



Award 21780

Docket 39174

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Robert M. O'Brien

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim is made for an additional 100 miles at yard rate on November 23, 1959, in favor of Engineer E. P. Morrison, Lake Shore Division (Ashland District), based on violation of Rule 30, Engineers' Agreement."

EMPLOYES' STATEMENT OF FACTS: On November 23, 1959, claimant, assigned to Train 282, was required at South Oshkosh, Wisconsin, a point en route of his assignment, to set out bad order car SP 20546 from his pickup at a time when a switch engine was on duty and available at South Oshkosh.

Rule 30, Engineers' Agreement, reads:

"(a) Engineers in road freight service required to perform switching at initial terminal and/or at final terminal where yard engines are not operated will be compensated on minute basis with a minimum of one hour at three-sixteenths of the daily rate, according to class of engine and service. Switching allowance to be independent of road trip time.

Engineers operating way freights or switch runs of seventy miles or less will not receive extra compensation for switching at initial terminal where yard engines are not operated.

NOTE: The above paragraph is not applicable to engineers in through freight service on runs of seventy miles or less when conversion is effected under provisions of Rule 28.

(b) Engineers in road freight service will not be required to perform switching at points where yard engines are operated and yard crew is on duty, subject to the following exceptions:

Wreck.

Washout.

Accident requiring immediate service of an engineer.

Setting out cars placed in train through error, bad order cars, cars improperly loaded and no bills, when yard engine is not immediately available. A yard engine will be considered 'immediately available' when the yard engine crew is on duty and in the train yard where train is made up.

(c) When road freight engineers are required to perform switching service in circumstances above described in conjunction with road work, they shall be compensated for the switching service subject to provisions of paragraph (a).

(d) If road freight engineers are required to switch at points where yard engines are operated and yard crew on duty in circumstances other than described in paragraphs (b) and (h) of this rule, they will be compensated for such service at not less than a minimum day at yard rate, independent of compensation for any other service performed.

(e) Road freight engineers may be required to switch at points where yard engines are operated but yard crew not on duty. When so used, they will be compensated subject to provisions of paragraph (a), except as provided in paragraph (h) of this rule.

(f) The time engaged in switching will be computed on following bases:

(1) At initial terminal from time crew required to report as a unit without regard to preparatory time or performance of individual duties until completion of work and train is coupled together ready for road trip.

(2) At final terminal from time engine arrives at designated switch where final terminal delay begins and/or from time switching commences at any point within the switching limits until engine is placed on designated track.

(g) Doubling over train account of yard track of insufficient length to hold train will not be classed as switching.

(h) At points en route where yard engines are operated and yard crew on duty, road freight engineers may be required to pick up cars from one track and/or set out cars on one track or on and from additional tracks when such tracks are of insufficient length to hold same, without additional compensation. At points en route where yard engines are operated but yard crew not on duty, road freight engineers may be required to place from their trains for unloading or pick up to go forward in their own trains cars containing perishables, live stock, or merchandise, independent of other setout or pickup movements, and will be compensated for this additional service on minute basis with a minimum of one hour at pro rata rate, independent of road trip.

Replacing cars displaced in performance of the above will not be classed as switching.

(i) When the switching time of road freight engineers, in yards where yard engines are operated, during periods yard crew is not on duty, amounts to four hours or more in an eight hour spread that comes within the time a yard crew may be worked under provisions of rule 22, for five consecutive working days, an additional yard engine assignment will be established for the purpose of performing such work. In applying provisions of this section the practices that now obtain in operation of switch runs and way freight runs will be continued.

(j) At points where yard engines are now operated yard engine service will be continued except when there is less than four hours switching for five consecutive working days in an eight hour spread that comes within the time a yard crew may be worked under the provisions of rule 22 hereof.

(k) In yards where yard engines are not operated for the full twenty-four hour period, road freight engineers will not be required to perform switching service within thirty minutes from regular tie-up time of yard engine. When it is known such work will be required, yard crew will be held on duty to perform same.

(l) Engineers operating trains designated as 'Main Line Road Work' on the Gogebic and Menominee Iron Ranges, required to switch preference cars, will be compensated for all time actually engaged in switching on a cumulative basis, subject to provisions of paragraph (a).

It is understood that 'Range Main Line' engineers are not subject to the provisions of paragraph (l).

Turning engine and placing caboose on train will not be considered switching under paragraph (l).

(m) Engineers will not be required to segregate cars in their trains en route. However, cars should be picked up in trains as advantageously as possible where it can be done without additional switching.

SWITCHING AT TERMINALS DEFINED FREIGHT SERVICE

(m-1) Switching trains, putting away trains, making up trains, loading or unloading stock, loading or unloading freight, actually switching cars to be loaded to go forward in their own or other trains shall be classed as switching.

SWITCHING PASSENGER SERVICE

(n) Engineers on passenger runs will not be required to handle cars between yards and passenger stations other than the consist of their own trains.

(o) Engineers in passenger service required to switch consist of their own train at initial terminal, turnaround point or final

terminal, inclusive of setting out car or cars or picking up car or cars to go forward in their own train where yard engines are not operated will be paid on a minute basis with a minimum of one hour at passenger overtime rate, independent of road trip.

(p) Engineers in passenger service required to switch consist of their own train, inclusive of setting out cars or picking up cars to go forward in their own train at points where yard engines are operated but yard crew not on duty will, except as provided in section (r) of this rule, be paid on the minute basis with a minimum of one hour at a rate per hour of 3/16 of the daily rate, independent of road trip.

Pay for switching under sections (o) and (p) of this rule will be computed on the following bases:

(1) At initial terminal from time crew required to report as a unit, without regard to preparatory time or performance of individual duties, until completion of the work.

(2) At turnaround point, time actually engaged in switching, computed on a cumulative basis.

EXAMPLE: Switch 7:00 A.M. to 7:30 A.M. after arrival at turnaround point, then from 9:15 A.M. to 9:50 A.M. prior to departure. Allowance, 1 hour 5 minutes.

(3) At final terminal from time of arrival at passenger station until switching is completed.

(q) Engineers in passenger service required to perform switching where yard engines are operated and yard crew on duty will, except as provided in section (r) of this rule, be paid therefor independent of road trip on basis of a minimum day at pro rata yard rates.

(r) Engineers in passenger service required to pick up cars first out and/or set out one block of cars at initial terminal, intermediate point or final terminal where yard engine is operated, will be paid thirty minutes at passenger overtime rate, independent of road trip.

Movement with train intact between passenger station and yard at terminals is not classed as switching.

(s) This rule does not provide additional compensation to engineers on passenger runs for service in territory Council Bluffs-Union Station, Omaha, nor to engineers on short turnaround passenger runs, including suburban service, when required to perform switching outlined in sections (o), (p), (q) and (r), neither does it provide for dual compensation under provisions of rules 3(h), (i), (j), (k), 18 or 20 hereof.

NOTE: If the compensation earned under provisions of rules 3(h), (i), (j) and (k), or other rules exceeds the compensation provided for in this rule, engineers will be compensated on the higher basis.

NOTE: Sections (n) and (q) of this rule are not applicable to engineers on passenger runs operating in either direction between Council Bluffs and Union Station, Omaha, when handling cars other than the consist of their own train.

UNDERSTANDINGS APPLICATION OF RULE 30

The following understandings in respect to proper application of provisions of revised rule 30 are agreed to:

Rule 30(a) as revised provides allowances for initial terminal switching and final terminal switching on the minute basis at 3/16 of the daily rate per hour, according to class of engine and service for which called. These allowances are applicable to engineers in through freight service regardless of the road trip miles.

The second paragraph of rule 30(a) provides that engineers on way freight or switch runs of 70 miles or less will not be compensated for performing switching at the initial terminal provided a yard crew is not on duty at the initial terminal. Provisions are made, however, for the allowance of switching time at the final terminal when yard crews are not on duty. The provisions of rule 20—final-terminal-delay rule—apply on way freights or switch runs without regard to road trip mileage. If overtime, delayed time, or other allowances would produce more compensation than the final terminal switching, compensation will be rendered on that basis. This paragraph does not provide for dual compensation.

Rules 30(b), 30(c) and 30(d) pertain largely to meeting emergencies at points where yard engines are operated and yard crew on duty. The allowances covering the varying conditions arising are clearly set out therein.

In rule 30(e), provisions are made for the performance of switching at points where yard engines are operated but yard crew not on duty. At points where yard engine is operated but yard crew not on duty road freight engineers may be required to perform switching at initial and final terminal stations subject to the restriction in paragraph (k), and compensated under provisions of paragraph (a). The compensatory period for the performance of switching at initial terminal and final terminal is clearly and definitely set out in rule 30(f).

Rule 30(g) is self-explanatory.

Rule 30(h). Engineers who receive compensation under the provisions of rule 30(h) will not be credited with a setout or pickup at a point en route for the purpose of converting the rate as per rule 28. (See Award 5512, page 205, and Circular S-1-211-A, S-3-68-A of October 7, 1943, page 208.) (EXHIBITS A and B)

Rules 30(i), 30(j), 30(k), 30(l), and 30(m) are self-explanatory.

Rule 30(n) restricts the handling of equipment by engineers in passenger service between yards and passenger stations to the con-

sist of their own trains, except as provided in note following rule 30(s).

Rule 30(o) provides compensation for engineers in passenger service when required to switch consist of their own trains at initial terminal, turnaround point or final terminal where yard engines are not operated and differs from present passenger service switching rule in that a minimum of one hour is paid for one hour or less.

Rule 30(p) provides compensation for engineers in passenger service when required to switch consist of their own train at points where yard engines are operated but yard crew not on duty and also provides basis for computing switching allowance under provisions of rules 30(o) and 30(p). Example in item 2 of rule 30(p) applies only in computing allowances on turnaround passenger runs of over 80 miles and less than 100 miles.

Rule 30(q) provides compensation for engineers in passenger service on basis of a minimum day at pro rata yard rate when required to perform switching other than that provided in rule 30(r), at points where yard engines are operated and yard crew on duty.

Rule 30(r) provides for a minimum of thirty minutes at passenger overtime rate, independent of road trip, for picking up and/or setting out as outlined therein at points where yard engine is operated, and is applicable whether or not yard crew is on duty. The second paragraph of the rule is self-explanatory.

Rule 30(s) provides that the passenger service switching rule is not applicable to service in territory Council Bluffs-Union Station, Omaha, nor to short turnaround passenger runs, including suburban service, and also provides that there will be no dual compensation allowances under the switching rule and the other rules referred to therein.

Freight service switching rule will apply when train classification is changed from passenger to freight account of handling freight in passenger trains.

Final terminal delay time for engineers operating passenger trains from the west will be computed from time of arrival at Union Passenger Station, Omaha." (Emphasis ours.)

POSITION OF EMPLOYEES: The position of the organization is that the rule (30) relied on states that switching out bad order car by road crew when a yard engine is on duty and available is a violation of contract and the carrier is subject to penalty of an additional 100 miles at yard rate for such agreed-to violation. In fact, interpretation of the language "immediately available" would be pure exercise if the carrier did not understand and agree that they could not have road crews do work that they and we agreed was switching while a yard crew was on duty and immediately available.

For reference I wish to bring to the attention of the Board BLE Case 49-61, C&NW File 3-8-629 (EXHIBITS C and D) and disposition of claim

on the local level on the basis of whether or not yard engine was available at the time the switching out of bad order car took place. The only question given relevancy in the disposition of this case was: Was the switch engine available, or was it not available, under the agreed-to understanding of the language "immediately available?"

Also, BLE Case 50-142, C&NW File 3-8-660 (EXHIBITS E and F). Here again it should be noted that the only point of relevancy developed and deemed important is whether or not the yard engine was available at the time the bad order car was set out. You will note that the Director of Personnel agreed to the allowance of this claim on the basis the bad order car was switched out of pickup at Racine Junction, a point en route, at a time when switch engine was on duty and available.

Also, BLE Case 49-122, C&NW File 3-15-340 (EXHIBITS G, H, and I). Here again the point in question was: Was a yard engine on duty and available, or was it not? Claim was referred to the local level and withdrawn on the basis that it developed yard engine was not immediately available at the time of the alleged violation.

Also, C&NW File 3-15-285 (EXHIBITS J and K). Here again there was but one point to be determined; that was, whether or not a switch engine was on duty and available at the time that road crew was required to switch out a no bill car from their train prior to departure. Claim was allowed on the basis that yard engine was assigned and available at the time this work was performed.

To further give evidence of the accord that has been held between the carrier and this organization as to the meaning of Rule 30, and more specifically, Rule 30(b), I would ask that you review the language found in the following MEMORANDUM AGREEMENT BETWEEN THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS REGARDING APPLICATION OF RULE 18(b), CURRENT ENGINEERS' AGREEMENT (INITIAL TERMINAL DELAY-THROUGH FREIGHT SERVICE):

"It is hereby agreed by and between the parties hereto that the 'Note' immediately following the first paragraph of Rule 18(b) reading:

'The phrase "train leaves the terminal" means when the train actually starts on its road trip from the yard track where the train is first made up.'

is modified to the extent that where additional cars are added to a train at a point in the initial terminal (within the switching district) after train leaves the yard where first made up, the phrase 'train leaves the terminal' will mean when the train actually starts on its road trip from the track in the yard where the additional cars are added to the train.

The first paragraph following the above Note is also modified to the extent that where mileage is allowed between the point of reporting for duty and the point of departure from the track in the yard where the additional cars are added to the train, each mile so

allowed will extend by 4.8 minutes the period of one hour and fifteen minutes after which initial terminal delay payment begins.

It is understood and agreed that when cars are added to a train at the initial terminal after train leaves the yard track where the train is first made up as outlined herein, no contention will be made that such movement constitutes a violation of rule 30, engineers' schedule, even though the road crew may make a cut in their train or cut off the locomotive to permit the yard engine to place additional cars in their train in proper block.

It is also understood and agreed that this memorandum agreement does not cover the setting out of cars, bad order or otherwise, at the initial terminal.

This memorandum agreement constitutes a modification of the initial terminal delay rule and is not to be considered a concession on the position of the Brotherhood of Locomotive Engineers regarding the interpretation of the initial terminal delay rule.

This memorandum agreement shall be effective July 1, 1957 and shall continue in effect until either party shall serve thirty days' notice in writing on the other party of its desire to amend or cancel same." (Emphasis ours.)

I feel that the language carried in the interpretation of Rule 18(b) as shown in the above-quoted memorandum of agreement as recently as July, 1957, sets aside any possible argument or contention by the carrier that there was a matter in dispute as to whether or not the setting out of bad order cars or no bills by road crew when yard engine available was a violation of contract. The very language of Rule 30 as concurred in by this organization and the carrier clearly classifies the setting out of bad order cars as switching on the part of a road crew if a yard engine is immediately available.

As I understand the purpose of appealing a dispute to the National Railroad Adjustment Board, there is alleged a need for interpretation of the contract. It is further the position of this organization that there is not a need for interpretation of the term "switching" as generally referred to, because of the language contained in Rule 30 of the Engineers' Agreement and held understandable for all of these years between the organization and the carrier. However, the organization now finds itself before the Board because of the carrier's attempt to have the Board write a new rule for the carrier.

All of the above evidence or argument has been handled with the carrier, either verbally in conference or in letter form, in attempt to settle this case.

Oral hearing is not requested unless carrier so requests in their behalf.

CARRIER'S STATEMENT OF FACTS: On November 23, 1959, the claimant was regularly assigned to through freight Train No. 282, and made a straight setout and a straight pickup at South Oshkosh, a point en route on his assignment where switch engines are assigned and were

on duty. After the pickup was coupled to the train and the engine started to pump air, it was found that one of the cars they had just picked up had a bad order train line. Therefore, it was necessary to remove this car. Claim is presented for an additional 100 miles at yard rate for setting out the bad order car, based on BLE Rule 30. Claim has been declined.

POSITION OF CARRIER: An engineer is not performing switching within the meaning of BLE Rule 30(b), which is relied on by the employees, when he sets out a bad order car from his pickup after he had coupled onto the pickup at a point en route.

The awards of the First Division have established the principle that setting out a bad order car is a road crew's work once the road crew has coupled onto its train at the initial terminal, or onto its pickup at an intermediate point when the bad order car is found in the cars picked up. Awards Nos. 3732, 3733 and 3734 sustained some claims and denied other claims involving road crews setting out bad order cars, depending on whether it was known whether the cars were bad order before the road engine had coupled onto the train. For instance, Award No. 3732 involved four dates, sustaining the claim for May 25, 1929 when the road crew handled a car from the interchange track to its train at the initial terminal instead of having a yard crew make up the train, but denied claims for three other dates on the ground that "the setting off bad orders on the other three days discovered only after the road engine had coupled on was permissible."

Awards Nos. 8742, 9071, 10571, 11741 and 15384 involved claims by road crews for setting out a bad order car which was not discovered at the initial terminal until after the engine had been placed on the train. All of these awards denied the claims with findings mentioning that the bad order car was not discovered until after the train was made up.

There have been many First Division awards involving setting out bad order cars at points en route, disposing of disputes on the basis of the same principle involved in awards concerning setting out of bad order cars at the initial terminal. The following First Division awards denied claims by a road crew for a yard day's pay when they switched out a bad order car discovered after the pickup was placed on the train at a point en route: 12545, 13792, 13795, 13802, 13803, 13804, 13815, 16200 and 18806.

The rationale of these awards is well summed up in the Findings in Award No. 16200, holding in pertinent part:

"In the claim before us the road crew had properly been ordered to pick up the eleven cars which a yard crew had placed for pick-up. The road crew properly coupled its engine to the pick-up, took control thereof, and had started to place the cars in the train. This movement was wholly within the jurisdiction of the road crew, as much so as if the eleven cars had been moved without incident to the rest of the train and the bad order car had been then discovered. After the movement started the bad order car was discovered and set out. The car had passed from the control and jurisdiction of the yard crew to that of the road crew just as effectively as if the bad order car had been discovered after the train was made up, as in Award 13792, or as the overload was discovered and switched out after the helper engine went out of order as in Award 15332."

In support of the claim in this case, the employees also cite the Findings in Award No. 5512, BLE vs. C&NW, copy of which is attached as Employees' Exhibit A, involving the same parties as the present dispute. Award No. 5512 involved a dispute between the carrier and the Brotherhood of Locomotive Engineers concerning the proper interpretation of BLE Rule 30(h), which provides:

"30. (h) At points en route where yard engines are operated and yard crew on duty, road freight engineers may be required to pick up cars from one track and/or set out cars on one track or on and from additional tracks when such tracks are of insufficient length to hold same, without additional compensation. At points en route where yard engines are operated but yard crew not on duty, road freight engineers may be required to place from their trains for unloading or pick up to go forward in their own trains cars containing perishables, live stock, or merchandise, independent of other setout or pickup movements, and will be compensated for this additional service on minute basis with a minimum of one hour at pro rata rate, independent of road trip.

Replacing cars displaced in performance of the above will not be classed as switching."

The submissions of the parties in Award No. 5512, Docket No. 9064, show that at various points on the property, the cars to be picked up by a road crew were placed on a track with other cars not to be picked up by the road crew, so that road freight engineers were being required to switch cars out in making a pickup, instead of having the pickup in one block; likewise, a road freight engineer might be required to set out cars destined to that point from more than one place in his train, instead of having the cars blocked for that point at his initial terminal. It was the carrier's position that the last sentence in BLE Rule 30(h), providing that "Replacing cars displaced in performance of the above will not be classed as switching.", permitted the carrier to have a road crew switch out cars in making a pickup at a point en route where the yard crew was on duty, and likewise set out cars for that point from more than one place in their train.

The organization contended that the last sentence in Rule 30(h) was merely intended to permit road crews to move spotted cars in order to spot cars from their own train containing perishables, livestock, or merchandise, and then move such cars back on the spot after they had done their work. In disposing of this dispute, First Division Award No. 5512, held:

"The dispute in this docket is upon an interpretation of the term 'switching' as used in Rule 30(h) cited from Agreement between the parties effective June 1, 1939, and collaterally upon interpretation given paragraph (m) of said Rule 30. The said rules are hereby interpreted to mean:

(1) At points en route where a road freight engineer be required to pick up cars which cars are together in one block (not necessarily first out) on one track or on additional tracks when such tracks are of insufficient length to hold same, 'switching' within the meaning of Rule 30(h) is not involved.

(2) If cars to be taken into his train at a point en route are not together in one block and on account thereof a road freight engineer be required to switch cars out from among other cars found on one or more tracks the same is held to be 'switching' within the meaning of Rule 30(h).

(3) When a road freight engineer be required to set cars out of his train at a point en route which cars are together in one block in the train, irrespective of whether that block be at the forward end or at some other location in the train, it is held to be not 'switching' within the meaning of Rule 30(h) and considered in the light of paragraph (m), Rule 30.

(4) When a road freight engineer be required to set cars out at a point en route from more than one place in his train it is held to be 'switching' within the meaning of Rule 30(h) and considered in the light of paragraph (m), Rule 30.

(5) 'Replacing cars displaced' within the meaning of the second paragraph of Rule 30(h) is hereby interpreted to mean the replacing of cars previously placed at a given location for a specific purpose such as loading, unloading, repairs, etc."

BLE Rule 30(m), referred to in the findings above, provides:

"Engineers will not be required to segregate cars in their trains en route. However, cars should be picked up in trains as advantageously as possible where it can be done without additional switching."

The employees have from time to time contended that paragraph (4) of the above findings interpreted BLE Rule 30 as meaning that when the road crew makes a second setout of cars from their train at a point en route where a yard crew is on duty, regardless of the reason for the second setout, the road crew is performing "switching" within the meaning of the rule. However, the submissions of the parties in Award No. 5512, and in similar cases submitted to the First Division by the BLE and BLF&E at that time concerning BLE Rule 30(h) and similar BLF&E Rule 30(h), clearly show that the organizations were objecting to the requirement that road crews set out cars from two places in their train which were destined to the point en route, and made no reference to cases in which it was necessary to make a setout of a bad order car or cars after setting out cars destined for that point in one block.

Award No. 5512 involved a protest concerning the interpretation of BLE Rule 30(h) by the carrier. Companion claims involving the alleged performance of switching by road crews in setting out cars were presented by the BLE in Awards Nos. 5513, 5514 and 5517 and by the BLF&E in Awards Nos. 5519, 5520, 5528, 5531, 5540 and 5542. The Findings in Award No. 5528, BLF&E versus C&NW, placed the same interpretation on BLF&E Rule 30 as Award No. 5512 did on BLE Rule 30.

All of the claims in the aforementioned awards involved claims of road freight engineers or firemen for additional pay for allegedly performing

switching in setting out cars at a point en route where yard service was maintained. In none of those cases was any reference made to a road crew setting out bad order cars. The question of setting out bad order cars at a point en route where yard crews are employed was therefore not before the First Division when Award No. 5512 was made. The fact that the First Division in paragraph (4) of the Findings in Award No. 5512 referred only to set outs "from more than one place in its train" clearly indicates that the First Division was concerned with the blocking of cars for that point, and not with the set out of bad order cars, which would be in either the train or the pickup at a point en route.

Subsequent to Award No. 5512, as indicated in the Employees' Ex Parte Submission in this case, the organizations contended that road crews were performing yard service if they were required to set out a bad order car at a point en route where yard service was maintained, in addition to making the usual setout. Although the First Division had recognized in Award Nos. 3732, 3733 and 3734 the principle that a road crew was not performing switching in setting out bad order cars discovered after the train was made up, and in spite of the fact that the question of setting out bad order cars was not involved in Award No. 5512, the employees have continued to insist that paragraph (4) of Award No. 5512 is a binding interpretation by the First Division that a road crew is performing switching even when the second setout involves a bad order car or cars.

However, as pointed out above, the First Division has made it abundantly clear that setting out a bad order car is the road crew's work once the road crew has coupled onto its train at the initial terminal, or onto its pickup at an intermediate point when the bad order car is found in the cars picked up.

The employees' contentions concerning Award No. 5512 are clearly refuted by Award No. 52 of Special Board of Adjustment No. 312, established by agreement between the Chicago and North Western Railway Company and the Brotherhood of Locomotive Firemen and Enginemen, with Neutral Member and Chairman Kieran P. O'Gallagher. In that case, an engineer claimed an additional day's pay at yard rate for setting out a bad order car from his pickup at Peoria, a point en route, where yard engines were operated but none was on duty. The setout of a bad order car was in addition to his regular setout of cars for that point. The facts involved and the conclusion of the Board are set forth in the following pertinent Findings in Award No. 52 of that Board:

"At Peoria, a point en route where yard engines are operated but no yard crew was on duty, the road freight crew on which claimant was working as engineer made a straight setout and straight pickup of cars. After the pickup was coupled onto their train, a bad order car was discovered in their pickup and the crew was required to set out the bad order car.

Substantially similar circumstances were involved in Awards Nos. 1, 8, 22 and 26 of this Board, and the Board following the principle established by numerous denial awards of the First Division, N. R. A. B. based on comparable fact situations finds that there was no violation of the rules relied upon by the employees. The employees rely on certain prior settlements of alleged similar claims on the property. This Board is of the opinion that such prior dispositions

do not alter the conclusion of the Board. Therefore the claim lacking the necessary merit for a sustaining award must be denied."

A copy of the award is attached as Carrier's Exhibit A. Similar cases in which an engineer, fireman, or both an engineer and a fireman, in road freight service, were required to set out a bad order car found in their pickup, as well as making their usual setout at a point en route where yard service was maintained, were denied in Awards Nos. 53, 54, 55, 56, 57, 58, 59 and 60 of Special Board of Adjustment No. 312, on the basis of Findings similar to those in Award No. 52. Additional claims involving road crews setting out bad order cars were disposed of in Awards Nos. 1, 8, 22, 26, 34 through 74 and 139 of Special Board of Adjustment No. 312.

In reconciling the provisions in BLE Rule 30(b), relied on by the employees, and similar BLF&E Rule 30(b)(4), with the principle established in First Division awards that road crews are not performing switching in setting out a bad order car that is discovered in their train after the road crew takes charge or couples the engine to the train, Special Board of Adjustment No. 312 denied the road crew's claim for a yard day's pay in Award No. 22, where the road crew set out a bad order car at their initial terminal while a yard crew was on duty and available, but the bad order car was not discovered until after the road crew took charge of the train. However, Award No. 73 held that BLF&E Rule 30(b)(4) applied when it was known that the car was bad order before the road engine crew took charge of the train, and a yard crew was not immediately available. Award No. 73 held in pertinent part:

"The claimant was a fireman in road freight service, operating from Benld to South Pekin. When freight train No. 380 arrived at Benld on June 5, 1960, a bad order car was a part of its consist and it was necessary that it be set out. The bad order car was not set out until after the road crew, of which claimant was fireman, had taken up service on this train. Yard engines are operated, but no yard crew was on duty.

Under the circumstances of this case, in which it was known that the car was bad order before the claimant took charge of the train, and a yard crew was not immediately available. Rule 30(b)(4) applies. The claimant is entitled to one hour at three-sixteenths of the daily through freight rate instead of at yard rate as claimed."

A similar claim on behalf of an engineer and fireman was sustained in Award No. 74 of Special Board of Adjustment No. 312. Thus, Special Board of Adjustment No. 312 has interpreted BLE Rule 30(b) and similar BLF&E Rule 30(b)(4) as applying only to cases in which the bad order car was found after the train was made up but before the road crew took charge or placed the engine on the train; the awards have held in effect that the provisions of BLE Rule 30(b) and BLF&E Rule 30(b)(4) were not meant to apply to cases in which the bad order car was not found until after the road crew has taken charge or attached their engine to the train, and that in such cases the principle followed in First Division Awards holding that this may properly be done by road crews applies. Copies of Awards Nos. 22, 73 and 74 of Special Board of Adjustment No. 312 are attached as Carrier's Exhibits B, C and D.

In addition to the awards of Special Board of Adjustment No. 312, referred to above, denying claims presented by the Brotherhood of Locomotive

Firemen and Enginemen on behalf of firemen and enginemen for setting out cars at their initial terminal or at points en route, the question presented in this case has also been considered by Special Board of Adjustment No. 235, established by agreement between the Chicago and North Western Railway Company and the Brotherhood of Railroad Trainmen. Claims on behalf of conductors and trainmen for setting out bad order cars from their train at points en route where yard crews were employed and on duty were denied in Awards Nos. 131 and 219 of Special Board of Adjustment No. 235, copies of which are attached as Carrier's Exhibit E and F. In those cases, the employees relied on the switching rules in the conductors' and trainmen's schedule agreements, ORC&B Rule 56 and BRT Yard Rule 3, which contain provisions similar to BLE Rule 30, involved in the present case, and BLF&E Rule 30, which was also involved in the awards disposed of by Special Board of Adjustment No. 312.

ORC&B Rule 56(e) provides:

"56 (e) Conductors will not be required to perform switching at terminals where yard engines are operated and yard crew on duty, subject to the following exceptions:

Wreck

Washout

Accident requiring immediate service.

Setting out cars found to be bad order after train is made up.

When conductors are required to perform switching service in circumstances above described in conjunction with road work they shall be paid on minute basis with a minimum of one hour at yard foreman's overtime rate."

BRT Yard Rule 3(g) provides:

"3 (g) Roadmen will not be required to perform switching at terminals WHERE YARD ENGINES ARE OPERATED AND YARD CREW ON DUTY, subject to the following exceptions:

Wreck

Washout

Accident requiring immediate service.

Setting out cars found to be bad order after train is made up.

When roadmen are required to perform switching service in circumstances above described in conjunction with road work, they shall be paid on minute basis with a minimum of one hour at a rate per hour of three-sixteenths of the daily yard rate."

Thus, it will be noted that the rules involved in Awards Nos. 131 and 219 of Special Board of Adjustment No. 235 were similar to BLE Rule 30(b), on which the employees rely in the present case. The claims in Award No. 131 of Special Board of Adjustment No. 235 were denied on the basis of the following pertinent Findings:

"Claimant crews were operating between two terminal points, namely, Council Bluffs and Boone, Iowa. Missouri Valley is not a terminal for claimant crews but is a point en route where yard crews are employed.

Rule 3(g) provides that a road crew may switch out bad order cars at terminals where yard engines are operated and on duty.

Yard Rule 3(b) defines yard work and the Board finds that this rule has substantially the same scope as many other yardmen's contracts, so much so that it has the same connotation of a standard rule. There are, however, a long line of awards which do not sustain penalty claims for road crews switching out bad order cars which were discovered after the road engine was attached. Although the employees cite a similar claim that was allowed on the property, the carrier alleges there have been innumerable such claims which were not allowed. The Board here by following the principle established by numerous denial awards of the First Division, NRAB, based on comparable rules and fact situations finds that the rules relied upon by the employees are no more restrictive than those upon which denial awards have been rendered.

The Board therefore concludes that the claim is lacking the necessary merit for a sustaining award."

The above decision was reaffirmed in Award No. 219 of Special Board of Adjustment No. 235, copy of which is attached.

Following Award No. 5512, certain claims were allowed where a road crew set out bad order cars in addition to its usual setout at a point en route. However, it will be noted that in none of these allowances did the carrier concede that the claims were supported by any rule or agreement. While allowances were made in those cases, the payment of those claims did not constitute an amendment of the agreement nor a commitment to pay all similar claims in the future. The allowances were made to dispose of the disputes in question. The present claims must be decided on the basis of applicable rules and agreements.

Special Board of Adjustment No. 312, in several awards referred to above, in refusing to hold that similar settlements on the property with the BLF&E constituted a revision of applicable rules, held in pertinent part:

"The employees rely on certain prior settlements of alleged similar claims on the property. This Board is of the opinion that such prior dispositions do not alter the conclusion of the Board."

In First Division Award No. 16814 on this property, BLF&E versus C&NW, Referee Loring, the First Division held in pertinent part:

" * * * A carrier, like any other litigant, may buy peace without committing itself to pay future claims."

Likewise, in Award No. 16864 involving the same parties, with Referee Cluster, the First Division's Findings stated in pertinent part:

" * * * Way freight service and work train service, the two classes of service combined here, are both road service and fall clearly within the combination rule. Payment by the carrier of two claims similar to these in 1947 and 1949 constituted neither an actual nor implied construction of the contract requiring the payment of all like claims, when the payments are viewed in the light of all the circumstances at the time." (Emphasis ours.)

In Award No. 12239, BLE and BLF&E versus Northern Pacific, Referee Lattimore, the First Division's Findings stated:

"While agreements made by employe representatives and carrier as to interpretation of schedules, will be honored by this Division, every encouragement should be offered to settlement of disputes short of requiring the intervention of ourselves and similar agencies. To that end neither side must be penalized by making a precedent out of an agreed termination of a claim of an individual, or statement made by either side in seeking such termination or compromise, unless the facts show that such was intended by the parties to become such a precedent."

In Award No. 16513, ORC versus New York Central Railroad Company, Referee Loring, the Findings stated in pertinent part:

" * * * Claimants cite cases where in similar circumstances carriers have paid the extra miles in settlement of claims under the same or similar articles. Of course the penalty is not severe and such settlements have been made but, like any other litigant, the carriers who made these settlements were entitled to buy peace. The language of the article is as plain and unambiguous as language can be made. * * *

Claimants do not fall within the plain terms of the rule which they invoke or the penalty which they seek. * * *

When the language is plain and unambiguous, its misconstruction, no matter how often perpetrated, is no excuse for further misinterpretation. If the rule is unsatisfactory, the proper relief should be sought by amendment. It is not the function of this Division to supplement or amend any rule."

The employes' submission also refers to a provision in a memorandum agreement of July 9, 1957 between the Chicago and North Western Railway Company and the Brotherhood of Locomotive Engineers which provides for the computation of initial terminal delay in cases where cars are added to a train at a point in the initial terminal after the train leaves the yard where first made up; in the agreement, the parties agreed that the initial terminal delay would be computed up to the time when the train actually starts on its road trip from the track in the yard where the additional cars are added to

the train, in such cases. The provision referring to setting out cars was placed in the agreement in order to make it clear, that if a road crew had left the yard where the train was made up, and then had to stop and set out a bad order car, this would not extend the computation of initial terminal delay on the basis that the train was being made up at that point. This provision in the memorandum agreement does not in any way prohibit the carrier from having a road crew set out a bad order car at its initial terminal, nor does it have any other bearing on the issues presented in this case.

The question presented in this case has been ruled on many times by the First Division, and similar claims on behalf of engineers and firemen involving BLE Rule 30(b) and similar BLF&E Rule 30(b)(4) were denied in awards of Special Board of Adjustment No. 312, established by agreement between the Chicago and North Western Railway Company and the Brotherhood of Locomotive Firemen and Enginemen. In addition, claims of conductors and trainmen involving similar circumstances and similar rules have been denied in Awards Nos. 131 and 219 of Special Board of Adjustment No. 235, established by agreement between the Chicago and North Western Railway Company and the Brotherhood of Railroad Trainmen. It is clear that BLE Rule 30(b) does not apply under the circumstances of this case, where the car was found to be bad order after the road crew had coupled onto the pickup. The claimant did not perform switching within the meaning of BLE Rule 30(b) in setting out the bad order car.

The claim is without merit and should be denied.

All information contained herein has previously been presented to the employees during the course of the handling of this case on the property and is hereby made a part of the particular question here in dispute.

Oral hearing is waived.

EMPLOYEES' REPLY TO CARRIER'S ANSWER: The Carrier in their Answer cites the following National Railroad Adjustment Board Awards:

- 3732, 3733, and 3734, involving disputes of the ORC, BRT, and BLF&E versus Baltimore and Ohio Railroad
- 8742: ORC and BRT versus Wabash Railroad
- 9071: BRT versus Chesapeake and Ohio Railway
- 10571: BLE versus Detroit, Toledo and Ironton Railroad
- 11741: ORC versus Northern Pacific Railway
- 15384: BRT versus Virginia Railway
- 12545: BLE and BLF&E versus Baltimore and Ohio Railroad
- 13792, 13795, 13802, 13803, 13804, and 13815: BLF&E versus Duluth, Missabe and Iron Range Railway
- 18806: BLE versus Louisiana and Arkansas Railway
- 16200: BLF&E versus Grand Trunk Western Railroad
- 16864: BLF&E versus Chicago and North Western Railway
- 12239: BLE and BLF&E versus Northern Pacific Railway
- 16513: ORC versus New York Central Railroad
- 16814: BLF&E versus Chicago and North Western Railway.

This case is referred to last on account of error made on part of the Carrier in their quotation. The exact quotation from this Award reads as follows:

"A carrier, like any other litigant, may buy peace without committing itself to pay similar claims."

The Carrier in citing the above quotation in their Answer used the word "future" instead of "similar". We are not certain that the Carrier intentionally used the word "future" rather than "similar," as the Findings state; however, we believe it can be objectively observed that there is a vast difference in connotation of the word "future" and the word "similar."

We believe it can be rightfully concluded that the above-cited Awards involve decisions reached without benefit of Rule 30 of the Engineers' Contract on this railroad, which reduces them to a mere filler in the Carrier's Answer. In most cases in the Awards relied upon by the Carrier the circumstances were not the same and, surely, the rules relied upon by the organizations were not identical or similar and cannot have a direct bearing on the instant dispute.

Turning to Award 5512, which arose out of dispute between this organization and the Carrier as to the meaning of Paragraph (h) of Rule 30 of the BLE Schedule, the Carrier states that certain claims were allowed where a road crew set out bad order cars in addition to its usual setout at a point en route, but the Carrier avoided the use of language such as "supported by rule or agreement". This is an action of the Carrier that could properly be classified as the use of selective secondary language which in no way changes the facts or results. Further, the Carrier in recent years has employed or adopted such language as "without prejudice to rules involved" in any and all allowances that they make. We know of no way to force the Carrier to use language more to the organization's liking, and we rest assured that the Board will not be at all fooled by such play on words. In the Carrier's Answer, the overused language, "the allowances were made to dispose of dispute in question," becomes thin and shallow and without credibility. In fact, we might enlarge here to this extent: The Carrier in their desire to have the record show that claims were allowed without using the words "rule or agreement" as a basis for allowance is clearly semantical.

The Carrier relies upon decisions rendered by Special Board of Adjustment No. 235 dealing with disputes between the BRT and the Chicago and North Western Railway. We sincerely believe that if the Board compares the language found in rules of the BRT and ORC&B Schedules, they will note a vast difference from that language found in BLE Rule 30(b) relied upon by this organization in the present dispute. Rule 56(e) of the ORC&B Schedule and Rule 3(g) of the BRT Schedule read in part:

"Setting out cars found to be bad order after train is made up."

BLE Schedule Rule 30(b) reads in part:

"Setting out cars placed in train through error, bad order cars, cars improperly loaded, and no bills, when yard engine is not immediately available. A yard engine will be considered 'immediately available' when the yard engine crew is on duty and in the train yard where train is made up."

It requires little less than a blind man to see the difference in the quoted portions above.

Now, with respect to recent Special Board of Adjustment No. 312 Awards relied upon by the Carrier in their Answer, the decisions rendered in Special Board of Adjustment No. 312 on claims identical to this dispute and based on BLF&E Rule 30(b) which is identical but for one exception, that is, our additional definition of the words "immediately available," are almost completely void of understanding. We look at the rule relied upon by the BLF&E and we are completely mystified by the decisions rendered in light of the plain, clear, and understandable language embraced therein, not open to varied applications. The rule relied upon by this organization in the present dispute is further enhanced in clarity by the definition of the language "immediately available". The only and only imaginary condition under which decisions such as those rendered in Special Board No. 312 can be envisioned is by the employment of a principle foreign to this rule and the application of this rule on this property. (See Exhibits D-F-H-I found on Pages 17-19-21-22 of this organization's submission.)

This organization is aware of a uniqueness of our Rule 30, and at the same time we are aware of the uniqueness of contractual provisions held between other organizations and carriers. To allow or deny a claim by determining whether or not the bad order car was known prior to or after road crew attached to same is not in any way related to our Rule 30; in fact, the only point of determination in our Rule 30 is plain to see: Was the bad order car switched out at a point where yard engine was employed and at a time yard engine was immediately available? When this determination is reached, we no longer have a question to decide. The requirements of the rule have been fulfilled once this determination is made. The claim as submitted is properly within the purview of the rule relied upon, and a sustaining award should be rendered.

(Exhibits not reproduced.)

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 waived.

The parties are in agreement on the facts herein. On November 23, 1959, Claimant, regularly assigned to Train 282, was required at South Oshkosh, Wisconsin, a point enroute of his assignment, to set out bad order car SP 20546 from his pickup at a time when a switch engine was on duty and available at South Oshkosh. The bad order car was found after the pickup was coupled to the train and the engine started to pump air.

The Organization contends that Rule 30 (b) of the applicable Agreement states explicitly that switching out bad order car by road crew when a yard engine is on duty and available is violative of the contract and that when said switching is performed, Carrier is subject to a penalty of an additional 100 miles at yard rate as provided for in Rule 30 (d). Hence the claim.

It is the position of Carrier that an engineer is not performing switching within the meaning of Rule 30 (b) when he sets out a bad order car from his pickup **after** he had coupled onto the pickup at a point enroute.

The awards of the First Division, Carrier asserts, have established the principle that setting out a bad order car is a road crew's work once the road crew has coupled onto its pickup at an intermediate point when the bad order car is found in the cars picked up.

Given the foregoing facts, we are called upon to determine whether claimant's setting out the bad order car on November 23, 1959, was, in fact, switching within the purview of Rule 30 (b) and thus compensable account Rule 30 (d)?

Carrier strenuously contends that First Division awards do not penalize a Carrier when with a yard crew on duty a road crew sets out a bad order car, same having been discovered after the road men have taken charge of their train. A thorough examination of the pertinent awards upholds this contention. See, for example, S.B.A. No. 312, Awards No. 22, 52, 73, and 74.

However, it is a well established principle of contract construction that when the wording of a rule is clear, precise, and unambiguous no amount of practice contrary to the clear language of a rule can serve to nullify the provisions thereof. Such rule must be enforced as written. The Board finds that BLE Rule 30 is such a rule. The very language of Rule 30 clearly classifies the setting out of bad order cars as switching on the part of a road crew when a yard engine is immediately available. The intent of Rule 30 is clear and unambiguous and is not to be altered by past practice nor by prior First Division awards.

The Board is of the belief that Referee Daugherty, Neutral Member and Chairman of P. L. Board No. 118, in Award 39 thereof, clearly distinguished the Awards relied on by Carrier and no further elaboration is needed relative thereto.

Carrier would have us hold that Rule 30 (b) applies only to cases in which the bad order car was found after the train was made up but before the road crew took charge or placed the engine on the train. If there is any such understanding which would change the clear wording of the Rule it should be so written into the Rule by mutual consent of the parties through negotiation and agreement, and not supplied by this Board under the guise of contract interpretation. If this Division should add to agreements, exceptions and conditions not bargained for, ours would become a rules making function for which no authority exists in the law governing Board action.

For the reasons stated, this Board finds that BLE Rule 30 (b) and (d) clearly supports the subject claim as made and an affirmative award is in order.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November 1971.

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