SPECIAL BOARD OF ADJUSTMENT NO. 910

PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) CONSOLIDATED RAIL CORPORATION

STATEMENT OF CLAIM:

"Claim to allow Conductor E. L. Holtz an eight hour day for August 17, 1988, for removing ground air line." (Docket No. CR-T-5925; Harrisburg Division Case No. AT-88000036)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The Claimant, while working as a conductor on a traveling road switcher, was directed to remove the ground air line and make an initial terminal air brake test of his train at the reporting point for his assignment, namely, Newberry, PA. At the time he was required to perform such work, car inspectors were on duty.

It is the contention of the Employees that by being required to perform such work, or assume a responsibility which it maintains is beyond the normal duties of a trainman, that the Claimant is entitled to penalty compensation.

Basically, the Carrier says that the Claimant was required to remove the ground air line in order for him to change the marker of his train, and that, in this connection, he was allowed a two-hour penalty for handling the marker. Further, the Carrier offers that under Article IX, Section 2, Incidental Work, of the Agreement rules, yard and road crews may perform, without additional compensation, any work incidental to or in connection with their assignment. It says this includes such tasks as removing a ground air line and making air tests.

The Carrier also contends that air test work historically has been performed by both trainmen and employees of the maintenance of equipment crafts. However, it appears to this Board from its study of the record that at locations where maintenance forces are employed and on duty that such work has generally been performed by the craft employees.

In this latter respect, it is noteworthy that in its dissent to Award Nos. 234 through 237 of this SBA No. 910, the Carrier itself offered that there existed an historical difference as to the work that it required of trainmen, including the making of a

terminal air test, as between locations where yard crews or carmen are employed and those points at which yard crews or carmen are not in fact employed. The Carrier, after stating in its dissent that the location at which the work there in question had been performed was at a point where no yard crews are employed and no carmen are assigned, said: "This is all work a travelling switcher may perform at points where no yard crews or carmen are employed."

Under the circumstances of record, and in the light of it being unquestioned that carmen were employed and on duty at the time the Claimant was required to make the initial terminal air test, the claim will be sustained.

AWARD:

Claim sustained.

Robert E. Peterson, Chairman
and Neutral Member

William M. McCain
Carrier Member
Dissent Attached

Eugene F. Lyden
Organization Member
CONCURRING OPINION ATTACHED

Philadelphia, PA
~~April 10, 1990~~
Adopted October 23, 1990

Carrier Member's Dissent to
Award No. 415 of
Special Board of Adjustment No. 910

This Award cites and promptly disregards the controlling provision of the collective bargaining agreement. Having done so, it reaches a conclusion which directly contradicts a conclusion reached in a previous Award of the Board with the same Neutral presiding.

It is one thing for an award to misconstrue a complicated or ambiguous provision of the collective bargaining agreement; this Award, however, represents an egregious refusal to apply the plain language of the relevant provision. Article IX, Section 2 - Incidental Work is an important component of the economic bargain which the parties struck by entering into the June 28, 1985 Agreement. The majority's refusal to recognize the work rule relief for which the Carrier bargained in good faith and to which the Organization assented undermines the collective bargaining process. The Award's failure to base its Findings upon the collective bargaining agreement invalidates those Findings.

This case is not the first involving the incidental work provision which has been considered by the Board. In Award No. 234 of the Board with this Neutral presiding the majority found:

> "However, and despite Organization arguments to the contrary, the Board does find merit in the Carrier contention that work which had been required of Claimants in connection with their own train was incidental to the completion of their assigned duties, and is work contemplated by Article IX, Section 2, Other Rule Changes - Incidental Work, of the June 28, 1985 Agreement. This section of the Agreement reads:
>
> > 'The members of road and yard crews may perform, without additional compensation, any work incidental to or in connection with their assignment. Such work may include but is not limited to such tasks as handling switches, crew packs, turning, spotting and moving locomotives for fueling or supplying, inspecting cars or locomotives, bleeding cars, coupling and uncoupling hose or control cables, performing air tests, making reports or using communication devices for any purpose.'
>
> Accordingly, to the extent that claimants performed any air brake testing or placement of the telemetry device on their own train, the Board will hold that the claims for additional payment are to be denied. This was work incidental to or in connection with their assignment." (Emphasis supplied.)

In this Award the majority found:

> "The claimant, while working as a conductor on a traveling road switcher, was directed to remove the ground air line and make initial terminal air brake test of his train at the reporting point for his assignment, namely, Newberry, PA. At the time he was required to perform such work, car inspectors were on duty."

Having determined that the work performed by the claimant was in connection with his own train, the Neutral sustained the claim. The sole rationale offered for this stunning non sequitur is a reference to "an historical difference as to the work that [the Carrier] required of trainmen, including the making of a terminal air test, as between locations where yard crews or carmen are employed and those points at which yard crews or carmen are not in fact employed." Even assuming that such a "historical difference" existed, it is axiomatic that it is irrelevant in view of the Agreement the parties reached effective June 28, 1985.

It is apparent that this Neutral will go to extraordinary lengths to rationalize the sustaining of a claim. The Carrier dissents to the Award in the strongest possible terms. Because the Award fails to draw its essence from the collective bargaining agreement, we will not apply it voluntarily and intend to seek judicial relief.

William M. McCain
William M. McCain
Carrier Member

CONCURRING OPINION
of the
Organization Member of
Special Board of Adjustment No. 910
with
AWARD NO. 415

This Award was issued after a full, fair and fact-finding hearing in which the parties presented their evidence and arguments relative to the circumstances and governing rule of the collective agreement (Award of Arbitration Board No. 385).

The Carrier Board Member requested and was afforded an Executive Session to explain his displeasure with the proposed decision. At this session he merely reargued the position presented at the initial hearing.

This Award comports to the terms and provisions of the contract, however, this Award does not adopt the Carrier Board Member's interpretation of the rule. The circumstances involved in the case embodied in this Award clearly necessitated a sustaining decision by the Board.

In fact, this Award comports to the former Carrier Member of this Board and the "dissent" written and attached to previous Awards Nos. 234, 235 and 236. Now, it is interesting to note that at the recent Executive Session held to discuss this Award; the present Carrier Board Member declared that the prior dissents by the former Carrier Board Member were erroneous and not well-founded.

Such action demonstrates that the Carrier now wishes to change it's position in a similar previous case governed by the same rule. The Carrier Board Member's dissent is merely an exercise of displeasure with an Award that does comport to the rule and the position of the Carrier Board Member's Dissent to SBA 910's Award Nos. 234 through 237. In these earlier Awards; the Carrier after stating in its dissent that the location at which the work there in question had been performed was at a point where no yard crews are employed and no carmen are assigned, stated: "**This is all work a travelling switcher may perform at points where no yard crews or carmen are employed.**"

Consequently, this Award is correct and does recognize and apply the Carrier's earlier position in a consistent and appropriate manner. In view of such, the majority of the Board's Members affixed their signatures to this Award and are competent to adopt it with no changes from the original proposed Award.

At the conclusion of the Executive Session, the Carrier Board Member threatened "extra ordinary" action may be taken by the Carrier if the Award was not changed. In my opinion, this threat was made to coerce the other Board Members into changing the decision in a manner to reflect the changes in the Carrier's position (those advanced in their dissents to Award Nos. 234 through 237). The threat did not succeed and it appears the Carrier will attempt their "extra ordinary" action in order to stand behind it's threat (not because of any merit) but because it is displeased with the final and binding Award adopted on October 23, 1990.

I concur with this Award because it comports to the circumstances and governing provisions of the contract.

E. F. Lyden
Organization Member

SPECIAL BOARD OF ADJUSTMENT NO. 910

The Carrier dissent says that the undersigned, author of Award No. 415, has disregarded the provisions of the collective bargaining agreement in arriving at a determination of the dispute at issue. The Carrier asserts that Award No. 415 contradicts a conclusion reached in previous Award Nos. 234 to 237, which this same neutral authored.

The facts are that sound principles were followed in Award No. 415, and that the record in the instant dispute was not on all fours with the prior decisions which the Carrier cites in support of its dissent. The decision here, as related to the performance of an initial terminal air test, was not, as urged by the Carrier the same situation which prevailed in Award No. 234, the lead case of the four disputes in Award Nos. 234 to 237. Rather, the circumstances in Award No. 415, with respect to the making of an initial terminal air test, are not unlike that circumstance found to exist in Award No. 210 of this SBA No. 910, which this neutral also authored. Award No. 210 was adopted by the unanimous decision of SBA No. 910, i.e., the Chairman and Neutral Member, the Employee Member, and the Carrier Member.

In the light of Award No. 210 it is difficult to comprehend the basis for the Carrier contention that the sole rationale offered by this neutral for what the dissenter calls, "this stunning non sequitur," is a reference to "an historical difference" as to the work that the Carrier required of trainmen or that, in this same regard, the Carrier would assert: "Even assuming that such a 'historical difference' existed, it is axiomatic that it is irrelevant in view of the Agreement the parties reached effective June 28, 1985."

These statements by the dissenter ignore the Carrier's position in prior Award No. 210 of this SBA No. 910 which gave recognition to the existence of this now disputed historical difference. The author of the Carrier dissent would also apparently cast aside statements in the Carrier's ex parte submission in the dispute here at issue in Award No. 415 which likewise suggested the continued existence of an historical difference between certain incidental work that could be contractually required of trainmen at locations where carmen are employed and where carmen are not employed.

The Findings in Award No. 210 read as follows:

> "On the date of claim, January 10, 1985, Claimant was assigned as the brakeman member of Crew WPHA-19, a road traveling switcher assignment operating between Harrington and Seaford, Delaware. At Harrington, the ini-

tial terminal of the assignment, Claimant was instructed by Carrier's Yardmaster to couple air hoses and make a brake inspection of cars in the train.

It is the Organization's position that the work of air hose coupling and making terminal brake tests has been generally the job function of a Carman, particularly at this location and on this trick, and that a Car Inspector was employed and on duty at the time Claimant was directed to perform the service in question. It says that simply because the Car Inspector was attending a meeting at the time Claimant was required to perform the service may not be considered as having transferred such service to Claimant to be a part of his assigned duties without payment of additional compensation.

The Carrier maintains that the air coupling service performed by Claimant was merely that which may properly be required of a road freight crew in connection with the movement of their train. As concerns the second aspect of the claim, the Carrier submits that the claim as filed by the Claimant referred to work as having had to 'walk brakes,' whereas the Organization would refer to the work in question as having constituted an initial terminal brake inspection.

While there is no question, as Carrier asserts, that the record fails to show the specific work performed by Claimant, this Board believes it must be considered that since Claimant had made the hose couplings in the absence of the Car Inspector, that Claimant also made a terminal brake inspection in the absence of such Car Inspector, ergo the train could not have properly left the terminal without being in violation of FRA Air Brake Rules and Regulations or Carrier's Air Brake and Train Handling Rules and Instructions (EC-99).

Under the circumstances of record, we find there is sufficient reason to hold that the claim be sustained."

The Carrier Member did not dissent to Award No. 210. Rather, in keeping with two minor changes made to the draft award during an executive session, the Carrier Member formally concurred with the Award.

One change called for the summation of the Organization's position to show that the work of air hose coupling and making terminal brake tests has been "generally," rather than as stated in the draft award, "traditionally," the job function of Carmen.

A second change which was proposed by the Carrier Member and then adopted by the Board was to have the findings be more specific in referring to the location at which the dispute arose. In this

respect, the Carrier Member urged that there was an historic difference, dating back to August 1, 1942, between those points at which a trainmen could and could not be required to perform the work in question, and that since Harrington was one such historic point, and a carman was employed and on duty, that the Carrier could agree to Award No. 210 as being reflective of this continuing historic practice. It was thus agreed by the Board Members to also include as a part of the summation of the Organization's position, the phrase, "particularly at this location and on this trick." This, notwithstanding that the neutral and the Employee Member expressed some reservations on the Carrier Member's argument since it involved a matter which had not been made a part of the record so as to have permitted proper review and studied comment by the Employees.

In any event, the Carrier Member offered that with the above two changes in the draft award that Award No. 210 would nevertheless recognize that trainmen could not be contractually required to perform the work in question at least as concerned those locations where Carmen were employed on August 1, 1942, and continued to be currently employed.

The Carrier Member then proceeded, three days after Award No. 210 was adopted, to attach to Award No. 210 what is identified as the "Carrier's Concurring Opinion of Award No. 210". This concurring opinion of the Carrier reads:

> "Carmen were employed on the first trick at Harrington, Del. on August 1, 1942. Road Trainmen can make terminal air test. The Carmen's Scope provides, at the initial terminal where the occurrence took place, that engine and train road service employees may couple air hoses and make air tests in the yard and on the tricks where carmen did not perform the work on August 1, 1942."

It would seem to this neutral that in attaching this Concurring Opinion to Award No. 210 that the Carrier intended the award be read in a manner that supported argument, in the absence of findings such as those subsequently rendered in Award No. 234, that the Carrier had the right to have trainmen perform work connected with the coupling of air hose and the making of air tests at all locations except those points where there was a continuation of the aforementioned historic difference. In other words, the Carrier wanted to indicate that it was agreement with Award No. 210 on the basis that it would read the award to be stipulating that only at certain historically described locations was the Carrier contractually prohibited from requiring trainmen to perform the work in question.

Although the Statement of Claim in the award here disputed, i.e., Award No. 415, as briefly summarized, mentions only the work of removing a ground air line, there is no question, as the Carrier said in the Statement of Facts included as a part of its brief,

that the work also involved the performance of "an Initial Terminal Air Test at a location where Maintenance of Equipment people were employed and on duty."

As hereinbefore stated, the dispute in the award relied upon the Carrier for support of its contentions in challenging the findings of Award No. 415, namely, Award No. 234, did not concern a location where carmen or Maintenance of Equipment people were employed and on duty. Award No. 234 specifically points up the fact that "no carmen, mechanical department forces, or yardmen were employed at the location in question (Lock Haven, PA) on the dates of the claim."

Moreover, as concerns the Carrier's brief in Award No. 415, it is noted that in making reference to work that could be required of a trainmen, that the Carrier, at page 16 of such brief, said:

> "The Carrier's position, simply put, is that since both carmen and trainmen work in the yards, one should be able to do as much of the other's work that he or she is capable of doing when it will improve operations or reduce costs. Trainmen know how to test air and couple hoses, and they should be allowed to do so even when carmen are in the yard." (Emphasis Added)

This Carrier statement clearly suggests that the Carrier itself remained of questionable concern as to past practice relative to a right to require trainmen to test air and couple hoses in all instances. The Carrier, as this neutral views it, regardless of other argument offered, essentially here offers that trainmen "should be" allowed to test air and couple hose "even when carmen are in the yard." This Carrier statement apparently referring to situations where carmen are employed as opposed to circumstances where carmen are not employed or in the yard.

Along these same lines, the Carrier further states, at page 20 of its brief, the following:

> "The Carrier also argues that the practice on this property has been that Carmen do not have the exclusive right to perform the work made the basis of this claim. Trainmen have performed this work at locations where there is not enough such work to justify having a full-time Carman on duty." (Emphasis Added)

In the opinion of this neutral, this Carrier statement also tends to the support the conclusion that it has in fact been the practice to have the work here in dispute performed only at locations where Carmen are not employed or on duty.

Under the circumstances, Award No. 415 basically endorsed that same position which the Carrier, through its Board Member, had concurred with in the unanimous adoption of Award No. 210.

In conclusion, it is noted that this Supporting Opinion has been prepared because the Carrier has indicated in its dissent that it intends to seek judicial relief from Award No. 415. Accordingly, the neutral believes the record should reflect the fact that the award is written in a relatively brief manner in compliance with recommendations of the Joint Committee on Grievance Handling in the Railroad Industry, or, principally, without recitation of the various arguments of the parties or a detailed analysis of the rationale for a decision. Unfortunately, this procedure permits, as here, opportunity for a dissenter to distort facts of record in laying the foundation for judicial review. Thus, the need for this written response to the dissent.

Robert E. Peterson, Chairman
and Neutral Member

November 2, 1990

SPECIAL BOARD OF ADJUSTMENT NO. 910

PARTIES TO DISPUTE) UNITED TRANSPORTATION UNION
) CONSOLIDATED TRANSPORTATION CORPORATION

In Award Nos. 415, 416, 417 and 418, this Board directed that the claims of record be sustained account the claimant, while working as a conductor, being required to remove the ground air line and make an initial terminal air brake test of his train at the reporting point of his assignment when car inspectors were on duty.

It was the determination of the Board that since prior awards of this same Board had given recognition to the continuation of an established past practice that such work would not be required of train service employees at designated locations where carmen are employed, as is the circumstance in the instant cases, that the claimant could not be required under Article IX, Section 2, "Incidental Work," of the collectively bargained agreement, to perform such work without additional compensation. These prior and current award determinations notwithstanding that the Incidental Work Rule states, in part, that road and yard crews "may perform, without additional compensation, any work incidental to or in connection with their assignment [including] coupling and uncoupling hose or control cables [and] performing air test."

The Carrier, in taking exception to the Board's awards in the current cases, filed a complaint with the United States District Court seeking to vacate and set aside the awards under Section 3 First (a) of the Railway Labor Act, 45 U.S.C., section 153(q).

On June 10, 1991, the Honorable Charles R. Weiner, Judge, United States District Court for the Eastern District of Pennsylvania, issued a Memorandum Opinion and Order whereby the Court "vacated, set aside and remanded to the Board for express consideration of the Incidental Work Rule" this Board's determinations in Award Nos. 415, 416, 417 and 418.

Pursuant to the Court directive, the Board provided opportunity to the parties to submit briefs on such matter. The briefs essentially make reference to those arguments which had been made to the Board when it first heard the dispute and to statements by the Court.

It seems to the Board that in contesting the present awards that the Carrier is seeking to overturn and disassociate itself from the findings embodied in prior Award Nos. 210 and 234, and, in particular, the recognition which a former Carrier Member to the Board had given to the findings in those prior awards that the circumstance of a carman being employed at specified locations proscribed that train service employees not be required to per-

form work of the nature in dispute at such designated points.

Contrary to argument which is apparently now being offered to the Court, the Carrier did not state to this Board that its assent to prior Award No. 210 was premised upon rules or past practice that had been superseded by negotiation and adoption of the Incidental Work Rule. This argument is evidently now being put forward in a belated attempt to establish that since the claim which gave rise to Award No. 210 was for services performed on January 25, 1985, and the Incidental Work Rule became a part of an Agreement on June 28, 1985, that the past understanding and practice came to be superseded by the Incidental Work Rule.

This distinction or argument as between the date of claim and the date of agreement was not advanced by the Carrier when this dispute was docketed for hearings to this Board. This hearing was some two years after the date of the claim and likewise two years after negotiation of the Incidental Work Rule. This argument was not put forth when the Members of the Board met to finalize its findings in Award No. 210. Nor is mention made of such a contention in the Concurring Opinion which the then Carrier Member had prepared and attached to Award No. 210 on October 30, 1987. This was 28 months after the date that the Incidental Work Rule had become effective.

The Board rather concluded from argument presented by the parties that the past understanding and practice had indeed carried over during the interim period of time into the then current operating practice and thereby to application of the Incidental Work Rule.

This view of the application which had been given to the Incidental Work Rule by the parties, or, namely, a continuation of the aforementioned past practice, also comes from hearings in Award No. 234. That dispute involved claims which had originated in 1987, or dates of claim well beyond the June 25, 1985 Agreement and the adoption of the Incidental Work Rule. While the work involved in Award No. 234 was of a nature not unlike that in Award No. 210, no carman was on duty at the location where the train service employees had here been required to perform the work in question. Thus, the Board denied that portion of the claim for additional compensation in Award No. 234 where the grievant had been required to perform work in connection with his own train at that particular location. In other words, whereas in Award No. 210 a carman was on duty, the claim was sustained; and, whereas in Award No. 234 no carman was on duty, the claim was denied.

In this latter respect, it is noteworthy that the Carrier dissented in part to Award No. 234. The dissent was in opposition to that part of the Board's findings and award which held that train service employees could not be required to perform work of the nature in question "on other than their own train." However, and the Board believes of some significance, the Carrier did not

express in its dissent any exception or concern to the Board's findings making note of the fact that no carmen were on duty at the location at which the claims had arisen. This was a matter which specifically led to the adoption of Award No. 234, i.e., an understanding and recognition by the Board that since no carman was employed at the location covered by the claims that train service employees could be required to perform the work in question without any additional compensation.

Moreover, the same former Carrier Member of the Board who participated in the adoption of prior Award No. 210, and who had written the Concurring Opinion to such award, made specific mention in the Carrier dissent to Award No. 234 that no carmen were on duty. The Carrier dissent includes a statement which reads: "At Lock Haven, where no yard crews are employed and no carmen are assigned, claimants performed work on a traveling road switcher assignment." Then, after describing the work performed, the dissent continues: "This is all work a travelling switcher may perform at points where no yard crews or carmen are employed."

It would seem to the Board that if the Carrier was of a belief that the restrictive past understanding and practice had not in fact been carried over relative to those points at which carmen remain employed that there would not have been a need for the Carrier to have specifically referenced the fact that there were no carmen employed at the location in question in Award No. 234. After all, the claims in Award No. 234 were for dates in 1987, or dates some two years after the Incidental Work Rule of June 25, 1985 had become effective. The Board makes particular note of this circumstance in view of the argument now being advanced that whether a carman is or is not employed at any location is of no import in the application of the Incidental Work Rule.

There is no question that the Incidental Work Rule, as written, makes no mention of carmen and appears, at first blush, to permit the Carrier to require train service employees to perform the work in question without additional compensation. However, as stated above, the arguments and actions of both the Carrier and the Organization in adoption of Award Nos. 210 and 234 were controlling in leading to the conclusion that application of the isolated phrases or not fully defined "tasks" listed in the Incidental Work Rule had been conditioned in part upon a continuation of the same past understanding or practice which had formed the premise for resolution of those two prior disputes, i.e., that work of the nature in question could not be required of road service employees at locations where a carman continued to be employed.

The Board accordingly gave recognition to the principle that has often been held by past boards of adjustment that a collectively bargained agreement is a combination of written rules, custom, usage and practice, and that each of these forms a pertinent and

binding part of the agreement. See, for example, Award No. 11329 of the Third Division, National Railroad Adjustment Board, where it was stated in part as follows:

> "The Board is not unaware of those principles of contract construction relied on by lawyers and judges in cases similar to this one. It has often been said that when the language of a contract is 'clear and unambiguous', or has a 'plain meaning', or is 'express', past practice or the conduct of the parties thereunder should not be permitted to modify, abrogate or vitiate this 'clear' language. (Awards 7914, 7294, 6308, are typical.) This time-honored concept has its origins in and was widely used under the old common law to provide a bar to the admission of parol evidence seeking to change the terms of a written instrument.
>
> The rigid application of legalistic principles of contract construction to agreements collectively bargained by management and labor to meet the realities of modern industrial life is, in our opinion, open to question as a consistent, unvarying practice. This is especially true of labor-management agreements in the railroad industry where the language used and the technical idiom employed are not always susceptible of either easy or quick understanding. Resort to custom, usage and practice in this business more often than not is necessary to gain an understanding of what the parties intended to accomplish.
>
> Here the rule language employed, standing alone, would tend to support the Carrier's contention that Rowell Avenue may not be considered another 'station' for purposes of payment of the arbitrary. But for over 16 years the parties themselves obviously treated it as such. Mutual acquiescence in a past practice over such a long period of time not only establishes binding conduct on both parties under the doctrine of equitable estoppel -- it also leads logically to the conclusion that the practice reflects what the parties intended or had in mind when the Agreement was made (Award 2436).
>
> Limiting our decision here to the facts of this particular case, the Board finds that evidence of past practice establishes it was the consistent intent of these parties to include Rowell Avenue as another station within the meaning of the applicable rule, and that, therefore, the Claimant should be paid the arbitrary allowance."

In this respect, the Members of the Board, in a free choice of action, gave meaning and intent to the disputed phrases of the

Incidental Work Rule. They acquiesced to an interpretation of evidentiary value in bearing out the finding that the written rule itself was not the governing factor with respect to the work in question. The Board's actions were consistent with what the NRAB has many times held to be proper. For example, see First Division Award No. 16731, wherein it was stated as follows:

> "The interpretation placed on the rules by the parties, as evidenced by long practice, is regarded as controlling. We accept as proper those awards holding that practice, regardless of its duration, does not overcome rights existing under a clear and unambiguous rule that the practice clearly and directly contravenes; but such principle has no application where competent parties acquiesce in an interpretation that annuls the contract right." (Emphasis Ours.)

The Board also followed Award No. 11371 of the First Division, NRAB, where it stated in part as follows:

> "The determination of the claim in this docket does not depend alone upon a simple interpretation of the original words and intendments of the Rule in question here. It depends for the most part, if not altogether, upon a mutual understanding for its application on the property.
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> * * * * * * *
>
> This exchange of correspondence clearly outlined the practice to be followed in the handling of 'Hot Spots' as well as other movements at this point. It became a mutual interpretation and adaptation of the rules to this extent and perhaps to some extent a modification of the strict letter thereof.
>
> The Carrier cannot now unilaterally be permitted to depart from this mutual interpretation and adaptation.
>
> The requirement by the Carrier that roadmen depart from this adaptation in the manner herein in question necessitates a finding that the claimants are entitled to a yard day's pay as claimed."

In the circumstances, the Board, in reaching a determination on the application and interpretation to be given to the disputed phrases in the Incidental Work Rule, relied on the principle of past practice evidence, as enunciated in numerous past awards of the National Railroad Adjustment Board, i.e., Award No. 13688 of the First Division, NRAB, whereby it was stated as follows:

> "The parties to a contract know best what is meant by

> its terms and are least likely to be mistaken as to its intention. Each party is alert to protect its own interests and to insist on its rights. Whatever is done by them during the period of performance of the contract is strong evidence of the meaning of its terms as they understood and intend they should be.
>
> In the light of these principles, it must be held that the practical construction placed upon the agreement by the parties thereto should govern, ..."

The Third Division, NRAB, in Award No. 12390 conveyed the same meaning in stating more concisely:

> "The meaning of a contract is arrived at by ascertaining the action of the parties in implementing it."

This same Third Division, NRAB, in Award No. 14229, expanded the above statement by stating that once a practice has been accepted by both parties as being the correct interpretation of a rule, neither party should be permitted to change the practice through unilateral action. In pertinent part it stated:

> "To, therefore, require a subsequent change based upon a protest would negate the entire meaning and utility of past practice. More specifically, once a practice is established and adopted by both parties as the proper interpretation of a Rule neither party unilaterally should be allowed to abandon that practice anymore than he should be allowed to abandon a written rule."

The Second Division, NRAB, in Award No. 4120 went even further in its opinion in stating:

> "This practice has become a part of the labor agreement although not explicitly expressed in it."

It would seem to the Board that if it was to have reached a contrary conclusion in interpretation of the Incidental Work Rule and to have placed a different construction upon that agreement language than that to which the parties themselves had finally reasoned as being proper and acceptable in prior disputes that the Board would take away from the finality of awards and generate more disputes, not less, as was the purpose and intent of the Board.

In the light of the above considerations the Board believes that it properly drew the essence of its awards from the meaning and intent which the parties had given to the Incidental Work Rule and that it did not go beyond the scope of its jurisdiction in fashioning an award in resolution of the disputes. The Board rather sought to further the aims of the collectively bargained

agreement by giving that same meaning to the controversial provisions as in the earlier and finalized disputes to which the Carrier and the Organization Board Members signified their assent, and which decisions were not, as here, contested to the Court.

The undersigned referee sat as a member of the Board when Award Nos. 415, 416, 417 and 418 were adopted and participated with the other members of the Board in making this interpretation.

Robert E. Peterson, Chairman
and Neutral Member

William M. McCain
William M. McCain
Carrier Member
Dissent Attached
Philadelphia, PA
~~April , 1992~~
July 10, 1992

Eugene F. Lyden
Eugene F. Lyden
Organization Member

Carrier Member's Dissent to
"Interpretation" of Award Nos. 415, 416, 417 and 418 of
Special Board of Adjustment No. 910

The Carrier vigorously dissents from the Board's latest opinion, entitled "Interpretation No. 1," (hereinafter referred to as the "Interpretation") in the above-captioned cases.

In June 1991, Judge Weiner of the United States District Court for the Eastern District of Pennsylvania ordered the Board to revisit its awards in these cases. Judge Weiner found that "in spite of the obvious applicability of the Incidental Work Rule to the facts before him, the Neutral, other than noting that Conrail had raised the Incidental Work Rule issue, completely failed to apply it to the facts, or even given any reason why it did not control." (Memorandum Opinion and Order, hereinafter referred to as the "Opinion", at p. 8). Judge Weiner vacated the awards and supporting opinions and remanded the cases to the Board "for express consideration of the Incidental Work Rule." (Opinion at p. 10).

The Board's Interpretation has, once again, refused to apply the plain language of the relevant portion of the parties' collective bargaining agreement. Although this provision, the Incidental Work Rule, has been recited numerous times in the various submissions before the Board, I will reiterate

its language, which is so completely disregarded by the result in this case:

> Article IV - OTHER RULE CHANGES
> Section 2 - Incidental Work
>
> The members of road and yard crews may perform, without additional compensation, any work incidental to or in connection with their assignment. Such work may include but is not limited to such tasks as handling switches, crew packs, turning, spotting and moving locomotives for fueling or supplying, inspecting cars or locomotives, bleeding cars, coupling and uncoupling hose or control cables, performing air tests, making reports or using communication devices for any purpose.

Judge Weiner, when confronted with this unambiguous provision, had no difficulty in finding that the Rule "plainly permits Conrail to require trainmen like [the claimant] Holtz to perform work without additional compensation where that work is incidental to their assignment. An example of such 'incidental' work specifically includes the very work at issue in this case - performing air tests." (Opinion at p. 8). The Interpretation is forced to nominally concede this point: "There is no question that the Incidental Work Rule, as written, makes no mention of carmen and appears, at first blush, to permit the Carrier to require train service employees to perform the work in question without additional compensation." (Interpretation p. 3) Incredibly, however, the Neutral then continues on, in an attempt to avoid the inevitable conclusion that these claims should be dismissed, to assert that a certain past practice of the parties has

been incorporated into the Rule, thereby making it inapplicable to the situation presented.

The supporting "analysis" to this unbelievable assertion is based exclusively upon Award No. 210 and the dissent to Award No. 234. That this argument is fundamentally flawed is obvious for two reasons: (1) the Incidental Work Rule was not applicable in Award No. 210 (as the Neutral himself admits); and (2) the language from the carrier dissent in Award No. 234, on which the Interpretation relies, refers to Rule 7(c) of the parties' agreement at that time, and not to the Incidental Work Rule itself. Judge Weiner, in considering the identical arguments (and noting these same two fatal errors in reasoning), concluded that "the Neutral went to great lengths to avoid applying the Incidental Work Rule to the dispute before him." (Opinion at p.9)(emphasis in original). In fact, Judge Weiner stated that he was "disturbed" by the Neutral's repeated refusals to consider the undeniably relevant Rule, even in the face of numerous pleas to do so in the Carrier's submissions.

The Neutral has now had the added benefit of Judge Weiner's Opinion and Order, which sets out clearly and concisely the language of the Rule, why it should apply, and why arguments to the contrary cannot be credited. Yet the result in the Interpretation (and the supporting analysis) remains unchanged from the Award that was vacated by Judge Weiner.

Apparently, the Neutral has not been able to manufacture any more compelling support in his ongoing quest to sustain these claims, but rather continues to recycle his previous unpersuasive arguments.

The Interpretation's refusal to acknowledge the well-founded reasoning set forth by Judge Weiner in his Opinion and Order has robbed the Interpretation of any meaning outside of the fact that E.L. Holtz's claims have been granted in these cases. In view of this willful disregard of a controlling provision of the parties' collective bargaining agreement, as well as the Interpretation's unwarranted and unjustified reliance on arguments that, as Judge Weiner noted, are meritless, this decision cannot be viewed as having any precedential effect, and will not be treated as such by the Carrier.

Once again, the Carrier dissents from this Award in the strongest possible terms.

W. M. McCain
Carrier Member
Special Board of Adjustment No. 910

Organization Member's Concurrence with "Interpretation
No. 1: of SBA No. 910, Awards Nos. 415, 416, 417 & 418

The Organization concurs with the Board's Interpretation No. 1 because it was produced with the participation of the other members of the Board, together with the Neutral, in making said interpretation and after the express consideration of the Incidental Work Rule as Ordered by Judge Weiner in June 1991.

The Carrier erroneously infers in their "dissent" that Judge Weiner found that the Rule plainly permits Conrail to require trainmen like Holtz to perform work without additional compensation where that work is incidental to their assignment. Such was not the case at all, this because Judge Weiner had no jurisdiction nor authority to decide, "find" or arbitrate the dispute embodied in the above-captioned cases.

Rather, Judge Weiner was persuaded by the Carrier to believe that the "Board" did not give proper consideration of the incidental work rule when it framed its first decisions in the captioned cases. Based upon this premise; the Judge then vacated the awards and supporting opinions in June 1991 and remanded the cases to the Board "for express consideration of the Incidental Work Rule."

Subsequent to the Judge's Order, the Neutral with the participation of the other members of the Board convened a meeting and received supplemental submissions from the Partisan Board Members in the making of his Interpretation No. 1.

Judge Weiner did not dictate to the Board nor the Neutral why the Rule should apply and why arguments to the contrary cannot be credited as Carrier infers in their "Dissent",(at bottom P. 3) when he remanded the cases to the Board for express consideration of the Incidental Work Rule.

Interpretation No. 1 to which this Organization Member's Concurrence is attached, consists of six and one-half, single-spaced pages, which details in great depth the express consideration of the incidental work rule in the above-captioned cases. Said interpretation cites supporting decisions of the First, Second and Third Divisions of the National Railroad Adjustment Board, i.e., probative evidence on which the express consideration of the Rule was Ordered by Judge Weiner.

Interpretation No. 1 (P.6) then goes on to state:

> "In light of the above considerations the Board believes that it properly drew the essence of its awards from the meaning and intent which the parties had given to the Incidental Work Rule and that it did not go beyond the scope of its jurisdiction in fashioning an award in resolution of the disputes."

Therefore, in view of the fact that this dispute was contested to the Court and, that on remand, was the subject of careful and detailed express consideration of the dispute to the Rule, the undersigned whole-heartily concurs with the Board's "Interpretation No. 1" and feels confident that this decision must be a clear and probative precedent to all similar, present and future, disputes on this Carrier.

Eugene F. Lyden

Eugene F. Lyden, Organization Member
Special Board of Adjustment No. 910