Award #17

PUBLIC LAW BOARD NO. 4057

PARTIES	SOUTHERN PACIFIC TRANSPORTATION CO. (EASTERN LINES)	AWARD NO. 2
TO	AND	CASE NO. 2
DISPUTE	UNITED TRANSPORTATION UNION (C&T), (E) & (S)	

ISSUE TO BE RESOLVED:

Is an implementing agreement between the Carrier and the Organization required pursuant to Article I, Section 4 of the Oregon Short Line Conditions in connection with Interstate Commerce Commission Finance Docket AB-12 (Sub. No. 99X)?

BACKGROUND:

a. History of Dispute

On November 5, 1985 the Southern Pacific Transportation Company (SP) filed an application with the Interstate Commerce Commission (ICC) under ICC procedures governing exempt abandonments for authority to abandon the Carrier's 31.2 mile line of railroad between Milepost 37.00 near Bay City, Texas and Milepost 68.12 near Palacios, Texas. By decision of November 13, 1985, served November 25, 1985, the ICC in Finance Docket No. AB-12 (Sub. No. 99X) granted the Carrier's application. The Commission's decision provided that "[A]s a condition to the use of this exemption, any employee affected by the abandonment shall be protected pursuant to Oregon Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979)."

Since 1979 all business on the Palacios branch has been handled with an extra crew on an as needed basis with the exception of one industry at New Gulf which by agreement is handled with regular assigned pool freight crews from Houston, Texas. For the past three years the only

business on the branch has been an occasional carload for a company at Bay City, Texas interchanged to SP by the Santa Fe Railroad at that location. When that traffic arrives at Bay City, SP deadheads an extra crew from Victoria, Texas to spot the interchanged car to the shipper using a Santa Fe engine leased to SP.

The ICC's decision granting the exemption became effective December 25, 1985. Thereafter, the Carrier abandoned the Palacios line.

By letter of January 3, 1986 the Organization requested that the Carrier meet with it for the purpose of discussing employee protection for employees adversely affected by the abandonment. By letter of January 13, 1986 the Carrier took the position that since no employees were affected by the transaction authorized by the ICC, no discussions were required. A dispute between the Organization and the SP ensued.

The Carrier's January 6, 1986 letter was authored by the highest officer of the Carrier designated to handle such disputes. The parties determined to place the dispute before this Board by virtue of the issue to be resolved set forth above.

b. Parties' Positions

The Organization maintains that the abandonment meets the Oregon Short Line definition of a transaction set forth in Article I, Section 1(a) of the conditions which specifies a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." The Organization goes on to point out that Article I, Section 4 of the conditions requires notice and negotiation

of an implementing agreement with respect to any transaction as defined in Article I, Section 1(a) of the conditions. Accordingly, urges the Organization, the question at issue must be resolved in the affirmative.

In support of its position the Organization points to the ICC's treatment of notice and negotiation provisions in its decision in Finance Docket No. AB-36 (Sub. No. 2) Oregon Short Line-Abandonment-Goshen (Feb. 9, 1979) and in its decision in Finance Docket No. 28256, Mendocino Coast Railway, Inc.-Lease and Operate-California Western Railroad (Feb. 6, 1980) dealing with the level of benefits to be provided employees under ICC imposed protective conditions. The Organization points out that in its 1979 decision the ICC reconsidered and reversed its decision to impose only modified protection in cases of abandonment in favor of providing a full level of benefits for affected employees. The Organization specifically notes that the Commission changed the requirements from twenty days notice with authority for a Carrier to implement the transaction without an agreement, to ninety days notice together with the proviso that "[N]o change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered."

In further support of its position the Organization cites the December 19, 1980 opinion and award of Neutral Referee R. R. Kasher holding that notice and an agreement under Article I, Section 4 of the OSL Conditions was required prior to abandonment. The Organization places substantial emphasis upon the Neutral Referee's recognition, in the face of the Carrier's contention there had been no displacements, dismissals or

rearrangement of forces, that even though such consequences may not be immediate they may indeed occur in the future. The Organization also points out that the Neutral Referee distinguished the provisions of Article I, Section 4 of the OSL Conditions pertaining to notice and agreement from similar provisions in the Amtrak C-1 labor protective conditions on the ground that Article I, Section 4 of the OSL Conditions requires notice and agreement where a transaction may result in adverse effect upon employees whereas the C-1 conditions mandate such procedures only if the transaction will result in adverse effect. The Organization maintains that these principles are applicable to the instant case, and that they mandate the same result reached by Neutral Referee Kasher.

Citing the ICC's recognition that Sections 4 and 5 of the Washington Job Protection Agreement of 1936 (WJPA) formed the basis for the notice and agreement requirements of Article I, Section 4 of the OSL Conditions, the Organization relies upon numerous awards rendered by the Disputes Committee created pursuant to Section 13 of the WJPA. Pointing to the identical language in Article I, Section 4 of the OSL Conditions and Article I, Section 4 of the New York Dock Conditions, the Organization also cites the October 10, 1985 award of Neutral Referee Robert O. Harris interpreting the notice and agreement provisions of Article I,Section 4 of the New York Dock Conditions. The Carrier maintains that the decisions of the WJPA Section 13 Disputes Committee and the Harris award hold that advance notice and agreement or decision by a referee are mandatory requirements of employee protective conditions and, accordingly, that the

Carrier may not unilaterally negate those requirements by simply contending that because no employees are adversely affected no implementing agreements are necessary.

In any event, argues the Organization, the Carrier is factually incorrect in its assertion that no employees were adversely affected by the transaction in this case. Emphasizing that Article I, Section 1(b) of the OSL Conditions defines a displaced employee as one who is placed in a worse position with respect to rules governing his working conditions, the Organization points out that applicable agreements specify the working conditions of crews operating in the involved territory and that those agreements require that tabulations therein will be changed to conform with the limits described in any ICC certificate and order authorizing an abandonment. Accordingly, urges the Organization, an implementing agreement under Article I, Section 4 with respect to the transaction in this case will provide for the change of the tabulations and the mileage of the crews used in the affected territory when operating on the remaining portion of the Palacios branch. Additionally, argues the Organization, Award No. 5 of Public Law Board No. 3707 (Warshaw, Neutral, Feb. 1, 1986) held in the case before it that Article 17 of the agreements requiring that tabulations be changed had not been complied with inasmuch as there had been no negotiations to change such tabulations in connection with the abandonment authorized by the ICC in that case. The Organization contends that award demonstrates the Carrier has violated Article 17 in the instant case because there have been no negotiations in connection with the abandonment authorized by the ICC.

The Organization takes the position that in the instant case the adverse effect suffered by employees flows from the fact that the employees are paid in part based upon the mileage of the district in which they operate. The abandonment here shortened the mileage of the district by 62 miles and reduced the mileage available to employees by that amount.

The Organization contends that the Carrier was well aware of these facts inasmuch as compensation based upon mileage of the district is specified in the schedule agreements between the parties. Accordingly, the Carrier also knew that any reduction of that mileage necessarily would result in employees being placed in a worse position with respect to their compensation.

The Carrier takes the position that it is subject to the requirements of Article I, Section 4 of the OSL Conditions only if employees have been or will be adversely affected by the transaction upon which the ICC has imposed those conditions. No such showing, urges the Carrier, has been made in the instant case.

The Carrier states that it has been Carrier policy for the past eight years not to give notice or to negotiate implementing agreements pursuant to Article I, Section 4 of the OSL Conditions where employees have not or will not be affected by a transaction. Pointing to several abandonment proceedings before the ICC involving territory encompassed by agreements with the Organization, the Carrier asserts that the abandonments were implemented without notice, negotiation or agreement pursuant tc Article I, Section 4. Accordingly, urges the Carrier, the Organization has acquiesced

in the Carrier's policy with the result that the Organization is barred now by the doctrine of laches from contesting that policy. The Carrier asserts that the doctrine of laches is well recognized in the railroad industry as evidenced by numerous arbitration awards cited by the Carrier.

The Carrier argues that the purpose of the notice, negotiation and agreement provisions of Article I, Section 4 is to provide for the dismissals, displacements or rearrangements of forces resulting from ICC authorized transactions. The Carrier maintains that where there are no such adverse effects the procedures of Article I, Section 4 are unnecessary. The Carrier again states that because in the instant case no employees would be adversely affected by the abandonment, the Carrier did not give a notice or negotiate an implementing agreement under Article I, Section 4.

The Carrier argues that Article I, Section 4 is applicable only with respect to transactions which ". . . may cause the dismissal or displacement of any employees, or rearrangement of forces, . . ." (emphasis supplied). The Carrier urges that the word "may" means not only that such eventuality is possible but is "in some degree likely to occur." The Carrier urges that in the instant case no adverse effect is likely to occur. The Carrier contends that the Organization has not taken the position that any employee has been or will be adversely affected, nor has the Organization advanced even a hypothetical or speculative occurrence of such adverse effect. Instead, argues the Carrier, the Organization makes the bold and baseless assertion that notice, negotiation and agreement under Article I, Section 4 are required under all circumstances. The

Carrier maintains that had the ICC intended such a result, it would not have used the word "may" in Article I, Section 4.

Instead, urges the Carrier, the Commission's order in the instant case specifically requires that an employee be affected prior to being afforded protection. Consequently, until such time as adverse effect occurs the literal language of the ICC's order does not require the parties to take action.

The Carrier alleges that in the past two years the Victoria extra boards have remained virtually unchanged except that subsequent to the abandonment employees were added thus indicating an increase in work at that location. The Carrier urges that when this fact is considered in light of the Organization's failure to present evidence of any loss of work on the Palacios branch, the Organization has failed to establish a causal nexus even remotely connecting the transaction to any adverse effect upon employees it represents. Citing several arbitration awards which the Carrier contends apply to the instant case, the Carrier argues that the Organization's failure to establish such causal nexus is fatal to its position here.

Further in this regard the Carrier cites the December 17, 1978 award of Harold M. Weston involving the Brotherhood of Locomotive Engineers, Burlington Northern, Inc., National Railroad Passenger Corporation and Chicago, Milwaukee, St. Paul and Pacific Railroad Company. In that award Neutral Weston, interpreting Article I, Section 4 of the Amtrak C-1 Conditions, ruled that an implementing agreement was not required. The Carrier argues that this Board should reach the came result.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151, et seq. The Board also finds that it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute were given due notice of the hearing in this case.

Preliminary to our consideration of the question at issue in this case, we feel compelled to note that we reject certain aspects of both the Carrier's and Organization's interpretation of Article I, Section 4 of the OSL Conditions. Specifically, we cannot accept the Organization's contention that the procedures of Article I, Section 4 are invoked automatically by any transaction made subject to the OSL Conditions. We find equally untenable the Carrier's position that there must be an actual showing of adverse effect upon employees in order for the procedures of Article I, Section 4 to apply to a transaction. These positions are wholly inconsistent with the plain wording of Article I, Section 4 that the procedures of that provision shall be applicable to any transaction subject to the OSL Conditions which ". . . may cause the dismissal or displacement of any employees, or rearrangement of forces, . . ." We find the Organization's view of this language too broad and the Carrier's too narrow.

We believe the question at issue must be resolved solely upon the factual record before this Board. That record indicates there was no

immediate adverse effect upon employees resulting from the abandonment. However, as the Organization urges, the compensation of employees it represents conceivably could be adversely affected inasmuch as the mileage represented by the abandoned line no longer is to be included in the mileage of the district. The basis for computation of the employees' compensation has been reduced. We find the Carrier's objection to consideration of that fact by the Board is not well founded. Assuming, arguendo, that the Organization did not raise the point on the property, we do not believe that fact bars our consideration of it. In the context of determining the appropriate provisions for an implementing agreement pursuant to Article I, Section 4 of the New York Dock Conditions, Neutral Referee Robert O. Harris in his supplemental decision of October 14, 1985 ruled that any matter involving interpretation or application of the conditions should be considered without regard to whether it had been raised on the property prior to the arbitration proceeding. We find the rationale of that decision highly persuasive with respect to the Carrier's objection in this case.

Nor can we agree with the Carrier's interpretation of the word "may" as that term is used in Article I, Section 4. The Carrier reads that word as meaning a probability that adverse effect will occur. We believe the term is more in the nature of a possibility of such consequences.

We find support for this conclusion in the Kasher award finding that the term "may" in Article I, Section 4 of the OSL Conditions applied

to situations where the exact impact of the transaction was uncertain. Specifically, Neutral Referee Kasher found that simply because ". . . employees have not been affected by an abandonment during a given period it does not necessarily preclude their being affected in the future." The Neutral Referee also found that an implementing agreement pursuant to Article I, Section 4 was required. Unlike the Carrier, we do not believe the Kasher award is inapposite. On the contrary we find it applicable and persuasive with respect to the dispute before us. The same is not true of the award rendered by Harold M. Weston upon which the Carrier relies. That award involved the interpretation of Article I, Section 4 of the Amtrak C-1 Conditions which confines the procedures of that provision to transactions which "will" adversely affect employees.

Clearly the Carrier has an established policy not to give notice or to negotiate or enter into implementing agreements with respect to transactions which do not have a demonstrable adverse effect upon employees. However, we cannot find that the Organization has acquiesced in such policy to the point where it has become established practice and the Organization is barred by laches from taking a contrary position before this Board.

Rights established in Article I, Section 4 of the OSL Conditions are rights implemented by federal law by decision of the ICC. Waiver or extinction of those rights by virtue of laches should not be inferred. Additionally, each abandonment occurs in the context of new and separate facts to which the doctrine of laches, by its nature, is not clearly

applicable. Furthermore, as we have found above, the case before us is not one where there is no realistic possibility of some adverse effect upon employees, the factual basis upon which the Carrier urges the doctrine of laches upon this Board.

We find no merit in the Carrier's argument that the procedures of Article I, Section 4 are unnecessary in the instant case, in view of our finding that the record before us demonstrates uncertainty and possibility as to future adverse effect upon employees as a result of the abandonment. In our opinion that fact also establishes a sufficient causal nexus for purposes of establishing applicability of Article I, Section 4. The arbitration awards cited by the Carrier on this point are inapposite inasmuch as they do not deal with the question of the applicability of the doctrine to Article I, Section 4.

In the final analysis we believe resolution of the dispute before us turns upon the term "may" as that term is used in Article I, Section 4 of the OSL Conditions. We have found that both the Carrier's position that there must be a showing of adverse effect to invoke the application of Article I, Section 4 and the Organization's position that Article I, Section 4 is invoked automatically by the transaction to which the OSL III Conditions apply are both inconsistent with that term. Applying the well established principle governing the interpretation of agreements, statutes and regulations that words are to be given their ordinary and usual meaning, we feel compelled to conclude that Article I, Section 4 applies to any transaction which has the possibility of adversely affecting employees.

We are not unsympathetic to the problems posed to the Carrier by transactions such as the one before us in this case. Negotiation of an implementing agreement under Article I, Section 4 can be time consuming and expensive, particularly if that agreement must be arbitrated. Moreover, the Carrier is prohibited from effectuating the transaction until there is an agreement or an arbitrated implementing arrangement. While Article I, Section 4 contains strict time limitations so as to preclude an Organization from dragging out the notice, negotiation and arbitration procedures of Article I, Section 4 even "minimal" delay may seriously hamper the Carrier. This would appear to be particularly so in situations such as the instant case involving expedited ICC procedures. Potential delay even under the strict time limits of Article I, Section 4 seems inconsistent with those procedures.

Yet, the ICC imposed the OSL Conditions in the instant case with some imputed knowledge of the potential delay contained in the Article I, Section 4 procedures. The ICC officially approved the use of the term "may" therein for the purpose of which, we must infer, assuring that all employees potentially affected by a transaction would receive protection.

We believe any effort to correct what either party may perceive to be an inequitable or difficult situation resulting from the necessity to apply the OSL Conditions in a particular situation must be addressed to the ICC which authored those conditions and not to arbitration forums. Such forums have power only to interpret and apply the conditions, not to

alter them. We believe that by the interpretation of Article I, Section 4 of the OSL Conditions urged upon us by the Carrier, it seeks an alteration or modification in the terms of Article I, Section 4. It is beyond our power to grant that request.

AWARD

The question is answered in the affirmative.

William E. Fredenberger, Jr.
Chairman and Neutral Member

R. P. Guidry
Carrier Member

C. L. Little
Employee Member

DATED:

9-29-86

PUBLIC LAW BOARD NO. 4057

PARTIES	SOUTHERN PACIFIC TRANSPORTATION CO.) (EASTERN LINES)	
		AWARD NO. 2
TO	AND	
		CASE NO. 2
	UNITED TRANSPORTATION UNION	
DISPUTE	(C&T), (E) & (S)	INTERPRETATION

ISSUE TO BE RESOLVED:

Is an implementing agreement between the Carrier and the Organization required pursuant to Article I, Section 4 of the Oregon Short Line Conditions in connection with Interstate Commerce Commission Finance Docket AB-12 (Sub. No. 99X)?

BACKGROUND:

After this Board issued the above-captioned Award determining the Issue to be Resolved in the affirmative, the Carrier requested an interpretation of the Award taking the position that under the terms of the Award the Carrier was required to negotiate with the Organization under Article I, Section 4 of the OSL III Conditions only with respect to those road employees covered by Article 17 of the agreement with the Organization covering conductors and trainmen. The Organization responded opposing the Carrier's position.

On November 5, 1986 this Board conducted a hearing on the Carrier's request for an interpretation.

The Carrier bases its position upon this Board's finding in Award No. 2 that inasmuch as under applicable agreements the mileage of the district upon which employees' pay was computed was shortened by the Carrier's abandonment of the Palacios branch such employees "may" be

affected as provided in Article I, Section 4 of the OSL III Conditions. The Carrier emphasizes that only the agreement covering conductors and trainment has such a provision and points out that there is no similar provision in the agreements covering firemen and switchmen. Accordingly, urges the Carrier, the award should be interpreted not to require the Carrier to enter into negotiations for an implementing agreement under Article I, Section 4 of the OSL III Conditions with respect to firemen and enginemen.

The Organization argues that the Carrier's position is baseless. The Organization emphasizes that road and yard seniority districts have been merged with prior rights accorded each group. Thus, urges the Organization, any road employee dismissed or displaced as a result of a transaction could bump into yard service and would be required to do so with respect to a position producing compensation equal to or greater than the position from which the road employee was displaced or dismissed. The Organization maintains that the chain of bumping would extend throughout the yard employees. The Organization contends that an implementing agreement pursuant to Article I, Section 4 would properly include terms requiring the Carrier to post positions, and the compensation they would produce, which would be available to yard employees so that such employees could make an informed election.

The Carrier responds that the possibility of yard employees being affected by the abandonment which triggered the dispute in this case is not only remote but somewhere between "slim and none." The Carrier emphasizes that in order for yard employees to be displaced or

dismissed as a result of the abandonment in this case the Carrier would have to reduce extra board road assignments. The Carrier argues that is highly unlikely inasmuch as the amount of work performed on the abandoned line by extra board was very small. Moreover, argues the Carrier, the terms applicable to the joint seniority district would require that adversely affected road employees first displace junior road employees and then junior prior rights yard employees. The Carrier maintains that under these circumstances it reasonably cannot be argued that yard employees "may" be affected by the abandonment of the Palacios branch.

FINDINGS:

In Award No. 2 this Board found that the extreme positions taken by both the Carrier and the Organization were inconsistent with the plain wording of Article I, Section 4 of the OSL III Conditions providing that the procedures of that section should apply to any transaction which ". . . may cause the dismissal or displacement of any employees, or rearrangement of forces, . . ." (Emphasis Supplied). We believe the Organization's position in the instant proceeding falls within the scope of that finding.

It must be borne in mind that for three years prior to the Carrier's abandonment of the Palacios branch the only business on the line was an occasional carload for a company at Bay City, Texas spotted by an extra crew deadheaded from Victoria, Texas for that purpose. In order for dismissals and displacements to occur among yard crews as urged by the Organization, it would be necessary for the loss of the work on the

Palacios line to result in dismissals or displacements among the extra board crews at Victoria. In view of the insubstantial amount of work lost by the Victoria extra board crews as a result of the abandonment of the Palacios line, we believe the Carrier's point is well taken that the potential for dismissals and displacements among yard crews in light of the merger of road and yard seniority is at least "slim." In fact, we believe it is so slim that it does not reasonably fall within the scope of the term "may" in Article I, Section 4 of the OSL III Conditions.

This is not to say that in the event a yard employee is actually adversely affected as a result of the abandonment of the Palacios line, that employee would not be entitled to the protections of the OSL III Conditions. Clearly the conditions would apply. The procedures of Article I, Section 11 of the Conditions are available to such an employee.

In that regard we are not persuaded by the Organization's argument that an implementing agreement under Article I, Section 4 of the Conditions is essential to effectuate the requirement that a dismissed or displaced employee must exercise his seniority to an available position which produces compensation equal to or greater than the position from which the employee was dismissed or displaced. An employee who considers himself adversely affected has the right to receive that information from the Carrier, and the Carrier fails to produce that information at its own peril.

In the final analysis, we do not believe the provisions of Article I, Section 4 of the Conditions were intended to apply to a situation

such as the case before us where few if any employees are potentially adversely affected by the transaction. We feel it important to note that the situation before us in the instant proceeding is in stark contrast to the situation involving conductors and trainmen. Those employees have the very real possibility of being adversely affected because the mileage of their assignments, and thus the basis for their compensation, was reduced by the mileage of the abandoned Palacios line.

Thus we find in this interpretation of Award No. 2 that upon the particular facts of the case only conductors and trainmen must be covered by an implementing agreement pursuant to Article I, Section 4 of the OSL Conditions.

William E. Fredenberger, Jr.
Chairman and Neutral Member

DATED: November 25, 1986