NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

The First Division consisted of the regular members and, in addition, Referee Frank M. Swacker when award was rendered

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

LOUISIANA & ARKANSAS RAILWAY COMPANY

STATEMENT OF CLAIM.—Claim of L. & A. Engineers for pay account using Gifford-Hill engineers on L. & A. tracks for L. & A. work on Bonnet Carre Spillway.

EMPLOYEE'S STATEMENT OF FACTS.—The Louisiana & Arkansas Railway Company employed Gifford-Hill & Company, by contract, to do certain construction work in connection with the bridge being built over the Bonnet Carre Spillway, and in addition to haul dirt to fill in the Railroad Company's yards and widen dumps and elevating tracks for a system of yard tracks at Norco, Louisiana, for certain considerations agreed upon in contract, to be paid by the Louisiana & Arkansas Railway Company.

In doing this construction work, Gifford-Hill & Company used two locomotives of their own, which are used to haul dirt from the pit to where it is unloaded on each approach to the bridge. These engines haul this dirt over the main line of the Louisiana & Arkansas Railroad a distance of from one (1) mile to four and one-half (4½) miles, and in addition are hauling dirt to fill in the Railroad Company's yard and widen fills and elevating tracks for a system of yard tracks to serve the New Orleans Oil Refinery Company, at Norco, Louisiana, a distance of about one and one-half (1½) miles south of the south approach to Spillway bridge, and in addition spotting company material for bridge construction, which work is being done by another contractor, all this work being purely railroad construction work.

The Brotherhood of Locomotive Engineers contend that under their schedule or contract with the Louisiana & Arkansas Railway Company, they were entitled to operate these two engines over its tracks, and that this work should have been advertised and assigned in accordance with schedule or contract rules now in effect. (See Article 35.) As this was not done, the engineers contend that they are entitled to pay they would have earned.

Under Bulletin No. 26, effective June 6th, and Bulletin No. 28, effective June 20th, for conductors, bids were requested from the Louisiana & Arkansas Conductors covering this work and the time claimed by the engineers covers all time made by the engineers on the job that was put on June 6th, 1934, and all time that was made by the engineer that was put on June 20th, 1934. (See Exhibit 1.)

The Railway Company claims that it has a contract with the Gifford-Hill Construction Company which gives them the right to operate trains over its railroad under certain conditions, and that it has nothing whatever to do with the details or the manner in which the work is to be performed. It further contends that the existing agreement between it and the Brotherhood of Locomotive Engineers does not require Louisiana & Arkansas Engineers be employed on this work. (See copy of letters attached hereto.)

POSITION OF COMMITTEE.—The Committee contends that the schedule or contract under which the Locomotive Engineers are working on the Louisiana & Arkansas Railway Company is designed to cover, and does cover, the operation of all locomotives operated over its railroad *by it or in its service*, whether this operation be by contract or otherwise, and whether it be regular runs or otherwise, *and all Engineers* operating them. If it was otherwise, this schedule or contract would be valueless, for the reason that the Railway Company could contract construction work, or the hauling of freight, or passengers, or the switching work in any or all of its yards, and refuse to assign its engineers to any of this work, all of which would be in direct violation of the spirit and intent, as well as the wording of the schedule.

In support of this contention we refer to the Preamble of this schedule:

"*Agreement.*—It is hereby understood and agreed between the Management of the Louisiana and Arkansas Railway Company and the General Committee of Adjustment of the Brotherhood of Locomotive Engineers representing the Engineers on the L. R. & N. Seniority District of the L. & A. Ry. Co., *that the following rules and regulations pertaining* to the pay and government *of all Engineers of said Seniority District* shall be in force on and after November 1st, 1931, superseding all rates, rules, practices, and/or side agreements thereunder previously in effect on the original Louisiana Railway and Navigation Company from Shreveport, Louisiana, to New Orleans, Louisiana."

We likewise refer to Article 6 and Article 35 of this schedule, which reads as follows:

"*Article* 6.—(a) Freight Service-Rates of Pay. Rates of engineers in through and irregular freight, pusher, helper, mine run, or roustabout, belt-line or transfer, work, wreck, construction, circus trains, trains established for the exclusive purpose of handling milk, and all other unclassified service shall be as follows:

Weight on drivers	Per 100 miles	Per mile	Per hour overtime
Less than 80,000	$6.73	$0.84	$1.26
80,000 to 100,000	6.81	.85	1.27
100,000 to 140,000	6.19	.86	1.29
140,000 to 170,000	7.13	.89	1.33
170,000 to 200,000	7.29	.91	1.36
200,000 to 250,000	7.45	.93	1.39

"(b) For local or way-freight service, fifty-two (52c) cents per one hundred (100) miles, or less for engine men shall be added to the through-freight rate according to class of engine; miles over one hundred (100) to be paid for pro rata.

"(c) It is understood that the weight on trailers will be added to the weight on drivers of locomotives that are equipped with boosters, and the weights produced by such increased weights shall fix the weights for the respective classes of service."

That part of Article 35 of the Engineer's Schedule applying to this case reads as follows:

"*Article 35.*—Assignments: The following conditions will constitute vacancies and will be advertised:

"(a) All new runs, turns, and vacancies either permanent or for thirty (30) days or more. Yard assignments for less than six (6) days will not be bulletined.

"(f) Oldest man making application within five (5) days from date of advertisement will be assigned.

"(i) Engineers losing work trains, or any other run that has been put on temporarily, will be required to return to the run they gave up to take such work; or they may take any run which becomes vacant on or subsequent to the date they took the work train, which they could have bid in. (See Exhibit for full rule.)"

The schedule covers this class of work and it is clear, under Article 35, Section (a) that the work in this case should have been advertised, and under Section (f) assigned to the proper bidder.

In the present case it will be noted that the Railroad Company advertised the work under the Conductor's schedule for a Conductor to pilot each of these trains, the conductors assigned to each of these trains are performing the duties of conductors of these trains as well as directing the movement of these trains, and planning the day's work to the best advantage so as to avoid delay to movement of scheduled main-line trains. These Conductors are not being paid under the pilot rule but are being paid as work-train Conductors under their schedule which is higher than pilot rate.

If it was necessary for these trains to have Conductor who was fully qualified, it was likewise necessary for them to have an Engineer who was fully qualified.

It will be noted that the Conductor's Schedule, Rule 27, quoted in Exhibit, is similar with respect to assignment to the Engineer's Schedule.

The *real issue* in this case is whether or not the Railway Company can avoid the effect of its schedule with the Engineers by farming its work out under contract to independent companies and permitting them to employ their own labor and operate trains over its track, or not, and we say that they *cannot do so* without violating the plain provisions of the contract.

Illustrating the effect of such an arrangement, it is noted that the pay of the Engineers employed by the Construction Company to operate these locomotives is much less than the pay provided for such work in the Engineers' Schedule, as the men who are actually operating these locomotives are being paid seventy-five (75c) cents per hour, for hours actually worked.

This is *not* a case wherein the Railway Company has granted *trackage rights to a foreign line* to operate its trains over the owners' line, and in which the foreign train does no work for the owner, but, on the contrary, it is a case wherein the Construction Company is doing *work for the Railway Company* and is being paid for so doing by the Railway Company.

It is absurd for the Railway Company to say that it has nothing whatever to do with the details or manner in which the work covered by this contract with the Construction Company is to be performed. It is not only the right of the employees but it is the duty of the Railway Company to comply with this agreement in effect with its employees.

If the Engineers' Schedule does not cover the operation of all locomotives by the Louisiana & Arkansas Railway Company over its own tracks, and the operation by others of locomotives over its tracks *in its service* and under employment or pay by it, whether that employment be by special contract or otherwise, then the schedule is worth nothing more than a scrap of paper.

If it is permissible for the Railway Company, which has the work of filling in approaches to a bridge to do, or to fill in and elevate its yard tracks and to widen fills, to contract that work out and permit it to be done by the contractor, even though the performance of the contract requires the movement of trains over its main lines, and evade its prior contracts with its employees on the ground that it has nothing whatever to do with the manner in which that contract is carried out, then it is likewise permissible for the Company, who has certain switching to do in its switch yards, to contract that work to independent Companies without regard to its prior contracts with its employees, and evade the consequences of the breach, but this is not possible if a proper construction of its contract with the Engineers is placed upon it.

It was never the intention of the Engineers to make a contract or schedule which did not cover all locomotive movements of the kind we have already outlined above, and we do not believe it was the intention of the Railway Company to do so either.

We cite the case of the Missouri Pacific and Texas and Pacific Railway Companies, in which the Missouri Pacific operated trains over the Texas and Pacific lines between Alexandria and New Orleans. In that case when it developed that the Missouri Pacific trains had consolidated Texas and Pacific and Missouri Pacific traffic, and were hauling freight for both companies, it was required that Texas and Pacific men be used on all Missouri Pacific engines instead of Missouri Pacific engineers. The same thing applied to passenger traffic when it developed a similar condition.

The Gifford-Hill Company, previous to movement of this dirt for the Louisiana & Arkansas Railway Company, had just completed similar work for the Y. & M. V. Railway Company and had been required by that line to use Y. & M. V. Engineers, whose schedule with respect to such work is similar to schedule of the L. & A. Engineers. It has been the same all over the country where work of this nature is carried on, and we doubt if a single instance can be cited wherein such a situation as to the present one has arisen.

We submit that under proper application of the contract or schedule under which the Louisiana & Arkansas Railway Engineers are now working, that the Louisiana & Arkansas Engineers were entitled to this work, and that the jobs should have been advertised and bid for, and that as they were not, then the Engineers are entitled to pay just the same as they would have earned if they had bid the jobs in and actually operated the locomotives. Any other decision

will form the groundwork for future evasions of their contracts with the employees by the railroad, and render all working contracts and schedules worthless.

SUPPLEMENTAL POSITION OF COMMITTEE.—Engineers Gould and Sullivan, employees of the Gifford-Hill Company, were former employees of the Louisiana & Arkansas Railway, but could in no sense be considered L. & A. employees in the meaning of this dispute. While employed by the Louisiana & Arkansas Railway Mr. Gould held seniority rights over the tracks in question here, but Mr. Sullivan held his rights on another district altogether.

Our position with regard to meeting Mr. Gifford, President of the Construction Company, is answered in the letter from Assistant Grand Chief Engineer, Mr. O. K. Hedges, to President, Mr. C. P. Couch, July 7, 1934. (See exhibit.)

We call attention that the Louisiana & Arkansas Railway has used but two arguments in defense of their action:

> "First: We have no agreement that requires L. & A. engineers be assigned to this work.
>
> "Second: The conclusion we have reached is not limited to the fact that the contractor is using our line under trackage rights, but this fact is mentioned further to explain our position and to illustrate that your contention is unsound. (See letter from Couch to Hedges in Exhibit.)"

We maintain that the agreement was made to cover engineers of the Louisiana & Arkansas Railway and all engineers operating locomotives over its tracks are subject to this agreement. (See contract rules, pages 3–4.) If the construction company was using L. & A. tracks under trackage rights, engineers of the Louisiana & Arkansas Railway should have been assigned under provision of Article 29, reading:

> "Engineers will be used as pilot when available on foreign trains and will be paid the regular rates for trip according to class of service."

Exhibit no. 1

From President C. P. Couch to General Chairman R. E. Owens, July 2nd, 1934:

> "Referring to our conversation in my office on Tuesday, June 26th, with reference to the work now being done by Gifford-Hill & Company at the Bonnet Carre Spillway:
>
> "As explained to you at that time, Gifford-Hill and Company are doing this work under a Contract, and the Louisiana & Arkansas Railway Company has nothing whatever to do with the details thereof or the manner in which the work is to be performed. The existing agreement between this Company and the Brotherhood of Locomotive Engineers does not require that L. & A. Engineers be employed on this work. You will recall, however, that I stated to you that I had arranged with Mr. Gifford, President of the Construction Company, to meet us at New Orleans last week; that I further stated that, if you would meet me at New Orleans I would ask Mr. Gifford to employ L. & A. Engineers on this project; and that if any of our engineers desired to accept employment by the construction company we would be glad to give them necessary leave of absence.
>
> "I regret that you did not meet me as suggested in an effort to work out the plan above outlined."

From Superintendent N. Johnson to General Chairman R. E. Owens, May 5th, 1934:

> "This will acknowledge receipt of yours of May 3rd.
>
> "I appreciate the fact that you have told me that the operation of work trains belongs to the locomotive engineers, but that did not make it so; and I do not know what method the Y. & M. V. has employed on their work trains. Possibly their schedule or working agreement is different from ours.
>
> "We have a contract with the Gifford-Hill Construction Company which gives them the right to operate trains over our railroad under certain conditions, and I assure you that we do not intend to violate the B. of L. E.'s working agreement with the L. & A. Railway Company."

Advertisement No. 26

"All Conductors Southern District:

"Bids will be received in this office until 7:00 A. M. Wednesday, June 6th, 1934, as follows: One conductor-pilot on Gifford-Hill Company construction-work train between Norco and La Place, job to go on about Wednesday, June 6th.

"(Signed) W. M. DANIELS,
"Trainmaster."

"Advertisement No. 28

"All Conductors Southern District:

"Bids will be received in this office for one conductor-pilot working second-shift job, Gifford-Hill Company construction Spillway, until 7:00 A. M. June 20, 1934. This job to go about June 19, 1934.

"(Signed) W. M. DANIELS,
"Trainmaster."

"Conductors' Schedule Article 27—Advertising Vacancies

"All permanent vacancies and new runs will be advertised for five days; senior conductor making application within five days will be assigned. Senior conductor to have choice of lay-over. When lay-over of a regular run is changed five hours or more, it will be declared vacant and advertised."

From Assistant Grand Chief Engineer O. K. Hedges to President C. P. Couch, July 7th, 1934:

"This will acknowledge receipt of your letter of July 2nd, with a copy of your letter to Mr. R. E. Owens, General Chairman of the B. of L. E., attached.

"Your letter to me states that I may accept your letter to Mr. Owens as a reply to my letter of June 25th. I am somewhat surprised at your attitude that your letter to Mr. Owens would in any manner be a reply to my letter; as a matter of fact, your letter to Mr. Owens does not in any instance refer to the issue discussed in your office on June 12th, and it seems that it is your desire to evade making a direct reply to our request that L. & A. engineers entitled to the work be assigned to the Bonnet Carre Spillway construction work and paid for same under the provisions of schedule rules. You further state that the L. & A. made a contract with the Construction Company and have nothing to do with the manner in which the work is done. In reply to that statement, I may say that the L. & A. Railway Company in making a contract with the construction company should have provided that L. & A. engineers would be used on the work, which covered in Article 6 of the agreement between the L. & A. Railway Company and the Brotherhood of Locomotive Engineers.

"I stated to you in conference on June 12th that in event you declined to comply to use L. & A. engineers entitled to the work in accordance with schedule rules, it would be our intention to claim pay for every day made by other than L. & A. engineers from time the work started until its completion. This will confirm that statement.

"I note in your letter to Mr. Owens that you regret that he did not comply with your request to meet Mr. Gifford in an attempt to have L. & A. engineers used on the work. Your letter to Mr. Owens did not in any way indicate your intention to comply with our request, i. e., bulletin the runs and assign engineers entitled to same in accordance with schedule rules and rates of pay. It is my understanding that engineers now employed on the construction work are receiving 75 cents per hour and are required on Sunday to do all possible work in maintaining the power, and for such work receive no compensation. If it was your thought that Mr. Owens could make some agreement with the construction company whereby L. & A. engineers would be used under conditions just above mentioned, and that you would arrange proper leave of absence for them, it seems that you would realize that Mr. Owens could not make such an agreement with you or the construction company or deviate from the agreement between the L. & A. Ry. Co. and the B. of L. E. in a settlement of the question.

"I would appreciate it very much if you would give me a letter without further delay answering our question as to whether or not L. & A. engineers entitled to the work will be assigned in accordance with schedule rules and rates of pay.

"It seems that you should be able to furnish this information within ten days from date of this letter, as it is my intention and desire to have this matter settled, as we feel you should have protected your employees entitled to the work the same as was done by the Y. & M. V. R. R. Co. in this same construction work; in other words, we believe that you had no right to farm out work belonging to your employees.

"Thanking you in advance for your prompt attention and reply, I am."

From President Mr. C. P. Couch to Assistant Grand Chief Engineer O. K. Hedges, July 16th, 1934:

"Receipt is acknowledged of your letter of July 7th, in which you ask 'whether or not L. & A. engineers entitled to the work will be assigned in accordance with schedule rules and rates of pay' to the Bonnet Carre construction work in charge of Gifford-Hill & Company.

"In your letter you assume that L. & A. engineers are entitled to this work and ask whether they will be assigned in accordance with the schedule rules. We have tried to make it clear that we do not agree that L. & A. engineers are entitled to this work. Whether they are or not is governed by the existing agreement between the Brotherhood of Locomotive Engineers and this Company, and what other companies have done or failed to do has no bearing on the question. Our position is that we have no agreement that requires L. & A. engineers be assigned to this work. We were willing, however, to ask the contractor to use as its employees any of our engineers who wanted to accept such employment. Our offer to do this has been refused and now has no bearing on your demand.

"The contractor in charge of this work found it advisable to handle certain material with its own engines and cars. Instead of requiring the contractor to build its own tracks, we gave it trackage rights for a short distance over our line. The conclusion we have reached is not limited to the fact that the contractor is using our line under trackage rights, but this fact is mentioned further to explain our position and to illustrate that your contention is unsound."

POSITION OF CARRIER.—Before answering to the merits, the management desires to take exception to the Board taking jurisdiction of this matter for the following reasons:

"1. Nowhere does it appear that this matter in any way involves interstate commerce, or commerce as defined in the Railway Labor Act, and unless the matter involves interstate commerce, it is without the terms of the Railway Labor Act and beyond the jurisdiction of this Board.

"2. The rules of the Board in Ex Parte statements require the management of this carrier to submit a statement without having been furnished a copy of the statement of petitioners, or the evidence in support thereof; that said rules are illegal and arbitrary insofar as they seek to compel this carrier to answer without being appraised of the ground of complaint and the evidence submitted in support thereof, without an opportunity to answer or rebut same, all of which constitutes a taking of the property of this carrier without due process of law.

"3. Nothing has been brought to carrier's attention which in any way shows that the alleged controversy falls within the provisions of the contract between petitioners and carrier. Unless this is made to appear this Board is without jurisdiction."

Without waiving the foregoing exceptions, and reserving the benefit of them, in the alternative carrier further shows:

Statement of Carrier's Position on the Merits

"The United States Government, pursuant to an Act of Congress, constructed a spillway north of New Orleans from the Mississippi River to Lake Pontchartrain. The purpose of this spillway is in time of flood to divert the waters of the Mississippi through the spillway into Lake Pontchartrain and thus protect the City of New Orleans and the territory below.

"The lines of this carrier run from Baton Rouge to New Orleans on the east bank of the Mississippi between the Mississippi and Lake Pontchartrain. To secure the right to overflow the tracks of this carrier whenever the government so desired, condemnation proceedings were instituted by the government and an award of damages was finally made to this carrier in an amount sufficient to enable it to construct a bridge over the spillway some 9,000 feet in length, with the necessary earthen approaches thereto, which bridge will be used as soon as it is completed and the present line of road through the spillway will then be abandoned.

"Carrier let contracts for the work which were in two parts, viz: 1, the earthen approaches to the bridge north and south of the spillway; 2, the bridge proper.

"The specifications covering the approaches were duly advertised, bids on the work were submitted, and the contract finally was awarded to Gifford-Hill & Co., Inc., of Dallas, Texas, the contract being executed February 20th, 1934.

"This carrier in the meantime had acquired a right-of-way for the approaches and for the bridge through the spillway, all of which is entirely within the State of Louisiana.

"The contract between this carrier and Gifford-Hill & Co., Inc., contains the following clause:

"'11. Train Service and Use of Main Track.—The contractor will be permitted to use the main-line track of the Railway Company from dirt pit to Norco, also switch tracks at Norco in his operations, subject to such regulations as the Railway Company may prescribe to avoid interference with the operation of its trains. Any additional expense to the Railway Company as a result of such use of trackage will be charged to the contractor and deducted from the amounts otherwise due him under the contract. Any damages resulting from accidents to the Railway Company's main line traffic caused by the negligence of the contractor will be assumed by the contractor. The Railway Company will furnish at Contractors' expense necessary conductors and brakemen to protect dirt trains while using main line.'

"Pursuant to the foregoing provisions of the contract, Gifford-Hill used a short portion of the carrier's main line in hauling dirt from the dirt pit where it was obtained to the points where the work was being constructed. Said approaches and bridge are absolutely new railroad construction and have not and will not be used in interstate or intrastate commerce until work is finally completed, which will probably be a year from now. The work of Gifford-Hill in hauling this dirt had nothing whatsoever to do with, nor was in any way applicable to the contract between petitioners and this carrier, nor was same in any way connected with interstate commerce or commerce as defined in the Railway Labor Act. The entire construction work and haul is within the State of Louisiana.

"It will be noted that said contract does not give petitioners the right to any work other than that performed individually by carrier. There is nothing in the law, and particularly the law of Louisiana, which prohibits carriers from giving trackage rights to a third party."

Oral hearing is requested.

SUPPLEMENTAL POSITION OF CARRIER.—Carrier renews its plea to the jurisdiction of this Board to hear, consider, or decide the complaint involved herein; and supplementing said plea, respectfully submits that this Board is without jurisdiction in this proceeding since this complaint is not brought by any individual, and since it is not shown that any individual has been damaged or otherwise injured by reason of the alleged violation of the contract or schedule herein involved, and since the Brotherhood of Locomotive Engineers, as such, is not authorized and is without power to institute and prosecute this proceeding, and since under the record herein no valid and enforceable order can legally be made or entered by this Board; carrier, therefore, prays that this proceeding be dismissed.

Without waiving its plea to the jurisdiction, but especially insisting on same, for further answer carrier says:

"1. Carrier denied that said Gifford-Hill Company, Inc., was employed by it to fill in its yards, widen fills, or elevate tracks for a system of yard tracks to serve the 'New Orleans Oil Refining Company' at Norco, Louisiana, or to fill in, widen, or elevate tracks of any other concern at said

point. In this connection carrier shows that while the work of constructing said bridge approaches was in progress, the contractor thereon consumed about four days in moving 9,368 cubic yards of dirt, placed in new embankment near Norco, Louisiana, made necessary by the construction of the south approach to said bridge, and on which embankment carrier later constructed some new side tracks, and that said approaches and said embankment is the work, and the only work, done by said contractor of which complaint is now made.

"2. Carrier denies that the said Gifford-Hill Company, Inc., was required or expected, under its contract, to spot any cars for the contractor in charge of the Bonnet Carre Spillway bridge, and denies that any cars were so spotted under its direction or at its request. On the contrary, carrier says that if any such work was done by said Gifford-Hill Company, Inc., it was solely at the instance and for the convenience of said bridge contractor.

"3. Carrier denies that the conductors employed on the contractor's trains (said conductors being employed solely as pilots) planned each day's work to the best advantage, or otherwise had anything to do with the work performed by the contractor, except to see that its said trains were properly handled, and generally by protecting said trains while on Carrier's main line. In this connection carrier submits that Advertisements 25 and 28, copies of which are attached to complainant's submission, have no bearing whatsoever on this controversy. Each of said advertisements specifically shows that the trains involved were those of the contractor and not of the carrier.

"4. Carrier denies that it was necessary to have one of its engineers on each of contractor's trains, since the only purpose of having a pilot thereon was to protect said trains against other trains operating over carrier's main line, because the crews on the contractor's trains were not fully acquainted with carrier's transportation rules or the physical characteristics of its tracks. A pilot alone was sufficient for this protection."

The issue in this case is whether or not contractor's engines should have been manned by carrier's engineers after such places had been advertised for and bid in by them on seniority basis.

The determination of this issue depends entirely on the existing contract or schedule, and not on what some other carrier has or has not done. All reference to other carriers should be stricken from this record and the issue determined on the basis of the provisions in the contract or agreement relied on by complainant.

The preamble and two articles in said agreement are said to require the relief sought herein. The preamble is no part of the agreement and under well-known rules of construction reference thereto can only be made to ascertain the meaning, if otherwise doubtful, of any article in the agreement. As a matter of fact, such reference here is unnecessary since the contract plainly shows on its face that it merely applies to and covers trains owned or operated by carrier, or trains of other common carriers operated over carrier's tracks, and not to engines of contractors engaged in construction work, particularly new construction.

In its submission complainant underscores the following provisions in the preamble: "* * * that the following rules and regulations pertaining to the pay * * * of all engineers of said seniority district * * *." Just what bearing this clause has on the present controversy carrier is unable to understand. That said agreement was made to cover carrier's engineers on said seniority district is undisputed. The issue now is whether or not carrier's engineers should have been employed on contractor's trains and engines. This same statement applies to Article 6. Work or construction trains, as used in this article, means carrier's construction trains, and "unclassified service" means exclusive service performed by carrier.

Carrier likewise does not understand that Article 35 has any bearing on the contentions now urged by complainant. All that this article does is to provide the machinery to determine what engineers are entitled to fill vacancies on carrier's trains. There can be no dispute on this point, and the fact that carrier advertised, for the protection of its property, for a conductor to pilot these trains has no bearing and cannot add to or take away from the agreement.

Gifford-Hill Company, Inc., was performing a contract job. Carrier was not particularly interested in the amount of dirt removed each day or the number

of trains operated. That was a matter for the contractor. On the other hand, if carrier had performed this work with its own forces, the number of trains operated and the number of yards of dirt removed per day would have been of vital importance. It by no means follows that because a conductor was employed as a pilot, for the protection of carrier's property, that it was "likewise *necessary* for them (carrier) to have an engineer who was fully qualified." Even if the proper operation of contractor's trains, as contended by complainant, had required the employment thereon of the so-called "fully qualified" engineers, this fact cannot add to or detract from the contract or agreement.

It may be true that Article 27 of the Conductor's Agreement is similar to Article 35 of the Engineer's Agreement. Both articles refer to assignments in filling vacancies on carrier's trains, and not to pilots, as which the conductors on these trains were employed.

Complainant says that the "real issue is whether or not carrier can avoid the effect of its schedule with the engineers by farming out its work under contract with independent companies." Whether it can or not is not now involved. Carrier has no intention of farming out its work as intimated by complainant. The work involved is new construction and carrier was entirely within its legal rights in having this work performed by an independent contractor, a turn-key job, so to speak. Whether or not any other class of work can be done by an independent contractor without violating the schedule now involved, is a question which can be decided when the question arises.

Under complainant's contention, in its last analysis, all work performed for carrier must be done on a "force-account" basis. It is an established rule of construction that the probable results that may follow from a particular construction of a contract are not permissible except in very obscure or doubtful cases. No such situation is here presented. Hence whether carrier can fill in approaches to its bridges, fill in and elevate its yard tracks, widen fills, or farm out switching, by contract, is begging the question. Such work has not been done, and, as above shown, no such work is now involved or contemplated.

Complainant says that it was never the intention of the engineers to make a contract or schedule which failed to cover all locomotive movements, and that it does not believe that such was the intention of the carrier. This is not proper argument. It is a rule of law that the intention of the parties to a contract are to be obtained from the contract itself, under settled rules of consruction, and that all prior agreements and negotiations are merged into the contract itself. Carrier denies, however, that it was ever its intention to provide in the present agreement that contractor's trains, such as are now in controversy, must be manned by engineers in its service. As a matter of fact, this very issue was discussed in the negotiations leading up to this contract, and the absence of any specific provision in the present agreement is not only significant but conclusive answer to the contention now made.

Finally, it is common knowledge that complainant's representatives are experts in drafting agreements. No such calamity as complainant predicts will follow a decision adverse to its contention in this proceeding. If it be essential to the integrity of engineers' schedule that engines of contractors performing service for a carrier must be in charge of such carrier's regular engineers, complainant can see that any further contracts so specify, in plain language, just as is perhaps the case in contracts made by complainant with other carriers. The very fact that this particular schedule does not so require is convincing evidence that carrier never agreed to the construction of the present agreement for which complainant now contends. Carrier submits that complainant is endeavoring to have this Board read into the present agreement a rule which the parties themselves failed to include therein.

Complainant, in its so-called "resume", dated March 16th, 1935, for the first time cited certain decisions of the old Railroad Labor Board. As stated in the original submission of this case, none of these decisions were called to carrier's attention or relied on by complainant in the conferences leading up to the present stage of this controversy. Under the Board's rules, as carrier understands them, matters not so submitted cannot now be considered by the Board, and carrier asks that these cases be disregarded.

Without waiving this contention carrier submits that the cases cited have no controlling influence on the present issue. In Decision No. 982, decided May 9th, 1922, the question involved was whether the contracts of certain carrier were in violation of the Transportation Act of 1920, and the wage and rule decisions of the Railroad Labor Board, and whether such contracts removed

from the jurisdiction of the Board employes of contractors performing shop work. In this case the old Labor Board went rather thoroughly into the questions stated and held that the contracts there involved were in violation of the Transportation Act and the decisions of the Board.

In Decisions Nos. 1218, 1241, and 1361, relied on by complainant, the Board followed the rule announced by it in Decision No. 982. All of these cases involved farming out ordinary maintenance and operation of tracks and shops, already in existence, work that had formerly been done by the employees of the carrier. It was, in effect, decided by the Board that the contracts considered in the cases mentioned were subterfuges and in violation of positive law, as well as the decisions of the Labor Board.

No such issue is here involved. It is not contended that the arrangement now complained of violates any law or any authoritative decisions; the facts in this case are entirely different from those in the cases mentioned. The contractor here was engaged in entirely new work, complainant's statement to the contrary notwithstanding, and the operation of contractor's engines over a small portion of carrier's main line was merely incidental to such new construction. The issue is whether or not the engineers' schedule made it mandatory on the carrier to man the contractor's engines with carrier's regular engineers, and not whether this carrier has violated any law or ruling of any Board.

In Decision No. 2144 the schedule provisions construed by the Board in support of its decision was the following:

> "All motive power in road or yard service will be handled exclusively by engineers in active service holding rights as locomotive engineers on engineer's seniority list, and *all engines going over the road under steam will be in charge of an engineer in active service.* Engineers will not be required to assume responsibility of other than engine engineer is in charge of en route."

In this case the Frisco, by contract, undertook to perform certain maintenance work and to permit the contractor to operate its engines over carrier's main line in charge of contractor's engines.

There is a glaring difference between that case and this one. In the Frisco case the work done by the contractor was regular maintenance on tracks already in use, whereas in the present case the work involved is entirely new construction. Irrespective of this difference, the contract in the Frisco case required every engine moving over the carrier's tracks to be in charge of an engineer in active service of the carrier. The agreement in this case contains no such provision. If the representatives of the Brotherhood of Locomotive Engineers really desired and intended, as they now insist, that the present agreement should cover the situation of which they complain, they should have included it in the agreement, as was done in the Frisco case.

There is a significant incident in the Frisco case, in that the carrier showed that previously it had constructed a second main track under contract with a contractor doing the entire work with its own equipment in charge of its own employes, and that no protest was made by the engineers thereto.

In Decision No. 3079, the Labor Board simply decided that the contract relied on by complainant supported its position. That contract is entirely different from the present agreement, and the decision has no bearing on this case.

Carrier has failed to locate Decision No. 4029, the last case cited, and is therefore unable to answer it. If it similar to the cases above discussed, however, it can be of little use in this proceeding.

If this Board decides to consider the decisions of the old Labor Board above mentioned, then carrier submits the following:

> "1. Carrier now has in effect a contract with the Louisiana Delta Hardwood Lumber Company, whereby the lumber company is permitted to operate with its engines and caboose, and carrier's cars, under lease, over some 17 miles of one of carrier's branch lines. This contract has been in effect for several years. These trains are in charge of the lumber company's own employees. No complaint has ever been made about this arrangement.
>
> "2. Carrier also submits that since the existing agreement has been in force, carrier has permitted the Louisiana State Penitentiary, under contract, to operate its engines and cars, in charge of penitentiary employees, over some 12 miles of carrier's main line, the only employee on said trains

qualified under carrier's transportation rules being the conductor. This arrangement has now terminated, but no complaint was ever made thereto.

"3. Carrier submits one other case. Its line from Jena to Jonesville, Louisiana, about 23 miles, was built by List & Gifford Construction Company under an agreement which permitted the contractors to use a portion of carrier's main line in connection with such new construction. This work was performed about 1912. No complaint was made thereto and none of the dire consequences which the complainant now fears may result from an adverse decision in this case have followed the Jena-Jonesville construction."

In availing itself of the opportunity granted by the Board to make this additional presentation, carrier expressly reserves unto itself any and all rights it may have with respect to jurisdiction or on the merits, both before this Board or in the courts. Carrier requests to be heard further, orally and by brief if necessary. Should jurisdiction be assumed by the Board or should the Board hold that the Brotherhood of Locomotive Engineers is entitled to bring and prosecute this proceeding, then, and in either event, requests that the claim be denied.

OPINION OF REFEREE.—The organization's ex-parte petition shows that at the times complained of it had a contract with the carrier, covering steam locomotives engineering on the railway line of the carrier; it asserts that this contract covers all locomotive engineers' services which may be performed on the carrier's line, including not only those locomotives engaged in the transportation, both state and interstate, of traffic, but also those which might be engaged in work-train service, whether for the purpose of construction, repairs, or betterments. That while this contract was in force (February 20, 1934), the carrier entered into a contract with a contractor to do certain construction work in connection with a change of line and also, incidentally, to do some filling for new embankment for new side tracks near Norco, Louisiana. That under the terms of this contract the carrier granted the contractor the privilege of operating engines and trains over its railway line to the extent necessary to move material involved in the work, with the right in the contractor to furnish engineers employed by the contractor to operate these engines. The petition further shows the organization regarded this contract as an infringement upon their own, in that it deprived engineers represented by the organization of work, under the terms of their contract. The organization protested to the management. The matter was conferred upon with the management which denied that the arrangement was an infringement upon the organization's contract and the dispute failed of adjustment between the parties.

The petition was filed pursuant to notice of the organization, dated January 1, 1935, of an intention to file it in conformity with the rules of practice of the Board, of which notice the carrier was advised in a letter from the Secretary, describing the complaint as:

"Claim that Louisiana & Arkansas Railway Engineers should have been used on the Bonnet Carre Spillway construction work, and claim for pay for time they were not so used."

and the carrier, in conformity with the rule, was called on to file its submission on or before February sixth. Under date of February second the carrier filed its submission, prefacing the same with the following:

"Before answering to the merits the management desires to take exception to the Board taking jurisdiction of this matter for the following reasons:

"1. Nowhere does it appear that this matter in any way involves interstate commerce, or commerce as defined in the Railway Labor Act, and unless the matter involves interstate commerce it is without the terms of the Railway Labor Act and beyond the jurisdiction of this Board.

"2. The rules of the Board in Ex-Parte statements require the management of this carrier to submit a statement without having been furnished a copy of the statement of petitioners, or the evidence in support thereof; that said rules are illegal and arbitrary insofar as they seek to compel this carrier to answer without being appraised of the ground of complaint and the evidence submitted in support thereof, without an opportunity to answer or rebut same, all of which constitutes a taking of the property of this carrier without due process of law.

"3. Nothing has been brought to carrier's attention which in any way shows that the alleged controversy falls within the provisions of the contract between petitioners and carrier. Unless this is made to appear this Board is without jurisdiction."

The first exception contends, in substance, that the controversy must involve interstate commerce or commerce as defined in the Railway Labor Act, before this Board would have any jurisdiction of the matter. This is an entirely too narrow construction of the Act. It is not necessary that a dispute which may be subject to adjudication by the Board involve commerce of any kind, state or interstate, at all. All that is necessary is that the carrier be engaged in interstate commerce and the other party to the dispute an employee of such carrier. The employe may have nothing to do directly with commerce. Such is the situation with respect to employes engaged on maintenance of way, accounting, clerical, legal, mechanical, and other services.

As to the second exception. After receipt of the carrier's submission, the matter was set down for hearing and argument which was had on March 18, 1935, and upon this hearing the carrier was furnished a copy of the full petition of the organization. Thereafter, upon consideration of the second exception, the Board amended its notice to the carrier concerning the identification of the dispute submitted by the organization to read:

"Claim that the employment under the contract between Louisiana and Arkansas Railway Company and Gifford-Hill & Co., Inc., dated February 20, 1934, of Locomotive Engineers on construction, betterment, or repair work on the railroad of Louisiana and Arkansas Railway Company, other than under and pursuant to the terms of the contract between the Brotherhood of Locomotive Engineers and the Louisiana and Arkansas Railway Company, is in violation thereof; and claim for pay for Engineers who should have been but were not used."

and the Board, in order to insure the carrier a full opportunity to meet the organization's case, set the matter for a further hearing June 4, 1935, and accorded the carrier the right to supplement or amend its submission and reply to the detailed submission of the organization or produce any additional evidence or argument or file any supplemental or amended submission, answer, and argument, and both parties appeared and were heard further. The carrier also raised a further question of jurisdiction based on the contention that the organization (as distinguished from the individual employe) is without power or authority to institute or prosecute the proceeding. It is considered that the Act clearly contemplates such representation and as a matter of practice substantially all grievances are so handled. This exception is therefore overruled.

That the carrier was fully cognizant as to what dispute was intended to be submitted when it received the Board's first notice is evident from the fact that it did accompany its exceptions with a full submission on the merits concerning the dispute involved. Nevertheless, if there was any irregularity in the original notice or procedure, it is considered that such was cured by the subsequent action of the Board in according the carrier the opportunity to make further submission after having received the detailed submission of the organization. It is therefore considered that this exception should be overruled.

As to the third exception. As indicated with respect to the first exception, the organization's petition clearly shows that the dispute or controversy surrounds an alleged violation of the contract between petitioners and carrier and that this claim was made to the management in the negotiations in effort to adjust the dispute before it was brought to this Board. This exception is therefore without merit.

As to the merits. The material facts are not in dispute. The question is primarily one of law. That is, the construction of the contract between the organization and the carrier. The organization contends that both by its terms and its intent the contract contemplates that all locomotive engineering service performed on the line of railway of the carrier, whether in the transportation of passengers or property, for hire, or whether work-train service, engaged on constuction, improvement, or repair work, or in the handling of company material, shall be manned by the engineers for whose benefit the contract was made and subject and pursuant to its provisions. The carrier takes the position, first, that the contract only applies to engines operated by the carrier itself and has no application to engines which might be operated by a contractor, even though the

contractor may be engaged in doing construction, improvement, or repair work for the carrier. Second, that as to Bonnet Carre Spillway, that this is entirely new construction work on a line which has never yet engaged in interstate commerce and probably will not for another year; that the hauling of the dirt over a portion of its main line is purely intrastate and the construction itself is entirely within the State of Louisiana and that consequently the operation is entirely beyond the provisions of the Act. The Bonnet Carre Spillway work consists of the change or relocation of carrier's line of railway to an adjacent parallel line, occasioned by government drainage operations and involves the construction of a bridge over the Spillway with necessary earthen approaches thereto. In performing this work, as well as the incidental work near Norco, the contractor obtained the filling material from a ballast pit and hauled it over the existing main line of the carrier from one to four and one-half miles. It should be understood that although the actual work is performed by a contractor, the construction and maintenance are being done by the carrier in its corporate capacity and not by any new or separate corporation. There might be some force to the objection that the new line has never yet engaged in interstate commerce if it were being built by a separate carrier corporation. Under the conditions actually obtaining, however, it is of no moment whether the particular work concerned involves commerce at all; as previously stated, it is enough to bring the dispute within the scope of the Act that the carrier is itself engaged in interstate commerce.

It is an elementary feature of a contract that it shall have a subject matter. The subject matter of the contract between the organization and the carrier is the manning of locomotives and the terms and conditions governing same. It becomes necessary to determine whether the contract, by its terms or intention, covers all locomotive service involved in the business of the carrier or only some portion of such service. It is not contended by the organization that the contract would cover the manning of locomotives of some other railway company engaged in its own business, which might be privileged by the carrier to run over portions of the carrier's line under a trackage-right agreement. This, the organization concedes, is not a part of the business of the carrier, the other party to its contract. On the other hand, the organization contends that any construction, improvement, or repair work on the carrier's property is a part of the carrier's business and that any locomotive service incident thereto is subject to the contract. The preamble to the agreement reads as follows:

> "*Agreement.*—It is hereby understood and agreed between the management of the Louisiana and Arkansas Railway Company and the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, representing the Engineers on the L. R. & N. Seniority District of the L. & A. Ry. Co., that the following rules and regulations pertaining to the pay and government of all Engineers of said Seniority District shall be in force on and after November 1st, 1931, superseding all rates, rules, practices, and/or side agreements thereunder previously in effect on the original Louisiana Railway and Navigation Company from Shreveport, Lousiana, to New Orleans, Louisiana."

Article 6 reads:

> "*Article 6.*—(a) Freight Service—Rates of Pay.—Rates of engineers in through and irregular freight, pusher, helper, mine run, or roustabout, belt-line or transfer, work, wreck, construction, circus trains, trains established for the exclusive purpose of handling milk, and all other unclassified service shall be as follows:

Weight on drivers	Per 100 miles	Per mile	Per hour over time
Less than 80,000	$6.73	$0.84	$1.26
80,000 to 100,000	6.81	.85	1.27
100,000 to 140,000	6.91	.86	1.29
140,000 to 170,000	7.13	.89	1.33
170,000 to 200,000	7.29	.91	1.36
200,000 to 250,000	7.45	.93	1.39

"(b) For local or way-freight service, fifty-two (52c) per one hundred (100) miles or less for enginemen shall be added to the through-freight rate according to class of engine; miles over one hundred (100) to be paid for pro rata.

"(c) It is understood that the weight on trailers will be added to the weight on drivers of locomotives that are equipped with boosters, and the weights produced by such increased weights shall fix the weights for the respective classes of service."

and a portion of Article 35 reads as follows:

"*Article 35.*—Assignments.—The following conditions will constitute vacancies and will be advertised:

"(a) All new runs, turns, and vacancies either permanent or for thirty (30) days or more. Yard assignments for less than six (6) days will not be bulletined.

"(f) Oldest man making application within five (5) days from date of advertisement will be assigned.

"(i) Engineers losing work train, or any other run that has been put on temporarily, will be required to return to the run they gave up to take such work; or they may take any run which becomes vacant on or subsequent to the date they took the work train, which they could have bid in."

It will be seen from the foregoing that the preamble describes the rules and regulations "pertaining to the pay and government of all engineers * * *." That Article 6, in enumerating rates of pay, includes *work* and *construction* trains and that Article 35 provides for the filling of vacancies, including those of engineers operating work trains. There is no limitation in the contract to a portion of such service. To hold that the contract contemplated less than all of such services would leave it quite indefinite as to what, if any, portion of the service of the kind involved was subject to it. It could not reasonably be contended that the carrier would have a right under this contract simply to declare that certain of its trains would not in the future be subject to the terms of the contract and thus withdraw from the operation of the contract. Such a construction of the contract would make it a mere "will, wish, or want" contract or, that is, no contract at all. The carrier contends, however, that even if the contract be deemed to embrace all locomotive service, it must be limited to all such as might be performed directly by the carrier itself; and would not embrace such as might be performed by a contractor to whom it might accord the right to operate locomotives over its railway, incident to the performance by the contractor of construction work on its line. Conceivably, if the construction contract had been in force at the time the contract was entered into with the organization, it might be arguable that the service being performed by the contractor was not subject to the organization agreement because it already was beyond the power of the carrier to contract respecting. Here, however, the situation was just the reverse. The organization contract was in force at the time the construction contract was entered into. A breach of the organization contract could readily have been avoided by making the trackage privilege in the construction contract subject to the terms of the organization contract. The carrier did reserve the right to place its conductors on the contractor's trains, apparently for safety reasons. Apparently it could have done the same with respect to engineers, but it chose not to do so. It is urged by the carrier that it was not necessary to the performance of the contractor's work that its engines be operated on the carrier's line at all. That the contractor might have performed the work by constructing a tramway from the ballast pits to the new work, entirely off the carrier's right-of-way, and operated it with "dinky" engines and there would then have been no conflict with the organization contract. However, the fact is that the carrier and contractor chose otherwise. It may be it was less costly to the contractor to operate as was done. He at least paid the engineers on a lower basis of wages than is called for by the organization contract. Presumably, if the contractor was thus enabled to reduce his costs, the carrier shared in the saving in the prices paid for the work, else what benefit would it have been to the carrier to have accorded the trackage privilege? The result would be that by contracting the work out with the unrestricted trackage privilege the carrier would obtain the benefit of getting this locomotive service performed for its benefit at a lower rate of wages than that incorporated in the organization contract. It is not a question of whether that

was the carrier's conscious purpose or motive; motive is not involved. If the carrier has the right, despite its contract with the organization, to farm out this work, it has the right to do so for the express purpose of reducing the cost to it below what would be entailed in paying the wages called for by the contract. To hold that the carrier can thus avoid the obligations of the contract with the organization would be equivalent to holding that performance on the carrier's side is entirely optional with it. If it may thus contract out its construction and improvement work with the privilege to the contractor of furnishing his own engineering service, at whatever rate of wages he may be able to procure, there is no reason why the carrier may not likewise contract out the carriage of freight and passengers, with similar privileges, with the consequence that there would finally be nothing left which would be subject to the contract with the organization.

The fact that the writing of November 1, 1931, does not say in express words that it binds the carrier to employ the engineers represented by the organization to man all engines engaged in any work, operation, maintenance, or construction on the carrier's railway is not of much significance. These contracts are of a type peculiar to the business involved. They are not in form at all similar to the ordinary contract of employment. They are particularly distinctive, in that they leave largely to implication the fact that they *are* contracts of employment. They leave more unsaid than said. They really are more in the nature of a schedule (which is what they generally are called), or specifications, commonly made and appendix of any ordinary contract, than the contract itself; they consist primarily of tables setting forth the rates of pay applicable to specified services, a very meager specification (if any) of what the services shall consist of, rules governing pay for incidental services, rules governing seniority, and rules governing the assignment of runs and such matters.

The circumstances that the writing of November 1, 1931, does not expressly say in so many words that it is applicable to all locomotive engineering to be performed for the carrier, and likewise is silent as to specifying any definite portion thereof less than all, are not of equal weight so as to counterbalance. On the contrary, it is quite simple to draw the inference that it applies to all, but impossible to infer some definite portion as there is nothing upon which such an inference could rest. The obvious place any limitation of the contract to less than all, and the extent of such limitation, should be expressed is in the written agreement of November 1, 1931. Consequently, its absence there creates an irresistible inference of its nonexistence and a corresponding inference that the contract embraces all.

The contract with the organization involves valuable property rights in the employes represented by the organization. Outstanding among these are the provisions affecting seniority and turn to be used; the safety protection involved in having engines running on the same tracks with themselves manned by engineers equally qualified. The express recognition in the contract of these rights is not unattended by obligation on the employes' part; they are required to and do hold themselves available to be called in their orderly turn and subject to severe discipline for failure to be on hand. Without some such an arrangement the punctual running of trains by the carrier would be impossible. Thus these rights and obligations arising under the contract are reciprocal. It is not reasonable to suppose that incidents of such mutual value and importance would attend a one-sided mere option in favor of the carrier that it alone might exercise or not, whichever way advantage laid. To construe the contract as embracing less than all of the service subject to the carrier's control would render these rights of little or no value.

The only reasonable interpretation and manifest intention of the contract was to embrace all locomotive engineering service to be performed on the railway of the carrier for its benefit. Consequently, the making of the contract with the contractor, according him the privilege of manning the engines operated by him, on and in the work of the carrier, was a breach of the organization contract and deprived engineers represented by the organization of work to which they were justly entitled and for which they should be compensated according to the schedule.

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.

(1) The carrier, Louisiana & Arkansas Railway Company, is a railroad common carrier for hire, owning and operating lines of railway extending from Arkansas through Louisiana to New Orleans, and is engaged in the general transportation of persons and property between those states and among the other states.

(2) The petitioner, Brotherhood of Locomotive Engineers, is an unincorporated membership association or organization composed of locomotive engineers, including those employed on said railroad, and is duly authorized to represent all such employes.

(3) Under date of November 1, 1931, said engineers (through their organization) entered into a contract with the carrier concerning the terms of their employment which contract (with certain modifications, irrelevant here) was in force at the time of the dispute hereinafter described and still is.

(4) That in or about the month of June 1934 a dispute arose between said parties, growing out of the application and interpretation of said contract and a grievance of the employes with respect thereto, which dispute was considered and conferred upon by the authorized and designated representatives of the parties and was pending unadjusted June 21, 1934, and said dispute was handled in the usual manner, including by the chief operating officer of the carrier designated to handle such dispute; but the parties failed to reach any adjustment of said dispute, and thereupon the organization filed its petition on said employes' behalf with this, the appropriate Division of the Board, setting forth said grievance and the facts and circumstances surrounding it and said dispute and praying the Board to take jurisdiction thereof and determine and adjust the same.

(5) The parties to said dispute were heard by the Board pursuant to due and adequate notice.

(6) The carrier made and filed certain exceptions to the jurisdiction of the Board which it holds are not well taken and overrules.

(7) The Board finds that the contract of November 1, 1931, between the carrier and the organization, both by its terms and by the intention of the parties, embraces all engineering service to be performed (thenceforth so long as remaining in effect) by or for the benefit of the carrier, including the operation of engines engaged in work-train service upon construction, maintenance, or betterment of the railroad of the carrier, regardless of whether such work was performed by the carrier itself or by a contractor employed to do it.

(8) The Board finds that under date of February 20, 1934, and while the contract of November 1, 1931, between the carrier and the organization was still in full force and effect, the carrier entered into a contract with Gifford-Hill & Co., Inc., for the performance by the latter of certain construction work upon and in connection with the railroad of the carrier and under the terms thereof granted to the contractor the privilege of operating engines over and upon the carrier's railroad, handling work trains engaged in the performance of the work without requiring or providing for the observance of the terms and conditions of the carrier's contract with the organization.

(9) That pursuant to the construction contract of February 20, 1934, the contractor, on numerous days thereafter, operated engines in the performance of said contract which engines were manned by engineers employed by the contractor under terms and conditions other and less favorable to the engineers than those specified in the contract.

(10) That such engineers as might have been entitled by their seniority right thereto were among the engineers for whose benefit the contract with the organization was made and existed and they were available and ready to perform under and subject to the contract the work of manning the engines engaged in the said construction work, but they were deprived of the right to so do.

(11) That the making and performance of the contract of February 20, 1934, insofar as they failed to provide for an accord to the engineers represented by the organization in the contract of November 1, 1931, the right to perform the engineering service involved under the terms of their contract, constituted a violation by the carrier of the contract with the organization.

AWARD

That such of the engineers employed by the carrier as may have been entitled under their contract to perform the service of operating the engines employed in the construction work performed under the contract of February 20, 1934, between the carrier and Gifford-Hill & Co., Inc., shall be paid such amounts as they respectively would have earned under the organization schedules had they performed the work.

By Order of First Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

(Sgd.) T. S. MCFARLAND,
Secretary.

Dated at Chicago, Illinois, this 4th day of June 1935.