IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONGRESS OF RAILWAY UNIONS and RAILWAY LABOR EXECUTIVES' ASSOCIATION, Unincorporated Associations of Railway Labor Organizations, (Plaintiffs) v. J.D. HODGSON, SECRETARY OF LABOR, NATIONAL RAILROAD PASSENGER CORPORATION and THE CHESAPEAKE AND OHIO RAILWAY COMPANY, SEABOARD COAST LINE RAILWAY COMPANY, Individually and as Representatives of a Class of an Undertermined Number of Class I Railroads, (Defendants)	CIVIL ACTION NO. 825-71

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

AFFIDAVIT OF JAMES D. HODGSON
SECRETARY OF LABOR

JAMES D. HODGSON, being duly sworn, deposes and says:

1. That he is the Secretary of Labor, a party defendant in the above-entitled proceeding, and is familiar with all the facts relating to the present litigation.

2. That pursuant to Section 405(b) of the Rail Passenger Service Act of 1970, he is required to certify that all contracts entered into pursuant to the provisions of section 401(a)(1) of that Act contain labor protective provisions affording affected employees fair and equitable protection.

3. That on March 10, 1970 he called a meeting of representatives of railroads, railroad unions and Railpax for the purpose of working out a protective arrangement for those employees affected by discontinuances of rail passenger service under the Act.

4. That on or about March 26, 1970, he received from the railroads a proposed protective arrangement which was to be included in all contracts made pursuant to section 401(a)(1) of the Act between a railroad and Railpax.

5. That the proposed arrangement was reviewed and rejected and an explanation of the reasons for rejection was communicated to the railroads.

6. That thereafter followed a series of meetings between representatives of the Railroads and the Department represented by Assistant Secretary of Labor W.J. Usery and Solicitor of Labor P.G. Nash during which the Railroads proposed various protective arrangements which were rejected.

7. That one major issue raised during these meetings involved the question of whether section 5(2)(f) of the Interstate Commerce Act (referred to in section 405(b) of the Rail Passenger Service Act) required the verbatim adoption of sections 4 and 5 of the so-called "Washington Agreement." (Plaintiffs' Exhibit 4, pp. 1 et seq.) Railpax, a quasi-governmental corporation, also raised this issue and in a letter dated April 2, 1971, the Department of Justice was requested to issue an opinion on the necessity of including sections 4 and 5 of the "Washington Agreement" in the Railpax protective arrangements. Thereafter the Department of Justice set forth its views concluding that, although the precise language of sections 4 and 5 need not be included, some form of notice and some right or negotiation and arbitration must be required by the Secretary in any Railpax protective arrangement. The Department of Justice also concluded that sections 4 and 5 contain no requirement that employees be retained on their jobs or on the payroll pending final completion of the procedures specified. As a result, section 4 of Appendix C-1 of the protective arrangement now in question was accepted as providing for notice, negotiation and arbitration as required by sections 4 and 5 of the "Washington Agreement" relative to disputes arising out of the discontinuance of rail service.

8. That on April 15, 1971, I was presented with a proposed set of protective arrangements, which I reviewed in detail and certified on April 16, 1971. A copy of those arrangements and my certification is attached hereto as Appendix A. In my judgment such arrangements provided fair and equitable protection of the interests of employees affected by discontinuance of intercity rail passenger service.

9. That in response to the specific objections raised by plaintiffs to the certified arrangement as set forth in Appendix E to their Memorandum, I state as follows:

(a) Plaintiffs allege that section 4 of the certified arrangement eliminates any notice to employees of the railroad prior to the discontinuance of intercity passenger train service to be effected on May 1, 1971.

Section 4 requires at least twenty (20) days notice for any transaction occurring after May 1, 1971. It also provides that a railroad must give notice as soon as possible after signing a contract for a contemplated discontinuance on May 1, 1971. The Act itself contemplates, if not dictates, this distinction concerning the May 1 date.

Thus, Section 401(a)(1) authorizes the Corporation (Railpax) to relieve railroads of their entire responsibility in intercity rail passenger service on May 1, by contracting with railroads to that effect. Section 401(a)(1) of the Act further states that "The contract may be made upon such terms and conditions as necessary to permit the Corporation to undertake passenger service on a timely basis." Section 401(b) provides that Railpax shall, itself, begin the provision of intercity rail passenger service on May 1, 1971, and Section 401(c) provides that no railroad, without Railpax's consent, may conduct any intercity rail passenger service over any Railpax route. A precondition of the contract between railroads and Railpax is the certification by the Secretary of Labor of employee protection provisions which are a part of that contract. (Section 410(a)(1)) Therefore, in order to accommodate the mandate of the statute it was essential that any application of section 4 and 5 of the "Washington Agreement" provide a procedure which would allow for the discontinuance of trains on May 1, 1971. The "notice" provision of section 4 of the arrangements which I certified on April 16 was, in my judgment, a fair and equitable way of providing employee protection within the requirements of the statute.

(b) Plaintiff alleges that section 4(d) of the certified arrangement eliminates the requirements that implementing agreements must be executed prior to the displacement or rearrangement of the employee forces, and that to permit such would forever deprive some employees of their rights.

As previously stated, the Act contemplated train discontinuances on May 1, 1971, and further prohibited the operation of rail passenger service trains by railroads after that date, unless the consent of Railpax was obtained. Sections 4 and 5 of the "Washington Agreement" were tailored to mergers and consolidations of railroads, which activities could be stayed until the negotiation and arbitration contemplated by those sections had been completed. However, in the case of Railpax, such a deferral was not feasible under the statutory scheme. Under the circumstances I certified the appended arrangements, section 4

of which requires notice, negotiation and arbitration of matters left unresolved by negotiations. Section 4 does allow train discontinuances by railroads and reassignment of affected employees pending the outcome of arbitration. However, that section fully protects such employees during the arbitration process and further provides that any employee improperly displaced, dismissed or reassigned as so determined by the arbitrator's award shall be made whole. Further, the interaction of sections 1(d) and 4 provides that the employee's six year "protective period" shall not begin until after the completion of the arbitration process. Hence, no employee can be adversely affected by the procedure outlined in the certified arrangements and yet those arrangements meet the statutory scheme for the discontinuance of intercity rail passenger service.

(c) Plaintiffs allege that section 7 of the certified arrangement effectively eliminates an employee's option to resign and accept separation pay because it allows an employee only 7 days in which to exercise the option.

The "Washington Agreement" provided that an employee must exercise his option to accept separation pay at the time of his dismissal. Section 7 of the current arrangement not only preserves the option but also permits the employee seven days to make his decision which is deemed both fair and equitable to all concerned.

(d) Plaintiff alleges that section 8 of the certified arrangement reduces the amount of fringe benefit protection to which an employee is entitled.

Since the "Oklahoma Conditions" in 1944 (Plaintiffs' Exhibit 4, pp. 23, et seq.) through the recent "Southern-Central of Georgia Conditions" (Plaintiffs' Exhibit 4, pp. 32, et seq.), fringe benefit protection has been measured by an employee's protective period. The provisions of the certified arrangements are virtually identical to those protections.

(e) Plaintiff alleges that section 9 of the Railpax arrangement eliminates as part of moving expenses the requirement that an employee be reimbursed for his wage loss during the time necessary for him to transfer and for a reasonable time thereafter (not to exceed two working days).

As in the case of fringe benefits, since the 1944 "Oklahoma Conditions" and as reflected in the "Southern-Central of Georgia Conditions", wage loss associated with moving has been limited to two days. The current arrangement provides for the payment of actual wages lost not to exceed three working days. In all other respects the provisions of the certified arrangements are virtually identical to the protections in "Oklahoma" and "Georgia".

(f) Plaintiff also alleges relative to section 9 of the Railpax conditions that there is no protection for employees who are required to move a second time due to changes effected by the carrier.

As provided in the "Southern-Central of Georgia Conditions", section 9 of the Railpax protections simply clarifies what obviously was never meant to be included under moving expenses-- i.e., a change of residence not related to the discontinuance of rail passenger service. If an employee is required to move a subsequent time as a result of a transaction, his moving expenses would be covered by the protective conditions. There was no intent to change the meaning of the "Southern-Central of Georgia Conditions" in this regard and any question to that effect would be resolved in favor of employer protection under Article V, section 1 of the certified arrangements.

(g) Plaintiffs allege that the current protective arrangement eliminates retroactive protection to employees adversely affected in anticipation of a discontinuance.

Section 10 of the Railpax Conditions clearly provides that an employee dismissed or displaced in anticipation of a discontinuance will be covered by the protective arrangements and section 1(d) makes those provisions applicable at the time of his dismissal or displacement. To have included the additional words "as of the date when he was so affected" would have been redundant.

(h) Plaintiff alleges that section 11 of the certified conditions in question will be a source of litigation because it is one of two arbitration provisions which purports to govern disputes of the "application" of the document.

Section 11(a) specifically provides that the procedures contained therein will not apply to sections 4 and 12. Sections 4 and 12 provide for their own procedures relative to disputes arising thereunder.

Plaintiffs also object to the fact that section 11 provides for equal representation by a railroad on an arbitration committee where more than one labor organization is involved. Certainly the provision is not unfair on its face, but simply provides for fair and equitable representation on the arbitration committee for all parties concerned, a provision in no way substantially different from those contained in other protective arrangements.

(i) Plaintiffs also object to the "burden of proof" provisions under section 11(c) of the arbitration provision.

Under the "New Orleans Conditions" employees had great difficulty in sustaining the burden of proof that they were affected by a particular transaction. The Railpax Conditions simply require an employee to identify the transaction and the facts upon which he relies in his claim that he was affected by a transaction. The burden is then on the railroad to prove that factors other than "a" transaction affected the employee. (Emphasis added) The clear intent of this provision and the basis upon which I accepted it as a part of my certification of the protective arrangements, is to impose upon the railroads the burden of proving that something other than the discontinuance of rail passenger service affected the "claiming" employee. The railroad does not meet its burden by showing that some discontinuance other than the one upon which the employee relies affected him. It must show affirmatively that something other than any transaction affected the employee. Further, it is intended that a claiming employee shall prevail if it is established that a discontinuance had an effect upon the employee, even if other factors may also have affected the employee. Thus, the burden of proof has been transferred from the employee to the railroad, putting the employee in a better position than that existing under the "New Orleans Conditions."

(j) Plaintiffs raise a question concerning the proviso to section 3, alleging it would deprive employees of benefits governed by other protective agreements.

On the contrary section 3 specifically preserves the rights of an employee under other protective arrangements, although it does prohibit the pyramiding and duplication of benefits. The proviso simply recognizes that there may be certain obligations related to a particular benefit which an employee may not ignore if he chooses to take advantage of that benefit as opposed to another contained in a different protective agreement. Thus, each benefit carries with it the obligations which accompany that benefit. No other requirement could be deemed "fair and equitable."

(k) Plaintiffs claim that section 6(d) could result in employees being required to accept demeaning jobs.

Section 6(d) requires a dismissed employee to accept only a comparable position for which he is qualified. The use of the words "comparable" and "qualified" clearly prohibit a railroad from arbitrarily denying protection to a dismissed employee who refuses a job which is not comparable and for which he is not qualified. Hence no employee would be required to accept a demeaning job.

10. That the Railpax protective conditions in many respects go beyond those required by section 5(2)(f) of the

Interstate Commerce Act. The protective period, for example, has been extended not only from 4 to 6 years, but the six years commences at the time the employee is affected, rather than at the time of the transaction. The burden of proof in arbitration has been changed from the employee to the railroad, thus making it likely that far more employees will receive the protections provided by the arrangement. The wage loss required in the event of a move has been put at three days as opposed to two. Moreover, allowances due employees are adjusted to reflect subsequent wage increases.

11. That there shall be no harm to the employees entitled to the protection provided by section 405 of the Act is evident from Article V of the Railpax Conditions which specifically provides that it was the intent of said Conditions to provide benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act, and that the terms of the arrangement are to be resolved in favor of providing employee protections and benefits no less than those established pursuant to section 5(2)(f).

JAMES D. HODGSON

Subscribed and sworn to before me this _____day of April, 1971.

Notary Public