
F-9801

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 28250

**NEW YORK DOCK RAILWAY—CONTROL—BROOKLYN
EASTERN DISTRICT TERMINAL**

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EASTERN DISTRICT TERMINAL**

Decided February 9, 1979

The proceeding is reopened and, on further consideration, the employee protective conditions imposed in our prior decision and order in this proceeding are modified. The imposition of employee protective conditions appropriate in certain rail transactions for which approval is sought under 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act] is discussed. These transactions include all rail transactions covered in those sections except trackage rights and lease situations.

Stuart H. Johnson, Jr., and Walter M. King for applicants New York Dock Railway and Brooklyn Eastern District Terminal.

John S. Shannon, Donald M. Tolmie, and William G. Wooldridge for intervenor Norfolk and Western Railway Company.

John O'B. Clarke and William G. Mahoney for intervenor Railway Labor Executives' Association.

Harold A. Ross for intervenor Brotherhood of Locomotive Engineers.

**DECISION OF THE COMMISSION ON FURTHER
CONSIDERATION**

BY THE COMMISSION:

Pursuant to a petition for administrative review filed October 18, 1977, and supplemented May 22, 1978, by the Railway Labor Executives' Association (RLEA), we issued a decision dated July 17, 1978, finding that the entitled proceeding involves a matter of general transportation importance and reopening the proceeding for further consideration of the appropriate level of employee protection to be imposed when approval for certain rail transactions is sought under 49 U.S.C. 11343, *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act].²

¹This decision embraces Finance Docket No. 28294, New York Dock Railway—Securities.

²By decision of November 13, 1978, we extended the deadline for our final decision in this proceeding to February 12, 1979. This action was taken pursuant to 49 U.S.C. 10327(j) [formerly section 17(9)(d) of the act].

PROCEDURAL HISTORY

By initial decision dated May 13, 1977, the Administrative Law Judge recommended that control of Brooklyn Eastern District Terminal (BEDT) of New York, NY, by New York Dock Railway (Dock), also of New York, NY, be approved subject to certain conditions including ones imposed for the protection of employees. More specifically, the Administrative Law Judge imposed the "New Orleans" labor protective conditions² set forth in appendix II of *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 588 (1962), augmented by the Appendix C-1 conditions of the National Railroad Passenger Corporation Agreement (Appendix C-1) with some modifications. Exceptions were filed by the Minority Shareholders of BEDT and Phelps Dodge Products Corporation, individually, and intervenors RLEA and The Brotherhood of Railway and Airline Clerks (BRAC), jointly. Applicant Dock replied.

Inasmuch as Dock's tender offer was to expire on September 30, 1977, the Commission, Division 3, issued an emergency order on September 26, 1977, affirming the initial decision in all respects except as to the appropriate labor protection conditions to be imposed. In that decision the employee protective conditions recommended by the Administrative Law Judge were modified so as to substitute the Appendix C-1 conditions (referred to in that order as the "Amtrak Conditions"). The division noted that a subsequent report would be issued in the proceeding which would contain a detailed discussion of the issues raised on exceptions and that said report would become a part of the September 26 order by reference. Pursuant to a petition filed by RLEA, division 3 issued a supplemental order on September 29, 1977, which modified the prior order by allowing the parties to consummate the transaction authorized but prohibiting them from taking any action that would affect employee rights until the Commission could act on a petition to be filed by RLEA seeking discretionary review of the labor protective conditions imposed in the September 26 order. On October 18, 1977, RLEA filed the described petition under rule 98(c) of the Commission's General Rules of Practice, 49 CFR 1100.98(c), seeking a determination that the question of appropriate employee protective provisions involves a matter of general transportation importance and that the case should be reopened for further consideration. Dock replied on November 25, 1977,

²The Commission initially promulgated the "New Orleans" conditions in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), 360 I.C.C.

opposing the relief sought in the petition. In a "Notice to the Parties" dated March 2, 1978, the parties were notified that action on the above petition and reply would be held in abeyance pending the issuance of the full report of division 3 in this proceeding, upon which issuance the petition and reply could be supplemented to address more fully the issues discussed in the report. The decision of the Commission, Division 3, Acting as an Appellate Division, dated April 11, 1978, was published at 354 I.C.C. 399 (1978). In this decision the basis for the findings made in the emergency order of September 26, 1977, as supplemented by order of September 29, 1977, were detailed; however, the labor protective conditions were modified by combining a version of sections 4 and 5 of the Washington Job Protection Agreement (WJPA) with the provisions of Appendix C-1, with inapplicable references eliminated. See appendix III of *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 354 I.C.C. 399 (1978). Certain arrangements were made for the equitable application of the conditions in this proceeding as strict adherence to the provisions of article 1, section 4 were impossible because the parties had already been authorized to consummate the transaction, albeit without affecting employee rights, by the order of September 29, 1977. As authorized by the "Notice to the Parties" dated March 2, 1978, RLEA filed its supplemental petition on May 22, 1978, reiterating that the appropriate labor protective conditions to be imposed in cases of this type is a matter of general transportation importance. Dock filed its supplemental reply on May 19, 1978. By decision dated July 17, 1978, the Commission granted RLEA's petition and reopened the proceeding for further consideration of appropriate employee protective conditions.⁴

In addition to the pleadings, as supplemented, of RLEA and Dock, several other statements have been filed in this proceeding. More specifically, in a "Notice to the Parties" in Finance Docket No. 28643 (Sub-No. 1), *Norfolk and Western Railway Company—Acquire Branch Track—Detroit, Toledo, and Ironton Railroad Company*, dated July 24, 1978, it was stated that the labor protective conditions finally adopted in the *New York Dock* proceeding would be imposed in that proceeding. Therefore, the employee organization opposing that proceeding, the Brotherhood of Locomotive Engineers (BLE), was authorized to submit its views concerning appropriate employee protective conditions here. Parties both to this proceeding and to the *Norfolk and Western*

⁴By decision of September 8, 1978, Division 3, Acting as an Appellate Division, modified its prior decision of April 11, 1978 in certain respects none of which are relevant to the issues involved here.

proceeding were authorized to respond to BLE's comments. BLE filed its comments on September 11, 1978, and Dock and BEDT, jointly, and Norfolk and Western Railway Company (NW) and RLEA, individually, responded to these comments in pleadings all filed September 26, 1978.

PRELIMINARY MATTERS

Embraced in the respective pleadings of BLE and RLEA are requests that we reopen this proceeding and hold an evidentiary hearing⁵ to develop additional factual support assertedly necessary to enable this Commission to comply with the requirements of 49 U.S.C. 11347 [formerly section 5(2)(f) of the Interstate Commerce Act].⁶ We note that the parties have been given ample opportunity to supplement the record in this proceeding as to appropriate employee protective conditions, and, in light of the detailed pleadings and appendixes so filed, an oral hearing would result in no substantive enhancement of the record. For this reason, and to avoid further delay in disposition of this matter, we will deny the requests.

⁵In a decision dated August 30, 1978, the Commission denied a petition in which RLEA sought to consolidate this proceeding with AB-36 (Sub-No. 2), *Oregon Short Line Railroad and the Union Pacific Railroad Company—Abandonment Portion Goshen Branch Between Firth and Ammon in Bingham and Bonneville Counties, Idaho*, and Finance Docket No. 28387, *Norfolk and Western Railway Company—Trackage Rights—Burlington Northern, Inc.*, and to reopen the records therein for the purpose of receiving additional submissions from the parties on proposed employee protective conditions.

⁶The Interstate Commerce Act (act) was recently revised, codified, and enacted without substantive change as subtitle IV of Title 49, United States Code, "Transportation" section 5(2)(f) of the act is now codified at 49 U.S.C. 11347 and has been revised without substantive change to read as follows:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, 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, 1976, 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).

For purposes of reference, section 5(2)(f) of the act reads as follows:

As a condition of its approval, under this paragraph (2) or 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

(footnote 6 continued on next page)

THE EVIDENCE

RLEA and BLE challenge the labor protective conditions previously developed in this proceeding. These conditions were found to be appropriate for imposition in certain cases involving coordination of separate rail carrier facilities and seniority rosters and similar situations requiring Commission approval under 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the act].

Generally, RLEA offers a two-pronged objection to the conditions. First, it asserts that the conditions are in violation of that portion of section 5(2)(f) of the act which requires that conditions be imposed that are "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***." See 49 U.S.C. 11347 for current language. Second, RLEA argues that by allegedly imposing the minimum level of protection without examining each provision, the Commission abused its discretion and failed to require a fair and equitable arrangement.

Specifically, as to its first charge, RLEA states that by not including the full protections of sections 4 and 5 of WJPA, which protections were previously imposed in cases of this type, the Commission failed to meet the minimum level of protection mandated by the statute. RLEA complains that though the Commission assertedly did include the protection of those sections, essential portions thereof were omitted. RLEA points to three segments in article I of the conditions previously imposed which RLEA feels cuts back on the rights afforded under sections 4 and 5 of WJPA. The first of these is the final sentence in article I, section 4, which reads: "At the completion (of) the ninety (90) day notice period, (the) railroad may proceed with the transaction." RLEA argues that this sentence would allow consummation of a transaction

(footnote 6 continued)

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.

prior to agreement between the railroad and its employees which consummation is contrary to sections 4 and 5 of WJPA. Second, RLEA states that the term "transaction" as defined in article I, section 1, must be redefined so as to encompass not only the initial transaction which requires Commission approval but also future related actions made pursuant to that approval. Assertedly, this change is necessary to insure that the notice provisions of article I, section 4 (which provisions are set in motion "when a railroad contemplates a transaction***") are triggered in the same situations as they were in sections 4 and 5 of WJPA, those situations being when the carrier contemplated a coordination.⁷ Finally, RLEA seeks to delete the ban in article I, section 4, on negotiations while the arbitration provisions are being invoked. RLEA feels this is violative of our policy in support of negotiated changes. The modifications sought by RLEA in these matters can be found in appendix I to this decision which sets forth RLEA's proposed employee protective conditions in full.

As to the second general challenge to the proposed conditions, RLEA argues that the adoption of the Appendix C-1 conditions, without individual examination of each provision therein, resulted in the imposition of certain inequitable conditions. RLEA directs attention to article I, section 3, which section it contends must be rephrased as it has been interpreted, contrary to the intent of its drafters, to require forfeiture of all other existing protective provisions.⁸ RLEA also objects to article I, section 7, as it allegedly requires an employee to make an irreversible choice without knowledge of options. RLEA seeks modification of article II to add incentives for retraining of employees and modification of the method of calculating the employees' displacement or dismissal allowances under article I, sections 5 and 6, so as to avoid problems such as those in *Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37

⁷In section 2(a) of WJPA, the term "coordination" is defined as a "joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities."

⁸RLEA cites the opinion and award of the arbitrator (H. M. Weston, Referee) in *Arbitration of Penn Central Transportation Company and DRAC* (1972), which found that (1) article I, section 3 of Appendix C-1 requires an election of either all the benefits and obligations of Appendix C-1 or all the benefits and obligations of the preexisting agreement and (2) the election to take the benefits and obligations of Appendix C-1 obviates any future application of the preexisting agreement. RLEA then quotes pp. 8-9 of the affidavit of the Secretary of Labor Hodgson, which was placed in evidence in *Congress of Railway Unions, et al. v. J. D. Hodgson, et al.*, civil action No. 825-71, in support of its contention that the intent of article I, section 3 is to preserve the rights of employees under other protective arrangements.

(1971).⁹ RLEA also finds fault with article I, section 11 and wants it rephrased to clarify the proper decisionmaking process of the arbitration panel and the proper burden of proof. Finally, RLEA requests more equitable relocation provisions than those contained in article I, section 9.

As noted above, RLEA presents alternative provisions which it feels are fair and equitable and these are set forth in appendix I to this decision. We note, however, that despite RLEA's criticism, some of the proposed revisions do not differ in the areas of expressed concern from the provisions we developed in the prior decision in this proceeding. For example, RLEA would modify article 11 to suggest incentives for retraining of employees. Yet, the proposed conditions also contain numerous modifications other than those enumerated above for which no explanation is offered.

BLE contends that the conditions imposed fail to (1) recognize the particular seniority problems applicable to engineers and firemen, (2) provide a means to reach an equitable agreement on the rearrangement of work forces, and (3) adequately protect the earnings of operating employees. Generally, BLE seeks attrition-type protection; but, acknowledging our past refusal to impose such conditions, it directs comments to the specific provisions imposed. Like RLEA, BLE would redefine the term "transaction" in article I, section 1(a), so that it would be as broad as the term "coordination" in sections 4 and 5 of WJPA. Next, it submits that the "protective period," as defined in article I, section 1(d), has been improperly limited with respect to displaced employees. It argues that section 6(a) of WJPA provides that every displaced employee, regardless of the length of service, is entitled to protection for 5 years and that the instant conditions would limit the displacement allowance protection to the length of the employee's prior service if less than 6 years. Next, BLE seeks to add a specific definition in article I, section 1, of the phrase "change of residence," similar to the definition of that phrase proposed by RLEA in appendix I to this decision.

Also, BLE agrees with RLEA that (1) article I, section 3, must be modified so as to assure that an employee will not forfeit his protections under another protective agreement as a condition of accepting any benefit of Appendix C-1, and (2) the last sentence of article I, section 4, should be deleted as it would allegedly permit a railroad to proceed with the transaction at the end of the 90-day

⁹The problem in that case arose from a protective condition limiting the allowances solely to the amount paid employees for seasonal work. Accordingly, this resulted in deflated average monthly compensation. RLEA proposes to avoid such potential problems by computing the average monthly compensation utilizing only months in which the employee performed compensated service more than 50 percent of the time.

notice period and prior to completion of arbitration. BLE would further delete article I, section 4(d) and section 11(d), on the basis that requiring the parties to bear the involved expenses equally makes it prohibitive for an individual or small labor representative to arbitrate a dispute.

Additional comments of BLE are summarized as follows. There are objections to article I, sections 5 and 6, on the grounds that traditional concepts of displacement and dismissal allowances are not adequate for operating employees; to article I, section 7, on the grounds that the carrier should be compelled to make the employees knowledgeable of options prior to election; to article I, section 9, on the grounds that the moving expenses now are inequitable and should read as set forth in appendix II to this decision; to article I, section 11, on the grounds that it fails to recognize that the dispute may involve more than one railroad; and to article I, section 12, on the grounds that section 11(a)(2) of WJPA, which protects an employee from loss arising out of a contract to purchase, should also be included.¹⁰

As noted in the procedural history set forth above, Dock, individually and jointly with BEDT, and NW, individually, filed replies to the labor organizations' proposed modifications.

Stressing the limited and local operations of the involved carriers, Dock argues that this proceeding is not an appropriate forum for the Commission to determine the level of employee protective conditions to be imposed in all usual proceedings of this type; but, in light of our decision to consider the matter further, it generally argues that section 5(2)(f) of the act (now 49 U.S.C. 11347) does not require the imposition of Appendix C-1 conditions. It cites *Missouri Pac. R. Co.—Merger—T&P and C&EI*, 348 I.C.C. 414 (1976) for the proposition that Congress did not intend a significant policy change when it amended section 5(2)(f) of the act (now 49 U.S.C. 11347) and that the "New Orleans" conditions are appropriate here. In their joint reply to BLE's comments, Dock and BEDT (carriers) offer the following specific objections. The carriers again point to the specialized and limited nature of their waterfront operations to counter any need for modifications in the conditions to accommodate a territorial seniority system. They also oppose attrition-type conditions and cite our decision in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 584 (1978), to support their contention that Congress did not intend such conditions. As to the labor organizations' complaints concerning the manner article I,

¹⁰Article I, section 12(a)(iii) of the Appendix C-1 conditions also provides for this type of protection. Since we intended to incorporate those conditions, the omission of that paragraph was inadvertent.

section 4, incorporates sections 4 and 5 of WJPA, the carriers state that the principles of those sections (i.e., notice, opportunity to negotiate, and the right to arbitrate) have been properly and sufficiently adopted. They fear that deletion of the authority to consummate after the 90-day period would enable a union to block a transaction already found by the Commission to be in the public interest. They also allege that *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151 (1967), did not require an agreement prior to consummation, but merely arbitration."

The carriers' objections to the various other modifications proposed follow. As to article I, section 1, they oppose redefinition of the term "transaction," stating that it is not necessary; oppose insertion of the term "change of residence," stating that the facts do not warrant it; and support our prior definition of "protective period" to the extent it limits protection to the length of previous service. As to article I, section 3, the carriers do not feel rephrasing is necessary, though they do not elaborate on the concerns expressed by the organizations. BLE's suggestions to delete article I, section 4(d) and section 11(d) are attacked as being in violation of the equitable principle that each party bear its own expenses in arbitration. The carriers submit that any deviation from the long-established principles of article I, sections 5 and 6, is not warranted here. They feel article I, section 7 is sufficient and that it is the duty of the organizations to advise their members of the various options. Since this proceeding does not involve potential residence changes, the carriers oppose modifications of article I, section 9 and section 12, which involve moving expenses and losses from home removal, respectively. Next, they question BLE's criticism of the traditional arbitration provisions set forth in article I, section 11. Finally, the carriers discuss the appropriate length of the "protective period." They allege that section 5(2)(f) expressly limits the term to 4 years or less from the effective date of the order of the Commission approving the transaction and that we cannot ignore this plain language.

In its pleadings, NW generally opposes the adoption of any conditions requiring agreement before implementation of a transaction. NW adopts by reference the comments of the

"We do not agree with this conclusion. It was in that decision that the Commission clarified that sections 4 and 5 of WJPA were indispensable prerequisites to a valid order of approval. That case also recognized that, had those provisions been adhered to by the parties, a preconsummation agreement would have resulted; however, as explained in that decision, consummation had already been accomplished without compliance with those sections. For this reason, it was impossible to require a preconsummation agreement, but equitable compliance with sections 4 and 5 was mandated.

Association of American Railroads (AAR) filed in AB-36 (Sub-No. 2), *Oregon Short Line, supra*, which basically reflects the view that Appendix C-1 exceeds the statutory minimum required by section 5(2)(f) of the act (now 49 U.S.C. 11347).

DISCUSSION AND CONCLUSIONS

We are concerned here with the level of labor protective conditions required by 49 U.S.C. 11347 [formerly section 5(2)(f) of the act] in transactions involving rail carriers for which approval is sought under 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the act] with the exception of trackage rights and lease proceedings.¹² Despite the carriers' protestations, we feel that this is an appropriate proceeding in which to make such a determination. While each labor protective provision may not be invoked in the situation arising from the transaction approved here (i.e., provisions regarding moving expenses, et cetera), there is ample evidence of record upon which to base a determination of the appropriate conditions to be applied in the usual case.

The statute (49 U.S.C. 11347) requires that, as a condition to approving certain proceedings, the Commission must provide for a fair arrangement to protect employees. This arrangement, at a minimum, must contain provisions at least as protective as (1) the terms imposed under the section prior to February 5, 1976, and (2) the terms established under section 565 of title 49. In our prior decision in this proceeding we concluded that imposition of a version of the protections of sections 4 and 5 of WJPA in combination with the Appendix C-1 conditions was required by the act. See *New York Dock, supra* at 411, 412. For the reasons discussed in that decision we reaffirm our general conclusions as to this minimum level of protection.¹³ However, the parties raise several matters which warrant further discussion and, in some instances, modifications of our prior findings so that the conditions imposed are commensurate with our statutory obligation. The

¹²Appropriate labor protective conditions for imposition (a) in trackage rights proceedings have been developed in Finance Docket No. 28387, *Norfolk and Western Railway Company—Trackage Rights—Burlington Northern, Inc.*, and (b) in lease proceedings have been formulated in Finance Docket No. 28256, *Mendocino Coast Railway, Inc.—Lease and Operate—California Western Railroad*.

¹³Therefore, contrary to the carriers' arguments, we remain of the view that the appendix C-1 conditions, which conditions were developed pursuant to section 405 of RPSA, are required by the statute. This does not conflict with what we said in *Missouri Pac. R. Co.—Merger—T&P and CAEL, supra*. While we stated in that case that Congress did not intend to have the Commission significantly change its policy in the employee protection area, this was meant to indicate that Congress did not intend a change requiring imposition of attrition conditions. See *Oregon Short Line, supra* at 589.

discussion below will be twofold. First, we will address the arguments that the conditions previously imposed do not meet the minimum requirements of the statute as they do not incorporate the full protections of sections 4 and 5 of WJPA. Next, we will analyze the conditions previously imposed in order to assure that they not only meet the statutory minimum but also constitute a fair arrangement.

The labor organization intervenors correctly point out that though we stated we were imposing a version of the protections of sections 4 and 5 of WJPA (as modified to require compulsory arbitration), the conditions actually imposed are not as protective as those sections in several respects. First, the final sentence of article I, section 4, would conceivably permit consummation of a transaction prior to agreement or decision of the referee if the deadlines prescribed therein could for some reason not be met. Though Dock argues that article I, section 4 sufficiently encompasses the pertinent sections of WJPA, we cannot overlook the significance of the shortcoming attacked by the organizations. Therefore, to insure that the requirement of a preconsummation agreement as contained in sections 4 and 5 of WJPA be incorporated, we will modify article I, section 4, by deleting the final sentence and substituting in lieu thereof the language proposed by RLEA in article I, section 4(b), of appendix I, which language is appropriate for that purpose.

The labor organizations also request that the definition of the term "transaction" in article I, section 1(a), be modified to encompass the same situations as the complementary term "coordination" does in WJPA. These terms are the triggering mechanisms of article I, section 4 and sections 4 and 5 of WJPA, respectively. Since article I, section 4 here is intended to incorporate the full protections of sections 4 and 5 of WJPA, the term "transaction" should be redefined to set the notice, negotiation, and arbitration provisions in motion in the same situations as does the term "coordination." We also note that the broad definition is necessary in the types of transactions for which approval is required under 49 U.S.C. 11343 *et seq.*, because the event 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. Also, in order to clarify exactly when article I, section 4, is triggered, it is necessary to rephrase that section in several minor

negotiation following a 30-day period will be deleted. We point out, however, that subsequent to the set period either party may submit the matter for arbitration; therefore, the deletion, while in accord with our long-established policy supporting negotiated agreements, will not allow the process to be prolonged contrary to the interests of the parties.

We note here that article I, section 4, embodies a highly structured plan with specified time limits for notice, negotiation, arbitration, and decision. This is so, to assure that the parties reach the necessary agreement prior to consummation but within a reasonable period so as not to delay unduly consummation of the transaction. The parties offer no objection to the time limits set for the various stages and we feel that they are reasonable for imposition in the usual case. If, in future proceedings, however, it becomes apparent that these deadlines are not susceptible of being met, we will then consider modification of the time deadlines of article I, section 4.

Next, we will consider the petitioner's argument that by adopting the Appendix C-1 conditions *in toto*, we have incorporated certain inequitable provisions and that individual examination of each condition is, therefore, necessary. In the past we have discussed at length the increased level of protection afforded by the Appendix C-1 conditions, as well as the fact that those conditions were developed pursuant to a statutory mandate requiring "fair and equitable arrangements to protect the interests of employees." See *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76, 84-86 (1977). We have not changed this view that the Appendix C-1 conditions generally conform to the requirement for imposition of a "fair arrangement" as mandated by 49 U.S.C. 11347 [formerly section 5(2)(f) of the act]. However, some confusion has resulted from the application of the specific language of the Appendix C-1 conditions to different types of transactions other than those for which they were originally developed. Moreover, certain additional problems concerning various interpretations of these conditions have been raised by the parties. Therefore, we feel it is necessary here for us to clarify and modify the conditions to insure that they constitute a fair arrangement suitable for imposition in the usual transactions involving rail carriers for which approval is sought under 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the act], with the exception of trackage rights and lease situations which are being considered elsewhere. In this regard, we will generally discuss the provisions in light of the various comments of the

parties. Except as discussed and modified herein, we find that the conditions previously imposed satisfy the statutory requirements of 49 U.S.C. 11347 [formerly section 5(2)(f) of the act.] We will not discuss at any length the various modifications we made above to insure that the conditions incorporate the full protectons of sections 4 and 5 of WJPA.

First, we will discuss the various criticisms of article I, section 1. The term "protective period" is the subject of some dispute. Dock argues that the period set in our definition should be shortened as the statute explicitly limits the term to 4 years or less from the effective date of the order of the Commission approving the transaction, while BLE asserts that the period set should be modified as WJPA provides 5 years of protection for displaced employees even if he/she has been employed for a lesser period. We do not agree with either argument. First, as to the 4-year limit espoused by Dock, we point to the decision of the U.S. Supreme Court in *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950), where it was stated that section 5(2)(f) of the act is a statutory minimum and that we are not required to limit employee protection to 4 years from the effective date of the order, but can provide for a longer period. As to the modifications suggested by BLE, we point out that section 6(a) of WJPA does not provide a 5-year across-the-board protective period. While an employee continued in service might receive up to that length of protection, dismissed employees receive significantly less (see section 7 of WJPA). The up to 6-year protective period depending on length of service provided by Appendix C-1 is the same for both types of employees and in several ways is more protective of all employees than the provisions of WJPA. Therefore, since the Appendix C-1 protective period is generally more beneficial and equitable than the period allocated uner WJPA, we will not modify our prior decision in this respect.

Next, both RLEA and BLE suggest the addition of the term "change of residence" to the definitions. This term is utilized in several of the provisions yet we do not feel that establishing a strict definition is advisable. The facts surrounding different proceedings will vary significantly. For example, in some areas of the country employees generally travel much greater distances from home to work than in other areas; therefore, different computations may be warranted. We feel the possible variations prevent the equitable imposition of a set definition, and determine that negotiation and/or

arbitration between the parties will be the best mode for resolving this matter.

Article I, section 2, appears acceptable to all parties. RLEA does propose an additional sentence dealing with the effectiveness of subcontracting agreements subsequent to a transaction; however, the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary.

Both RLEA and BLE express concern over the interpretation of article I, section 3 as it is now written. We agree that a fair and equitable arrangement usually should not require a complete forfeiture of other existing labor protective conditions. Because the section as now written has been interpreted in such a manner, we feel it is necessary to rephrase the conditions so as to preclude the possibility of such a reading. Our study of the provision suggested by RLEA indicates that it preserves existing protections yet with the required prohibitions against duplication of benefits (see the first proviso) and against pyramiding (see the latter portion of the final proviso). We will adopt the proposed provision as we feel it is an appropriate clarification of the intent of that section.

We have discussed the major employee objections to article I, section 4, and provided for some modifications thereof. BLE also requests the deletion of section 4(d) [as well as a similar provision in article I, section 11(d)] which section provides that the salary and expenses of the referee shall be borne equally by the parties while all other expenses shall be paid by the party incurring them. BLE argues that these sections render the costs of arbitration prohibitive for small organizations and individuals. Contrary to these unsubstantiated charges, we feel that such a provision is the only fair and equitable manner in which to approach the question of costs. Such a condition helps to promote good faith utilization of the available procedures, and we will not depart from this traditional approach.

Article I, sections 5 and 6 cover displacement and dismissal allowances respectively. Generally, the sections delineate at what point and for how long an employee is eligible for the allowances, the method of computing the amounts of the allowances, and certain situations when the allowances shall be reduced or shall cease prior to the expiration of the protective period. BLE avers that the sections are inadequate for operating employees, since they have territorial rather than plant-type seniority. However, no explanation of just how the present, traditional approach is insufficient is offered, nor does BLE offer a proposal for modification. As

explained before, RLEA proposes certain modifications to the method of computing the average monthly compensation. The record here does not support such a provision. The problem cited by RLEA arose from the specific facts of a particular case. The evolution of article I, sections 5 and 6, is set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76, 80-85 (1977). Our discussion there outlines the increase in protections afforded by the various revisions, including the Appendix C-1 conditions. In the absence of any evidence to the contrary, we reaffirm that these sections are fair and equitable for imposition in the usual case.

Because of our redefinition of the term "transaction" to encompass actions taken pursuant to our authorization but after the initial changes, we will modify article I, section 9, to delete that language which would automatically remove changes in residence which are made subsequent to the initial change from the purview of that section. The final phrase, "which grow out of the normal exercise of seniority rights," is unnecessary and will also be omitted. This modification will insure that the protections of the provision will be available to any employee who is required to move his place of residence within his protective period, as a result of action taken pursuant to our authorization.

We feel that the method for arbitration of disputes provided for in article I, section 11, sets forth a fair and equitable manner for the parties to settle disputes and controversies with respect to the interpretation, application, or enforcement of specific provisions. As to BLE's argument that the provision is insufficient in situations involving two railroads, we point out that generally a dispute will arise between employees and a single railroad. There are no facts here to indicate that this proceeding is other than the usual case and therefore no modification is warranted. In the event, however, that future proceedings involve more complex situations, we will then consider alternative provisions for application therein.

Both BLE and RLEA point out that, though article I, section 12, allegedly incorporated all the losses from home removal provisions of Appendix C-1, the paragraph therein covering losses arising from a contract to purchase was inadvertently omitted. We agree that this paragraph should have been included and will accordingly modify that provision. We will also make certain changes in paragraph (b) of that condition. This is done for the same reasons we modified article I, section 9, as explained previously. The modification will assure that the protections afforded by sections 9 and 12 will be available in the same instances.

Other modifications we find appropriate are as follows. Article V will be rephrased to reflect the recent redrafting and codification of section 5(2)(f) (now 49 U.S.C. 11347). Finally, we note that "Article V" proposed in RLEA's provisions will not be included because it concerns matters more appropriate for settlement between the parties themselves than for strict determination here.

In conclusion, we note that we have considered all of the numerous modifications proposed (including additional modifications of those sections discussed above, as well as changes in article I, sections 7, 8, and 10, and articles II and IV). We find that, except as noted, said changes are either (1) unnecessary because they are redundant or consist of mere rewording or (2) inadvisable because they involve matters which are best left to negotiation and/or arbitration between the parties. We stress that it has long been Commission policy to encourage the parties to work out their own arrangement and here we are only establishing a fair, yet minimum, level of protection to be applied in certain proceedings. Particular problems arising from the varying facts of specific cases are best handled by the individual parties involved within the framework of negotiation and arbitration provided for here. We feel that the level of protection developed here and set forth in appendix III to this decision represents a fair arrangement meeting the minimum requirements of 49 U.S.C. 11347 [formerly section 5(2)(f) of the act], and appropriate for imposition in this proceeding as well as other proceedings involving rail carriers arising under 49 U.S.C. 11343 *et seq.* [formerly section 5(2) and 5(3) of the act], excluding trackage rights and lease proceedings which are being considered elsewhere. Certain other minor modifications have been made which do not necessitate detailed explanation.

Because Dock and BEDT have already consummated their control transaction, we must provide for an equitable rather than strictly literal application of the employee protective provisions developed here. In essence, this equitable application will only relieve the carriers from their duty to notify, negotiate, and arbitrate as to the control transaction already accomplished. Since we prohibited the carriers from taking any action which would affect employees, such relief is not detrimental to the interests of employees. Due to our modification of the term "transaction," any future related action taken pursuant to our approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions.

It is ordered:

(1) The conditions for the protection of employees set forth in our prior decision in this proceeding at 354 I.C.C. 399 (1978), are modified in the manner set forth in appendix III to this decision for the reasons stated above.

(2) Subject to these modified conditions, the prohibition in our order of September 29, 1977, against the parties taking any action which would affect employees' rights, is removed.

(3) Except as modified here and by our decision of September 8, 1978, the decision and order of April 11, 1978, shall remain in full force and effect.

(4) This decision shall be effective 30 days from the date it is served.

By the Commission. Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Vice Chairman Brown absent and not participating. Commissioner Gresham concurring in the result.

H. G. HOMME, JR.,
Secretary.

(SEAL)

APPENDIX I

The labor protective provisions suggested by RLEA are as follows:

The scope and purpose of this appendix is to provide for fair and equitable arrangements to protect the interests of employees of railroads affected by actions taken pursuant to authorizations or approvals of this Commission to which this appendix has been imposed. Therefore, fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of this appendix.

ARTICLE I

1. Definitions.—

(a) "Transaction" means any action taken pursuant to authorizations of this Commission to which these provisions have been imposed.

(b) "Displaced employee" means an employee of a 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.

(c) "Dismissed employee" means an employee of a railroad who, as a result of a transaction is deprived of employment with a railroad because of the abolition of his position or the loss thereof as the result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom; *provided, however,* that the protective period for benefits under section 6 of this article for any particular employee shall not continue for a longer period following

the date he was displaced or dismissed than the period during which such employee was in the employ of a railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provision of section 7(b) of the Washington Job Protection Agreement of May 1936.

(c) "Change in place of residence" means transfer to a work location which is located either (A) outside a radius of 30 miles of the employee's former work location and farther from his residence than was his former work location or (B) is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former work location.

2. The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of a railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes. The various agreements dealing with subcontracting, scope rules, and classification of work rules in effect at the time of a transaction, shall continue in effect unless and until changed by agreement between the railroads and labor organizations involved in such transaction, and work performed on such properties shall not be subcontracted except as may be expressly, or by reasonable necessary implication, permitted by said agreements. Disputes concerning subcontracting of work shall be disposed of on the basis of existing collective bargaining agreements between the parties.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided, however*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of his protective period under that arrangement.

4. (a) Each railroad contemplating a change or changes in its operations, services, facilities, or equipment as a result of a transaction which may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days' written notice of such intended change or changes 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 effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.

At the request of any party interested in such intended change or changes, a place shall be selected within five (5) days from the date of receipt of notice 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. 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 change or changes shall be made on the basis of an agreement or decision under 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, then 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) If a notice of intended changes is served pursuant to this section 4, 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.

5. Displacement allowances.—

(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position, which does not require a change in his place of residence, producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed compensated service more than fifty (50%) percentum of each such months immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period); *provided, however*, that the "total compensation" and the "total time for which he was paid" shall be adjusted to reflect on an annual basis the reduction, if any, which would have occurred during the test period had a Public Law amending the Hours of Service Act of 1907, enacted subsequent thereto, been in effect throughout the test period; and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to

his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

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 performed compensated service more than fifty (50%) percentum for each such month prior to the date he is first deprived of employment as a result of a transaction. Such allowance shall be adjusted to reflect subsequent general wage increases; such allowance shall also be adjusted to reflect on an annual basis the reduction, if any, which would have occurred during the applicable test period had a Public Law amending the Hours of Service Act of 1907, enacted subsequent thereto, been in effect throughout the test period.

(b) The dismissal allowance of any dismissed employee who returns to service with a 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 railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employees in employment other than with a 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, or failure without good cause to accept a regular, bulletined, comparable position which does not require a change in his place of residence, for which he is qualified and eligible with the railroad from which he was dismissed after appropriate notification, if his return does not infringe upon the 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 thirty (30) days of his dismissal or of an arbitration award establishing that he is a dismissed employee, resign and (in lieu of all other benefits and protections provided in this appendix) accept at that time a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936. Until such lump sum payment is received, the dismissed employee shall receive a dismissal allowance in accordance with section 6 of this appendix.

8. *Fringe benefits.*—No employee of a railroad who is affected by a transaction shall be deprived of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service 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.

9. *Moving expenses.*—Any employee retained in the service of a railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of a transaction, and is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss, not to exceed 10 working days. The exact extent of the responsibility of the railroad during the time necessary for such transfer and for a reasonable time thereafter, and the ways and means of transportation shall be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of a transaction, which are made subsequent to the initial change and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent as provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

10. Should a 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 retroactively to such employee as of the date when he is so affected.

11. *Arbitration of disputes.*—

(a) In the event a railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 30 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroad, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree unanimously upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree unanimously to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives; provided, however, that the decision in said case shall be made by the neutral member.

(c) The decision, by majority vote (except as provided for in paragraph (b) of this section), of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) 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. The claiming employee shall prevail on this issue if it is established that the transaction had an effect upon the employee even if other factors also may have affected the employee.

12. Losses from home removal.—

(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of a railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of a transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall, at his option, be reimbursed by the railroad for any loss, including real estate commissions, loan placement fees, et cetera, suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) The employee may elect to waive the provisions of paragraph (a)(i) of this section and to receive, in lieu thereof, an amount equal to his closing costs which are ordinarily paid for and assumed by a seller of real estate in jurisdiction in which the residence is located. Such costs shall include a real estate commission paid to a licensed realtor (not to exceed \$3,000 or 6 percentum of sale price, whichever is less), and any prepayment penalty required by the institution holding the mortgage.

(iii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iv) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(h) Changes in place of residence which are not the result of a transaction, which are made subsequent to the initial changes caused by a transaction and which grow out

of the normal exercise of seniority rights, shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, the loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives, and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee whose employment is terminated or who is furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on any railroad involved in the transaction which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under sections 1 or 2 of this article II fails without good cause within 10 calendar days after actual receipt of notice to accept an offer of a position comparable to that which he held when his employment was terminated or he was furloughed, which does not require a change in residence, and for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of a railroad whose position is not within the scope of a collective bargaining agreement shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee whose employment is not within the scope of a collective bargaining agreement with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to this Commission for resolution.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established pursuant to section 5(2)(f) of the Interstate Commerce Act, and to section 405 of the Rail Passenger Service Act, and which are now required as a minimum by section 5(2)(f) of the Interstate Commerce Act. In so doing, changes in wording and organization from arrangements earlier developed under sections 5(2)(f) and 405 have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Moreover, it is the intent of this appendix to provide protections which are fair and equitable. Thus, the terms of this appendix are to be interpreted in a fair and equitable manner, and are to be construed in favor of this intent to provide employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and pursuant to section 405 of the Rail Passenger Service Act.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected, and such unenforceable provision shall be resubmitted to this Commission for modification or other appropriate actions.

ARTICLE V

1. The protections and benefits of this appendix shall be applicable to any railroad employee who is affected by the transaction to which these provisions have been imposed regardless of whether such employee is employed by a railroad who was an applicant before this Commission in the proceeding in which these provisions were imposed.

2. The carrier, or the owners thereof in the event of the dissolution of said carrier, who employed an employee who is affected by the transaction shall be responsible for the actual payment of all allowances, expenses, and costs provided to such affected employee pursuant to the provisions of this appendix unless expressly provided for otherwise by the carriers and the representative of such employee, or by the provisions of this appendix.

3. The carriers who were applicants before this Commission, or who derived a substantial benefit from the transaction, shall bear the ultimate responsibility for the payment of benefits to affected employees, and shall reimburse any other carrier who provides benefits under this appendix as a result of the transactions covered herein for the actual amounts paid to affected employees. The formula for the sharing of ultimate responsibility shall be agreed to by the carriers bearing the ultimate responsibility, and upon failure to agree, the carriers may seek the aid of this Commission to resolve such disagreement upon the basis of percentage of benefit derived from the transaction.

APPENDIX II

The labor protective provision covering moving expenses suggested by BLE for imposition here is as follows:

Moving expenses.—Any employee retained in service by the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of a transaction, and is

required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and members of his family, including living expenses for himself and his family, and for his own actual wage loss during the time necessary for such move, and for a reasonable time thereafter not to exceed 5 working days. The extent of the responsibility of the railroad under this provision and the ways and means of transportation shall be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however*, that changes in place of residence which are not a result of a transaction, which are made subsequent to the initial change and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent as provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to the railroad within 90 days after the date on which the expenses were incurred.

APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

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

(b) "Displaced employee" means 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.

(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.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(h) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under

any existing job security or other protective conditions or arrangements: *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction 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 then 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.

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

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 the 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 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.

9. *Moving expenses.*—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; *provided, however*, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

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.

11. *Arbitration of disputes.*—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall

serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) 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.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept

comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.