Award
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November 25, 1987

All Chief Executives
Railway Labor Executives' Association

Gentlemen:

Enclosed is an arbitration decision between BMWE and the UP issued under the Oregon Short Line conditions which has precedential value under New York Dock as well since the provisions involved are identical in the two protective arrangements.

The issue was whether a "dismissed" employee is to be treated as a furloughed employee thereby losing his health and welfare benefits after four months or an "active" employee in which case his health and welfare benefits and all fringe benefits are preserved throughout his "protective" period (up to six years).

The arbitrator ruled that a dismissed employee's status for fringe benefit purposes must be determined as of the date immediately preceding the "transaction" which affected him: "If an employee was entitled to such benefits before the transaction, then that employee continues to be entitled to them following the transaction."

The arbitrator held that the applicable statutory requirements of Section 10903(b)(2) to which Oregon Short Line must adhere "make it plain that employees affected by an abandonment are to be protected in such a way that their economic situation would be no different that what it was before the transaction."

Sincerely yours,

HIGHSAW & MAHONEY, P.C.

By _____
Wm. G. Mahoney

WGM/bb
cc: J.J. Kennedy, Exec. Secy-Treas., RLEA

Before an Article I, Section 11
Arbitration Committee

In the Matter of Arbitration Between BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and UNION PACIFIC RAILROAD COMPANY	OPINION AND AWARD Nicholas H. Zumas, Chairman and Neutral

BACKGROUND

The undersigned Neutral was selected as Chairman of an Arbitration Committee established pursuant to Article I, Section 11 of I.C.C. Abandonment Docket No. AB-36 (hereinafter "Oregon Short Line" or "OSL"), 360 I.C.C. 91. Hearing was held September 24, 1987 in Washington, DC at which time exhibits were offered and made part of the record and oral argument was heard. The parties presented prehearing submissions. The Brotherhood of Maintenance of Way Employes (hereinafter "BMWE" or "Union") was represented by William G. Mahoney, Esq. and the Union Pacific Railroad Company (hereinafter "UP" or "Carrier") was represented by Mr. E. R. Myers.

STATEMENT OF THE FACTS

By letter dated March 28, 1985, Carrier filed with the Interstate Commerce Commission a Notice of Intent to Abandon pertaining to its track in Yakima County, Washington. On April 25, 1985, Carrier filed its Application to Abandon that same track. By its Certificate and Decision rendered June 11,

1985, the I.C.C. granted Carrier's application to abandon its track in Yakima County. In that Decision the I.C.C. imposed "appropriate labor protection conditions" which in this dispute means the OSL Conditions (hereinafter "OSLC"). The I.C.C. also ordered that the "certificate and decision shall be effective 30 days from the date of service. . ." and that the Carrier "may abandon the line after the effective date of this certificate and decision."

On July 11, 1985, the Carrier notified its employees of the impending abandonment. On July 18, 1985, the Carrier and the Union conferred. The Carrier's letter of July 18, 1985 to the Union confirming the conference of that day identified the Claimants herein as the incumbents of positions to be abolished. The Carrier's letter stated:

> 1. On or before October 1, 1985, the positions of BMWE-represented employes on the Yakima Valley Transportation Company shall be abolished. In the event the abolishments occur prior to October 1, 1985, or are delayed beyond that date, the Company shall provide the General Chairman five (5) days' written notice of the intended action.
>
> 3. Following the abolishment of the three positions, the employes shall become "dismissed" employes within the intent of Section 1(c) of the OSL Conditions, and, as such, shall be eligible for the benefits provided in either Section 6 or Section 7 of the OSLC.

On November 1, 1985, the Carrier issued a force reduction bulletin advising Claimants that effective November 18, 1985, the

"Yakima Valley Transportation Company [the Carrier's subsidiary and Claimants' employer] will be abandoned pursuant to the I.C.C.'s Certificate and Decision dated June 5, 1985." The bulletin provided further that "this bulletin serves as five day notice to incumbents affected: [lists Claimants]."

By letter of November 14, 1985, Claimants accepted the six year protective period provided in OSL and elected to receive a dismissal allowance pursuant to Section 6 of OSL Conditions. In December 1985, one of Claimants was advised by Mr. Robin Rock, the Carrier's Manager - Labor Relations, that Carrier intended to discontinue medical, dental and other fringe benefits after the initial four months of the Claimants' protective period. In response to a letter from the Union protesting this action, the Carrier's letter of December 19, 1985, confirmed its intent to treat Claimants as "dismissed" furloughed employees and that the Carrier would provide them with four months of fringe benefits just as it did for furloughed employees who were not "dismissed" within the meaning of OSL. The Union disagreed with this interpretation and by letter of January 20, 1986, advised the Carrier that it would submit this matter to arbitration pursuant to Article I, Section 11 of the OSLC.

The provisions of the OSLC relevant to this dispute read:

> 1. **Definitions.**--(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(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.

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 also 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 [employment] 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. [Underscoring added]

An exchange of letters between the Carrier and counsel for the Union selected this Neutral as Chairman, and this dispute is now before this Board for adjudication.

ISSUE

The issue to be resolved in this dispute is whether OSLC require that fringe benefits, in the form of health and welfare benefits, are preserved to Claimants, who are "dismissed employees", during their "protection period;" and if so, what should the remedy be.

POSITION OF THE CARRIER

The Carrier contends that Claimants have been treated in complete compliance with the OSLC. Specifically, the Carrier contends that Claimants are "dismissed" furloughed employees and, therefore, are entitled only to those benefits of furloughed employees who are not in a dismissed status pursuant to an

abandonment and the imposition of OSLC. Under the National Health and Welfare Plan, a furloughed employee is provided coverage for a period of four months following the last month in which the employee rendered compensated service. The Carrier argues that it did not certify Claimants for coverage after the fourth month following the month they last rendered compensated service because the eligibility requirements for coverage are conditioned on compensated service.

The Carrier asserts that Claimants have been furloughed since November 18, 1985.

The Carrier contends that by accepting vouchers under Section 6 of OSLC, Claimants have acknowledged they are "deprived of employment or otherwise furloughed within the meaning of the Railroad Employes' National Health and Welfare Plan covering hospital, surgical and medical benefits." Based on that "acknowledgment" of their furloughed status, the Carrier argues that Claimants are only entitled to four months of health and welfare benefits, similar to any other furloughed employee who is not subject to OSLC.

The Carrier cites five cases deciding fringe benefits protection issues under fringe benefits protection provisions of OSLC and four other protective agreements. (The Carrier asserts that the protective provisions of OSLC are similar if not identi-

cal to these four other agreements as well as two additional agreement decisions which the Carrier does not cite.) In each of these cases, Carrier maintains that furloughed employees were not treated as active employees and that the claiming furloughed employees were found to have been treated the same as all other furloughed employees for fringe benefit purposes.

In sum, the Carrier's position is that Claimants are "dismissed" furloughed employees and as such have only those rights to fringe benefits that unprotected employees on furlough have, namely, four months' payment of health and welfare benefits.

POSITION OF THE UNION

The Union argues that Carrier has not treated Claimants in accordance with the OSLC. Moreover, the Union argues that the Carrier has not complied with the statutory requirements on which the OSLC are based.

In its statutory argument, the Union maintains that by denying the fringe benefits to Claimants, the Carrier has violated the statutory mandates of 49 U.S.C. Section 11347 and 45 U.S.C. Section 565. The Union asserts that a denial of those benefits violates the requirement that Carrier, by its abandonment, puts Claimants in "no worse position with respect to employment for at least six years." Specifically, Section 802 of

the 4R act amended Section 1 of the Interstate Commerce Act to require that in I.C.C.'s certification of abandonments, the provisions for protections of employees be "at least as beneficial to such interests as Section 5(2)(f) of [the Interstate Commerce Act] and Section 405 of the Rail Passenger Service Act (45 U.S.C. Section 565)." Upon recodification of Title 49, Section 1 became 49 U.S.C. Section 10903 which retained an almost identical provision for employee protection in abandonments while changing the reference from Section 5(2)(f) of the Interstate Commerce Act to 49 U.S.C. Section 11347 of the recodified Title 49. The reference to 45 U.S.C. Section 565 remained. In relevant parts, those provide:

49 U.S.C. Section 10903 (b)(2):

> On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

Section 5(2)(f):

> As a condition of its approval, under this paragraph (2) or a paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to

continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(2)(f) recodified as Section 11347:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this tile, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1986, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Section 405 RPSA (45 U.S.C. 565):

Section 565. Protective arrangements for employees

(a) Duty of railroads; discontinuance of intercity rail passenger service. A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by discontinuances of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include a discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 [45 USCS

Sections 545, 562] of this Act pursuant to any modification or termination thereof or an assumption of operations by the corporation.

(b) Substantive requirements for protection. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 40(a)(1) of this Act [45 USCS Section 561(a)(1)] between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

The Union argues that the statutes compel the Company to leave Claimants in no worse a position than they would have been had they maintained their employment, and these statutes explicitly compel the preservation of "rights, privileges and benefits (including continuation of pension rights and benefits)" to employees affected by "transactions" under the OSLC.

The Union then proceeds to an examination of various decisions by courts, administrative agencies and arbitrators designed to show that fringe benefits are regularly and properly preserved

to employees. The Union asserts that to deprive fringe benefits to an employee offered by a transaction is to place them in "a worse position with respect to [his or her] employment", thus violating the statutory mandates cited above.

The Union further argues that a "dismissed" employee under OSLC is not necessarily a "furloughed" employee. The Union contends that by applying the statutory mandates to Section 8 of OSLC, that section acts to preserve the economic status of the affected employee as it was before the "transaction." The Union asserts that the language of Section 8 referring to "benefits attached to [the employee's] previous employment" means employment before the employees were "affected." Thus, argues the Union, if the employees were in active service, those benefits, including the fringe benefits here at issue, of active employees continue throughout the protection period.

In sum, the Union maintains that Claimants are entitled to receive fringe benefits for the entire protection period because at the time that the abandonment affected them, they were in active service (which was their "previous employment") and to treat them otherwise is in direct contradiction of the statutory mandates of Titles 45 and 49.

OPINION OF THE BOARD

There is no dispute that the OSLC apply to Claimants herein. Claimants are obviously "dismissed employees" under OSLC, and the I.C.C. Certificate and Decision clearly brings them into the OSLC scheme. What remains to be determined is whether their fringe benefits are preserved for the full protection period.

The statutory underpinnings of OSLC make it plain that employees affected by an abandonment are to be protected in such a way that their economic situation would be no different than what it was before the transaction. The Board finds that the fringe benefits here at issue are one element of that equation. If an employee was entitled to such benefits before the transaction, then that employee continues to be entitled to them following the transaction. We then examine Claimants' status at the time of the transaction.

There was no direct evidence as to the precise time, if any, at which Claimants were placed on furlough. What is apparent from the July 18, 1985 letter is that Claimants were the "incumbents" of positions that would be affected by the transaction. And the November 7, 1985 force reduction bulletin makes it clear that Claimants were the affected employees and that they were not on the distribution list for carbon copies. The bulletin also characterizes itself as a five day notice. The description of Claimants as "incumbents" shows that they were still in active

service. The absence of Claimants from the distribution list implies they were still at work and in active service where they could view a posted bulletin. Likewise, the characterization of the bulletin as a five day notice suggests that Claimants were still in active service, since those notices only go to such employees. Therefore, the Board finds Claimants were in active service at the time of the transaction and concludes that they are entitled to receive the fringe benefits identical to those of active employees for the full term of their protective period. The language in Section 8 of OSLC which refers to "benefits attached to his previous employment" refers to the Claimants' employment before they were "affected"--thus, in active service. Claimants were in active service when affected by the transaction, and only the transaction caused them to be furloughed. Thus, Claimants became "'dismissed' 'active service' 'employees'" rather than "'dismissed' 'furloughed' 'employees'."

Carrier's argument that Claimants were furloughed employees is without foundation. Factually, the dispute did not appear to arise until after the November 7 bulletin. This suggests that it was raised as a result of a failure to furlough Claimants before the abandonment in an attempt to defeat their rights to fringe benefits under Section 8. Even if this were not the case, the furloughing of employees who would be dismissed (i.e. leave regular service as a result of an abandonment) once the abandonment had been decided upon should entitle those employees to the

protections of "active service"--not "furloughed" employees. A Carrier should not be permitted to defeat the rights of an affected employee to his fringe benefits for the term of his protection period simply by placing him on furlough early in the abandonment process. That employee, at the moment of the abandonment-induced furlough, becomes "an employee. . .who as a result of a transaction is deprived of employment with the railroad because of the abolition of his position. . ."; in short, a "dismissed employee."

AWARD

For the foregoing reasons, this Board finds that the Claimants are to be provided health and welfare benefits for the duration of their full protection period; and that they are to be reimbursed for any such payments made thus far to the extent they were actually paid by Claimants.

Nicholas Rumas

Nicholas H. Zumas
Neutral and Chairman

Date: November 20, 1987