

Award No. 7511

Docket No. 9871

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

The First Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

BROTHERHOOD OF RAILROAD TRAINMEN

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and the Brotherhood of Railroad Trainmen request restoration of third brakeman on all Elkhorn service crews operating out of Bluefield, West Virginia.

Claim of the Brotherhood of Railroad Trainmen for payment of a minimum day at mine switching rate for each of a total number of brakemen corresponding with the number of Elkhorn service crews operated on July 2, 1938, and each subsequent date. The claimants in this case to be the men on the Bluefield Extra Brakemen's List not used, together with sufficient number of senior Pocahontas Division furloughed brakemen where necessary, to equal the number of Elkhorn service crews operated daily during this period.

EMPLOYEES' STATEMENT OF FACTS: The Pocahontas Division, a part of the Norfolk and Western Railway, double tracked, extends in a westernly direction from Bluefield, West Virginia for a distance of 99.57 miles to Williamson, West Virginia, the western terminus of this division.

Bluefield, West Virginia is the home terminal for passenger, time freights, local freights, and mine run crews operating out of this terminal. For a period of forty years or longer, there has been established on this division a set-up of service operating in a pool, known as "Elkhorn Mine Run Service." These assignments operate out of Bluefield, the home terminal when needed as far west as Auville Yard (an intermediate terminal) located 54.78 miles west of Bluefield and junction point to Dry Fork Branch at Iaeger, West Virginia. The crews assigned in this pool are required to perform service between the two named points, Bluefield and Auville, and are also required to perform service on the Bluestone, Pocahontas, and Tug Fork Branches of this division as requirements of the service demands.

Prior to February 1, 1915, the runs assigned in this "pool" were operated by steam power. Since February 1, 1915, electric power has been substituted. The nature of the work performed by these crews on the westward trip is moving loads and empties out of the home terminal, Bluefield, West Virginia, on one or more trips out of this terminal each day worked. These cars are set on sidings and in yards between Bluefield and Auville on main line and on sidings and in yards on branch lines. These crews also make frequent delivery of empties to coal operation tracks in coal field territory. The nature of the work performed on eastward trip is moving a train of loads from Auville Yard or intermediate points. When train is moved out of Auville with three

electric motors, the tonnage rating is 17,400 tons Auville to Farm. Farm is a storage siding at foot of grade about 18 miles east of Auville, and at this point tonnage is reduced to 12,600 tons. This tonnage is moved to Eckman, West Virginia, an intermediate yard, by the three electric motors and at which point tonnage is again reduced to 6,300 tons and from this point, this tonnage and train is then moved through to Bluefield.

In the performance of the work assigned to these crews, it is necessary to cross over from westward to eastward tracks and vice versa in picking up or setting off cars. When this is done, it is necessary to protect this train in both directions. This requires the services of two brakemen in making this movement, which leaves the conductor to perform the brakeman's work of lining up switches, setting of brakes on cars on a 2% grade and riding the lead car into tracks where set off, as practically all cars set off are backed in on tracks.

For the past 40 years, or longer, or since the establishment of this service, there has been assigned one conductor and three brakemen to each crew operating in this pool. Beginning July 2, 1938, the Management arbitrarily discontinued the services of one of the brakemen on each of these assignments. And by so doing, there was a violation of Article 28, paragraph (h), captioned Pocahontas Division Mine Switching Runs and NOTE thereto, as appearing in both the Conductors' and Trainmen's current schedules.

This claim has been declined by the Carrier.

POSITION OF EMPLOYES: It is the contention of the committees that when the services of the third brakeman on all the Elkhorn mine run crews was arbitrarily discontinued July 2, 1938, there was a violation of schedule rule Article 28, paragraph (h), captioned Pocahontas Division Mine Switching Runs and NOTE thereto, as referred to in Statement of Facts, and appearing in both the Conductors' and Trainmen's current schedules, reading as follows:

POCAHONTAS DIVISION MINE SWITCHING RUNS			
	Per Mile		Overtime
	Cents	Per Day	3/16
			Cents
Conductors	7.62	\$7.62	143.00
	Per Mile		Overtime
	Cents	Per Day	3/16
			Cents
Brakemen	5.63	\$5.63	105.75

For basic day and overtime see Articles 5 and 7.

NOTE—The above tabulation was agreed to on March 8, 1930, with the understanding that it would also be applicable to service on the Pocahontas Division known as "Elkhorn Service" and with the further understanding that "Working conditions heretofore applicable to crews engaged in mine switching or Elkhorn Service are to be continued unchanged."

Mine switching means the handling of cars to or from mines and the work involves switching to place or pick up such cars, but if crews are simply required to set off or pick up cars on mine tracks the freight rate governs.

It is the further contention of the committees that since the services of the third brakeman was discontinued on each Elkhorn crew assignment, that tonnage in each train operated has been increased one third by the use of three electric engines, which prior to this time, July 2, 1938, only two electric engines were used. This increasing the responsibility on each train operated

one third, and decreasing the working force of brakemen one third. Thereby forcing a hardship in having conductor to perform brakeman's work in making up and disposing of trains.

The committees further contend that crews filling out at Lick Branch coal outlet track on main line do so with train unattended, standing on a 2% grade; and crews filling out at Switchback Storage Track, do so with train unattended, standing on 2% grade on main line, while pusher engine is moved over branch line for distance of one half mile often under flag protection ahead to this storage track to obtain this filler. This movement is required to be made without the protection of stationing a man on rear of train as required by operating rule 90 (d) as appearing in Railway Company's Book of Operating Rules. Rule 90 (d) reading as follows:

"90 (d) When a train stops on an ascending grade where it is possible for the rear end to run back one man must be stationed on rear end. When the engine is to be detached where it is possible for the train to drift ahead or back, sufficient hand brakes must be applied to anchor train before detaching engine."

This movement forces the conductor to violate this rule in making up his train short handed. The committees further contend that position of, and vacancies, for middle brakemen on Elkhorn mine run crews have been bulletined as such since the establishment of this service for a period of forty years or longer. And the service of this third brakeman is now more essential than at any time during the establishment of this service.

It is the further contention of the committees that in conference with the management of the Railway Company when mine run rate of pay was made and agreed to March 8, 1930, that after thorough discussion as to application of this rule, it was agreed to in this conference that no reduction in members of crew would be made to off-set the increase in rate of pay in "Elkhorn Service."

Therefore, after the operation of these crews for a period of eight years and four months, as agreed to between the carrier and employes, the carrier on July 2, 1938 arbitrarily discontinued the services of this brakeman without conference or negotiations with organization authorized to make and interpret this contract. We are, therefore, submitting this dispute to your honorable Board for decision.

This dispute has been handled in accordance with the provisions of the Railway Labor Act. All evidence introduced in this submission has been previously discussed in conference and by correspondence by parties to this dispute and no agreement reached on a settlement thereof. It is hereby submitted to the National Railroad Adjustment Board, First Division, for decision.

SUPPLEMENTAL POSITION OF EMPLOYES: With reference to that part of the Carrier's submission which reads: "the management agreed to this rate increase provided the agreement carry a note protective of its interests, to the effect that 'working conditions'—that is, the schedule rules of the agreement—theretofore inapplicable to mine switching crews (and Elkhorn Service) were to remain inapplicable to this classification of service." To this assertion we do not agree, as the employes' representatives at the present time were members of this committee when this rule was negotiated and after a thorough discussion as to the application of this rule, it was agreed that no reduction in personnel of crews would be made to off-set increase in rates of pay in Elkhorn Mine Run Service.

Note thereto of paragraph (h), Article 28, was at this time written in schedule to support contention of employes in reduction of personnel of crews in this specified service and upon which this claim is based.

CARRIER'S STATEMENT OF FACTS: Prior to July 2, 1938, three brakemen were assigned to each of the "Elkhorn Service" crews. Effective at 12:01 A. M., July 2, 1938, at which time seven "Elkhorn Service" crews were in service, the third brakeman on each of these crews was discontinued, and since that date, two brakemen have been assigned to these pool crews.

The Order of Railway Conductors and Brotherhood of Railroad Trainmen have requested restoration of the third brakeman on all "Elkhorn Service" crews, basing their position on that part of Article 28, Section (h), of the Conductors' and Trainmen's respective schedules reading as follows:

**"POCAHONTAS DIVISION
MINE SWITCHING RUNS**

(Tabulation of rates omitted.)

NOTE—* * * 'working conditions heretofore applicable to crews engaged in mine switching or Elkhorn Service are to be continued unchanged.'"

The Organizations' request has been declined by the carrier.

POSITION OF CARRIER:

PART 1

A—HISTORICAL BACKGROUND OF ELKHORN SERVICE

The Elkhorn Service crews which are subject to the same schedule rules as mine switching crews are pooled in freight service and work first in and first out. The origin of the service has been lost in the destruction of records covering a period prior to 1908, but it is well known that these crews were assigned to mine switching service shortly after the beginning of mining operations west of Elkhorn Mountain in 1888. The earliest advertisement for crews in Elkhorn Service now in existence bears the date of 1908. Copy of this advertisement is attached hereto as Exhibit "A." These Elkhorn crews operated, and still operate, out of Bluefield, West Virginia. In days gone by, they seldom went west of Eckman or Vivian, but in recent years, they regularly go as far west as Iaeger.

Prior to February 1, 1915, the motive power for Elkhorn Service was steam. On that date, the first electric service was inaugurated. The electrification extended along the main line from Bluefield to Kimball, as shown on the attached map (Exhibit "B"). Various tributary branches were electrified in the subsequent ten years. (Pocahontas Branch was placed in service in 1916; Bluestone Branch in 1917; Kimball to Farm in 1923; Farm-Wilcoe extension in 1923 and the Farm-Iaeger in 1925). With the substitution of electric for steam power, management found that the electric engines used by the Elkhorn Service were not efficient for mine switching service, and the use of Elkhorn crews for such switching was gradually decreased as it could be absorbed by mine crews with steam engine. Since about the year 1923, the Elkhorn Service crews have not been called upon to perform mine switching **except on infrequent occasions**. Since that time, the service performed by the Elkhorn Service crews has been confined to the movement of empties, coal loads and cars containing miscellaneous freight between Bluefield and intermediate yards or storage tracks at various points along the main line and certain tributary branches between Bluefield and Auville Yard, West Virginia.

B—THE CONFERENCES OF 1928, 1929 and 1930

On February 14, 1928, the General Chairmen of the O. R. C. and the B. of R. T. wrote the General Manager of the carrier requesting an opportunity to discuss the revision of the then existing schedules to raise the rate of pay in mine switching service (and Elkhorn Service) to a parity with the

rates of pay accorded to men in local service. This communication, with its attached enclosure, is appended to this submission as Exhibit "C." Although only an increase in the rate of pay was requested, the labor organizations desired that it be understood that "all * * * rules and conditions in our agreement not specifically affected by its proposed amendment shall remain unchanged, * * *." (Underscoring ours.) After conferences between management and the General Chairmen, this request for a pay increase was temporarily withdrawn. The request was renewed on February 1, 1929. On February 13, 1929, General Manager Crawford replied to General Chairmen Smith and Horn that a date for a conference would be set as soon as practicable. Mr. Crawford added that the carrier wished to have certain changes made in wages and "working conditions covering the employes represented by your organization * * *." (Underscoring ours.) Mr. Crawford attached a memoranda of changes in schedule rules which the management desired to change. Copies of the General Manager's letters dated February 13, 1929, addressed to General Chairmen Horn and Smith with attached memoranda are appended to this submission as Exhibits "D-1" and "D-2." A conference between management and the organizations was convened on October 8, 1929.

On March 8, 1930, the management agreed to this rate increase provided the agreement carry a note protective of its interests, to the effect that "working conditions"—that is, the schedule rules of the agreement—theretofore inapplicable to mine switching crews (and Elkhorn Service) were to remain inapplicable to this classification of service. A copy of the agreement later incorporated into these schedules as Notes to Article 28 (h), is attached to this submission as Exhibit "E."

PART 2

A—MEANING OF THE WORDS "WORKING CONDITIONS"— IN SCHEDULE MAKING

This dispute turns on the intended meaning of the words "working conditions" as used in the Notes to Article 28 (h). When the third brakeman was cut off from the consist of these crews in 1938, the organization contended that the carrier was forbidden from taking this action, because of an understanding with labor in 1930 that "working conditions" theretofore "applicable to crews engaged in * * * Elkhorn Service" were "to be continued unchanged." It is their contention that the number of men required to perform a task is one of the "working conditions" of that task. There has never been a rule in these schedules requiring the carrier to employ a given number of men on these crews in Elkhorn Service, so the major premise in their argument is that "working conditions" as used in these Notes included not only the schedule rules but conditions not covered by the rules of the agreement.

When the words "working conditions" are considered in relation to the background of the negotiations leading to their adoption, their meaning becomes entirely clear, that is that they were synonymous with rules governing working conditions. When these words are detached from their textual background and considered apart from the circumstances leading up to their inclusion in the Special Agreement of March 8, 1930, they appear to be ambiguous and require definition.

The term "working conditions" had a distinct and well understood meaning in the language of railroad men, participants in negotiation of collective bargaining agreements. In determining the meaning of these words, it must be kept in mind that expressions and terms used in railroad labor discussions, and in written understandings which reflect the intent of negotiators in that field, have meanings peculiar to the industry. This fact was expressly recognized in *Louisville and Nashville R. R. vs. Bryant*, 92 S. W. (2) 749, in which Commissioner Morris observed that:

“* * * It must not be overlooked that railroad men speak a language of their own and that the terms which they employ in their agreements * * * are not always intelligible to the uninitiated, but have a technical meaning which those charged with a duty of construction must seek and ascertain by putting themselves in the place of men.”

Mr. John G. Walber and Mr. Elisha Lee, for the railroads, and Mr. D. B. Robertson and Mr. W. N. Doak, for the organizations, were the representatives of the carriers and labor, respectively, who drafted the Railway Labor Act of 1926. They were men versed in the language of collective bargaining agreements in the railroad industry. Several of these men have spoken of the “technical meaning” of the words “working conditions.” Their authoritative comments will assist this Division in understanding the sense and the intent of the words which were used.

In the arbitration between the Brotherhood of Railroad Signalmen and The Grand Central Terminal—United States Board of Mediation (1934)—C-1152 A. R. B., a question arose as to the meaning of the words “working conditions.” Mr. Walber, who was a member of the Board of Arbitration, said (p. 72):

“I happen to be with Elisha Lee, the two negotiators with Mr. Doak and Mr. Robertson, who wrote the Railway Labor Act. * * * I want to tell you that the term working conditions is synonymous with rules and was so definitely understood when it was written. You will recall that the name of the board was the Board of Railway Wages and Working Conditions. The only working conditions that they ever dealt with were those that were spelled out in the rules of the agreement.”

Again, at p. 74, Mr. Walber said:

“I wanted it left ‘rules’ but both Mr. Robertson and Mr. Doak (Mr. Robertson is still alive—I won’t say anything about some one who is dead)—I have correspondence to prove my statements—said that that was railroad lingo and everybody understands it, and that term is recognized in the railroad fraternity as being synonymous with ‘rules.’” (Underscoring ours.)

There is attached to this submission as Exhibit “F,” a copy of a letter from Mr. Robertson to Mr. Lee, dated January 30, 1927. This Division will particularly observe the following language:

“Aside from the peculiarities of a particular case, I agree that the words ‘rules and working conditions’ generally are recognized as being quite synonymous in schedule making, * * *.” (Underscoring ours.)

There is further attached to this submission as Exhibit “G,” a copy of a letter dated January 20, 1927, from Mr. Elisha Lee (now deceased) to Mr. B. R. Pollack, Vice President and General Manager of the Boston & Maine Railroad Company. This Division will observe Mr. Lee’s understanding of the synonymy of the words “working conditions” and “rules.” We quote that understanding:

“Very few trade agreements contain the comprehensive rules that are included in the railroad schedules. On the railroads, rules and working conditions have been treated as synonymous terms. On account of the conception of non-railroad men, I thought it was unnecessary to include the term ‘or working conditions.’ My recollection is that Mr. Robertson answered that this was a railroad term and was understood just as I stated, and being a railroad term he thought that

it would be disadvantageous to eliminate it. * * * According to my recollection, my statement that 'rules' and 'working conditions' were practically synonymous was accepted."

Of importance is the following quotation from the statement of Mr. D. B. Robertson in regard to the meaning of the word "condition" as used in Section 10 of the Railway Labor Act of 1926. Mr. Robertson said (p. 291, Hearing):

"The railroads agreed with us that the word 'conditions' meant * * *, they would not be permitted to reduce wages during this sixty days mentioned in Article 10; if we had sought an increase in wages or conditions; that is, a change in working rules, we agreed as practical men that we would not, * * * have any reason, for authorizing a strike unless it were to change those conditions; * * *." (Underscoring ours.)

Thus this Division will find from lips and pen of a man sitting on the labor side of the table a meaning of "working conditions" as management used it in the Note to Article 28 (h) in the instant schedules.

The Division will understand that the Carrier does not contend that the words "working conditions" in their normal, ordinary meaning are ambiguous. It does contend that in the practical drafting of collective bargaining agreements in 1930 that the words were considered synonymous with "schedule rules" by both the management and labor in the language of the railroad industry.¹ The words were so used in these notes.

B—THE INTENTION OF THE PARTIES IN THE USE OF THE WORDS

Faced with this ambiguity, this Division will want to consider the general setting of the negotiation to reach a conclusion as to the true intent and meaning of these words. (Although they were not ambiguous words in the industry and had a well understood meaning "in schedule making"). The Carrier was opposed to the grant of the increase in rate of pay to the men in mine switching service. It was only after some five months of discussion that the increase was granted. There was no request from the organization for a rule that crews in the mine switching service or the Elkhorn Service should be manned by three brakemen. It was the prerogative of management to reduce the consist of these crews at any time that in the judgment of management the service of some men were unnecessary (as will hereinafter be shown).

¹ " * * * the prevailing tendency at the present day is to enforce the local meaning though contrary to an apparently clear normal meaning. * * * " 3 Williston on Contracts, p. 1746. "Neither in the construction of a contract among merchants, tradesmen, or others, will the evidence (of a local usage) be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that." Brown v. Byrne, 3 E. & B. 703. In Myers v. Sarl, 3 E. & E. 306 Blackburn, J., said: " * * * I take to be the true rule of law upon the subject that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the instrument relates, that meaning is *prima facie* to be attributed to it; * * * ." In Smith v. Wilson, 3 B. & Ad. 728, in an action on a covenant in a lease to "leave in the warren ten thousand rabbits," proof was allowed that the customary meaning of **thousand** as applied to rabbits in that vicinity was one hundred dozen. In Grant v. Maddox, 15 M. & W. 737, **years** was interpreted as meaning a period of a year less a long vacation. In Mitchel v. Henry, 15 Ch. D. 181, the words "white selvage" were interpreted as covering a **dark gray border** on a piece of goods, on proof that such was the trade name.

Furthermore, the organizations, prior to the negotiations (in the only written exchange of views between the parties), specifically stated that "all * * * rules and conditions in our agreement not specifically affected by the proposed increase in the rate of pay "shall remain unchanged." (Under-scoring ours.) See Exhibit "C." Again the Division is reminded that when General Manager Crawford replied to the General Chairmen he informed them that the carrier desired to have certain changes made in "working conditions" and in an attached memorandum he set out ~~those~~ schedule rules which the carrier wanted to change. See Exhibits "D-1" and "D-2." This correspondence clearly indicates that both parties used, and understood that the other party used the words "working conditions" and "schedule rules governing working conditions" synonymously.

This Division will understand that these Notes were offered by the management for its own protection to the end that the grant of rate of pay to men in mine switching and Elkhorn Service, which was the same as that paid for local freight service, would not carry with it the application of schedule rules not previously enjoyed by men in these two services, such as the Switching at Terminals Rule, The Final Terminal Delay Rule, the local guarantee rule, etc.

The impartial mind may well doubt whether management would voluntarily surrender a fundamental prerogative pertaining to the consist of these crews under these circumstances. The point is particularly emphasized since during these same negotiations in 1929 and 1930, the carrier requested the organization to eliminate the rule requiring three brakemen on work trains (see Exhibit "D-2"). The carrier would hardly seek to relieve itself of the burden of this restriction on its main line work trains, and at the same time be willing to impose upon itself voluntarily the same restriction covering mine service which in volume far exceeds work train service.

By Supplement No. 15 to General Order No. 27, the United States Railroad Administration granted to engineers, firemen and helpers in mine run and other specified services the same rates of pay as were paid to men in through freight service (April 10, 1919). The question immediately arose on a railroad where mine runs were paid yard rates whether men in mine run service previously paid yard rates were thereupon subject to the schedule rules of through freight service. This question, among others, was answered by the Railroad Administration in August, 1919, by Interpretation No. 1 to Supplement 15 to General Order No. 27 (Question 33 and answer) which reads as follows:

"QUESTION 33.—Where mine run, belt line or transfer service, pusher and helper service, etc., was formerly paid yard rates, and is by this article paid the same rates as through freight service, is such service now subject to road conditions, such as initial terminal delay, switching allowances, running for coal and water, doubling hills, etc?"

"DECISION.—No; but through freight rules as to mileage and road overtime shall apply. (See Article VII.)"

When these organizations requested a rate of pay increase for conductors and trainmen in Elkhorn Service to be the same as that paid for local freight service, the management appropriately foresaw in 1930 that the same question would arise in connection with its grant of the higher rate as had arisen in 1919 in connection with the question quoted above. Where mine runs and crews in Elkhorn Service were formerly paid through freight rates and are by the result of negotiations paid the same rates as local freight service, is such service now subject to an application of different schedule rules?

The answer was spelled out with care with regard to the terms of the grant in these Notes. The crews in Elkhorn Service were not to be paid the local freight rate. They were to be paid "a rate which is the same as local

freight rate." Instead of adopting the question and answer method of the Railroad Administration this management insisted on writing a proviso into the schedules "that working conditions heretofore applicable to crews engaged in mine switching or Elkhorn Service are to be continued unchanged." These were words of limitation, that is, indicating that the management would go no further in making concessions than to grant the increased rate of pay. They were not words of an additional grant.

Prior to the effective date of Supplement No. 16 to General Order No. 27 covering Conductors and Trainmen, the rates paid to mine run service and to local or way freight service were the same on the Louisville & Nashville Railroad. Both rates had been increased under Section (b), Article V, Supplement No. 16. In Case No. 1902, Railway Board of Adjustment No. 1 (L. & N. and Conductors and Trainmen) the organization contended that a mine run should have been paid the local guarantee under the schedule rule in the Conductors' Schedule (Art. V, Section 1 of that Agreement) on the calendar working days on which the run was not operated.

In the Carrier's submission, there is to be found the following language in support of its position that the schedule rule in question did not apply to mine runs:

"It is not the understanding of the railroad that because the rate was made the same under the provisions of Supplement No. 16 that working conditions applying to local or way freight runs would also apply; in other words, that the rate only was affected and not the working conditions."

(The Division will observe that on a neighboring carrier the words "working conditions" were used as synonymous with "schedule rules"). The claim was denied after the Board had found that under "past practice" the run in question was a mine run.

In 1930 on the Norfolk & Western the request from the organizations was for a rate of pay increase for crews in mine switching and Elkhorn Service to be the same as the local freight rate. This railroad understood (as did the L. & N.) that the Supplements in 1919 only affected the rate of pay and not the schedule rules ("working conditions"). In 1930 the management could not be sure that the understanding under the Supplements would govern ten years later. To safeguard the understanding that "the rate only was affected" management insisted it be written into the agreement that "working conditions heretofore applicable to crews engaged in mine switching or Elkhorn Service are to be continued unchanged." By this language this Carrier intended that the implied understandings under the Supplements should be expressly written into the Agreement.

This Division is being asked to believe that after carefully drawing a distinction between the grant of local freight rate and "a rate which is the same as the local freight rate" in the first sentence, that the management reversed itself in the second sentence and voluntarily restricted its freedom to change working conditions not included in the schedule rules. See Exhibit "E" Those familiar with schedule making must know that this contention is without foundation.

It is a familiar rule in the interpretation and construction of contracts that doubtful language in contracts should be interpreted most strongly against the party who uses it. Doubtless it will be urged that since the language of these Notes to Article 28 (h) were inserted in these schedules at the insistence of the carrier that the ambiguity of phrase must be resolved against the carrier. This rule of construction is not favored and will only be invoked in extreme cases and as a last resort. The reason for the rule is "that a man is responsible for ambiguity in his own expression and has no right to induce another to contract with him on the supposition that his

words mean one thing while he hopes" some tribunal or administrative board will adopt a construction by which they would mean another thing more to his advantage. The reason for the application of this rule of construction is completely lacking in this case. The Note was not added to the schedules to induce the organization to contract with the carrier. On the contrary, the Note was added as a protection against any possible subsequent enlargement of the terms under which the carrier was willing to grant a rate of pay increase. The conversion of the shield designed by the carrier to protect itself into a weapon now to be used against it—must appeal to this Division as contrary to elemental principles of justice and fair play.

PART 3

A—THE TRUE "WORKING CONDITIONS" UNDER THE EMPLOYES' ERRONEOUS AND UNINTENDED DEFINITION

Employes and employers sometimes agree that a given number of men will be employed to perform a given task. We find such an agreement in the schedules with one of these organizations. Thus Article 25 (a) of the Trainmen's Schedule provides that:

"All main line work trains will have at least three (3) brakemen."

That contract provision impliedly recognizes the right of the employer to man work trains with any number of brakemen which management deems necessary to employ in the absence of such an agreement. There is no schedule rule requiring that a given number of men shall man local freight crews. The consist of local freight crews have been reduced from time to time as shown in attached Exhibit "H."

The carrier conceives of its right to control the number of men which shall constitute a crew as being preserved in a reservoir of freedom of action. That reservoir is depleted to the extent that its freedom of action has been curtailed by statute (full crew laws) or common law, grants by contract, and by the operation of agreed practice. Except as this reservoir has been curtailed by these four factors, the employer has the residual freedom of action to carry on its business according to the judgment of its management. This conception finds support in the following quotation from the opinion of Referee Hotchkiss in Award 311 (Third Division):

"Labor agreements are usually less explicit in respect to the rights and guarantees enjoyed by managements under them, since the responsibility for operating the business to which the agreement pertains is the responsibility of management and the rules of agreements and of law governing the operation of a business operate chiefly to restrict the freedom of action which management would otherwise possess. In other words, all agreements of necessity leave with management a considerable zone of operation within which management has the right and the duty to exercise judgment as to the best and most efficient way to run the business. * * *" (Underscoring ours.)

The organizations come to this Division with the argument that in 1930, the carrier agreed that "working conditions" theretofore applicable to Elkhorn crews were to remain unchanged. It is their contention that the number of men on these crews was a "working condition" and that the carrier is forbidden to reduce that consist. The carrier denies that the language relied on has any such meaning. But assuming for the sake of argument it has such meaning, the carrier still asserts that the organization cannot prevail on their own argument.

The contention that a consist of crew is a separate "working condition" ignores the "right and the duty" of the carrier to reduce that consist when necessary in its judgment,—in the absence of contract or law prohibiting such reduction. Consistent with the Organizations' contention the true "working

condition" prior to 1930 was that three brakemen manned the Elkhorn crew **subject to the right of the employer to reduce the consist of the crew** whenever in the judgment of management such reduction was necessary. This was the "working condition" which remains unchanged if the naked language of the Note is applied as these organizations now contend.

The right and the duty of the management to determine the consist of a crew is an inseparable element of this "working condition" affecting the employment of men in Elkhorn Service. Were this Division to sustain the claim, it would in effect change this "working condition" contrary to the now suggested intention of the Note. The vice in the argument advanced by the petitioners is that they seek to separate the visible counting of heads in the consist of the Elkhorn crew from the intangible (but none the less real and effective) right and duty of the employer to determine the consist of these crews. The number of men on the crews in 1930 and in days past is inextricably a part of this "working condition" which includes this right and duty on the part of management. It is as impossible to separate the one from the other as it is to divorce substance from shadow. Together, they form this inseparable "working condition" in that sense now suggested by the organizations' definition. If the petitioners through this Division now arbitrarily fix the crew's consist at three brakemen, the right of the carrier is abridged, and this "working condition" is accordingly changed, contrary to the language of the Note as the petitioners would now interpret it.

B—THE CONSEQUENCES OF APPROVAL OF THE ORGANIZATIONS' DEFINITION OF "WORKING CONDITIONS"

The organizations have contended that "working conditions" other than those agreed to in schedule rules were to remain unchanged. The practical interpretation which the organizations have placed upon these words amounts to freezing the *status quo* as it existed in 1930. Obviously, there was no intention between the parties to achieve any such fantastic result. Given the definition of "working conditions" which give rise to this dispute, the carrier submits that it would have been forbidden to change operating rules applicable to Elkhorn Service; to change safety rules; to make changes in report forms; to make changes in equipment or in facilities. Yet all these changes (and many more) have been made with the acquiescence of the organizations.

Each instance is an aspect of working conditions not covered by schedule rules. They are conditions affecting the work of the employes. The bare statement of these "working conditions" within this definition is sufficient to reduce the contention to a practical absurdity. The words used in these Notes in Article 28 (h) simply could not mean that which the organizations now say they mean. The contention amounts to no more than turning the clock back nine years. It is a fundamental construction that words must be given a reasonable construction—First Division Award No. 4230:

"There is a cardinal rule of interpretation of contracts to the effect that where an agreement is equally susceptible of two meanings, one of which would lead to a sensible result and the other to an absurd one, the former will be adopted."

The construction which the organizations have placed upon these words is an unreasonable construction and one which was not intended when the Notes were placed in the schedules.

CARRIER'S REPLY TO EMPLOYES' POSITION:

1. ALLEGED BURDEN ON CONDUCTOR ALLEGEDLY PERFORMING BRAKEMAN'S WORK.

The allegation that conductors have been required to perform the work of brakemen has no proper place in the consideration of this case by this Division. The Agreements with the Conductors and the Trainmen do not and were never intended to specify the work required of brakemen and conductors. This portion of the argument would have to presuppose a dispute

growing out of an Agreement, *—a subject over which this Division has jurisdiction under Section 3 (i) of the Amended Railway Labor Act (1934). The premise is contrary to fact and the organizations do not contend that it is a fact. The introduction of this argument which is not based upon and which does not grow out of an Agreement is improper, irrelevant and inadmissible. In effect this Division has so held in Award No. 2285. Without waiving its objection to the relevancy of this argument and the admissibility of these allegations, the Carrier denies that the reduction of one brakeman from the consist of crews in Elkhorn Service has resulted in a "hardship" to the Conductors.

2. QUESTION OF SAFETY OF OPERATION:

The organizations contend that Operating Rule 90 (d) has been violated. The Carrier insists that an operating rule has no place in the consideration of this dispute. The Second Division has held in Award 262 that disputes growing out of operating rules are not within the jurisdiction of the National Railroad Adjustment Board. Only those disputes growing out of rules which have been agreed to by men and management are cognizable by this Division.

Disputes involving the application or interpretation of operating safety rules is not a field over which the Divisions of the National Railroad Adjustment Board have jurisdiction. This Division has so held in Award 3106. Without waiving its objection to the relevancy of this argument and the admissibility of these allegations, the Carrier denies that the reduction of one brakeman from the consist of crews in Elkhorn Service has endangered the safety of the crews who have operated these trains since July 2nd, 1938.

3. THE INTENTION OF THE PARTIES:

The organizations assert that:

"after thorough discussion as to application of this rule, it was agreed in this conference" (March 8, 1930) "that no reduction in members of crews would be made to offset the increase in rate of pay in 'Elkhorn Service.'"

The Carrier emphatically denies that there was such a discussion or agreement. On this vital issue, there is fundamental disagreement between the parties.

The agreement for an increase in the rate of pay to be the same as that paid to men in local freight service was adopted without reference (either express or implied) to the then existing practice in 1930 under which three brakemen manned the crews in Elkhorn Service so long as management deemed their services necessary. The Carrier denies that the third brakeman

* The organizations contend that the Notes to paragraphs (h) Articles 28 were intended to prevent "reduction in members of crew" which might be made "to offset the increase in rate of pay." Under this contention (and the Carrier denies that the notes had any such intent) there is no claim that these rules were mutually agreed "safety" or "hardship" rules. Under the organizations' express theory these were "money" rules. It is for this reason that the Carrier insists that allegations of hardship and danger in operation are inadmissible. In this connection, the attention of the Division is called to the following language from the concurring opinion of Hutcheson J., in *Estes v. Union Terminal Co.* 89 Fed. (2) 768, at 774:

"Under the theory and purpose of the statute (the Railway Labor Act as Amended) neither the employe favored, nor those disfavored, by the carrier, have individual legal rights which they can press against the carrier as rights personal to themselves, apart from the collective agreement under which they work. Their rights are those of the class covered by the agreement, arising to the class and to them as members of the class, by virtue of the agreement, and by virtue of it alone." (Underscoring ours.)

was cut off these crews in order "to offset the increase in rate of pay in 'Elkhorn Service.'" The services of third brakemen were dispensed with because they were not necessary in the considered judgment of management. The Carrier insists that the action was taken without breach of its agreements with the Conductors or the Trainmen.

All data submitted in support of these two positions has been exchanged by the parties to this dispute and are properly a part of this record.

The Employes and the Carrier desire an oral hearing in this dispute.

(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 waived hearing thereon.

This is a request for restoration of third brakeman on all Elkhorn mine service crews operating out of Bluefield, West Virginia, and claims for pay by brakemen on extra list not used. The decision hinges upon the interpretation to be given a clause contained in a note to Article 28, Section (h) of the Conductors' and Trainmen's Schedules reading as follows: "Working conditions heretofore applicable to crews engaged in mine switching or Elkhorn service are to be continued unchanged." It is contended by claimants that as three brakemen had been used previous to the making of this rule to which the quoted note is appurtenant, that the carrier is required to maintain three brakemen on these runs in order to avoid a violation of the rule.

We are of the opinion that the words "working conditions" as used in the note are synonymous with "schedule rules." The record is replete with evidence that such term is so used by those engaged in railroad schedule making. It was clearly the intention of the parties to change the rate of pay for this class of service and otherwise to leave the situation as it was. There was no consist rule or law that required the use of three brakemen prior to the negotiation of the rule and the appurtenant note as it now appears in the schedule. It was the function of management to determine the number of employes in a crew under such circumstances. That right is not abridged by the clause before us for interpretation. In fact, the note evidences an intent to protect against any change by virtue of the adoption of the new rule other than the change in the rates of pay. An affirmative award is not warranted.

AWARD

Claim denied.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

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

Dated at Chicago, Illinois, this 25th day of November, 1942.