FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Ill.
The First Division consisted of the regular members and in addition Referee Thomas F. Gallagher when award was rendered.

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

NEW YORK CENTRAL RAILROAD COMPANY,
BUFFALO AND EAST

STATEMENT OF CLAIM: Claim for one day's pay at yard rates in addition to pay for road trip for:

A. October 12, 1943, Engineer F. Foster and Fireman I. MacWade, prior to starting their road trip with train No. 14 from Buffalo Terminal to Syracuse were required to perform switching service in the Buffalo Terminal by switching out the 4th and 5th cars. Also for the same payment on dates subsequent to October 12, 1943, to these or such other engine crew members who were required to switch out cars from their train at Buffalo Terminal prior to starting their road trip.

B. November 23, 1943, Engineer F. Foster and Fireman G. F. Nickolson prior to starting their road trip with train No. 14 from Buffalo Terminal to Syracuse were required to perform switching service in the Buffalo Terminal changing the make up of train No. 14 from that in which the train arrived in Buffalo Terminal by taking the two head cars from the train then going to another track in the terminal where four additional cars were picked up and all six cars then placed in the train. Also for the same payment on dates subsequent to November 23, 1943, to these or such other engine crew members who were required to switch additional cars into their train at Buffalo Terminal prior to starting their road trip.

JOINT STATEMENT OF FACTS: On October 12, 1943, Engineer F. Foster and Fireman I. MacWade went on duty in the Buffalo passenger station for a trip in through passenger service from Buffalo, west end of division, to Syracuse, east end of division. The engine arriving in Buffalo passenger station with train No. 14 continues with train from Buffalo. Engine crews are changed in the station. A change was made in the make up of train No. 14. Engineer Foster and Fireman MacWade were required to take the first five cars from the train, place the fourth and fifth cars on another track, return three cars to the train.

On November 23, 1943, Engineer Foster and Fireman G. F. Nickolson were required to place four additional cars in train No. 14. This involved
movements taking the two head cars from the train, picking up four cars from another track, placing all six cars in the train.

Yard engines are employed in the Buffalo Terminal. The track on which train No. 14 arrived and departed from held the entire train.

On these dates, claim was made for one day's pay at yard rates in addition to pay for the road trip with train No. 14. These claims were not allowed, crews being paid the passenger rates on continuous time or trip basis from time going on duty at Buffalo until relieved at Syracuse.

The evidence and contentions of the respective parties have been considered in conference before this dispute was submitted to your Board.

Oral hearing is desired.

**POSITION OF EMPLOYEES:** Schedule Article 2, Engineers' Agreement and Article 2, Firemen's Agreement, Basic Day in Passenger Service, provide:

"One hundred miles or less (straight-away or turn-around), five hours or less, except as provided in Article 3, Section (a), shall constitute a day's work; miles in excess of 100 will be paid for at the mileage rate provided, according to class of engine." (The exception provided in Article 3 refers to short turn-around passenger service and has no bearing in this claim.)

Train No. 14 operates approximately 146 miles in through (straight-away) passenger service from Buffalo to Syracuse. As provided in Article 2 the minimum payment for the passenger trip, exclusive of any other service, is the actual miles run from Buffalo to Syracuse.

Schedule Article 14, Engineers' Agreement and Article 17, Firemen's Agreement, Basic Day in Yard Service, provide:

"Eight hours or less shall constitute a day's work."

As provided in Articles 14 and 17, any yard switching service of eight hours or less constitutes a day's work. There are no rules, understandings or agreements which permit combining road and yard service. The above quoted rules are separate and distinct for each class of service as are other rules which provide the payment and method of computing same for straight time worked in yard service and mileage run in road service, overtime at time and one-half in yard service and at pro rata rate when hours exceed miles in road passenger service. There are other separate and distinct rules for each class of service governing seniority; trip rules in road service; starting times, assignments and meal periods in yard service.

Schedule Article 21 (b), Engineers' Agreement and Article 24 (b), Firemen's Agreement, provide:

"Where regularly assigned to perform service within switching limits, yard men shall not be used in road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the greater, with a minimum of one hour, for the class of service performed in addition to the regular yard pay and without any deduction therefrom for the time consumed in said service."

Yard men, except in emergency, may not be used for road service, crews employed in road service have no rights to yard service and cannot be required to perform the work of yard men and be paid for such as a part of their road trip.

In the instance on October 12, 1943, train No. 14 arrived in Buffalo passenger station from the west. The track on which it arrived and from
which it departed on eastward trip held the entire train so that there were no movements required with cars of the train were it not to be remade before departure from Buffalo. A change in the make up of the train was made, the fourth and fifth cars were taken from the train. There were yard crews on duty and available to perform the switching service but they were not used, Engineer Foster and Fireman MacWade were required to perform this yard switching service prior to their departure with the train.

In the instance on November 23, 1948, train No. 14 arrived in Buffalo passenger station from the west. The track on which it arrived and from which it departed on eastward trip held the entire train so that there were no movements required with cars of the train were it not to be remade before departure from Buffalo. A change in the make up of the train was made by taking the two head cars from the train, handling same to another track where an additional four cars were picked up, then all six cars placed in the train. There were yard crews on duty and available to perform the switching service but they were not used, Engineer Foster and Fireman Nickolson were required to perform this yard switching service prior to their departure with the train.

The Management takes the position no switching was involved in the two instances as that term is commonly understood because all of the cars handled were operated in train No. 14. Committee knows of no common understanding that when cars are being switched it is not switching service because only the cars operated in the train have been handled in the switching movements. If such contention of the Management were valid road crews would be required to make up and break up their trains, the service of yard men would be such miscellaneous switching service as was not performed by road crews. Various Awards, also previous cases handled with the Management which will be referred to later herein, demonstrates the fallacy of the position of the Management.

One of the contentsions of the Management is practice, Management contending that it has been a practice of many years for road passenger crews to make switching movements at Buffalo as a part of their passenger service. Management supplies exhibits consisting of statements from officials of the Company in support of such contention, Management holding that practices of long standing are evidentiary of true meaning of contract provisions.

With regard to practice such as contended by the Management, the committee quotes the following from Awards of the National Railroad Adjustment Board, First Division:

**AWARD NO. 4061:**

"Practice, except as agreed upon, is obviously the creature of management since it alone has power to impose it, but it may not, properly exercise this power to make changes in agreed upon or existing practice with respect to which the schedules were adopted, except by agreement. Of course no amount of practice, in direct conflict with the written rules will operate to create a novation of the agreement, unless shown to have been consciously acquiesced in by authority as high as that which agreed upon, or is authorized to agree upon modification of the schedule."

**AWARDS NOS. 4839 and 4844:**

". . . as has been repeatedly held by this Division no amount of practice contrary to schedule rights will justify violation thereof. The rule is frequently invoked that operation under a contract is evidentiary of the intent of the parties in making it. That rule has no application here. The practice is determined by one party—the management—not by the action of both parties to the contract. Unless evidence be shown of definite acquiescence by a party such
as the general committee competent to make or modify the contract it cannot be deemed to be modified by the action of one party.

..."

**AWARDS NOS. 4851 and 4852:**

"... As has been held many times, a practice dictated by the carrier cannot nullify a rule ..."

Prior to 1921 when a number of road hostler and helper jobs were discontinued at Buffalo terminal, road passenger crews were relieved on arrival with train at the passenger station by the road hostlers and helpers who took charge of the engine. Road passenger crews taking trains east from Buffalo went on duty at the passenger station, their engines were placed on their trains by the road hostlers and helpers, the only work required of the road crews prior to their trip being such preparation of engine as was necessary for the road trip. Road hostlers and helpers made all passenger engine movements before departure of a train and following arrival of a train. These employees were paid yard rates as engineers and firemen instead of the lesser road hostler and helper rates for they also performed service handling cars. Yard engines were employed in passenger station prior to and following 1921, these yard crews performed the passenger station switching in addition to such cars as handled by the road hostlers and helpers.

The committee had no knowledge of the so-called practice which Management states has been in effect in the Buffalo terminal for many years. The subject of road crews being required to perform switching service at the Buffalo terminal was first brought to the attention and knowledge of committee when the claim involved in this submission reached committee. Exhibits supplied by the Management consisting of statements from officials are to the effect that no protests or claims were ever made upon them in connection with road crews performing switching service at Buffalo, this verifies that committee has at no time handled this subject with Management in any way. If, as is contended by the Management, engine crews have been performing switching service at the Buffalo terminal in addition to their passenger trips without claim or protest, that does not establish a practice and indicate acquiescence by committee in such so-called practice.

In exhibits supplied by Management it is set forth that on certain trains switching movements have been programmed at the Buffalo terminal. Committee knows nothing regarding programmed operations of the Management other than as may be made known to the committee at time of such program. At no time to the knowledge of committee has there been any bulletin notices posted for the information of engine crews that switching service would be required of road passenger crews at Buffalo terminal, either in general bulletin notices, bulletins advertising runs for bids or in bulletins assigning men to runs.

The General Grievance Committee, referred to herein as the committee, is the authority to make or modify contracts. This committee is composed of 23 men coming from all sections of the New York Central Line East. There has been no understanding or agreement between committee and Management that road passenger engine crews at the Buffalo terminal were not governed by the articles of agreement applicable to road and yard service or that Management could, at that terminal, require road crews to perform the work of yard men as a part of their passenger trip or that yard crews would not perform all of the yard switching at that terminal.

If, as is contended by the Management, road passenger engine crews have performed switching service in addition to their passenger service at the Buffalo terminal, without protest or claim, such action on the part of individual employees cannot establish a practice contrary to the articles of agreement. No individual employee or group of employees, no official or group
of officials can establish a practice that would circumvent or nullify the application of the articles of agreement and proper payment thereunder and thereby bind all other employees coming within the articles of agreement to such so-called practice.

Committee is not unfamiliar with past efforts of the Management to establish so-called practice by failing to properly pay engine crew members for service performed over extensive periods unknown to committee until claim or protest reached committee and upon handling same with Management was informed by Management that it was the practice, brought about by failure to properly pay, for crews to perform the service in question without payment as required by articles of agreement, the position of the Management in such instances being that they were relieved from proper payment due to employees accepting such payment as made by Management without protest. Further, committee is not unfamiliar with efforts of Management to establish so-called practice by calling employees to the office of operating official after they had made proper time slip claims for service performed and inducing such employees to withdraw their time slip claims.

To indicate that under the articles of agreement it is not permissible to require road crews to perform switching service and further, to indicate that when it is made known to committee by protest or claim that such service is being required the committee has made protest or claim upon the Management, the following instances will serve for illustration:

Protest with regard to road passenger crews being required to handle their trains to the Sand Lot after arrival at Albany was handled with the Management and disposed of in April 1937 by the Management agreeing to discontinue the handling of cars to the Sand Lot.

Claim of Fireman W. T. Burgess for one day's pay at yard rate in addition to the pay for his passenger trip for switching performed with the cars of his passenger train after his arrival at Albany on July 17, 1937. Claim handled with the Management and disposed of by payment of the time as claimed.

Claim of Fireman J. J. Becker for one day's pay at yard rate in addition to pay for his passenger trip for switching performed with cars of his train after arrival at Albany with train No. 2nd/14 on November 19, 1937. Claim handled with Management and disposed of by payment of the time as claimed.

Claim of Fireman W. A. Woitke for one day's pay at yard rate in addition to pay for his passenger trip for switching performed with cars of his train after arrival at Albany with train No. 157 on December 23, 1937. Claim handled with the Management and disposed of by payment of the time as claimed.

Claim of Fireman A. F. Brissette for one day's pay at yard rate in addition to pay for his passenger service for switching performed with cars of his train after arrival at Troy with train No. 769 on December 16, 1938. Claim handled with the Management and disposed of by payment of the time as claimed.

Claim of Fireman W. T. Burgess for one day's pay at yard rate in addition to pay for his passenger trip for switching movements made with cars of his train after arrival at Syracuse with train No. X-1 on December 19, 1940. Claim handled with the Management and disposed of by payment of the time as claimed.

Protest with regard to switching movements being required with cars of train after arrival at Ogdensburg with train No. 59. This handled with the Management and disposed of in May 1943 when Management agreed to discontinue the switching service.
The Management refers to special allowances in effect on other portions of the New York Central System and the declination of committee to agree to their proposal for the adoption of rules providing special allowances of the character provided in the Michigan Central Railroad or Boston & Albany Railroad agreements. The Management sets forth that apparently the committee is standing out for a full day's pay at yard rates for the yard work performed, also, that the special allowance agreements in effect on the other railroads as referred to above, demonstrates that the yard work involved in this dispute has not been considered exclusive work of yard crews.

Special allowance agreements in effect on other railroads have no effect or bearing on the articles of agreement and their proper application and payment thereunder as in effect on the New York Central Line East, consequently no bearing on the claim involved in this submission. The articles of agreement in effect on the New York Central Line East are applicable to and govern the claim in this submission, such articles do not permit or provide that road crews will perform the work of yard crews as a part of their road trip, when such has been required, as in this case, the articles of agreement require payment to the road crew under the yard rules with a minimum of one day's pay at yard rates.

The Management refers to conferences held with the General Chairmen of the four train and engine service organizations in 1936 in connection with road crews performing yard service, this apparently for the purpose of creating the impression that during those conferences the so-called practice at the Buffalo terminal was a matter of discussion, that committee was aware of same and was agreeable to continuance. As set forth in the first instance, the Management set forth that the records would show, etc. The committee knew of any such records and so stated, also stating, that the reference was, at the least, vague. Later, the Management identified the source of the record they referred to as being taken from part of a letter addressed to the four General Chairmen by former Vice President Personnel Walber on October 15, 1936. Management now quotes a portion of a paragraph in that letter.

With regard to the conferences held in 1936 and the letter from which Management quotes, the following reviews the purpose of the conferences:

Following Awards Nos. 618, 619, 664, 665, 666, 667 and 669 of the National Railroad Board of Adjustment, First Division, in which claims of committee for one day's pay at yard rates in addition to pay for road trip were sustained, the Management was not inclined to comply with the Awards and make payments required. This eventually resulted in the Chief Executives of the four train and engine service organizations handling the subject with the President of the New York Central Railroad. On January 3, 1936, agreement was reached which provided for payments due under the Awards. In the letter of agreement dated January 3, 1936 as addressed to the four Chief Executives by the President of the New York Central Railroad it was set forth that the representatives of the management and of the employees would, as soon as practicable, confer and endeavor to agree upon the application of the awards to the individuals involved, and further, to be understood that representatives of the management and of the employees would at the same time confer with a view of reaching an understanding as to future practices under existing rules.

Shortly thereafter conferences were started at Syracuse, N. Y., between the four General Chairmen and Management resulting in a tentative proposal, subject to approval of committees, in connection with payments to road crews when required to perform any yard service. This tentative proposal was not agreeable to committees in original form and also required a more thorough and complete understanding as to just what each paragraph of the proposal intended in application. Later conferences were held in New York City. On October 9, 1936, the four General Chairmen addressed a letter to former Vice President Personnel Walber in which they referred
to the conference held on October 7, 1936, and set forth therein their understanding as to the provisions of the tentative proposal. Paragraph 11 of that letter was as follows:

“As we stated to you, it is agreeable on our part to give further consideration to your objection to the inclusion of terminal duties by passenger engine and train crews, although it was definitely understood by us that there had been no exception made for any service except that of traveling switchers and mine runs.”

On October 15, 1936, Mr. Walber made reply to the four General Chairmen. In referring to paragraph 11 of the Chairmen’s letter, which is quoted in part by Management in this submission, Mr. Walber wrote:

“Paragraph 11: We are at a loss to comprehend how the statement can be made that ‘although it was definitely understood by us that there had been no exception made for any service except that for traveling switchers and mine runs’. At several of the conferences in New York beginning September 18th, I reminded you of how this matter was left at the Syracuse conferences which terminated April 18, 1936, when I made the statement that it was my understanding that nothing in the memorandum which had been prepared dealt with passenger switching and that the Watertown decision had no bearing upon the practices at other places. One of the General Chairmen made the statement that there was no thought of opening up that question and made some remark to the effect that those conditions were of long standing and there was no thought of disturbing them. His three associates took no exception at that time to his statements. At the New York conferences mentioned, the General Chairman in question confirmed my statement as to what transpired at Syracuse. All of the examples in the Syracuse memorandum plainly demonstrate that there could not have been in our minds any other service than freight, and to now include passenger is clearly an additional request.”

There is nothing in the above quoted paragraph that indicates that there was at any time any discussion with regard to Buffalo terminal. There is nothing in the above quoted paragraph to indicate as contended by Management that “the matter of work which had long been performed by road passenger crews at terminals was discussed” and “that the committees recognized the practice had been in effect for a long time and that there was no intention to interfere with the practice”. The committee repeats the reference to passenger switching at any place is very vague.

With regard to the letter of Mr. Walber dated October 15, 1936, which includes the above quoted paragraph, the four General Chairmen made the following reply:

“Syracuse, N. Y.,
October 22, 1936.

Mr. John G. Walber,
Vice President of Personnel,
New York Central System,
New York City.

Dear Sir:

Referring to your letter of October 15th, 1936:

It was the intent of our letter to you under date of October 9th to express the fact that there was no exception for service other than mine runs or traveling switchers, and that the memorandum drafted at Syracuse April 18, 1936 should be understood to apply as written.
In the conference held with you since you received our letter of October 9th, you have presented argument against the decisions rendered by the National Railroad Adjustment Board to justify your understanding of the tentative proposals dated April 18, 1936, some of such argument being contained in your letter of October 15th. This same argument had been presented to the National Railroad Adjustment Board when the disputes were presented to and argued before the Board at the time decisions were made by the Board.

Since the exchange of letters of January 3rd and 4th, it has been our intent and so expressed at all conferences held to go as far as possible in granting the relief requested by the Management. However, we were of the opinion and still are that the Syracuse memorandum of April 18th gave such relief.

This situation, in our opinion, requires that any request for further understandings with regard to practices in the application of schedule rules other than carried in the Syracuse memorandum, should be submitted by you to us for any consideration that may be warranted.

Yours very truly,

H. W. Evans
General Chairman, B. of L. F. & E.

M. H. Kanary
General Chairman, B. of R. T.

J. M. Albright
General Chairman, B. of L. E.

M. C. Slattery
General Chairman, O. R. C.

Other conferences were later held. No proposals being agreed to, consequently, the application of the articles of agreement with regard to road crews performing yard service which require a minimum of one day’s pay at yard rates for any yard service performed, apply without any modification.

The Management takes the position that the time consumed in making the switching movements for which claim is made was trivial and the claimants were well paid for their entire service on dates of claims. To support this position the Management sets up a tabulation of actual earnings as paid; actual time worked; average earnings per hour; total pay as claimed, and what the average per hour and the total pay as claimed would amount to were the rates in effect to be applied instead of the rates in effect on dates of claim in 1943. The Management charging that the claim is an effort to collect “FEATHERBED PAY”.

This tabulation is obviously an attempt to influence the Board on the basis of amounts actually paid and amounts that would be paid. The claim in this submission is based upon the articles of the contract agreed to by the Management. This contract is the result of many years of experience and many of the articles, including the articles upon which this claim is based, are the result of Awards of various Bodies or Boards. It is not an optional contract conferring prerogative on the Management to be the sole judge as to whether they shall comply with the provisions of the contract or to pay employees coming within the provisions of the contract only what they may consider as being well paid for the service performed. The provisions (Articles 14 and 17) of both contracts governing, provide a day's work of eight hours or less in switching service. It matters not if the Management considers the time consumed in switching service as trivial in this claim, any yard switching service of eight hours or less is a day's work. The total amount paid, which Management considers well payment to the claimants is the minimum amount they are required to pay under Article 2 of both contracts for the actual miles run on the passenger trip exclusive of any switching service.

The charge of the Management that the claim is an effort to collect “FEATHERBED PAY” is so unwarranted and so obviously an attempt to
endeavor to influence the Board in a claim based upon the application of the articles of agreement that committee is impelled to refer to comments made both with regard to payments required for each mile run by road crews exclusive of other service and "FEATHERBED PAY" in the Report to the President by the Emergency Board appointed March 8, 1946, to investigate the unadjusted dispute concerning rates of pay and working rules involving the Alton Railroad Company and other carriers and certain of their employees represented by the Brotherhood of Railroad Trainmen on April 8, 1946, from which the following is quoted:

"Observations Concerning the Rules Controversy:

In this case as in similar predecessor controversies between the railroad carriers and the railroad transportation unions, one of the causes of the impasse in negotiations and subsequent conflict in presentation of evidence revolved around different concepts regarding the operation of the dual basis of pay. Because of this conflict between the parties concerning the dual basis of pay, we think it not inappropriate to comment to some extent upon it.

Briefly, the dual basis of pay applies only to road service and consists in a combination of miles and hours. For example, in road freight service, 100 miles is deemed equivalent to an 8-hour day or a speed basis of 12 1/4 miles per hour. If the crew runs 100 miles or more in 8 hours, it is paid on a mileage basis. If the time required to run the mileage is longer than a speed basis of 12 1/4 miles per hour, overtime accrues at time and one-half. If on the other hand, the run is less than 100 miles and is performed within 8 hours, the basic minimum day for 8 hours or 100 miles is applicable.

In recent years certain aspects of the application of the dual basis of pay system have been characterized by some as a type of "feather bedding". During the course of the hearing, criticism of the operation of the dual basis of pay was expressed by both parties but more particularly by the carriers. Much testimony on their behalf was submitted concerning the relatively high earnings per hour worked by some employees in preferred runs as the result of the operation of the rule. However, when pressed on the point by the Board, carrier representatives disavowed any desire to abolish the system. Additionally, none of the 29 carrier proposals which were characterized as embodying the long-term objectives of the railroads to secure rules relief contained any proposal to do away with the dual basis of pay.

To comprehend the nature and effects of the dual basis of pay it is necessary to keep in mind that it is analogous to a piecework or incentive wage system. As a method of wage payment, this system entails distinct financial advantages to both carriers and employees. Under the operation of the system an employee can and commonly does earn more than a basic day's pay within eight hours. The carriers, on the other hand, enjoy the dual advantage of moving traffic more quickly and making available more quickly plant, equipment and facilities for additional use within the elapsed time."

"The clear recognition by the parties of the mutually advantageous results arising from the dual basis of pay rule is sufficient indication of the desirability of its retention. The dual basis of pay does at times operate to the disadvantage of the carriers. However, it is hardly accurate to characterize the system as 'featherbedding' and it is notable, we repeat, that neither party to the proceedings proposed to abolish it."
In this submission the committee would have preferred to set forth only such as was relevant to the claims under the articles of agreement and the facts in the case. However, in view of the many varied contentions of the Management, many of which are far afield to the case and entirely irrelevant as to whether the claims are valid under the articles of agreement and the facts in the case or otherwise, the committee has been impelled to insert in this submission in the way of comment and refutation, much that would otherwise not have been necessary.

The Management, constructively, refers to presentations of committee with characterizations such as: "astounding"; "a drive toward inefficiency in train operation"; "fantastic"; "irrelevant"; "short-sighted"; "attempting to muddy the waters"; "exorbitant allowances"; "should be cooperating with their employer instead of trying to drive business away through these unjustifiable claims" and "featherbedding". To this last, when the committee was impelled to quote from a decision of an Emergency Board with regard to this characterization and also with regard to the tabulation of the Management as to the actual time on duty of the claimants and the contention of the Management that claimants were well paid, and claimants were only paid under rules providing for miles or hours (dual basis of pay) for their road trip, the Management responds—"This quotation has to do entirely with the dual basis of pay in road service and is irrelevant to the case at hand."

To the Management's lengthy position embracing the future of the transportation industry; competition; orders placed for stream lined deluxe passenger cars; running time of trains; character of trains; number of main line tracks; stoker equipped engines, and the working conditions in passenger service to-day and of 25 years ago, the committee can only leave it to the Board to pass upon their being relevant to a claim based upon the articles of an agreement.

Committee contends that Articles 14 and 17 provide a day's work in yard switching service of 8 hours or less and the crews involved in these claims having performed yard switching service of 8 hours or less prior to start of the passenger trip, they should be paid a minimum of one day's pay at yard rates for such service. Further, that Article 2 provides for the payment of all miles run on the passenger trip and a trip having been made from Buffalo to Syracuse following the yard service performed, payment for such passenger trip of the actual miles run from Buffalo to Syracuse should be made at the passenger rate.

**POSITION OF CARRIER:** The position of the carrier is based upon the following principal points:

1. **SIMILAR MOVES HAVE BEEN MADE BY PASSENGER ENGINEERS FOR MANY YEARS.**

2. **TIME CONSUMED IN MAKING MOVES WAS TRIVIAL.**

3. **CLAIMANTS WERE WELL PAID FOR THEIR ENTIRE SERVICE ON DATES OF CLAIMS.**

4. **RULES RELIED UPON BY EMPLOYEES DO NOT SUPPORT CLAIM.**

5. **SPECIAL ALLOWANCES ARE MADE IN OTHER OPERATING DISTRICTS WHICH HAVE RULES IDENTICAL WITH THOSE RELIED UPON BY EMPLOYEES.**

6. **OCCURRENCE AND DEVELOPMENTS IN RECENT YEARS SHOW THE INCONSISTENCY OF THE CLAIM.**

7. **PRACTICES OF LONG STANDING ARE EVIDENTIARY OF TRUE MEANING OF CONTRACT PROVISIONS.**
8. ENGINEMEN AS WELL AS OTHER EMPLOYEES SHOULD BE COOPERATING WITH CARRIERS INSTEAD OF TRYING TO COLLECT "FEATHER BED" PAY.

Said principal points will hereinafter be discussed seriatim.

1. SIMILAR MOVES HAVE BEEN MADE BY PASSENGER ENGINEMEN FOR MANY YEARS.

The moves made by claimant enginemen on October 12 and November 23, 1943, have been described in the Joint Statement of Facts and it will be noted that on October 12 the crew set out two cars and on November 23 picked up four cars, both of these moves being simple set-offs or pick-ups.

Neither move required the handling of cars other than those operated in Train 14 and therefore there was no switching involved as that term is commonly understood.

Moves of this character have been made by passenger engine crews at Buffalo and other terminals in Line East territory for many years. In support of this fact Carrier submits herewith and makes a part hereof ten statements from officials and subordinate officials as follows:

Exhibit 1. John J. Brinkworth, Vice President and General Manager

  2. Chester A. Raymond, Assistant General Manager
  3. Newman J. Evans, Assistant Superintendent
  4. Alvin W. Zink, Stationmaster
  5. William J. Kohler, Assistant General Yardmaster
  6. Robert S. Young, Assistant General Yardmaster
  7. Michael J. Murphy, Yardmaster
  8. Patrick J. Durkin, Yardmaster

In Exhibit 1 Vice President and General Manager Brinkworth has stated in part:

"During the entire period above covered my official duties involved either directly or indirectly the supervision of the passenger terminal and I clearly recall that it was the practice, both at Exchange Street station and at Central Terminal, to have road engine crews make straight set-off or straight pick-up of cars on head portion of their passenger train prior to departure.

This procedure was included in the road trip of road engine crew; no additional compensation was allowed, and during my entire service at Buffalo, no claim was ever made that such straight set-off or pick-up constituted a violation of any provision of schedule covering engine crews."

It will be noted from Exhibit 2 that Mr. Raymond has stated:

"At all such terminals, during the entire 31 years, it was the uniform practice to have road engine crews make straight head end set-off or pick-up moves as part of their road trip. This interpretation of the schedule was never questioned.

During the period November 1937 to July 1943, while I was Superintendent at Buffalo, there was no claim or complaint filed as a result of this work being performed by road engine crews at that terminal."
In Exhibit 3 Mr. Evans has stated that his service as Passenger Trainmaster and Assistant Stationmaster from June 1, 1927 to August 31, 1942 included supervision over the making up and handling of passenger, mail and express trains at Buffalo Passenger Station, Curtiss Street Express Terminal and Clinton Street, that the handling of set-off or pick-up moves on head end of trains at those three locations by road engine crews was programmed work on many trains, that this arrangement has been in effect up to the date of his statement but at no time during his service at Buffalo was any question raised as to the propriety of such moves by road engine crews as a part of their road service and without any additional payments.

In Exhibit 4 Stationmaster Zink has stated in part:

“During my entire service at Buffalo Passenger Terminal, from 1916 to date, road engine crews have consistently performed, as part of their road trip, straight head end set-off or pick-up work.”

The following statement has been made by Assistant General Yardmaster Kohler in Exhibit 5:

“I can state definitely, from my actual performance of the work and supervision of same, that the setting off and picking up of head end cars by road engine crews on passenger, mail and express trains at Clinton Street, Curtiss Street, Exchange Street and new Central Terminal has been performed regularly during my 26 years of work in the Buffalo Terminal territory.

The method of handling these head end moves changed with the running through Buffalo of passenger power, but since around 1925, the uniform practice has been to have head end set-off or pick-up handled by the outgoing engine crew.

I have never heard from any source that the performance of this work by the road engine crew was alleged to be a violation of any rule in their schedule, or the basis for any additional pay beyond their road trip earnings.”

Robert S. Young, another Assistant General Yardmaster, has stated in Exhibit 6:

“Prior to operation of engines in through road service, these head end moves were made by either incoming or outgoing road engine crew; after the through engine service was arranged, we received instructions to have such moves uniformly handled by outgoing crew.

During these 25 years, I have never heard any contention by engine crews that the head end set-off or pick-up work was a violation of their schedule, or that it entitled them to any additional payment beyond their road trip.”

Michael J. Murphy, Yardmaster, has stated in Exhibit 7 that he commenced work as a yard brakeman in the passenger terminal area at Buffalo in December 1899 and worked at various locations in said area up to the date of his statement. He has outlined the conditions at Exchange Street Station, which was the main passenger depot until June 1929, at Curtiss Street Express Terminal and at Clinton Street where road engine crews were changed on some trains prior to June 1929. The following paragraphs are quoted from his statement for ready reference here:

“From the foregoing it will be seen that I have been in a position to know from actual connection with the work, as well as supervision of those doing the work, the manner in which the making up, breaking up, and switching of passenger, mail and express
trains, both in the passenger terminal itself and at outlying points such as Curtiss Street and Clinton Street, was actually handled.

With that background I can positively state that the engine crews working on road passenger, mail and express trains operating into and out of Exchange Street Station, Curtiss Street Express Platform and Clinton Street, regularly made head end pick-up and set-off moves with cars in their train and this same practice was carried over to Central Terminal when that facility was placed in service.

Prior to the time we operated the locomotives through Buffalo without changing power at that point, the arrangement ordinarily was for the incoming engine crew to make a head end set-off, and the outgoing engine crew would make the head end pick-up. After the through engine arrangement went into effect it was programmed for the outgoing road engine crew to make either pick-up or set-off on the head end in all cases.

At no time since I started working in the passenger station service in 1899 have I ever heard that the performance of these head end set-off or pick-up moves by the road engine crews was considered a violation of any rule in their schedule or a move that called for any additional payment. It has always been a part of the road trip and performed by road engine crew without any criticism or claim."

P. J. Durkin, Yardmaster, has stated in Exhibit 8:

“During my entire service as switch tender and Yardmaster, it has been the practice for road engine crew to make head end set-off or pick-up moves on cars in their train. Such moves included cars set out or picked up by engine alone, also by engine when handling other cars in train ahead of those to be set out or picked up.

Train 14 regularly made such a move during the period from 1940 to the present time, under my supervision. Ordinarily No. 14 would have 2 New York mail cars next to engine and would hang on to these 2 cars with road engine in picking up or setting off cars. The move would consume not to exceed 10 minutes.

In no instance that I can recall, was the road engine crew of No. 14 required to make a set-off and a pick-up on the same date. They made either move, but not both.

Until the question of claim for additional day at yard rate was brought up in 1943, no complaint had ever been made to me that such a move was contrary to road engine crews’ schedule, and no claim for extra pay was ever made by road engine crews.”

Other exhibits not specifically mentioned here are equally pertinent to this matter of proving that moves similar to those made by claimant engine-men have been made by passenger engine crews for many years.

2. TIME CONSUMED IN MAKING MOVES WAS TRIVIAL.

The time consumed by passenger engine crews in making the moves involved herein will vary to the extent of a few minutes but the actual time will seldom consume as much as ten minutes.

On October 12, 1943, one of the dates involved in the claim, Train 14 arrived at Buffalo in two sections. First 14 arrived at 9:45 P. M. and Sec-
ond 14 at 9:54 P.M. Claimant enginemen departed on Train 14 at 10:19 P.M. The delay report shows the following entries:

14 minutes Buffalo, Line West (meaning waiting for connection)
5 minutes Buffalo, mail
5 minutes Buffalo, inspection and air.

Engineer Foster's time slip shows that he and Fireman MacWade registered on duty at 9:15 P.M. and departed at 10:20 P.M. It further shows that the engine crew arrived at Syracuse and went off duty at 1:04 A.M. Their total time on duty was therefore three hours and 49 minutes.

On November 23, 1943, Train 14 arrived at Buffalo in two sections. First 14 arrived at 10:02 P.M. and Second 14 at 10:06 P.M. Claimant enginemen departed on Train 14 at 10:41 P.M. The delay report shows the following entries:

26 minutes, Line West (meaning waiting for connection)
12 minutes Buffalo, switching
8 minutes Buffalo, air and steam.

Engineer Foster's time slip shows that he and Fireman Nicholson registered on duty at 9:15 P.M. and departed at 10:43 P.M. It also shows that this crew arrived at Syracuse and went off duty at 2:00 A.M. The on duty time was therefore four hours and 45 minutes.

There is a slight difference between the departure times shown on the time slips and those recorded on the train sheets of the train dispatcher's the latter showing departure time as 10:19 P.M. on October 12 and 10:41 P.M. on November 23.

It is apparent from the foregoing records that the major portion of the time consumed at Buffalo was due to the late arrival of the Line West connection, the handling of U. S. mail and the inspection of air and steam lines. The actual time spent in picking up or setting off cars was certainly trivial.

3. CLAIMANTS WERE WELL PAID FOR THEIR ENTIRE SERVICE ON DATES OF CLAIMS.

In Carrier's argument under principal point 2 the on duty times of claimant enginemen, as reflected by Engineer Foster's time slips, were shown to be 3 hours, 49 minutes and 4 hours and 45 minutes respectively.

The mileage allowed for a trip Buffalo to Syracuse is 147 miles.

The following tabulation shows the actual earnings received by each engineman on the dates involved in their claims, the average earnings per hour actually worked, the total amount of pay on the basis of their claim and what the average earnings per hour actually worked would be if their claims were allowed.

<table>
<thead>
<tr>
<th></th>
<th>Actual Earnings Received</th>
<th>Actual Time Worked</th>
<th>Average Earnings Per Hour</th>
<th>Total Pay Claimed</th>
<th>Average Per Hour Would Be</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engineer</td>
<td>$12.01</td>
<td>3 hrs. 49 mins.</td>
<td>$3.15</td>
<td>$20.78</td>
<td>$5.44</td>
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<tr>
<td>Fireman</td>
<td>9.73</td>
<td>3 hrs. 49 mins.</td>
<td>2.55</td>
<td>16.86</td>
<td>4.42</td>
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<table>
<thead>
<tr>
<th></th>
<th>Actual Earnings Received</th>
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<th>Average Earnings Per Hour</th>
<th>Total Pay Claimed</th>
<th>Average Per Hour Would Be</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engineer</td>
<td>12.60</td>
<td>4 hrs. 45 mins.</td>
<td>2.65</td>
<td>21.68</td>
<td>4.56</td>
</tr>
<tr>
<td>Fireman</td>
<td>10.20</td>
<td>4 hrs. 45 mins.</td>
<td>2.15</td>
<td>17.65</td>
<td>3.72</td>
</tr>
</tbody>
</table>
The calculations in the foregoing tabulation are based upon rates of pay which were in effect in October and November 1943. As the Board knows, wage rates were increased on January 1, 1946, and again on May 22, 1946. The following tabulation shows what the enginemen would have earned at the present road rates, what their pay claim would have amounted to at present yard rates, the total pay on the basis of their claim and the average earnings per hour on the basis of these present rates:

October 12, 1943

<table>
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<tr>
<th></th>
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<th>Pay at Yard Rates</th>
<th>Total Pay</th>
<th>Average Per Hour</th>
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<tr>
<td>Engineer</td>
<td>$15.24</td>
<td>$10.97</td>
<td>$26.21</td>
<td>$6.87</td>
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<tr>
<td>Fireman</td>
<td>12.97</td>
<td>9.33</td>
<td>22.30</td>
<td>5.84</td>
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</table>

November 23, 1943

<table>
<thead>
<tr>
<th></th>
<th>Pay at Road Rates</th>
<th>Pay at Yard Rates</th>
<th>Total Pay</th>
<th>Average Per Hour</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engineer</td>
<td>15.36</td>
<td>10.97</td>
<td>26.33</td>
<td>5.54</td>
</tr>
<tr>
<td>Fireman</td>
<td>12.97</td>
<td>9.33</td>
<td>22.30</td>
<td>4.70</td>
</tr>
</tbody>
</table>

4. RULES RELIED UPON BY EMPLOYEES DO NOT SUPPORT CLAIM.

The employes rely upon Articles 2 and 14 of the Engineers' Agreement, effective April 1, 1928 and Articles 2 and 17 of the Firemen's Agreement, effective April 1, 1928, which are the basic day rules in passenger and yard service. Also Article 21(b) of the Engineers' Agreement and 24(b) of the Firemen's Agreement, which articles cover arbitrary and special allowances for employes assigned to yard service.

Claimant enginemen were paid for their service on October 12 and November 23, 1943, under Article 2 of the Engineers' Agreement and Article 2 of the Firemen's Agreement just as all passenger engineers and firemen who performed like service have been paid since those articles were placed in the respective agreements.

Article 14 of the Engineers' Agreement and Article 17 of the Firemen's Agreement have been in the respective schedules since April 16, 1920, but neither has been construed by either party to said agreements as denying Carrier's right to have passenger engine crews make the moves involved in this dispute as a part of their road service. Such work has not been considered as work which belongs exclusively to yard engine crews and this fact is supported by Carrier's Exhibits 1 to 9 inclusive.

It is therefore clearly apparent that the rules relied upon by the employes do not support the claim. In order to justify the claim for separate pay under the basic day rule for yard service, the employes must prove to the Board that the work involved has been construed as exclusive yard work on this Carrier, but in view of the above mentioned exhibits the employes cannot do so.

To the Carrier's knowledge, the employes have made no attempt to apply the provisions of Articles 21(b) and 24(b) to employes in road service until the case at hand. The Carrier does not feel that it is necessary to go into detail or clutter up the records as your Board can see from the very language of these articles that they could only apply to employes assigned to yard service when required to perform road service outside of switching limits. For your Board to uphold the employes in their contention would, in reality, be giving them a new rule.

5. SPECIAL ALLOWANCES ARE MADE IN OTHER OPERATING DISTRICTS WHICH HAVE RULES IDENTICAL WITH THOSE RELIED UPON BY EMPLOYEES.

In other operating districts of the New York Central System which have in their agreements with engineers and firemen rules that are identical with
those relied upon by the employees in this case, special allowances for passenger
enginemen have been negotiated and incorporated in collective bargaining
agreements. This fact further demonstrates that the work involved in the
dispute has not been considered exclusive work of yard crews on the New
York Central and that the committees representing engineers and firemen
in these other operating districts have found it necessary to negotiate special
provisions in order to acquire additional pay for the performance of such
work.

The Engineers' Agreement on the Michigan Central Railroad contains a
rule reading:

"Passenger train engineers required to do switching at terminals
shall receive their schedule rate of pay for actual time engaged in
this service, a terminal to be considered as the point at which engi-
neers give up their engines and are relieved from duty, or the point
at which engineers take their engines."

The same type of rule is contained in the Firemen's Agreement on the
Michigan Central Railroad.

In the Boston & Albany Railroad agreement with the engineers the
following rule appears:

"Road passenger engineers on mileage runs (runs of over 80
miles in one direction) required to perform switching at points
where yard engines are employed and on duty will be paid for the
actual time consumed with a minimum of one hour at the pro rata
rate. The rate to be the same as the rate paid them for road
service.

Road passenger engineers on mileage runs (runs of over 80
miles in one direction) required to perform switching at points
where no yard engines are employed or where yard engines are
employed but not on duty, will be paid for the actual time con-
sumed at the pro rata rate. The rate to be the same as the rate
paid them for road service."

A similar rule appears in the Firemen's Agreement on the Boston &
Albany Railroad.

In the handling of this case Carrier has endeavored to dispose of the
matter through the adoption of rules providing for special allowances of the
character provided for in the Michigan Central and Boston & Albany agree-
ments, but on October 3, 1945, the General Chairman of the Firemen's
Committee advised Carrier that his General Grievance Committee was not
agreeable to accepting Carrier's proposal.

The General Grievance Committee is apparently standing out for a
full day's pay at yard rates for this work of five or ten minutes at the
initial terminal, notwithstanding the fact that since 1899 road passenger
enginemen have performed the service as a part of their road trip.

We ask the Board especially to take note of the preceding paragraph,
as the committee has attempted to distort the language thereof in the follow-
ing assertion on sheet 6 of this submission:

"The Management sets forth that apparently the committee is
standing out for a full day's pay at yard rates for the yard work
performed, * * *." (Underscoring added.)

Carrier did not state it was "yard work". And in another assertion in
the same paragraph on sheet 6 the committee further distorts Carrier's
language:

"The Management sets forth * * * that the special allowance
agreements in effect on the other railroads * * * demonstrates
that the yard work involved in this dispute has not been considered exclusive work of yard crews." (Underscoring added.)

But what Carrier actually "set forth" was this:

"This fact further demonstrates that the work involved in this dispute has not been considered exclusive work of yard crews on the New York Central and that the committees representing engineers and firemen in these other operating districts have found it necessary to negotiate special provisions in order to acquire additional pay for the performance of such work."

These attempted distortions are very apparent.

6. OCCURRENCES AND DEVELOPMENTS IN RECENT YEARS SHOW THE INCONSISTENCY OF THE CLAIM.

In 1933 conferences were held with our train and engine service committees and Grand Lodge Officers representing the four brotherhoods on the subject of work performed by road crews at terminals. This conference was the outgrowth of some cases which had been presented to the Train Service Board of Adjustment (Eastern) but not decided by said Board.

These cases were eventually submitted to the First Division of the National Railroad Adjustment Board which made awards in the latter part of 1935.

Following the receipt of said awards conferences were held with the four General Chairmen with the view to arriving at understandings with respect to work which road crews performed at terminals. At the conference in April, 1936, a proposed understanding was tentatively agreed to which provided for additional allowances for freight crews performing certain work at terminals. This understanding was never consummated but the records will show that during these conferences and others which were held in the latter part of 1936 the matter of work which had long been performed by road passenger crews at terminals was discussed and the spokesman for the four General Chairmen stated in effect that there was no intention of opening up that situation, that the committee recognized the practice had been in effect for a long time and that there was no intention to interfere with the practice.

One of the cases referred to above which was decided by the First Division (Award No. 669) involved the claim of train and engine crews on Train No. 7 for additional pay at yard rates for switching performed at Watertown, N. Y. The findings in this case contained the following paragraphs:

"The evidence in this case shows that prior to July 11, 1932, switch engines performed what switching service was required on passenger trains at Watertown passenger station and subsequent to that date passenger crews were required to do more or less switching on arrival at or passing through Watertown, when switch engines were on duty in Watertown Yard.

The evidence also indicates that one switch crew was taken off when passenger crews were required to do this switching and under the circumstances, this Division decides that the switching performed by passenger crews at Watertown properly belonged to yardmen."

That dispute bears out two points clearly—(1) that passenger cases were discussed at the conferences in 1936, and (2) the facts and circumstances at Watertown were different from those obtaining in the present claim.
In answer to statement made by the Committee that they have no record of statement made at the 1936 conference in regard to memorandum of understanding not applying to passenger service, the Carrier wishes to quote in part letter from former Vice President of Personnel Walber, dated October 15, 1936, addressed to:

Messrs. J. M. Albright, General Chairman
Brotherhood of Locomotive Engineers,
H. W. Evans, General Chairman
Brotherhood of Locomotive Firemen and Enginemen,
M. C. Slatery, General Chairman
Order of Railway Conductors, and
M. H. Kanary, General Chairman
Brotherhood of Railroad Trainmen.

reading in part as follows:

"* * * I reminded you of how this matter was left at the Syracuse conferences which terminated April 18, 1936, when I made the statement that it was my understanding that nothing in the memorandum which had been prepared dealt with passenger switching and that the Watertown decision had no bearing upon the practices at other places. One of the General Chairmen made the statement that there was no thought of opening up that question and made some remark to the effect that those conditions were of long standing and there was no thought of disturbing them. His three associates took no exception at that time to his statements. At the New York conferences mentioned, the General Chairman in question confirmed by statements as to what transpired at Syracuse."

The Committee has quoted on sheet 9 the letter of October 22, 1936, which the four General Chairmen wrote to Mr. Walber after receipt of the latter's letter of October 15, 1936, and has followed that quoted letter with the following assertion:

"Other conferences were later held. No proposals being agreed to, consequently, the application of the articles of agreement with regard to road crews performing yard service which require a minimum of one day's pay at yard rates for any yard service performed, apply without any modifications." (Emphasis added.)

The Board will please note that that correspondence and those conferences took place in 1936 and this claim of Enginemen Foster, MacWade and Nickolson involves two dates in November, 1943, which fact clearly shows that the Committee in the seven year ensuing period did not regard the simple set-offs and pick-ups by these passenger crews as constituting "road crews performing yard service." It took the committee 7 years to hatch this thought.

There can be no question that the train and engine service committees in our Line East territory have been thoroughly conversant with the long standing practice of having outgoing passenger crews make a simple set-off or a simple pick-up, but not both, as a part of their road trip and, as Carrier's Exhibits 1 to 9 inclusive show, no claims for additional pay were ever presented until October 12, 1943, which was at least 43 years after the practice was inaugurated.

In answer to the employes' statement, "The Committee had no knowledge of the practice Management states has been in effect at Buffalo terminal for many years," etc.: This statement is refuted by the record as the present General Chairman of the B. of L. F. & E., who was elected to that position in the early 1920's, served as Local Chairman of that organization in the Buffalo territory for many years prior to his election as General Chairman.
and as such was a member of the General Grievance Committee referred to by the employees. Furthermore, one of his predecessors was O. D. Hopkins who was General Chairman prior to and during a part of the period of federal control and at that time was elected a Vice President of the B. of L. F. & E. After Mr. Hopkins gave up his Grand Lodge office he returned to New York Central (Lines East) service and was a passenger engineer for several years, running between Buffalo and Syracuse. On many occasions during these later years he performed the simple set-off or pick-up movements that are in dispute in this case. During a part of his Grand Lodge service, which extended over a period of about 15 years, Mr. Hopkins was a member of the Train Service Board of Adjustment (Eastern), one of the predecessors of the present Board. His knowledge of rules and their intended application was therefore very extensive, yet at no time during his service as General Chairman, as Vice President of the B. of L. F. & E., or as a passenger engineer on the Syracuse Division, did he ever indicate that the movements made by passenger engine crews at Buffalo were in any way improper or that they constituted yard service.

With this background and the large number of trains operating in and out of Buffalo terminal upon which the engine crews have performed head end work, such as making a straight-set-off or pick-up of head end cars for so many years as is evidenced by the affidavits attached, there should be sufficient proof that the Committee did have knowledge and did acquiesce in the moves being made and that such moves were in accord with a common interpretation placed upon the agreement by both parties.

Other awards that were discussed during the 1936 conferences were Awards Nos. 665 and 668, both of which involved claims of road freight crews. The findings of these two awards are identical and read as follows:

"The schedule rules in evidence support the employees’ contention. There is not sufficient evidence of any agreed practice at variance therewith to warrant the board in not applying the rules."

In this case Carrier has presented a vast amount of evidence to show what the practice has been for approximately 50 years, during at least 25 of which the rules relied upon by the employees in this case have been in their agreements, and has shown that such practice was not only known to the Local and General Committees of the Brotherhood but was acquiesced in by said committees. Further evidence of that nature is presented under the next principal point.

7. PRACTICES OF LONG STANDING ARE EVIDENTIARY OF TRUE MEANING OF CONTRACT PROVISIONS.

At the time this dispute was handled by the Firemen’s Committee, road enginemen on the following eastbound trains were picking up or setting off head end cars at Central Terminal, Buffalo: 10, 14, 22, 32, 34, 38, 46, 52 and 90. In most instances the set-off is the car next to engine, or the pick-up becomes the first car of the train, no other cars in the train being moved when the set-off or pick-up is made. Certainly all these passenger engine crews could not be involved in these movements for so many years without the committee’s knowing about it. General Chairman Evans goes to Buffalo fairly often. The B. of L. F. & E. has Local Chairmen in Buffalo and they are also members of the General Grievance Committee. It is therefore quite clear that the statement in the Position of Employees—

"The Committee had no knowledge of the so-called practice which Management states has been in effect in the Buffalo terminal for many years ** **"

is too fantastic to be taken seriously. Beyond every reasonable semblance of a doubt the committee knew all along about the practice and acquiesced in it.
Carrier's Exhibits 1 to 9 inclusive show that this practice has been in effect in the Buffalo territory since the year 1899, at least.

Since railroad adjustment boards were first established in the United States they have been guided quite extensively in their interpretation of collective bargaining agreements on practices and in some cases settlements under rules involved in disputes. That is a sound premise for any adjustment board to be guided by. The manner in which rules have been applied and the recognized meanings of the language are the best indications of the intent of such rules when they became a part of the agreement.

Where certain rules have been applied in a certain manner over a long period of years, such application should not be disturbed by any adjustment board.

As shown in Carrier's arguments under principal point 4, the rules relied upon by the employees in this case have been in the Engineers' and Firemen's Agreements since April 16, 1920. The parties to those agreements were supposed to know and in fact did know what the rules were intended to mean, and by their conduct over a long period of years they have established the true meaning and application of the rules. There is no sound reason for one party or the other to request the First Division of the National Railroad Adjustment Board to place new meanings and applications on the rules, which would have the effect of placing far different applications and completely disturbing the long established practices. There can be no doubt that such a revolutionary change would be equivalent to creating some new provisions in the guise of interpretations of old rules. Such radical changes must be handled through the process of serving due notice and negotiating in accordance with the Railway Labor Act. Any other procedure ignores the collective bargaining provisions of said Act.

In support of our statement that from the very beginning adjustment boards have given weight and recognition to past practices and settlements between the parties, we cite below some concrete examples:

**Railway Board of Adjustment No. 1—**

In Case No. 42 the Board said: "It is decided that in view of the fact that yard crews employed at Norway have long been required to do the switching at several iron mines in that district, that under the rules no specific claim for additional compensation for switching performed at Loretto mine can be sustained."

In Case No. 72 the Board decided in part: "* * * moreover, the employees are in honor bound to continue to accept this allowance by virtue of their own voluntary acts for about ten years."

In Case No. 111 the decision was: "Notwithstanding Rule 3 has been in the schedule for years, the handling of pay cars within the yards has been paid for as yard service. We are unable to find anything to require a change in this practice."

In Case No. 271 the second paragraph of the decision reads: "The Board decides that in the absence of a rule to the contrary and in view of the past accepted practice that it cannot sustain the claim of the Committee. However, if it is desired to change the practice of many years' standing, negotiations should be entered into, looking to the adoption of a rule to cover this question."

In Case No. 654 the Board said in part: "* * * it was established at the hearing that the practice at Mendota, now complained of by the Committee, has been in effect for many years, and the Committee in its brief requests that the Board direct the company to 'discontinue the practice' * * *. On account of past practice, the Board cannot sustain this contention of the Committee."
In Case No. 920 the last paragraph of the decision reads: "It is further conceded that the practice now complained of has been in effect for years without any claims having been made on the basis now contended. In view of the language of the rules and of the established practice under it, the Board decides the claim is not sustained."

Case No. 1318 is an outstanding example, and the Board's decision reads in part: "In view of the fact that following the adoption of the rule the practices adopted on the various divisions went on for 7 or 8 years without change and without protest, it must be held that the two practices in question, even though different, became accepted and established interpretations of the rule on the various divisions, and the Board accordingly decides that the practices originally adopted be continued on the respective divisions of the System unless changed by mutual agreement."

Case No. 828 is also an outstanding example, the decision reading in part: "An accepted practice of years' standing under a rule must be held to be an agreed upon interpretation of the rule in question, and neither party to an agreement has any more right to arbitrarily set aside an interpretation of the agreement than it has to change its language."

In Case No. 925 the Board sustained the claim of the employees on the basis of past practice, as follows: "The established practice thus fully supports the contention of the Committees, and the claim is therefore sustained."

In Case No. 954 the Board decided: "It is the judgment of the Board that a practice for four years under the circumstances cited, clearly indicates the intent of the rule, and they therefore decide the Engineers are entitled to be paid under the schedule provisions * * * from the date of schedule until a new rule is negotiated."

Case No. 1023 provides another outstanding example, and the decision reads: "The record discloses that, irrespective of the rule cited, the practice and the precedence for many years places upon the rule the interpretation contended for by the employees."

In another outstanding instance, Case No. 1976, the Board sustained the employees on the basis of past practice, as follows: "The Board decides that a literal interpretation of the rule quoted would not require payment of 100 miles for such service, but in the case herein submitted it is well developed that it was the practice in the past to pay upon the basis claimed by the Committee. Claim is therefore sustained."

Still another outstanding illustration is Case No. 957, in which the third paragraph of the Board's decision reads: "The Board is of the opinion that a long continued practice, though originally erroneous, establishes the rule and they are not inclined by a technical exposition of a rule to unsettle rights honestly acquired and upon which many persons have rested for years."

If the Board be inclined to pursue the matter further, we suggest a review of Cases Nos. 201, 1331, 1332, 1333, 1334, 1336, 1337, 1364 and 1366.

It is a well known fact that Railway Board of Adjustment No. 1 was composed of four representatives of labor and four of carriers and that all decisions made by the Board were adopted by a majority or unanimous vote of the eight members, there being no arrangement under which a referee
or neutral member could be called in. It therefore becomes apparent that the principles set forth in the decisions hereinbefore cited were acceptable to both labor and carrier members.

After Railway Board of Adjustment No. 1 was discontinued there were created, in the several regions of the United States, Boards of Adjustment, composed of four labor and four carrier members. Such Boards were established in the Eastern Region, the Southeastern Region, the Western Region and eventually in the Southwestern Region. All of those Boards functioned until July 1934 and were discontinued when the National Railroad Adjustment Board was created. Many decisions of those Boards were based on evidence of past practice or settlements between the parties. We could cite here innumerable cases of this kind, but will not burden the record to that extent, and it should not be necessary to do so for the reason that no person who is familiar with the records of those four Boards can or will deny that our statements here are correct. The records clearly reveal that those successors to Railway Board of Adjustment No. 1 followed the same line of reasoning in dealing with cases involving past practices and settlements.

The records of the National Railroad Adjustment Board, which succeeded those four regional Boards, reveal also that the four Divisions have accorded recognition to past practices and settlements. In the instance of the First Division, which will handle the instant case, we cite the following awards as illustrations without quoting from the findings:

<table>
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Carrier desires to discuss specifically a few of those awards.

In the findings of Award No. 2205 the First Division and Referee Swacker said:

“This conclusion does not warrant the making of any changes, except by negotiation, in existing local practices with respect thereto.”

Referee Swacker again served with the First Division in making of Awards Nos. 4234, 4235 and 4240, all of which involved work performed by passenger crews at a terminal. The last paragraph of the findings in each of those awards reads as follows:

“Dockets Nos. 3935, 3936 and 5015 are passenger cases. The special agreement has no application to passenger service, being intentionally confined by the parties to freight service. In these cases it is claimed by the management that it has been the practice, since the road was opened, to require passenger road crews to make pick-ups and set-outs in unusual circumstances, where yard crews are not immediately accessible. This contention appears to be sustained by Train Service Board of Adjustment for the Western region, Decisions 1159 and 1450. These claims will therefore be denied.”

In the findings of Award No. 5821 the First Division with Referee Fox said:

“Even if a protest and claim, based on an improper discontinuance of yard assignments, would have been in order, if made within
a reasonable time, the general acquiescence, over a long period of
time, by both roadmen and yardmen, in what was done, must be
held to be the equivalent of a contemporaneous construction of the
contract on the basic question here involved, and the claim now
made comes too late. While, under the contract, no limitation is
placed on the right to register protest, and to assert claims, the
old true rule, applicable to any claim before any tribunal, that rea-
sonable diligence must be exercised by the claimant, especially
when delay is prejudicial to the other party to the controversy,
cannot be ignored."

In Award No. 7615 the First Division with Referee Mitchell said in its
findings:

"With the above rules in mind, we turn to the record in this
case. It is the contention of the employes 'that extra yard firemen
have been called to perform the work similar to that done by the
road crew in this instance', while the carrier alleges that for forty
years under similar current agreements road firemen have been
used in similar cases, and that never has a claim been made before
the one in the case at bar.

As said by Judge Swacker in Award No. 4234, it becomes a
question of actual intent of the parties and that can be best ascer-
tained by the conduct of the parties over a period of years. There
is a sharp conflict in the record. If the employes' contention is
true that firemen were called to perform similar work prior to the
filing of this claim, then there should be an affirmative award. If
however for a long period of years, during the life of the present
current agreement no claims have been made and road crews per-
formed the work as contended by the carrier, then the claim would
have to be denied."

In Award No. 8169 the First Division with Referee Bakke held in its
findings:

"Working for ten years without protest under carrier's con-
struction of agreement must be construed as a concurrence
therein."

All of these references are directly pertinent to the case here involved.

Awards based upon past practice are not in all cases detrimental to
the claims of the employes, and this fact is supported by reference to awards
of the Third Division of the National Railroad Adjustment Board in the
cases discussed below. In the Opinion of Board in Award No. 1397 the
Third Division with Referee Stone said:

"The long delay in asserting this claim does not bar the em-
ployees from complaining of a violation of the contract by continuing
course of conduct or otherwise. But, under the controlling and
distinguishing facts of the case, such delay is cogent evidence that
there has been no violation. Compare Award 1289.

The practice complained of is one of long standing. During
its continuance there have been revisions of the contract, without
correction, if correction be needed, of this practice. That is per-
suasive that, for eleven years or more, the employes themselves
have not regarded it as a violation of their contract."

In the Opinion of Board in Award No. 2345 the Third Division with
Referee Burque said:

"There is a well recognized and implied doctrine and rule of
law that in construing contracts and agreements, the language used
shall be given its natural, ordinary and common usage meaning. The test is: What does the language used mean and convey to the average person? What would the average mind understand it to mean? When the Carrier assigned the office work on a 7 ¼ hour basis and construed it to mean an 8-hour day and paid the employees therefor on a basis of eight hours, the latter had the right to assume and understand that 7 ¼ hours were the equivalent of eight hours and constituted a day's work, and that all work required of them over and above the assigned 7 ¼ hours was to be compensated for.

Had the Carrier lived up to the accepted practice of giving an equal amount of time off to equalize for the increased hours worked over and above the assignments, to which the employees had assented, there could be no claim for compensation. But the Carrier, not having seen fit to carry out this established practice, must now compensate the employees for the extra work performed over and above the assigned hours.”

It should be noted here that in the dispute involved in Award No. 2345 and in the disputes covered by the two following awards the basic day rules provided that 8 consecutive hours, exclusive of the meal period, should constitute a day’s work. In Award No. 2436 the Third Division with Referee Carter held in the Opinion of Board:

“Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. See Awards Nos. 507, 1257 and 1397.”

Within the last few months the Third Division with Referee Tipton made Award No. 3338, which also involved the basic day rule of the clerks. In the Opinion of Board reference is made to Awards Nos. 2345 and 2436 hereinbefore discussed. The Opinion reads in part:

“In the claim before us the practice of working these employees 7 ¼ hours had been in effect for over 25 years and the carrier recognized this practice after the effective date, March 1, 1939, of the current agreement, for nearly 7 years. In the record are bulletins running back through 1942 attesting the fact that the carrier recognized this practice. Under these circumstances, the carrier is now barred from changing this practice at the places in question without the consent of the other party to the agreement. That practice having been in effect through the agreements of 1936 and 1939 as well as for many years before and since, is just as much a part of the agreement as though it were written therein.”

The similarity between these cases and the case here involved is strikingly apparent. The rules relied upon by the employees in the instant case have been in their agreements since April 16, 1920, and the agreements were revised at times subsequent to said date. The practices have been in effect through the agreements of 1920 and 1928 as well as for many years before and since, and Carrier holds they are as much a part of the agreements as though they had been written therein.

In the employees’ position they are relying upon 5 awards from your Board as well as several cases occurring on the Line East upon which the Carrier will comment below:

In Award 4061, relied upon by the employees, Referee Swacker stated “taking coal or water is not ‘supplies’ as the word is used in Article 52 (a)” . However, it was pointed out by Mr. Swacker that under this rule it had been the practice for many years and generally understood by both the management and employees, that
employees other than firemen would be required to take coal and water on locomotives, and the position of the employes was sustained, based on past practice which the Carrier attempted to change without negotiations with the organization. There is no similarity to the circumstances in case at hand as Carrier has not made or attempted to make a change in the practice which has existed for a great many years.

Award 4839. In this award, which was also before Referee Swacker, the Carrier laid great stress upon the fact that it had been the practice to lay in regular crews and have other regular crews perform the work of the laid in crew on dates when there was not sufficient work for all crews. This case is not comparable to the one at bar as the Carrier has previously pointed out in its submission, outgoing passenger crews have performed this head end work daily. It is not a question of having a passenger crew perform this work on certain days and yard crews on others. The practice outlined in this award was one to suit the convenience of the Carrier on dates when there was not sufficient work for all crews.

Award 4844. The circumstances in this case are the same as those involved in Award 4839, and as Carrier has pointed out are not comparable to the circumstances in the case now before your Board.

Awards 4851 and 4852. In these cases, which were also before Referee Swacker, the agreement contained a definite rule covering the performance of switching service at terminals where no yard engines were employed and again the circumstances in these cases are not comparable to the case at hand as the practice in the Carrier's position, as has been previously pointed out in Carrier's submission, is one in which the employes have acquiesced and is borne out by the very fact that the common interpretation placed upon the agreement has been the same throughout these many years with respect to the performance of the work at Buffalo.

Regarding the statement made by the employes that prior to 1921 road hostlers and helper jobs performed the service which is and has been performed by road crews for many years and which is the basis of their complaint. This statement is irrelevant to the case at hand. We do not have any records to either support or deny the statements made by the employes and we question whether the Committee can produce such records to substantiate their statement. However, while it is possible that the road hostlers did perform some of this service at times, the road crews were likewise performing such service as is evidenced by the affidavits attached to this submission. The Organization, in an endeavor to strengthen their position, is attempting to muddy the waters, so to speak, and to mislead your Board as to the interpretation of the articles referred to and which have been commonly interpreted by both the employes and the Management for so many years.

Regarding the cases relied upon by the employes as having occurred on the New York Central, Line East territory, and which they claim are comparable and have been paid under the rules of their agreement:

The circumstances in the Sand Lot case at Albany, relied upon by the employes, are as follows: On trains arriving Albany passenger station from the River Division, engine crews were required to remain on their train until after passengers, mail, express and baggage, had been unloaded and then handle their train from the passenger station to another point in the yard, known as Bull Run Yard. Similar condition existed on trains from the Main Line terminating at Albany, on which the engineers were required to
remain with their train until passengers, mail, baggage and express had been unloaded and then handle their train from Albany passenger station to another part of the terminal known as the Sand Lot, located at Rensselaer. Upon complaint from the engine and train service employes, arrangements were made to discontinue the practice and have the trains handled to Bull Run and the Sand Lot by yard crews.

In the Burgess claim, relied upon by the employes, Fireman Burgess performed service as a fireman on Train X-1, Albany to Syracuse, on December 19, 1940, and upon arrival at Syracuse passenger station on Track 1 engine crew was required to pull their train to the west end of the passenger station and back their entire train on Track 7, in order to clear Track 1 for following trains. The Carrier disposed of this claim by allowing Fireman Burgess a day's pay at the yard rate, due to the fact that he was required to perform additional service after arrival of his train at Syracuse on Track 1, normally performed by yard crews. It is not necessary for the Carrier to point out to your Board that the circumstances surrounding this case are in no way comparable to the circumstances involved in the Buffalo head end case now before your Board.

Regarding the Becker case, relied upon by the employes: The circumstances in this case are that Fireman Becker performed service as a fireman on Train 2nd/14, Syracuse to Albany, on November 19, 1937, and upon arrival at Albany passenger station on Track 2, the crew was required to set off the head end cars which were destined Albany. On account of this being contrary to the practice of many years standing, as cited in the Carrier's position, which practice is to have the out-going crew make the set-off or pick-up, the claim was disposed of by allowing Fireman Becker a day's pay at the yard rate.

In the Woithe claim, relied upon by the employes, the circumstances were as follows: Engineman Fowler and Fireman Woithe performed service on Train 157, Harmon to Albany, on December 23, 1937. After arrival at Albany passenger station they were held on the train until after passengers, mail, express, baggage, etc., had been unloaded and then required to handle their train from Albany passenger station to Rensselaer, which claim is similar to the complaint rendered by the employes in connection with the handling of their train after arrival at Albany to another location in the terminal, such as the Sand Lot and Bull Run Yards. This claim was disposed of on the basis of allowing the engine crew an additional day at the yard rate.

In the Brissette claim, relied upon by the employes in their position, the circumstances were as follows: Fireman Brissette performed service on Train 769, Albany to Troy, on December 16, 1938, and upon arrival of this train at Troy passenger station on Track 3, the turn-around point, this crew was required to place one of their cars on Track 4, one on Track 2, and the other on Track 1, for which claim was made for yard day. In view of the switching required of this crew in disposing of their train, claim was adjusted by the allowance of a yard day for the service performed.

In the Burgess claim, relied upon by the employes in their position, the circumstances were as follows: Fireman Burgess, assigned to short turn-around service between Albany and Troy, arrived Albany passenger station on Train 722, July 17, 1937. After the train had pulled in on Track 5, in the station, and passengers, mail, express, and baggage had been unloaded, the engine
crew, with the assistance of a yard brakeman, were required to pull their train to the west end of the station on Track 5, to clear the switches to Track 4, and then back their New York cars, which were on the rear end of Train 722, to the rear end of 1st/22, the New York train, which stood on Track 4, placing the balance of train on Track 2. Claim in this case was made by the fireman for a day's pay at the yard rate which was adjusted account of the moves being made in disposing of their train.

In the case at Ogdensburg, relied upon by the employees in their position, it had been the practice for many years for the crew of Train 59, after arrival at Ogdensburg passenger station, the terminus of their run, to remain on duty until the passengers, mail, express, and baggage had been unloaded, after which they were required to handle their train from the passenger station to another point in the yard for storage and placing on steam. This complaint was adjusted by having the yard crew which was on duty handle the train after arrival at Ogdensburg.

In all of these cases relied upon by the employees, occurring on the Carrier's property, your Board will note that the circumstances are in no way similar to the circumstances in the present dispute.

8. ENGINEMEN AS WELL AS OTHER EMPLOYEES SHOULD BE COOPERATING WITH CARRIER INSTEAD OF TRYING TO COLLECT "FEATHER BED" PAY.

Regarding the statement made by the employees regarding "Featherbed Pay" and their quotation from findings of the Emergency Board appointed on March 8, 1946. This quotation has to do entirely with the dual basis of pay in road service and is irrelevant to the case at hand. The basis of pay requested by the employees in the present dispute is not in the category of dual payments referred to by the Emergency Board but is an action on the part of the employees to pyramid their road pay by the addition of a day's pay at yard rates for service that has been paid strictly on the basis of road service without question for a period of well over 40 years. We do not feel that it is necessary to burden your Board with the details of an explanation as to the difference between the dual basis of pay as referred to in the Emergency Board findings and that which the employees are now seeking to have your Board sustain.

The rail transportation industry is faced with a future which is mirrored with much doubt and uncertainty insofar as passenger business in particular is concerned. Competition of air and bus lines is becoming stronger as the country passes from a wartime to a peacetime period. Aviation made lengthy strides during the war and will surely extend its gains in the postwar period. It aims to get its full share of passenger, freight, express and U. S. mail business, within the United States and to and from other countries. Bus lines are equally diligent in extending their business.

The following extract from an article in a late issue of NEWS WEEK—December 16, 1946—brings out these facts very effectively:

"COMPETITION & COMPETITION: Rail men not only have to fight the battle of rising costs vs. profits but must take the measure of growing competition, Barges, ships and pipe lines are out after bulk freight and are getting their share of the business. The airlines, buses and private automobiles landed a body blow to the rails' passenger business before the war and the situation has bettered little since. Hope is that new equipment and better service will brighten the picture."

To meet this competition the railroads have been engaged in a study of postwar transportation conditions and problems and many of them have
contracted for millions of dollars' worth of new streamlined, modern equipment. The New York Central System has placed definite orders for 500 streamlined deluxe passenger cars, the largest passenger car order in its history, and in terms of money it comes to over 22 million dollars. If any railroad has ever placed a larger order in all the history of rail transportation it has not been made known to us.

The very success of this vast project is dependent in large measure on the interest, courtesy, efficiency, cooperation and diligence of the employees who are in some way connected with operation of trains. After all is said, it is their railroad, and without it they would have to seek other employment. Its prosperity is their prosperity; its welfare is theirs too; its successful coping with this problem of competition is just as much to their interest as to those of the stock and bond holders, the owners of the physical assets. They are shortsighted if they do not perceive where lies their best interest.

The claims presented by three enginemen in this case can only be characterized as a drive toward inefficiency in train operation and as such it is against the best interest of employees as well as Carrier.

The only way to attract passenger travel to the rails, and hold the business, is to provide fast trains and comfortable cars. Passengers want to ride in comfort and get to destination expeditiously. Delays are annoying to them. They want to keep moving. Where it is necessary to remove a car from a train en route, or attach another car, the set-out or pick-up must be made as quickly as possible. That is just good railroading.

As the record herein presented by Carrier shows, it has been the custom and practice for at least 47 years, going back to December, 1899, to have road passenger enginemen make a simple set-off or pick-up, but never both, on head end and the performance of such work has always been regarded as a part of the road trip. All other moves which necessitate some switching have been and are now made by yard engines and crews. But now, for the first time in all the span of years, come three enginemen with a demand for a day's pay for the 5 or 10 minutes that it takes for the simple set-out or pick-up.

Carrier could not afford to pay a day's pay for each such move, and the alternative would be putting on many more switch engines and crews, incurring a heavy and needless capital expenditure for the engines, payroll expense for the employees, and the attending expenses for maintenance, taxes, etc. Of course this would mean longer delays to the passenger trains.

As Carrier has shown, claimant enginemen are employees of the Syracuse Division and their runs are between Syracuse and Buffalo. For each single trip they are paid for 147 miles which is equal to almost 1 ½ days' pay—100 miles constituting a day's work. They report at the passenger station when going on duty and are released at the passenger station on arrival at the far end of the run. The timetable running time Buffalo to Syracuse on Train 14 is 2 hours and 39 minutes, and under normal operation they are actually on duty about 3 hours and 30 minutes. The running time of other trains mentioned in the first paragraph of principal point 7 varies from 2 hours and 25 minutes on Train 22 to 3 hours and 30 minutes on Train 32.

These and other Syracuse Division runs such as the CENTURY, the COMMODORE VANDERBILT, EMPIRE STATE EXPRESS, etc. are probably the best passenger enginemen jobs in the United States. The Line from Buffalo to Syracuse is four-tracked throughout, with the exception of that portion of the Line between SS-2, Syracuse Junction, and the passenger station, which is three tracks a distance of approximately 3 miles, and few stops are made on these trains. Most of the enginemen can complete their trips in less than 4 hours and a few in even 3 hours. How many occupations are there in the United States in which the worker can earn 1 ½ days' pay in 3, 4 or even 5 hours? Very few, if any.
The earnings of claimant enginenmen have been stated under principal point 3, and Carrier has also shown there what the total earnings would amount to if the claims were allowed. Each claimant wants a separate day's pay at the yard rate for the 5 or 10 minutes consumed in the set-out or pick-up move, which would give the engineer $10.97 and each fireman $9.33 additional on the basis of present yard rates.

This is what the general public has in recent years referred to as "feather bedding"—a full day's pay claimed for just a few minutes of work.

This should not be! The Carrier finds it hard to believe that these enginenmen feel that they are entitled to these exorbitant allowances when they know full well that passenger enginenmen have made these very moves for countless years as a recognized part of their road trips.

Their claims in this case are almost astounding when the improvements in working conditions are considered. Before the early 1920's engines as well as crews were changed at division terminals. Enginenmen reported at the engine house when going on duty and were relieved at the engine house at the end of the trip. Their time on duty was much longer on this account but their mileage pay was only a little more, mileage being allowed for the mile or two between passenger station and roundhouse. In those days too stoker fired engines were just being placed in service and firemen had to stoke the fires manually. All steam engines now used on these passenger runs are stoker fired and are the most modern types of engines obtainable. The runs of these passenger enginenmen are much better today, from the standpoint of working conditions, than runs of 25 years ago, and Carrier is totally unable to understand these penalty claims. These enginenmen, as well as other employes, should be cooperating with their employer instead of trying to drive business away through these unjustifiable claims.

CONCLUSION

Carrier has shown by concrete evidence that a long standing and commonly accepted interpretation of the rules relied upon by the employes negates the claim.

The employes have made general denials that the committee knew of the practice here complained of, but the very fact that the practice has been in effect for 40 odd years at the important terminal of Buffalo, and on General Chairman Evans' home division, shows lack of foundation for those denials.

The rules relied upon by the employes have been in the agreements for over 25 years, and the Firemen's Committee, by progressing Engineer Foster's claim, is endeavoring to interpret the Engineers' rules in a manner different than they have been interpreted by the Engineers' Committee and the carrier for a period well over 25 years. By a "presto, change" trick that would be envied by Mandrake, The Magician, the employes seek to convert work that has been regularly performed by road passenger enginenmen for 40 odd years to the status of exclusive yard work.

The claim has neither merit nor consistency, and the Board should deny it forthwith.

(Exhibits not reproduced.)

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
The parties to said dispute were given due notice of hearing thereon.

Claim for payment of an extra day at yard rates by Engineer F. Foster and Fireman I. MacWade for performing switching service in the Buffalo Terminal on October 12, 1943, and all dates subsequent thereto, when they were required to switch out the fourth and fifth cars of their train prior to starting their road trips. They also claim payment for an extra day at yard rates for performing switching services in the Buffalo Terminal on November 23, 1943, and all dates subsequent thereto, when they were required to change the make-up of their train by taking the two head cars therefrom to another track there picking up four additional cars, and then placing all six cars on their train prior to starting their road trip.

From exhibits submitted by Carrier, it is established that the services complained of had been performed by road crews for the Carrier since 1899; that both the Carrier and employees had construed the agreements between them as authorizing road crews to perform such service; that during the latter part of 1936 in a discussion between the Carrier and the four General Chairmen of employees with respect to work performed by road passenger crews at terminals, the four General Chairmen recognized that the work complained of had always been regarded by both parties to the agreement as properly within the scope of services performed by the road crews, and raised no further objections thereto. Both the employees and the Carrier subsequently acquiesced in this interpretation of the agreement, until the present claim was filed on October 12, 1943, about 43 years after the practice was inaugurated.

A number of awards have sustained claims that services of the type here involved were not properly within the duties required of road crews. See Awards Nos. 3122-3129 inclusive, 10612, 12060, 12231, and 12171. Likewise, a number of awards have held that services of this type did not constitute switching and were within the scope of road crews' required duties particularly when the practice had been recognized and approved by both parties to the agreement for an extensive period. See Awards Nos. 4234-T, 4235-C&T, 4240, C&T, 5821, 7615, 8169, 8374, 8634, 8636 and 10083.

In view of this conflict of authorities on this issue, it would seem that the interpretation placed upon the agreement by both parties thereto, as evidenced by the long years of practice thereunder, should govern. The parties to a contract know best what is meant by its terms and are least likely to be mistaken as to its intention. Each party is alert to protect its own interests and to insist on its rights. Whatever is done by them during the period of the performance of the contract is strong evidence of the meaning of its terms as they understood and intended they should be.

In the light of these principles, it must be held that the practical construction placed upon the agreement by the parties thereto should govern, and that the services described be held within the duties properly required of claimants on the dates in question.

AWARD

Claim denied.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

ATTEST: (Sgd.) T. S. McFarland
Executive Secretary

Dated at Chicago, Illinois, this 26th day of June, 1950.