

**Award 20231**

**Docket 33592**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**FIRST DIVISION**

**39 South La Salle Street, Chicago 3, Illinois**

**With Referee Carroll R. Daugherty**

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**PARTIES TO DISPUTE:**

**ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY**

**STATEMENT OF CLAIM:** "Claim of Conductor Lee Frasure, Brakemen R. C. Phelps, M. D. Branham and H. C. Hopkins to be paid in accordance with Rule 40 of Conductors' and Trainmen's Agreements November 27, 1952, and each subsequent date that Shelby shifter crews are operated on Meade Fork Subdivision; also, claim for one additional 100 miles for the Shelby Shifter that was used on Meade Fork Subdivision."

**EMPLOYES' STATEMENT OF FACTS:** On November 26, 1952 Conductor Lee Frasure and crew were regularly assigned at Jenkins to perform the switching at Jenkins and pull and supply service on what is known as the Meade Fork Subdivision. On November 26, 1952 Conductor Frasure received the following message:

"Jenkins, Ky. - November 26, 1952

"C. & E. Meade Fork Shifter

Your crew is annulled for one day November 27th. Report for duty at 11 a.m., November 28th unless notified otherwise.

C.L.S."

On November 27th Conductor H. C. Robinson, Brakemen L. B. Branham, C. A. Price and C. G. Patton were called at Shelby, Kentucky at 4:45 P. M., engine 1473, and performed service on the Meade Fork Subdivision running through terminal at Jenkins, Kentucky.

**POSITION OF COMMITTEE:** The following rules are involved:

Rule 40 — FIRST-In, FIRST-Out.

(a) Except on regular assigned manifest runs; through freight and mine run-shifter pool crews, will run first-in, first-out of termi-

nals. Extra freight conductors on the board shall run first-in, first-out provided rest period is up.

(Paragraphs (b), (c), (d) and (e) effective September 1, 1942).

(b) Conductors in pool freight service who are not called for service in their proper turn through no fault of their own will be allowed 50 miles at the rate of pay applicable to the service they should have been called to perform, and will not lose their standing they held when the run-around occurred.

(c) If, through no fault of his own, a conductor of a pool crew or a conductor on a regularly assigned run is not called in proper turn, or a conductor is deprived of service to which entitled, under the rules of the agreement, he will be paid the difference between what he earned (straight time) and what he would have earned (straight time) had he been properly called or used in the service to which entitled.

(d) Conductors on extra list not called in their proper turn through no fault of their own will be allowed one-half of one minimum day's pay at the rate of pay applicable to the service they should have been called to perform and will not lose the standing they held at the time the run-around occurred.

(e) This rule not to apply in cases of wrecks, washouts, or other emergencies necessitating immediate action to prevent loss of life, injury to person or damage to property.

#### Rule 41 — DIVISION RESTRICTION, FREIGHT SERVICE.

Through freight conductors will be restricted to their respective districts or divisions, except specified interdivisional manifest runs; in which case the mileage will be divided on percentage basis.

#### Rule 13 — Mine Run Only

(Special Settlement)

(a) Sections (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) and (l) of this rule apply only to Mine Run-Shifter Service.

(b) Eight hours or less shall constitute a day. Time will commence at the time they are required to report for duty, and continue until they are relieved from duty.

Overtime at time and one-half shall be paid for all time on duty in excess of eight (8) hours, on the minute basis.

(c) Mine Run or Shifter service is understood to mean — Supplying empties to or pulling loads from mines.

(d) Mine Run or Shifter service will not be combined with yard service on yards having one or more yard engines, except they may be required to do work in yards in connection with the train they are handling not to exceed one hour and thirty (30) minutes

on any one day or any one trip. If one hour and thirty (30) minutes is exceeded, or if they are required to do any other work in yard service, they shall be paid the regular yard rates for the entire day or trip.

(Note — Effective April 1, 1930). The application of Paragraph (d) will not operate to reduce Mine Run rate for conductors shown in Rule 10.

(e) In applying Section (d), only the actual time worked will be counted, that is to say, if a crew works less than one hour and thirty (30) minutes and is delayed in yard thirty (30) minutes, then proceeding on trip in Mine Run or Shifter service, mine run or shifter rate will be allowed for the entire day or trip, but if time worked exceeds one hour and thirty (30) minutes, they will be paid as provided for in Section (d).

(f) When mine run or shifter men perform work on yards to the extent that it entitles them to the yard rates, as provided for in Section (d), only the rules applicable to mine run or shifter service will apply.

(g) Doubling over from two tracks to pick up outgoing train or to set off incoming train and the handling of caboose car to train or to caboose track (for their train) shall not be counted as yard work.

(h) Nothing in the above rules to be construed to prevent the present practice of yard crews doing mine shifter work within yard switching limits. Mine run or shifter service performed by mine run or shifter crews working exclusively within yard switching limits, will be paid yard rate.

(i) It will not be the purpose of the Company to take advantage of the one hour and thirty (30) minutes referred to in Section (d) to change its former practice of reducing or increasing yard crews as fluctuation of business requires.

(j) Mine run-shifter crews will be allowed twenty (20) minutes for lunch between four and one-half (4½) and six (6) hours after starting work, without deduction in pay.

(k) Mine run-shifter crews will not be required to work longer than six (6) hours without being allowed twenty (20) minutes for lunch with no deduction in pay or time therefore.

Lunch period pro rata will be paid for when not given.

(l) (Effective January 15, 1939). Crews assigned in coal fields will be paid mine-run rates when performing short turnaround freight service within mine-run territory, subject to Rule 13; except through freight rates will be paid on the N. F. & G. and on Coal River Sub-divisions (between St. Albans and Whitesville or Danville), except as provided in Rule 13 (c).

Rule 46 — Regularing Working List (Effective December 1, 1941)

(a) Pool crews in through freight and mine run service will be reduced when their average monthly earning (including all time earned), fall to: Conductors, \$262.52, Brakemen \$214.85.

Extra conductors' list will be reduced when their average monthly earnings (including all time earned), fall to the average monthly earnings of brakemen assigned to pool freight and mine run service.

Extra brakemen's list will be reduced when their average monthly earnings (including all time earned), fall to \$141.57.

The foregoing will not apply when it is mutually agreeable to both conductors and brakemen and the Superintendent not to reduce the crews or lists.

(b) When the average monthly earnings (including all time earned), of pool crews in through freight and mine run service go beyond: Conductors, \$305.68; Brakemen, \$250.18, additional crew or crews will be added to bring the average earnings below the maximum earnings stated herein; except it should be understood that such limitation of wages shall not preclude the officials of the railway from requiring men to make wages in excess of this limitation when the necessities of the service require it.

(c) When a sufficient number of crews have been assigned to service on any district, emergency crews will not be added to avoid the expense of deadheading crews from the opposite end of the district when such crews have laid at the opposite end of the district eighteen (18) hours or more.

The mine run shifters at Shelby are assigned to S. V. & E. Subdivision which is Shelby, Kentucky to Jenkins, Kentucky. The S. V. & E. Subdivision is located in time card and station book as such.

The Meade Fork Subdivision was built from Jenkins, Kentucky to end of line which is 15 miles from Jenkins. The Jenkins job always worked at Jenkins and Meade Fork Subdivision until the Carrier started using diesel power.

The S. V. & E. worked the mines between Shelby and Jenkins and delivered the empties to Jenkins and took the loads to Shelby.

Mine run shifters are regulated by Rule 46. The S. V. & E. shifters are regulated separately from any other branch or subdivision under the provisions of Rule 46.

The Carrier in their position in docket 1433, award 1465 states that "the Jenkins shifter crew that does all the yard switching and work on Jenkins yard as well as supplies the mines in and around Jenkins."

That is what the Jenkins shifter does. However, the Carrier was in error when they cut off the Jenkins shifter and used a mine run crew out of Shelby to perform the switching at Jenkins and pull and supply the mines at Jenkins and Meade Fork Subdivision.

All data presented in support of employes' position in this case has been given to the Carrier either by conference or correspondence and has been made a part of this particular claim.

An oral hearing is desired.

**CARRIER'S STATEMENT OF FACTS:** Conductor Frasure and crew were assigned to shifter service at Jenkins, Ky., and last worked November 26, 1952, from 11:00 A. M. to 8:30 P. M.

On November 27, 1952, account only one mine working at Pound, Virginia, Conductor Frasure and brakemen were cut off and not used. On this same date Conductor Robinson and crew were called to go on duty at Shelby 4:45 P. M., and performed shifter service on the SV&E and Meade Fork Subdivisions and were relieved at Shelby at 12 midnight.

Conductor Frasure and crew next worked November 28, 1952 at Jenkins, Kentucky, when called for 11:00 A. M., Extra 1484, and relieved at 8:20 P. M.

**POSITION OF CARRIER:** Attached is a sketch of the territory involved.

On July 1, 1925, The Chesapeake and Ohio Railway Company leased from the Baltimore and Ohio Railway Company the Sandy Valley and Elkhorn Railroad running between Shelby, Kentucky, and the end of this branch line approximately three miles beyond Jenkins, Kentucky. All of the crews operating on this branch line, while owned by the Baltimore and Ohio, were assigned as mine run (shifter) crews.

After the C&O took over the operation of this branch, the crews were placed under the provisions of agreements with employes of the C&O.

No yard service has ever been established at Jenkins. See Award 1465 of the First Division, National Railroad Adjustment Board.

While this branch line was owned by the B&O, there were two and sometimes three crews laying up at Jenkins. One of these crews made a trip in passenger service Jenkins to Shelby and return, and the other crews (sometimes one and sometimes two) were paid mine run rate and performed all switching at Jenkins, as well as supplying and pulling the mines in and around Jenkins.

There is no question of seniority involved in this case as all the employes on both crews hold seniority on the SV&E Branch.

After the C&O took over this branch line and the employes were placed under C&O agreement rules, one crew laid up at Jenkins and made trip in passenger service Jenkins to Shelby and return, after performing mine run service; and from one to two other crews laid up at the same point and performed mine run shifter service in and around Jenkins.

In addition, a pool board and extra lists were established at Shelby for SV&E conductors and trainmen, and these crews were used to pull loads and supply mines on this branch line in addition to the crews laying up at Jenkins. The extra lists at Shelby were used to fill vacancies on the SV&E crews both at Shelby and Jenkins.

During all of these years, during recession of business, mine strikes, etc., when the business did not justify mine run shifter crews at Jenkins, these crews were abolished, and the employes exercised their seniority rights to SV&E crews at Shelby. Such crews worked out of Shelby performing work at and around Jenkins along with other work on this branch line.

In other words, all of the work on this branch line (except the passenger work) has been mine run shifter work and has been performed by crews on this branch line working out of either Shelby or Jenkins, or both.

On February 29, 1948, an extension of 14.8 miles was added to this branch extending to Meade, Virginia, opening up new mines in that territory. This extension is known as the Meade Fork Sub-division.

On November 1, 1949, the passenger service between Shelby and Jenkins was discontinued.

After opening of the Meade Fork Branch, crews working out of Shelby have also performed work on this branch in addition to the crews working out of Jenkins.

The employes are contending that it is improper for the carrier to operate SV&E crews out of Shelby through Jenkins to the Meade Fork Sub-division, and in support of their position rely upon Rules 40, 41, 13 and 46.

Rule 40 is the runaround rule. There is no runaround involved in this case.

Rule 41 restricts **through freight** conductors (brakemen) to their respective districts or divisions. This rule does not apply to mine run service. Furthermore, this rule is not involved in any event, because the SV&E Sub-division and the Meade Fork Sub-division constitute one seniority district over which Conductor Frasure and crew hold prior seniority rights.

Rule 46 covers regulating working lists.

These rules are clearly inapplicable in this case.

Rule 13 covers mine run service. Conductor Frasure and crew were allowed payment in accordance with this rule.

Assignments in mine run territory have always been established, re-arranged or abolished on the same seniority district to meet changed conditions caused by new mine territory opening up, mines being worked out, and other changes in the operating conditions. Similar changes were made on the Powellton Branch in approximately 1916. For many years prior to 1916 Powellton Branch crew performed service between Handley and end of line on the Powellton Branch, laying up at Powellton. Due to the mines being worked out and the remaining work on the Branch not being sufficient to justify a crew being laid up at Powellton the assignment was abolished and the work on this Branch was thereafter performed by crews assigned at Handley, which crews run through Powellton to reach mines and other tracks beyond that point.

Prior to approximately 1922 a mine run crew was assigned at Sewell on the Keeneys Creek Branch to perform service on that Branch, and after the work diminished to the extent that this was not justified, this assignment

was abolished and the work was thereafter performed by crews assigned at Thurmond.

Prior to 1937 a crew was assigned at Ansted on the Hawks Nest Branch, and after the work on this Branch diminished to the extent that this assignment was not justified the assignment was abolished and this work has been performed by crews out of Thurmond.

Prior to July 1, 1928, a crew was assigned at Paint Creek on the Paint Creek Sub-division and was used to weigh and classify coal handled out of that point by mine run crews. On July 1, 1928, this crew was abolished, and subsequent to that date the coal has been handled into Handley and weighed and classified at that point.

Prior to July 1, 1928, a crew was assigned at Holden on the Island Creek Sub-division. On July 1, 1928, this assignment was abolished and the work at Holden has since been performed by mine run crews operated out of Peach Creek.

Prior to July 1932 mine run crews were laid up at Sproul on the Coal River Sub-division, and due to changed operating conditions this mine run terminal was abolished and the work performed by crews assigned at St. Albans, Danville and Whitesville, which are in the same seniority district.

In each of the above cases crews assigned at other points have operated into and through the points where the assignments had been abolished with no claim or protest being filed on account of this being done.

It can be seen, therefore, that the handling in the instant case was in accordance with past practice on this carrier, and as all of the points involved in this case are on the same seniority district the employees have not been required to perform any service not covered by their assignment.

It will be noted the Conductors' Committee has included claim for the trainmen. Trainmen on this carrier are represented by the Brotherhood of Railroad Trainmen, and the General Committee of the Trainmen have agreed with the carrier that it is proper to operate crews assigned at Shelby to any point on the SV&E Sub-division, including the Meade Fork Sub-division.

A claim was filed in 1939 by the Trainmen's Committee for a mine run crew assigned at Jenkins account of using a crew out of Shelby pulling mines at Jenkins on dates the Jenkins crew was not used. This claim was declined by the carrier and was not further handled by the employees. Attached as Carrier's Exhibit "A", sheets 1 and 2, are copies of the employees' letter filing the claim and the carrier's reply thereto.

Attached as Carrier's Exhibit "B", sheets 1 to 5 inclusive, is copy of settlement in Trainmen's Grievance Item 6422, from which it will be noted that the Trainmen objected to Shelby crews operating on the Meade Fork Sub-division, and filed claim for an additional day for a Shelby crew operating on the sub-division. However, it will be noted that the claim was handled in conference and it was declined on the basis that there was no violation of the agreement, to which the employees agreed in their letter of June 30, 1952. Therefore, so far as the trainmen assigned on the crew in the instant case are concerned, their organization has agreed that there is no basis for their claim. The Conductors' Agreement with respect to mine run crews is identical to the Trainmen's Agreement.

A similar claim was handled by your Board in the case covered by Award 5188 involving this carrier and this same organization, in which case a work train out of Paintsville was used on the Millers Creek Sub-division on a day the Millers Creek Sub-division crew was not used. The employes claimed payment under the run-around rule for the Millers Creek Sub-division crew, which claim was denied by your Board.

Also see Award 12907 involving a somewhat similar case on this carrier, in which case your Board in denying the claim stated:

“Nothing has been pointed out in the rules which requires negotiation with the Organization in the event of rearrangement of assignments in the light of changed conditions.

In the absence of a prohibitory rule it appears proper for a Carrier in order to meet changed conditions to rearrange runs and make assignments accordingly and to pay for the service on the rearranged basis according to the time and mileage of the run.

The Carrier contends that under the doctrine of past practice also the claim must be disallowed. This appears to be a case wherein the doctrine is applicable.

While no clear and distinct line may be drawn between situations wherein the doctrine may be applicable and where it may not, yet it would seem that in a case such as this where the practice does not amount to a specific rule violation, where the practice is dictated by the exigencies of the service to be performed in a particular locality, and where the employes over a long period of years with, we must assume, full knowledge acquiesced in it, it would seem that the doctrine should have application.”

“Pool freight service is operated over a division of the Carrier Also see Award 13743, in which case your Board stated: with sets of crews having home terminals at Page and Elmore. There is an overlapping in the assigned territory of the involved sets of crews. All of the crews are in the same seniority district. Claim is made by members of the pool freight crew with home terminal Page because a crew assigned in pool service with home terminal Elmore handled cars between Vaco Junction and Deepwater which were overlapping points on the assignments of both sets of crews.

It appears from the Joint Statement of Facts that cars have been handled between Vaco Junction and Deepwater by crews having the same pool assignments as those here involved since 1931. This Division has held that the right of the Carrier to have assignments that may overlap is not disputed (Award 4841) and that Carrier has a right to cancel an assignment and require other regularly assigned trains performing the same class of service to handle the tonnage of the cancelled run in the absence of an Agreement to the contrary (Award 7510). In view of these established precedents and the practice on this property as indicated by the Joint Statement of Facts, there being no rule or Agreement shown to indicate any restriction upon carrier's assigning the work as it did in this instance, we find no basis for sustaining Award.”



Also see Award 14313 reading:

"Here involved are overlapping pools, or more accurately, one pool operating within another. There is no showing that the bulletins recited any restrictions as to points of pick up or set off and there is no limiting rule disclosed. Further, it is asserted without dispute that the practice for more than thirty years has been for long pool crews to pick up or set off at intermediate points including the terminal of the short pool, even when running light with caboose to that terminal. Award 12497 is controlling."

Also see Award 15119 reading:

"We find no rules in either engineers' or firemen's agreements on this property expressly or by implication restricting the carrier's right to combine the Red Bank-Lakehurst turnaround with the Barnegat-Red Bank turnaround, with compensation on a continuous time basis. Engineers' Rule 1 (b) and firemen's Rule 1 (b) cannot be interpreted to prohibit the disputed assignment posted April 17, 1947, which met all rule requirements. Nothing contained in the rules relied on by petitioner can be construed as a surrender of carrier's right to abolish the service in effect prior to April 27, 1947 or to prohibit the substituted assignment effective on the following day. On the contrary, the employes' acquiescence in the propriety of the prior assignment, without any protest, constitutes a concurring interpretation of the rules and recognition of the carrier's right. The fact that the substituted service included a turn within a turn does not alter the principle.

Rule 1 (b) supports the carrier's method of compensation. In clear and unmistakable language it provides for payment according to time or mileage 'computed continuously from the time time begins until finally released at the end of the last run.' Engineers' Rules 15 (b) and 16 (d) and firemen's Rules 15 (a) and 16 (c) all clearly justify the conclusion that claimants were properly compensated.

The carrier is not obliged to point to any rule, as petitioner contends, that permits the challenged assignment. Conversely, the burden is on the petitioner to show that carrier has surrendered or limited its basic management functions by the use of language in some rule that is susceptible of no other interpretation."

Also see Award 16188 reading:

"These claimants base their claims upon the contention that the carrier had no right to cancel established assignments and bulletin new assignments. No contract or rule has been cited to us that sustains such a claim. The carriers have the prerogative to arrange their train assignments to conform to the demands of traffic. Even when an assignment was originally established as the result of a conference the rule is the same; nor is there any rule as to how long new assignments shall remain in effect. There could not well be such a rule if the carriers were to stay in business."

Also see Award 16501 reading:

"Denver to Loveland is 60.7 miles. The carrier proposed to cancel existing assignments and to establish new assignments to op-

erate its trains on a tri-weekly schedule, Denver to Loveland on Mondays, Wednesdays, and Fridays; Loveland to Denver Tuesdays, Thursdays, and Saturdays. It proposed to and did establish such assignments and advertised for bids to make such runs.

The carrier had a right to cancel established assignments and establish new ones. Awards 16188 and 16189."

It is the carrier's position that so far as the trainmen are concerned, the claim should be dismissed as no dispute exists between the Trainmen's Organization and the carrier, agreement having been reached that crews working out of Shelby have the right to perform work in and around Jenkins and on the Meade Fork Sub-division as was done in this case.

So far as the Conductor is concerned, the claim is also entirely without merit and should be denied.

All evidence introduced in this submission has been previously discussed in conference or by correspondence with representatives of the employes.

Oral presentation desired.

**EMPLOYEES' REPLY TO CARRIER'S ANSWER:** The carrier in their submission states that Conductor Frasure and crew were assigned to shifter service at Jenkins, Kentucky. They further state that on account of only one mine working at Pound, Virginia; they failed to state that there is only one mine at Pound, Virginia in accordance with their drawing. The mine at Pound, the mine at Meade, Va. and Mine 207 are all part of Conductor Frasure's assignment.

The carrier also states that when these crews on this branch were taken over by the C. & O. they were assigned as mine run shifter crews. From information which I received on this question it seems that one of these crews was assigned to short turnaround passenger run.

The carrier referred to branch line. If they are referring to the S. V. & E. subdivision we will show that the S. V. & E. is listed as Sandy Valley and Elkhorn Subdivision in Exhibit A. We will also show by Exhibit B that the Meade Fork Subdivision is also a subdivision and not a branch as referred to by the carrier.

The carrier states there is no question of seniority involved in this case as all the employes in both crews hold seniority on the S. V. & E. Both of these crews hold seniority on the S. V. & E. Subdivision but also, Conductor Frasure holds prior rights on the S. V. & E. Regardless of these men holding seniority rights Conductor Robinson and crew were assigned at Shelby, Ky. Conductor Frasure and crew were assigned at Jenkins. If Conductor Robinson wanted to work on the Meade Fork Subdivision it would be necessary for him to obtain a release at Shelby and take it to Jenkins and mark up on the assignment he desired. We will show as Exhibit Q, 1 & 2 that this was the practice originated by the carrier and in effect for many years.

The carrier further states that a pool board and extra list was established at Shelby, Kentucky, and that the extra list was used to fill vacancies on the S. V. & E. crews both at Shelby and at Jenkins. We wish to refer you to Exhibit O.

The carrier states that all of these years during the recession of business, mine strikes, etc. when business did not justify mine run shifter crews at Jenkins these crews were abolished and the employes exercised their seniority rights to S. V. & E. crews at Shelby. The carrier is in error when they state that these crews were abolished. From information I received, there always have been from one to three crews laying up at Jenkins until November 1949.

We do not agree with the carrier that all of the work on this branch line (except passenger work) has been performed by the crews on this branch line working out of Shelby, Ky. and Jenkins, Ky. or both. Crews out of Shelby performed all mine run service on S. V. & E. Subdivision except those within the switching limits of Jenkins terminal.

You will note that the carrier states in this case all this work was mine run shifter service. However, in this case #277 they state that Conductor Frasure and crew were assigned; in case #278 (Conductor Robinson) they state that he was regularly assigned.

The carrier also states that on February 29, 1948 an extension of 14 8/10 miles was added to this branch extending to Meade, Va. We do not agree that this is an extension of the S. V. & E. Subdivision. See Exhibit B. The carrier built this subdivision and in accordance with their own statement they leased the S. V. & E. from the B. & O. R. R.

The carrier further states that Rule 40 is not involved in this case. Rule 40, paragraph (3) plainly states: "Under the provisions of paragraph (a), (b), (c) and (d) of Rule 40 of Conductors' Agreement when conductors are runaround by persons who have not right to perform service as conductors over the territory involved, the conductor who should have been called to perform such service will be paid one minimum day at the rate applicable to the service they should have been called to perform. Such conductors will not lose their standing they held at the time the runaround occurred." It is our position that Conductor Frasure and crew were runaround by Conductor Robinson and crew and paragraph (3) is applicable. Conductor Robinson and crew had no release from Shelby to work out of Jenkins on the Meade Fork Subdivision.

The carrier also claims that Rule 41 is not applicable in this case and this rule is not involved in any event because the S. V. & E. Subdivision and the Meade Fork Subdivision constitute one seniority district. In accordance with what the carrier's representatives have just stated, we will show just how ridiculous it sounds. If the carrier is correct there is the Chicago Division and the Miami Subdivision and the Wabash Subdivision which operates from Cheviot, Ohio six miles out of Cincinnati and runs to Chicago, Illinois, a distance of 283 miles and conductors and brakemen hold seniority rights on both of these divisions although there is a terminal at Peru, Indiana and crews are assigned to Wabash Subdivision or the Miami Subdivision. There is no difference in the terminal at Peru, Indiana than the terminal that was at Jenkins. We will show as Exhibit E that the carrier has stated that Jenkins was a terminal. We will show by Exhibits P and R that this terminal was the same as other terminals. We would like also to refer you to the Train Service Board of Adjustment for the Southeastern Region, docket 562 which we feel will support our position.

The carrier also listed several terminals that they had abolished. Also they used to pick up a yard limit board and move it wherever they desired

or established yard switching service. All of this was prior to the establishment of the N. R. A. B. Your attention is called to the fact that this same carrier has paid claims for crews being run through a terminal. However they allowed this case to be submitted to the Board and it is our opinion that they are trying to get something they do not now have.

The carrier states on Page 3 that Rule 13 covers mine run service and that Conductor Frasure and crew were allowed payment in accordance with this rule. Regardless of what the carrier states, Conductor Frasure and crew has not received any rate of pay for November 27, 1952. The carrier has paid claims to the engineers for running crews from Shelby, Ky. over onto the Meade Fork Subdivision. We would like to show Exhibits C, D and S to sustain this statement.

The carrier also refers to these men's constituting one seniority district. We will show as Exhibits F, G & H that this same Carrier has paid identical claims for running Conductor Foster and crew through the terminal at Peach Creek, W. Va. Also, we will show as Exhibits I, J, K, L, M that they paid the crew who stood to be called on account of Conductor Foster's not having any rights to operate the train on the Logan and Southern Subdivision. We also want to call your attention to the agreement on page 85 of the Conductors' Agreement, which plainly states that the run could not be accepted for the reason it would require men to run off their division, which is not permitted under the schedule and it would also require them to run through a division terminal which is not permitted under the schedule.

(Exhibits not reproduced. Page references relate to original documents.)

**FINDINGS:** The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

This docket contains two sets of claims — that of Conductor Frasure and crew alleging deprivation of service under Rule 40 on November 27, 1952, and subsequently by Conductor Robinson and crew; and that of said Conductor Robinson and crew alleging that on said date they were improperly required to perform service on the Meade Fork sub-division.

The material facts in respect to one or the other or both of these claims may be summarized as follows: (1) As of claim date carrier operated two sub-divisions in which mine-run shifter service was being performed — the S.V. and E., based on Shelby, Kentucky, and running to and a little beyond Jenkins, Kentucky; and the Meade Fork, based on Jenkins and running to a little beyond Meade. (2) At that time there were two mine-run shifter pools — one at Shelby, which normally worked on the SVE sub-division; and the other at Jenkins, which normally worked mostly on the Meade Fork sub-division. (3) Both pools were within a single seniority district. (4) On November 27, 1952, carrier annulled the assignment of Frasure and crew, who normally worked from 11:00 A. M. for eight hours or more. The reason for annulment was reduction in mine tonnage to be pulled. On said date carrier worked Robinson and his crew out of Shelby from 4:45 P. M. till midnight. During this period the latter ran through Jenkins some eleven miles to a mine at Pound, i.e., Robinson and crew worked on both sub-divisions. (5) In a letter dated June 24, 1952, to the General Chairman of

the Locomotive Engineers, carrier's Assistant Vice-President of Labor Relations had flatly stated that Jenkins was a terminal and not an intermediate point. (6) Shelby-based mine run crew members had for some time been required to get written releases from carrier when they wished to change to the Jenkins-based pool.

The Robinson claim will be considered here first. In Award 19 530, which as of early 1954 involved the same circumstances as those here (so far as the Robinson claim is concerned) and which involved the instant carrier and the Engineers, this Division, in view of the above-mentioned letter of June 24, 1952, found that Jenkins had been a terminal of sorts and sustained the claim because Rule 85 of the Engineers' Agreement forbade two actions by carrier: (1) running engineers through terminals except on runs permitted in the agreement; (2) changing established terminals without agreement.

The question on the Robinson claim thus becomes: To what extent is Award 19 530 controlling here? First, must Jenkins here also be found to have been a terminal as of claim date? Second, if so, did any provision of the agreement relationship between the instant parties forbid carrier to run claimants through Jenkins?

In the light of facts (1), (2), (5) and (6) above, the Division holds that here too Jenkins must be found to have been a terminal of sorts. Jenkins was not a division terminal in the accepted sense, but it must be held to have been a sub-division terminal for mine run pool crews based on Shelby, as well as for crews based on Jenkins. It is true that the letter of June 24, 1952, was addressed to the General Chairman of the Engineers and not to the General Chairman of the Conductors. But there is no evidence of record that, as is sometimes possible, the pool train crews here had respective terminals other than the ones had by the pool engine crews. Carrier here makes no direct and positive statement, with or without evidence, that Jenkins was not a terminal for pool mine-run conductors. Carrier does state that after the construction of the Meade Fork sub-division in 1948 crews from Shelby as well as Jenkins worked on said sub-division, but petitioner in its rebuttal appears to disagree with this statement.

Given this finding, was carrier prohibited from running Robinson through Jenkins to Pound without penalty? The agreement here contains no rule counterpart of Engineers' Rule 85. But are there one or more other proper bases for finding such a prohibition?

The letter of November 26, 1910, found on pages 85-86 of the agreement, is signed by both parties and indicates accord on the principle that conductors are not permitted to run off their division through a division terminal. Because Jenkins was a sub-division rather than a division terminal, however, this letter cannot be held controlling here.

Rule 73 of the agreement deals with tie-up under the Hours of Service Act. This Act is not involved here, but paragraph (g) of Rule 73 says that said Rule does not allow conductors to run through terminals, unless permissible under other rules. It should be noted that this statement is not confined to division terminals. Said paragraph must then be taken to establish an agreed-on intent by the parties that carrier is not permitted without penalty to run crews through terminals of any sort save those specifically allowed under the agreement.

Given this finding and given the further fact that a number of prior awards of this Division (such as 7549 and 11 592) have held that train crews may not without penalty be run through their assigned terminals, division or otherwise, the claim of Robinson is found sustainable. He is to be paid for two basic days or 200 miles minus the pay he actually received for his work on November 27, 1952.

The statement of the claim implies a request not only for Conductor Robinson but also for the other two members of his crew, i.e., for his brakemen. On this point, there is evidence of record, presented by carrier and not contradicted by petitioner, that as of the period involved, the Trainmen's organization acquiesced in carrier's denial of such claims. Accordingly, the sustention here is limited to Conductor Robinson.

As to the runaround claim of Frasure and his crew, petitioner relies on Rule 40 (a) and (c). This Division has above found that Jenkins was a sub-division terminal with its own mine run pool; similarly with Shelby. There is no guarantee rule in the agreement. Accordingly, carrier must be found to have had the right as such to annul the Frasure assignment on claim date. However, a Shelby-based crew combined part of its own regular work with part of Frasure's regular work. Was Rule 40 (a) and (c) violated?

Rule 40 (a) says that the crews in any particular mine run pool must operate first in, first out. The parties clearly did not intend said principle to apply to two or more pools, e.g., Jenkins plus Shelby. Therefore it cannot properly be said that the Frasure crew was run around on claim date. No other crew at Jenkins got Frasure's work on the Meade Fork sub-division. Rule 40 (a) was not violated.

Rule 40 (c) says that a pool conductor who is not called in his proper turn or a conductor who is deprived of service to which entitled under the agreement will be paid, for the date involved, the difference between his actual straight-time earnings on said date and the straight-time earnings he would have then made if properly called or used. These are penalty provisions for two sets of circumstances: (1) violation of first in-first out for a conductor within any particular pool (this relates to Rule 40 (a)); and (2) violation of other agreement rules for any conductor who was entitled to service under the agreement.

As to the first set of circumstances, the Division has found no violation of rule 40 (a). Therefore the claim of the Frasure crew is not sustainable on this basis. As to the second set of circumstances, the Division has found that carrier had the right to annul Frasure's assignment as of claim date but that the Robinson crew based on Shelby and normally working on another sub-division improperly did some of the work that Frasure usually performed out of Jenkins on the Meade Fork sub-division because Jenkins was a sub-division terminal. In the light of these findings, the Division is compelled to hold further that carrier improperly caused Frasure to be deprived of work on November 27, 1952, in violation of Rule 40 (c). It must follow that for said date Frasure and his crew members are entitled to the penalty compensation specified in said Rule.

The Frasure portion of the instant claim asks for such compensation also for "each subsequent date that Shelby shifter crews are operated on Meade Fork Subdivision." This quotation does not mention any deprivation of Frasure's work by Shelby crews, and the record is bare of any information as to whether on any subsequent date Frasure and crew were in fact so

deprived. In other words, so far as the record shows, for any date subsequent to November 27, 1952, it is possible that both Shelby and Jenkins crews worked on the Meade Fork sub-division. Therefore the Division cannot here sustain any such vague unbuttressed claims for later dates.

**AWARD:** Claim for Conductor Frasure and crew sustained for November 27, 1952. Claim for Conductor Robinson sustained for November 27, 1952. Claim for brakemen members of Robinson crew dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of FIRST DIVISION

ATTEST: E. A. Killeen  
Executive Secretary

Dated at Chicago, Illinois, this 6th day of February 1963.