually agreed upon procedure for

processing all resultant claims. Unquestionably there occurred a technical violation of the 90 day notice rule. However, neither any employee affected nor the Union sustained any loss or inconvenience as a result of this delay which resulted from an anomalous fact situation rather than a deliberate omission by the Carrier. For the limited purposes of this dispute this inadvertent infraction will be disregarded but in future situations all time limits specified in the Oregon Short Line Appendix will continue to remain in full force and effect.

AWARD

The Arbitration Committee by majority vote hereby issues the following award:

1. The Carrier has not violated any of the labor protective conditions set forth in Oregon Short Line Railroad Company - Abandonment Goshen, 360 ICC 91 (1979) by the denial of the claims filed by the employees who are the Claimants in this arbitration proceeding.

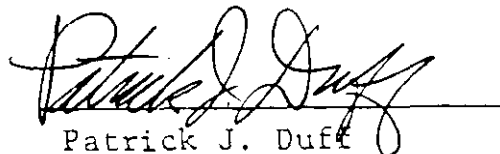
2. All claims submitted by the following employees are denied:

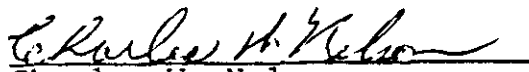
Brakeman B. J. Olds, Jr.
Conductor P. E. Olivier
Conductor C. H. DesJardins
Conductor J. R. Green
Brakeman F. P. Potvin

Brakeman J. R. L'Huillier
Brakeman J. D. Rule, Jr.
Brakeman G. C. DesJardins
Brakeman G. H. Haupt

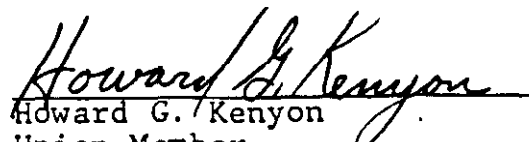
Pittsburgh, PA

January 20, 1985


Patrick J. Duff
Impartial Chairman


Charles W. Nelson
Carrier Member

☒ concur
() dissent


Howard G. Kenyon
Union Member

() concur
☒ dissent