ARBITRATION, THE COURTS, TECHNOLOGICAL CHANGE AND CRAFT DEFINITION: RAILROAD FIREMEN v. DIESEL LOCOMOTIVES

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Each new threat of a national strike in a vital industry raises calls for federal laws requiring compulsory arbitration of such disputes. This has been especially true in the transportation industries. This article is an examination of the judicial decisions and arbitration awards which have defined craft lines for railroad firemen and of how those definitions have evolved in response to technological change as exemplified by the advent of diesel locomotives. Through study of this example, it can be shown how existing laws and procedures were used in the craft definition process and produced the pressures which resulted, in 1963, in the first special compulsory arbitration law passed by Congress. What has happened since the enactment of the arbitration law will also be examined.

I. General Background

American railroading began in earnest in the 1830's. The locomotives relied on the burning of wood to fuel a steam boiler which provided the motive power. Due to the lack of automatic devices, the fueling of the boiler was done manually by a fireman. Even in the 1930's, when semi-automatic conveyors were used to fuel most coal boilers, firemen were indispensable to insure the operation of the conveyor and the maintenance of steam pressure in the boiler. This latter function was also largely true of firemen watching boilers fired by fuel oil with a pressure-injection system.

During the first century of railroading, approximately 1830 to 1930, the fireman's craft functions were apparent. His primary responsibility was the maintenance of steam pressure in the boilers by manually fueling them or by using semi-automatic fueling devices.[1] He shared, with the locomotive engineer, the duty of maintaining a watch on the guage which indicated steam

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[1] The clear craft definition of firemen also made it easier to identify them as a group and to organize them into a union to pursue their group interests. Thus, it is not surprising that the Brotherhood of Locomotive Firemen and Enginemen, founded 1873, is one of the oldest railroad unions. J. Stover, American Railroads 119 (1962).

pressure. When not performing these duties, he also shared with the engineer the duty of keeping a lookout, and of passing signals from other crew members and calling out the indications of road signals, e.g., semaphores and pot signals.[2]

Toward the very close of the first century of railroading, a few carriers began using locomotives driven by means other than steam pressure. These non-steam locomotives are divided into three main classes. In the first class are "diesels" (named after Rudolf Diesel who invented the high pressure self-injecting fuel oil engine). Diesel locomotives derive their power from the diesel engines attached to turbine generators. The generator furnishes electricity to large traction motors, electrical motors which turn the wheels. The second class consists of electric locomotives which also use traction motors but which derive the electricity for operating the motors from an outside source.[3] In the third class are "Budd cars" (named after a leading manufacturer of this type of equipment). Budd cars are small units weighing less than 90,000 pounds which are usually powered in the same manner as diesels but whose motors take so little space that the car has additional space for passengers or freight. Units of all three classes are capable of being connected to other units of their class in "multiple-unit" operation so as to provide greater motive power. When so connected, they are operated from a single set of controls in the leading or "head" unit.

Diesel locomotives soon became the dominant source of motive power in use in the United States.[4] Today they are the source of power for over 95 per cent of all railroad operations.[5] Due to the complexity of function of diesel locomotives, many, if not most, carriers do not expect or encourage firemen to attempt much maintenance or repair. Conversely, the controls and guages have been greatly simplified so as to facilitate operation by one man, the engineer.

The replacement of steam locomotives by diesels eliminated the primary function of the firemen, but the secondary functions remained, especially signal calling and passing and keeping lookout. However, these secondary functions also came under attack by the carriers who asserted that firemen were not the only ones who could perform them.

It was the gradual erosion of the exlusiveness of the fireman's right to per-

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[2] As will be shown, the duties of signal passing and lookout are, in part at least, duties incumbent on all engine and train crew members whether in road or yard service and are not the exclusive duties of any one craft.

[3] The outside source is usually a third rail, i.e., a special rail which is electrically charged, or overhead wires which are brushed by "trolleys" on top of the locomotive.

[4] In the twenty-five years from 1937 through 1961, the number of steam locomotives declined from 43,624 to 100 while the number of diesels increased from 218 to 28,150. By 1956, approximately ninety per cent of all locomotive power was supplied by diesels. Horowitz, *The Diesel-Fireman Issue—A Comparison of Treatment*, 14 LAB. L.J. 694, 695 (1963).

[5] The use of Budd cars is largely confined to some suburban-urban commuter routes and a larger use as utility cars for rail testing and similar uses. Due to the added cost of equipping railroad mainlines for electrical engines, relatively few ever were or still are in use.

form these functions which led to the arbitration award of 1963 which strongly curtailed the use of firemen on diesel locomotives. The major opponent of this erosion has been the Brotherhood of Locomotive Firemen and Enginemen, AFL-CIO (hereinafter BLF&E), which saw the danger of its own demise in this erosion.[6] The erosion of this right took place in three distinct areas of decision: (1) court decisions under state full-crew laws, (2) arbitration decisions of the National Railroad Adjustment Board (hereinafter NRAB) and (3) in national bargaining and decisions of national emergency boards eventually culminating in the 1963 compulsory arbitration.

II. Full-Crew Laws

In 1893, Congress passed the Federal Safety Applicance Act[7] regulating safety on trains for the benefit of employees. This Act, and subsequent amendments from 1903 through 1911, were the result of extensive lobbying by the railroad unions which prompted many states to pass their own measures to provide safer working conditions for "operating employees."[8] One of these laws (in effect at one time or another in almost all states) was the "full-crew law" which prescribed the minimum crew consist which it was felt could operate a train safely. Since firemen were included in these crew consists, carriers could not refuse to use them without violating the laws and being subjected to fines. The carriers viewed the laws as unnecessary restraints and attacked them in court but failed in their efforts to have them declared unconstitutional.[9]

After the advent of non-steam power, the carriers began a series of court attacks on the full-crew laws in an effort to restore to themselves control over crew consists. In 1931, the United States Supreme Court held that neither the federal laws regulating railroads nor the interstate commerce clause of the Constitution pre-empted the states' right to regulate railroad safety under the states' police powers.[10]

Having failed in the general attack at the federal level, the carriers then turned to the state courts in an effort to carve out an exception to the full-crew laws for diesel and electric locomotives. In 1931, Ohio held that electric locomotives were not covered by its law and thereby enabled carriers to discontinue

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[6] The danger was not imaginary. In the last decade, the BLF&E membership dropped from 78,412 to approximately 40,000. At least 16,000 of the members lost are attributed to firemen who lost their jobs as a result of the 1963 arbitration award. However, new bargaining demands may increase membership and the merger of the BLF&E with three other operating unions into the United Transportation Union on January 1, 1969, probably will strengthen the union's ability to insist on its demands for firemen. *See* Wall Street Journal, Dec. 11, 1968, at 8, col. 2; and Frailey, *Jan. 1 Merger Announced By Four Rail Unions*, Chicago Sun-Times, Dec. 11, 1968, at 3, col. 1.

[7] 27 Stat. 531 (1893), now codified at 45 U.S.C. § 1 (1964).

[8] "Operating employees", as the term is used in the railroad industry, refers to those employees who are actually engaged in moving a train or engine over the roads or in yards. It applies to engineers, firemen, conductors, yard foremen, brakemen, trainmen, switchmen, and hostlers and their helpers.

[9] Chicago, R.I. & Pac. R.R. v. Arkansas, 219 U.S. 453 (1911); St. Louis & Iron Mtn. Ry. v. Arkansas, 240 U.S. 518 (1916).

[10] Missouri Pac. R.R. v. Norwood, 283 U.S. 249 (1931).

the use of firemen on such locomotives.[11] In a decision which had a similar effect, a Texas court held that the lookout and signal passing functions were not the exclusive craft right of either the firemen or the trainmen, thereby enabling the carriers to substitute the latter for the former under Texas law and effect some salary savings.[12] Three years later, the Nebraska supreme court held that firemen were not required on gasoline powered cars (Budd cars) under its full-crew law.[13]

Though only 218 diesels were in use in late 1936, their existence, coupled with the increasing number of carriers which were not assigning firemen to diesels as they were put into use, greatly worried the BLF&E. In 1937, under threat of a nationwide railroad strike by firemen, the major carriers and the BLF&E negotiated the 1937 National Diesel-Electric Agreement.[14] This Agreement provided that firemen would be used on virtually all locomotives of more than 90,000 pounds weight on drivers or which are used in stream-line or main-line passenger service.

Subsequent to the 1937 agreement, most of the action in this area was on a national bargaining and emergency board level or before the NRAB. Except for one case in 1943,[15] there was virtually no significant court action until 1950.

During the next two decades, 1950-1969, the carriers became active again in their efforts to have courts exempt them from the effect of the full-crew laws as applied to firemen on diesels and Budd cars. In 1950, the Nebraska supreme court, relying on its 1934 opinion, held that since an engineer's view in a Budd car is unobstructed, and since the car has no boiler to fuel, there was no need for a fireman on such cars because their lookout and fueling functions were not required for safe operation under the full-crew law.[16]

In a similar case, the Nevada supreme court relied on the presence of a trainman in the Budd car who it found just as competent as the fireman to perform the lookout function. In that case, *Western Pacific R.R. v. State*,[17] the state prosecuted the Western Pacific for operating a Budd diesel car without a fireman, alleging a violation of the full-crew law. The court found there was no need for the firemen to perform the lookout duty because the construction of the Budd car gave the engineer a full lookout. The state insisted, however, that the firemen had other traditional duties which remained to be performed. The firemen read the engineers' written orders and were required to understand them and remind the engineer should he overlook them in any respect. Further,

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11 Bhd. of Loco. Firemen & Enginemen v. Public Util. Comm'n, 123 Ohio St. 336, 175 N.E. 454 (1931).

12 Railroad Comm'n v. Texas & New Orleans R.R., 42 S.W.2d 1091 (Tex. Civ. App. 1931).

13 Moredick v. Chicago & N.W. Ry., 125 Neb. 864, 252 N.W. 459 (1934).

14 1 BLF&E, GENERAL WAGE AND RULE AGREEMENTS, DECISIONS, AWARDS AND ORDERS GOVERNING EMPLOYEES ENGAGED IN ENGINE SERVICE ON RAILROADS IN THE UNITED STATES, 1907-1941, 571 (Cleveland 1942).

15 Northern Pac. Ry. v. Weinberg, 53 F. Supp. 133 (D. Minn. 1943) (firemen were not needed for yard switching on diesel switch engines).

16 Bressler v. Chicago & N.W. Ry., 152 Neb. 732, 42 N.W.2d 617 (1950).

17 69 Nev. 66, 241 P.2d 846 (1952).

it was the traditional duty of firemen to observe and understand all the signals and call them to the attention of the engineer. The court, however, found these to be essentially the duties of the engineer and though such reinforcement of the engineer *might be regarded as desirable*, where the firemen's presence was not otherwise necessary his employment could only be justified on the assumption that the engineer would not properly perform his assigned duties. This assumption was found to be without merit as the operators of high speed, interurban, electric trains not only operated on their own responsibility under more hazardous traffic conditions than existed in this case but were "firmly and positively isolated against the distractions created by the presence of others."

> Furthermore, even assuming such duties to be desirable in the interest of public safety, it does not appear from the record that a separate crew member is at all necessary to their performance. From undisputed testimony frequently reiterated throughout the record it would appear clear that all such duties could on the Budd car be assumed by the conductor or brakeman or shared between them.[18]

The court also noted that either a conductor or brakeman was sufficient to "watch over the continued fitness of the engineer" basing this statement on the decision of the Massachusetts Department of Public Utilities in *Brotherhood of Railroad Trainmen v. Boston & Albany R.R.*[19] Thus it added yet another function to the list of those shared by firemen and trainmen and not the exclusive right of either craft.

In 1955, the carriers finally won, in Nebraska, what they had been seeking. An opinion of the Attorney General of Nebraska extended the *Western Pacific* case to entire trains powered by any diesel engines.[20] While the opinion may seem unusual in that it does not mention that others can perform the firemen's functions, it must be remembered that it was decided on a narrow point of law. The opinion simply states that since *Moredick v. Chicago & North Western Ry.*[21] and *Bressler v. Chicago & North Western Ry.*[22] decided that firemen were not required on gasoline powered cars, they are not required to be used on diesel powered trains, especially freight trains, under the full-crew law of Nebraska. In 1964, the Nevada supreme court reached the identical conclusion.[23] Other decisions during this recent period held that neither firemen nor brakemen were needed on Budd cars in Texas,[24] that mail porters can act in the stead of brakemen in Mississippi,[25] and that firemen or hostler helpers are not required on diesel engines moving without cars as these are not trains under Ohio's full-crew law.[26]

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18 *Id.* at 71, 241 P.2d at 849.
19 92 P.U.R. (n.s.) 298 (1951). The Nevada decision was also based on the cases cited *supra*, notes 12 and 13.
20 [1955-1956] NEB. ATT'Y GEN. REP. 37.
21 125 Neb. 864, 252 N.W. 459 (1934).
22 152 Neb. 732, 42 N.W.2d 617 (1950).
23 Southern Pac. Co. v. Dickerson, 80 Nev. 572, 397 P.2d 187 (1964).
24 Railroad Comm'n v. Chicago, R.I. & Pac. R.R., 291 S.W.2d 796 (Tex. Civ. App. 1956).
25 Bhd. of R.R. Trainmen v. Illinois Cent. Ry., 243 Miss. 851, 138 So. 2d 908 (1962).
26 Co-operative Legis. Comm. v. Public Util. Comm'n, 1 Ohio St. 2d 187, 205 N.E.2d

The recent challenges to the full-crew laws by carriers grew out of the 1963 Arbitration Award. These challenges were major, seeking to void the laws involved on constitutional bases rather than merely restricting their impact through statutory construction. Because the understanding of these cases depends upon the Award and its history, they will be discussed in fuller detail after the discussions of the Award. For this section, it suffices to note that the challenges to the Indiana and New York laws in state courts, and the Arkansas law in the federal courts, have all been rebuffed and the laws upheld as valid exercises of the state's police powers.[27] Where the controversy arises in a bargaining context, however, the state's power to act in the event of a strike have been severely curtailed.[28] While other full-crew decisions have been rendered, the ones emphasized here are only those which have had a direct effect on the use of firemen on diesels.[29]

III. AWARDS OF THE NRAB

The National Railroad Adjustment Board (NRAB) is an agency of the federal government set up under the Railway Labor Act to decide disputes between the carriers and their employees involving the application or interpretation of collective bargaining contracts.[30] The Board is divided into four divisions, of which only the First Division has jurisdiction over disputes involving operating employees, including firemen. The Division has five carrier members and five labor members, each appointed by their respective sides, and decides disputes by majority vote. If it is unable to produce a majority decision a neutral referee is appointed or selected who sits as a member of the Division and whose added vote usually resolves the dispute. Adjustment without a referee is frequently a form of grievance settlement by bargaining while

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919 (1965). *But see*, Akron C. & Y. Ry. v. Public Util. Comm'n, 9 Ohio Misc. 183, 224 N.E.2d 169 (Ct. C.P., Franklin County, 1967), which held that firemen must continue to be used on diesel powered *trains* and upheld the constitutionality of Ohio's full-crew law as it was found to have some relation to public safety.

27 Public Serv. Comm'n v. N.Y. Cent. R.R., 247 Ind. 411, 216 N.E.2d 716 (1966); New York Cent. R.R. v. Lefkowitz, 23 N.Y.2d 1, 294 N.Y.S.2d 519 (1968); Bhd. of Loco. Engineers v. Chicago, R.I. & Pac. R.R., 382 U.S. 423 (1966); Bhd. of Loco. Firemen & Enginemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968).

28 Bhd. of R.R. Trainmen v. Jacksonville Term. Co., 394 U.S. 369 (1969).

29 A fuller account of the history of full-crew laws, especially their detrimental effect on the carriers and their concomitant benefit to trainmen, is set out in S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 323-29 (1960). While it cannot be denied that make-work rules usually require unnecessary work to be done (the authors of the above account concentrate unduly on that aspect), they also have a national genesis as valid union protective measures (which the authors admit most grudgingly) adopted prior to the evolution of more modern solutions to problems of worker displacement caused by technological advances. Thus, while the account is historically accurate, its authors' bias should not be overlooked.

30 45 U.S.C. § 153 (1967). These are the so-called "minor disputes" as distinguished from "major disputes" which arise out of a deadlocked bargaining situation. *See* 45 U.S.C. § 152 (1967); Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-23 (1945); Bhd. of R.R. Trainmen v. Chicago R. & I. R.R., 353 U.S. 30, 35-41 (1957). *Cf.* Bhd. of Loco. Firemen & Enginemen v. Elgin, J. & E. Ry., 404 F.2d 80, 83-85 (7th Cir. 1968) (Kerner, J. dissenting), *cert. denied*, 38 U.S.L.W. 3153 (U.S. Oct. 27, 1969). It is also worth noting that the crucial issue in this case involves an application of the 1963 Award.

adjustment with a referee is an arbitral process.[31]

While proceedings before the NRAB are not compulsory arbitration in *law*, they are so in *fact*. Submission of disputes to the NRAB is discretionary with the parties. Disputes are usually appealed to the NRAB by the union. However, since a union's only alternative to submission of an unadjusted dispute is to call a strike, carriers submit those disputes which may lead to a strike to the Board in order to avail themselves of an injunction against a threatened strike.[32]

The awards of the First Division have gone a long way toward eliminating as firemen's craft rights the secondary functions referred to earlier. Many awards have blurred the distinction between the crafts of firemen and trainmen by holding that the performance of these secondary functions is not an exclusive right of either craft. In addition to holding that trainmen have the same right and duty as firemen to engage in the lookout and signal passing and calling functions, the awards have also held that the function of throwing switches (once the exclusive craft right of trainmen) may also be performed by firemen.

In *Brotherhood of Railroad Trainmen v. Chicago, R.I. & Pac. R.R.*,[33] passenger brakemen were required by a dispatcher to ride engines and call signals for engineers due to a malfunction of an automatic train control system. The brakemen filed claims for additional pay contending that this was not proper brakemen's work. It was held that the operating rules cited did not support the claims. In *Brotherhood of Railroad Trainmen v. Southern Ry.*[34] a yard foreman (conductor) filed a claim when he was not used to pilot a new engine being broken-in within a yard by an engineer and a fireman. The claim was denied with the opinion holding, in part:

> It is also urged that *because the fireman threw some switches and gave signals to the engineer, he performed yardman's duties* and therefore a yardman should have been called to perform such service. The record fails to show how many switches were thrown, or how many signals were given by the fireman. It has been held by this Division, both with and without a referee, that in light engine movement within the yard, *a fireman may be required to handle switches*

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[31] This background discussion is merely intended to provide a setting for the discussion of specific cases. More extensive analysis of the NRAB and its processes and history are available in the following: C. Daugherty, *Arbitration by the National Railroad Adjustment Board* in NAT'L ACAD. OF ARBITRATORS, ARBITRATION TODAY, PROCEEDINGS OF THE EIGHTH ANNUAL MEETING 93 (1955); H. NORTHRUP, COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES ch. 5 (1966); and Northrup & Kahn, *Railroad Grievance Machinery: A Critical Analysis*, 5 IND. & LAB. REL. REV. 365-82, 540-59 (1952).

[32] Few disputes are submitted under an actual strike threat. However, an implied threat is always present as is shown by the small number of First Division cases submitted by joint agreement of the parties. This situation was brought about by Bhd. of R.R. Trainmen v. Chicago R. & I. R.R., 353 U.S. 30 (1957), which held that an injunction may be issued against a strike threatened over any dispute which has been submitted to the NRAB for adjustment.

[33] Awards 6967-68, Denied (no Referee). All awards cited in Section III are awards of the First Division, NRAB.

[34] Award 9252, Denied (Roll, Referee).

and give signals to the engineer as part of his duties.[35]

In *Brotherhood of Locomotive Firemen and Enginemen v. East Broad Top Railroad and Coal Co.*,[36] a fireman claimed a day's pay at conductor's rate and a conductor claimed a day's pay for not being used when he allegedly should have been (a "runaround") when the fireman was used to handle switches and give signals for switching movements during the road freight run. The claims were denied with the holding that the rules did not refer to conductor pilots and that the work performed did not belong exclusively to conductors.

In *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co. (Texas & Louisiana Lines)*,[37] firemen each claimed a day's pay at conductor's rates when required to handle switches and give signals for eight engine movements. They based their claim on a rule which stated that firemen would not be required to perform trainmen's duties. The claims were denied on the basis that the duties performed were proper for both firemen and trainmen and the firemen had acquiesced in their performance by past practice. Similarly, in *Brotherhood of Railroad Trainmen v. Virginian R.R.*,[38] a yardman claimed he was run around when a fireman performed similar duties in the yarding of a train. The fireman on a train coming into the Roanoke Yard performed duties normally those of the head brakeman in order to facilitate yarding of the train because of the closeness of a passenger train behind them. The employees' position was that the specific duties performed by the fireman were never fireman duties and that when not performed, permissibly, by the head brakeman they were exclusively yardman duties. The opinion held that the specific duties performed by the fireman were the exclusive duties of the train crew in yarding the train and were never yardman duties nor did they become such simply because the fireman performed them for the head brakeman and "[i]t was in the best interest of sound safety practices for the train crew to cooperate as it did in yarding . . . [the train], promptly."[39]

In *Brotherhood of Locomotive Firemen and Enginemen v. Southern Ry.*,[40] an engineer appealed the discipline imposed on him when he refused to move his engine without the fireman being present. The fireman had left the train for the purpose of relieving himself when the engineer received orders to move. There had been an accident the prior day due to poor visibility when an engineer moved without a fireman causing the engineer in this case to adhere

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[35] *Id.* (emphasis added); *accord*, Awards 10826, 11577-78, 15390, 15636, 15958 and, especially, 16013 which is virtually identical and is based on the quoted text. *See also* Award 6585 in which firemen and yard helpers filed claims on account of firemen being required to throw switches and perform flagging. The unions unsuccessfully asserted that Ohio's full-crew law supported their claim as it allegedly required a flagman as part of the crew consist. *Cf.* Awards 4600-03, 5057 and 5381-82 among others cited by the carrier in defending this case.

[36] Awards 13391 and 13393, Denied (Gilden, Referee).

[37] Awards 14666-70, Denied (Simmons, Referee).

[38] Award 17043, Denied (Rogers, Referee).

[39] *Accord*, Awards 17510, 18428 and 19460. *Cf.* analogous situations involving conductors or brakemen claiming these functions belonged to the other in Awards 17219, 18251 and 20068.

[40] Award 20165, Sustained (Seidenberg, Referee).

to a rule requiring that such orders be issued by someone with greater authority. It was held that the carrier could require the move to be made without a fireman, but that it had no right to discipline an engineer for adhering to the rules by insisting that the orders to make the move come from a superior authorized to give such orders. In two analogous cases, engineers were dismissed for in subordination when they refused to accept calls to make freight runs without firemen though the orders came from proper authority.[41] In each award, the discipline was upheld in principle though modified to suspensions for the time out of service.

In *Railroad Industrial Union v. Western Maryland Ry.*,[42] as in *Award 17043*, a fireman filed a claim account allegedly performing trainmen's duties when he threw a switch during a light engine movement. The claim was denied with the clear holding that trainmen do not have an exclusive right to such duties and they may properly be required of firemen as well.

Perhaps the award in this area most often cited before the NRAB and national emergency boards has been *Brotherhood of Railroad Trainmen v. Northern Pacific Ry.*,[43] decided in 1947. The carrier relied heavily on the findings of the *Report of the Presidential Emergency Board of May 21, 1943*, in the "1943 Diesel Case".[44] The facts were that a road head brakeman claimed additional pay at fireman's rate when he called signals and kept lookout because the fireman was absent from the cab. The carrier had posted a notice which required head-end trainmen to sit on the extra seat in the cabs of diesel locomotives and maintain a lookout ahead and to the rear during the absence of the fireman. Rule 71(b)[45] provided that it was not the duty of trainmen to assist the firemen and thus, the employee asserted the requirement covered by the notice violated this rule.

> The duties and requirements prescribed by the notice of January 30, 1945 are within the recognized duties required of a forward brakeman as indicated by the Transportation Rules in effect on the Northern Pacific. *Rule 854 provides Trainmen on duty when not engaged elsewhere must occupy the seats assigned to them. They will also observe the position of all train order signals, be prepared to and pick up any messages or orders, keep a sharp lookout for signals displayed by other trains, and keep in mind all train orders and notices affecting the movements of trains, so as to be prepared to call attention to or take necessary action in the event of any oversight or mistake.*
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> Rule 927 provides: "Enginemen and forward brakemen must frequently look back especially while rounding curves to observe the condition of the train. While passing through cities, towns and yards there must be no failure to keep a careful lookout ahead on both

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41 Awards 21172 and 21212.
42 Award 20867, Denied (Daugherty, Referee).
43 Award 11644, Denied (Gallagher, Referee).
44 2 BLF&E, General Wage and Rule Agreements, Decisions, Awards and Orders Governing Employees Engaged in Engine Service on Railroads in the United States, 1942-1948 1 (1949) (discussed in § IV *infra*).
45 *Cf.* Consolidated Code of Operating Rules and General Instructions (rev. ed. 1945) Rule 854, from which it derives.

sides of the engine."

The services required of employee here are well within the limitations of the rules quoted.[46]

The carriers have continued, and in all probability, will continue to refuse claims of this nature thereby causing them to be appealed to the NRAB by the employee or union who hope to reverse the carriers' decisions. The carriers find it to their advantage to have the union appeal because, due to the trend of awards in the carriers' favor, they will save money by not assigning extra trainmen to runs on which there are firemen so long as firemen can be required to perform the same essential functions as head brakemen.[47] Secondly, the burden of proof is on the union, as shown by awards of the First Division. One of the clearest statements of the burden of proof on an employee who contends that some of his duties have been performed by someone else, in violation of a collective bargaining contract and his craft rights, is in *Brotherhood of Locomotive Engineers—Brotherhood of Locomotive Firemen and Enginemen v. Northern Pacific Ry.*[48] It held:

> What is specified by contract or is well established by practice to be hostler's work on one property may very well on another property belong to yard crews or road crews. *It seems right under these circumstances on claims such as these to require an employe* [*sic*] *to show a clear, exclusive right to the work claimed. Otherwise, not only is the carrier subjected to uneconomic and excessive payment for services, but the rights of other employes* [*sic*] *within the craft to which hostlers belong can be greatly disturbed.*[49]

While the burden of proof is, under most awards in point, on the employee, the carriers still make every effort to present as strong a case as possible in their own behalf. Where possible, this will be done by direct evidence such as a prior award on the same carrier or by a clear established past practice. Where direct evidence is not available, old claims and settlements, testimony in discipline cases, or series of conclusions in a combination of these will be used. Some of these rather clearly lead to the carrier's desired result, while others are extremely tenuous and are rejected.

An illustration of the indirect approach is provided by the following argument. The carrier desired to prove that either head brakemen or firemen could be used to perform the work of keeping lookout and passing signals when piloting an engine to its roundhouse at the end of a run, without using yardmen or having to pay them. The carrier used awards and testimony in

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[46] Bhd. of R.R. Trainmen v. Northern Pac. Ry., Award 11644, Denied (Gallagher, Referee).

[47] The inverse of this approach is to argue that firemen are not needed on diesels where a head brakeman is present as they both perform essentially the same functions. This argument is the essence of the carriers' position in the full-crew law cases where they also add that safety is not impaired by the lack of the fireman. It will be discussed more fully below where it will be shown how the carriers have persuaded various national boards to agree with them.

[48] Award 16716, Denied (Leedom, Referee). *See also* Awards 16863, 20092, 20251, 20492.

[49] *Id.* at 14 (emphasis added).

discipline cases. *Brotherhood of Locomotive Firemen & Enginemen v. Atchison, Topeka and Santa Fe Ry. (Coast Lines)*[50] is a case involving the disciplining of two engineers for failure to observe or act on an observed hot box and fusee (flare). While the award was of no help, the carrier argued the record. One of the engineers testified that it was customary, on this carrier, for a head brakeman to share the lookout function with the fireman, *whether or not the fireman was present in the cab.* This was confirmed by testimony of another engineer and the fireman.[51] The next link in the chain of argument was *Brotherhood of Locomotive Firemen & Enginemen v. Atchison, Topeka and Santa Fe Ry. (Western Lines),*[52] which refused head brakemen's claims due to being required to pilot (guide) engines between a roundhouse and a road train. The awards noted that both head brakemen and firemen could perform this work and that in the many awards cited by the parties to the dispute, in practically every instance cited where a claim was granted, either a special covering rule was in force or the property involved or "*firemen,* hostlers, or hostler helpers *had been performing the work described.*"

> The general rule is contrary to that contended for by the employees. The special agreement on May 7, 1937 does not cover the service performed and for which claims have been made in this docket. The kind of pilot service referred to in the special agreement is that performed exclusively in the yard. *The work which was performed in this case is work that goes beyond the yard and to the destination of the train. In the absence of a covering rule, this has always been done by roadmen.*[53]

The final link is that between a head brakeman and members of the ground crew. This was established by the holding in *Brotherhood of Locomotive Engineers—Brotherhood of Loconomive Firemen and Enginemen v. Atchison,*

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[50] Award 15446, Docket 23939, Denied (Whiting, Referee).

[51] Engineer MacLean, on cross-examination testified (*Id.*, record at 42):

A. I would like to make a statement that *Brakeman Jones was on the job at all times, watching the train on both sides and on every curve. I don't think there was any lax of work on his part.* I have never had any reason to call his attention to any work on the head end. He always does his work willingly and wilfully.

Q. You heard me read Rule 457 (Keeping a Lookout) in the book of rules?

A. Yes sir.

Q. Does that apply to the crew on the head end?

A. Yes, except I am not the judge to tell the crew what they are supposed to do.

Q. *Did the men observe the train as they are required to do?*

A. *Fireman Chiaramonte watched the train while he was on the front end, except when he went back in the motor. Mr. Jones did,* and I watched the train without anyone telling me. I always do, and everytime I looked back Mr. Wiley was looking back. [Emphasis added.]

This was further confirmed by the fireman (*Id.* at 48):

A. *I know that Brakeman H. D. Jones and Engineman MacLean were watching the train, especially when they first noticed the brake sticking from Bibo to Pinta, and they had their heads out continuously looking to see if they could see something.* After they saw the first smoke they kept looking up the next curve and thought the smoke cleared up. [Emphasis added.]

[52] Awards 15474-75, Denied (O'Malley, Referee). The awards refer to "roadmen" as distinguished from railroad "yard" employees.

[53] *Id.* (emphasis added).

an additional helper in road freight service and specifically relied on the presence of the head brakeman, holding:

> [G]ranting for purposes of argument that some additional person should be in the cab at least while the train is in motion, is it essential that such person be a fireman? . . . The Organization insists strongly that the presence of the head brakeman in the cab in the absence of the fireman does not satisfy requirements of safety of operations. The Board is convinced that it does for several reasons.
>
> 1. Although it is urged that the duty of the head brakeman to look back to observe the train prevents his being an effective lookout forward, the argument is not valid. *If it were, it would similarly disqualify both the fireman and the engineer, for the duty to look back is common to all three.* The fact that it is the primary duty of the head brakeman is not a sufficient difference upon which to ground a distinction. Further, the observation of the train, which can be done only on curves, never prevents making sufficient observation forward on slow-moving freight trains.
>
> 2. *The head brakeman is as well qualified to perform the watching duties as the fireman.* He receives the same training and instructions and passes the same examinations as firemen. The duty to observe and call signals and perform the other functions of a lookout, regardless of the presence of the fireman, has existed for decades. . . .
>
> 3. The 1943 Emergency Board recognized and approved as sufficient for safety the practice of having the head brakeman observe and call signals. It said, "The necessity of having a second man in the cab continuously is met by the presence of the head brakeman, who customarily does signal watching while the fireman (helper) finds it necessary to patrol the engine room."
>
> 4. The qualification of the head brakeman to observe when the fireman cannot do so on steam locomotives was vouched for by Mr. Robertson, the President of the BLF&E.[61] *If the brakeman is qualified as an observer on steam, there is no reason why the same should not be true on Diesels.*
>
> 5. *There is no violation of any monopolistic right of the fireman to observe and call signals by the head brakeman doing it. The National Railroad Adjustment Board squarely so held.*[62] *Nor apparently is any such monopolistic right now claimed by the Organization.*[63]

The BLF&E also proposed that firemen be required in yard service on yard diesels weighing less than 90,000 pounds, which had specifically been ex-

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[61] 1943 Emergency Board hearing transcript, 796 [Note 33 in original].

[62] Award 11644, Carriers' Ex. 32. *See* Tr. 5327-38 [Note 34 in original].

[63] *No such right is urged among the eight reasons listed in the Organization's brief in this case,* (pp. 44-47, 74) *and it was disavowed during negotiation of the Western agreement in 1943,* (Carriers' Ex. 16, pp. 107-108). A statement by Mr. Robertson in the present hearing may possibly have constituted such a claim. This is not entirely clear, however, and, if so, the basis of it is obscure. *Apparently it is not founded upon a Contract right but upon tradition. The Board finds no tradition justifying such a claim.* [Note 35 in original, emphasis added.]

The foregoing quotation is from PRESIDENTIAL EMERGENCY BOARD NO. 70, REPORT 84-85 (Sept. 19, 1949) (emphasis added, all other footnotes omitted).

cluded from the classes of engines requiring firemen in the 1943-44 regional Diesel-Electric Agreements. Emergency Board No. 70 refused to recommend this proposal, stating that yardmen are sufficient for the purpose of keeping a lookout and calling and passing signals to the engineer.[64]

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[64] PRESIDENTIAL EMERGENCY BOARD NO. 70, REPORT 110-11 (Sept. 19, 1949) held:

> Where there are no cars ahead of the switcher in the direction in which it is moving, the visibility from the cab is so complete and the movement is so slow, *that there is no need for safety or any other reason to have a fireman as a lookout. In passing, it may be stated that there is absolutely nothing else for a fireman to do on these small switchers except to act as a lookout and to relay signals.*
>
> When one of these 44 tonners is working with one or more cars ahead of it in the direction in which it is moving, safety depends entirely upon that member of the ground crew who is acting as lookout at the front of the cut of cars. That man not only performs the lookout duty and directs the operation of the locomotive by the engineer by means of hand signals but has the duty and ability to stop the train in an emergency by a brake located there. *...The engineer operates entirely by hand signals from this man which he either observes directly or which are relayed to him by another member of the ground crew.* When the engineer is unable to see members of the ground crew who thus direct his movements, it is a universal rule on all roads, insisted upon as being inviolable, that the engineer must stop. This rule reinforces the safety inherent in the ability of the ground crew member at the head to stop the movement in case of danger. Where there are several cars ahead of the switcher on straight track, or when there is only one or two on track that curves to the left, the man at the head of the cut cannot be seen by the engineer. In such cases the signals are relayed to the engineer by another member of the ground crew who can see the man at the front and be seen by the engineer. If the cut is a very long one, there might have to be a second relay. The "stop" rule mentioned above operates here to give the ground crew time to take stations so that the signal may be relayed to the engineer. Where the signal has to be relayed by a second man, this man either walks along the right, or engineer's side of the cars, or if there is a left hand curve or the cut is a long one, stations himself on the middle of the top of a box car where he can see the signaler and be seen by the engineer. When the first practice is used, a fireman could not see the relayer. When the second situation occurs, a fireman usually could not see the man at the front any more than could the engineer. He, like the engineer, would depend on the signal from the ground crew man on top of the box car, and his only possible utility would be to check with the engineer to be sure that the latter had accurately observed the signal. *Even if he could observe the signal giver directly, his function then would be only to relay it, thus duplicating a function already being performed by a member of the ground crew.* Rarely, if ever, would there be any necessary case where the fireman, instead of a member of the ground crew, would be able both to see the front end man and be the only one who could see and relay the signal to the engineer. *There is no claim that the members of the ground crew are not competent to act as front end lookout and signaler or to relay signals from him to the engineer.*
>
> It is apparent from the foregoing that usually the only possible job for a fireman on these small switchers in this sort of operation would be to check with the engineer part of the time the correctness of the engineer's observation of the signal or its relay. Also, once in a while a situation would arise in which the engineer could not see a ground crew man, either the signaler or the relayer, and a fireman from his station could and thus would be in a position to relay it on to the engineer without the latter having to stop the locomotive until he could see a ground crew man who could give or relay the signal to him directly. The first of these possible duties certainly would not justify his presence on such slow-moving operations under the conditions existing where they occur. If the engineer did not correctly understand and obey the signal, the yard men would realize the fact and give additional signals. Nor is the second function sufficient to justify any [*sic*] additional man. When a situation develops where it would be possible to perform it, the basic "stop" rule comes into effect and gives the ground crew time to station themselves so as to relay the signal directly to the engineer. Again, the possible extra time required for this seldom oc-

In 1956, the Canadian Pacific Railway asked that firemen be discontinued on all road freight and yard diesels. Parliament appointed a Royal Railroad Commission (the "Kellock Commission") to investigate the request. The Report found that firemen were not needed. As to the signal passing function, the Report stated:

> *Are firemen required for signal passing?*
>
> Up to the present the crew in charge of a freight train has consisted of an engineer, a fireman, a conductor, a head end trainman and a rear end trainman. The conductor and rear end trainman ride in the caboose at the rear of the train while the engineer, the fireman and the head end trainman ride in the cab of the locomotive. Locomotives engaged in yard service are manned by an engineer and a fireman, their movement being directed by a yard crew composed of a foreman and two yardmen, the latter being sometimes referred to as the engine follower and the fieldman.
>
> In road service the conductor is in charge of the train and in its switching operations he and the two trainmen correspond to the three-man crew in yard service. Movements of locomotives in both yard and road service are controlled by signals originating with members of the train or yard crew as the case may be. Signals are given by hand in the daytime and by lantern at night. Fusees are employed in unusual conditions such as fog.
>
> One of the Brotherhood's submissions, made at the beginning of the sittings, was that the fireman "is there to receive and transmit signals when they can most safely and most efficiently be given on his side of the engine", i.e., on the left-hand side, as the engineer rides on the right-hand side of the cab and the fireman on the left.
>
> *It is common ground that the normal and preferable practice is for the engineer himself to see the hand signal whether given by the yardman or trainman with whom it orginates or to whom it is relayed by one or more of the ground crew.* As counsel for the Brotherhood put it in one of his questions to a witness at an early stage of the hearings:
>
> > It is obvious to me as it is to you that if I am to tell that fellow (the engineer) what to do, then if I can it is much better that I tell him directly than through some intermediary.[65]

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curring opportunity in such slow operations affords no justification for employing an additional man. *Further, since the task is purely one of seeing and relaying a signal, it would appear that, were another man needed, he should be added to the yard crew. In contrast to a fireman who would have to remain fixed at one place in the cab and has no especial qualifications for relaying signals, such a man would be mobile and be free to move into positions better adapted for seeing and relaying signals, a task in which he is thoroughly experienced.* [Emphasis added, footnotes omitted.]

This last sentence implies that a yardman on such an engine could, when necessary, step up on the engine or even go into the cab in order to relay signals to the engineer. While this may not be general practice in the United States, it certainly has been the practice on *many* carriers. Since the advent of the walkie-talkie and other radio equipment, the necessity for a yardman to occasionally mount the engine to relay signals to the engineer has decreased (on those carriers using these devices).

[65] ROYAL RAILROAD COMMISSION OF CANADA, REPORT 7-8 (Dec. 18, 1957) (emphasis added).

As to the lookout and signal calling functions, the Report specifically recognized that these duties are shared by trainmen and firemen:

> *Lookout duty of firemen*
>
> . . . .
>
> *These duties, however, are equally the responsibility of the engineer and of the head end trainman whose position in the cab was and is on the left-hand side like that of the fireman. When the latter is engaged in firing, these duties necessarily fall to be performed by the engineer and the head end trainman exclusively.* In the case of a locomotive hauling a passenger train, the engineer has to act alone at such times, as there is no third man riding in the cab of a locomotive engaged in passenger service.
>
> . . . .
>
> When it is remembered, as we have already mentioned, that in passenger service there are but two men in the cab of a diesel locomotive, and that there can be no question but that they adequately perform these duties, *it cannot be argued that a third man is necessary in the case of a freight locomotive.*[66]

The Report, after noting the desirability of an engineer's keeping his own lookout and receiving signals from a member of the ground crew in yard service, explicitly found that trainmen are adequate to keep the lookout and give signals in switching operations either from the ground or on or in the engine.[67]

The Commission also investigated carrier operations in four European countries and found that generally not only are firemen not used, but the engineer is alone in the cab and takes signals directly from the trainmen in yard and road swtching operations.[68] On June 16, 1958, a new contract was negotiated which incorporated the findings of the Commission and provided for the gradual discontinuance of *all* firemen on the Canadian Pacific.

On March 14, 1959, the Montpetit Board of Conciliation of Canada issued its report relative to a similar request by the Canadian National Railroad. This report confirmed all the findings of the Royal Railroad Commission and adopted virtually identical findings and conclusions. Subsequently, a contract was negotiated which was closely patterned after the Canadian Pacific contract.

On March 25, 1959, the Public Service Commission of the State of New

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[66] *Id.* at 9-10 (emphasis added).

[67] The Report stated, *id.* at 12-13:

> The diesel engine used in yards, the yard switcher, gives to the engineman a panoramic view of the track when it is moving in reverse, cab first. When the locomotive is moving forward and by reason of curvature of the track or otherwise, the engineman has not a sufficient view in the direction in which he is proceeding, *a yardman may be placed on the steps on the front of the locomotive on the engineman's side for the purpose of giving him signals. When so placed the yardman has a better view than anyone in the cab could have.*
>
> . . . .
>
> *What we have said with respect to yards is equally applicable to the switching of a freight train en route, the train crew taking the place of the yard crew. We are, therefore, of the opinion that the presence of a fireman in either freight or yard service is not required from the standpoint of lookout.* [Emphasis added.]

[68] *Id.* at 18-20.

York was authorized to investigate and make recommendations as to whether New York's full-crew laws would be retained. The unanimous recommendation of the Commission was that the laws be repealed.[69] The recommendation was only partly implemented.[70]

In 1959, through a series of carrier and BLF&E proposals, national negotiations were started on the issue of firemen on diesels in the United States. When negotiation and mediation failed, President Kennedy appointed a Presidential Railroad Commission to investigate the dispute and make recommendations.[71] In the Commission's hearings, consideration was given to safety, to American accident statistics, to the Kellock Commission report, to Emergency Board No. 70's Report and to the fact that most European diesels operated without firemen and had excellent safety records.[72] The Commission paid particular attention to the findings of Emergency Board No. 70 and many of its

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[69] In its Report (Jan. 26, 1960), the Commission stated (pp. 41-44 of the Ass'n of Western Railways reprint):

> Representatives of the brotherhoods elaborated upon the duties performed by firemen and expanded upon the testimony previously summarized by referring to peculiar situations under normal and emergency conditions, contending that the railroads' submission of proof did not, in their opinion, adequately describe the duties of firemen. *One of these was in yard service where hand signals from train crew members on the ground cannot be given directly to the engineer* because of peculiar local conditions, such as curves and obstructions on the engineer's side; *situations which, it was claimed, require that the signal be given to the fireman on the left side of the cab, then relayed to the engineer.* Other situations which were mentioned involved flagging duties imposed upon the fireman, some occurring in routine road switching operations and others in emergencies such as detailments, when firemen may be required to furnish flag protection for the head end. Frequent reference was made to switching over public highway crossings without watchmen where protection to traffic must be afforded, and to movements over and adjacent to crossings protected by automatic devices where manual operation thereof by a member of the crew is required.
>
> . . . .
>
> To comprehend the arguments of the railroads for elimination of firemen in the types of service designated in their submission, *it is of importance to recognize that a member of the freight service crew, the head-end brakeman, also rides in the locomotive with the engine crew.* Railroad representatives generally testified that this head-end brakeman normally rides in the cab of the leading unit along with the engineer and fireman. *The railroad witnesses asserted that the lookout and signal passing duties performed by the fireman are merely a duplication of functions performed by the head brakeman.*
>
> . . . .
>
> With respect to the need for a fireman in yard switching service, *the railroads asserted that the present duties of lookout and signal passing performed by firemen are not essential and that in those instances where signals are relayed through a fireman, there are several alternatives such as* dual engine controls, special light signals in difficult situations, and *the redistribution of the ground crew members in such a manner as to permit of the direct passing of signals from them to the engineer.* [Emphasis added.]

[70] The attempted repeal was unsuccessful as to firemen though certain changes in the law were made in other areas. *See* New York Cent. R.R. v. Lefkowitz, 46 Misc. 2d 68, 259 N.Y.S.2d 76 (Sup. Ct. 1965), *aff'd*, 23 N.Y.2d 1, 294 N.Y.S.2d 519 (1968).

[71] For further details covering the periods between the proposals and the appointment of the Commission, *see* Comment, 14 DE PAUL L. REV. 115, 122-23 (1964). *Cf., also* Bhd. of Loco. Engineers v. Chicago, R.I. & Pac. R.R., 382 U.S. 423, 430-31 (1966).

[72] REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION, APPENDIX VOL. I, 19-51, especially 20-23 and 47-51 (1962).

conclusions are also found in that Board's Report.[73] Especially important was its finding that firemen are not needed on a diesel for safety when a head brakeman is present, based on the findings of the 1943 Emergency Board.[74]

The *Report of the Presidential Railroad Commission* was released on February 26, 1962.[75] It observed that traditional firing duties had ended with the advent of diesels,[76] that firemen were not used on multiple-unit electric commuter trains,[77] and that Canada had held that firemen were not needed on diesels in freight or yard service.[78] In considering the duties of lookout and signal passing and calling, the Commission grouped them together under the heading of "Lookout Function", holding:

> 1. *The Lookout Function*
>
> . . . .
>
> *Under existing operating rules, the lookout function is performed by all employees riding the locomotive. Each is required to call out signals, to look ahead on the right-of-way for objects or persons, and to look back over the train for any indications of equipment trouble,* such as evidences of "hot boxes," or hazards involved in backing the train. In yard movements, the engineer is required to proceed slowly enough to stop short of any obstruction of opposing train movements, and to move the locomotive only if he has a signal from a member of the ground crew. *Ground crewmen in yard movements, therefore, also perform important lookout functions, as do those employees who ride in the caboose in road freight movements, or work on the ground in setting out or picking up cars en route. During the latter operation, the engineer proceeds only on signal from men on the ground, as in yards.*
>
> In freight service, a high percentage of the fireman-helper's time is spent in performance lookout functions. This is supported both by the 1958 and 1960 surveys of firemen's duties made by the Carriers, and the 1957 and 1960 surveys made by the Brotherhood of Locomotive Firemen and Enginemen. The Carrier surveys show that 91 percent of the freight fireman's time is spent in lookout duties, while the BLF&E surveys show about 80 percent similarly spent. *As noted above, on road freight diesels, the head brakeman also performs similar lookout duties, frequently on the left side of the cab.* In steam service the fireman was unable to perform this function a substantial portion of the time, since his principal work was firing the locomotive.
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> . . . .
>
> In yard service, the fireman's function is almost exclusively that

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[73] PRESIDENTIAL EMERGENCY BOARD NO. 70, REPORT 28 n.5, 33-35, 41, 61, and 83-88 (Sept. 19, 1949).

[74] *Id.* at 41.

[75] Detailed discussions of the procedures and findings of the Commission are: Arnow, *Findings of the Presidential Railroad Commission*, 14 LAB. L.J. 677 (1963) (a paper presented to the Spring, 1963 meeting of the Industrial Relations Research Ass'n), and Kaufman, *The Railroad Labor Dispute: A Marathon of Maneuver and Improvisation*, 18 IND. & LAB. REL. REV. 196 (1965).

[76] REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION 35 (1962).

[77] *Id.*

[78] *Id.* at 44-45.

> of a "lookout". The Carriers' surveys show that nearly 96 percent of his time is spent in maintaining lookout. (The Organizations' surveys did not cover yard service.) Part of the fireman-helper's function on yard diesels, the Organizations contend, is in passing signals to the engineer when the ground crew must work on the fireman's side. Although the evidence is conflicting, *there appear to be very few occasions when signals must be passed on the left side from the ground crew and relayed by the fireman to the engineer. In the vast majority of cases, one or more members of the ground crew can position themselves on the engineer's side and pass signals directly to him.* . . .
>
> Signal-passing, however, is not the only lookout function of the fireman on yard diesels. His role in maintaining a constant lookout from the left side for operating hazards is also emphasized by the Organizations. In the BLF&E safety award program, there were 139 applications for awards in which a yard fireman-helper claimed he averted accidents to other railroad employees, to trespassers, to his train, or to another train. Again, while this indicates a commendable alertness, the question is whether the presence of the fireman was essential to avert such accidents. *There is no basis to conclude that other members of the crew could not have taken similar preventive action.* Yard operations are usually slow; the engineer proceeds only when he has a signal, and must be prepared to stop short of any obstruction. *Furthermore, as we noted earlier, on transfer runs, a member of the ground crew usually rides the yard diesel and can perform the same lookout function.*[79]

The Commission concluded from this that firemen did not have an exclusive right to perform these duties since trainmen and yardmen have also traditionally performed them. The Report stated:

> The conclusion of this review of the fireman's lookout function is that it is not essential to the safe and efficient operation of road freight and yard diesels. *On freight diesels, the fireman has no special qualifications to perform the lookout function as distinguished from other members of the crew. Therefore,* he possesses no unique or traditional "craft right" to discharge this function. On yard diesels, his function in passing signals is minimal. In view of the slower nature of yard operations, which proceed under signals from members of the ground crew, the precautions taken by other members of the crew should suffice for the safety of men and equipment. . . .[80]

In general, the Report concluded that:

> [F]iremen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels. . . .[81]

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[79] *Id.* at 38-39 (footnote omitted, emphasis added).

[80] *Id.* at 40 (emphasis added).

[81] *Id.* at 45. The Commission recommended a progressive lowering of the retirement age and the use of attrition and promotion to engineer as the method for handling firemen who would no longer be needed if its recommendations were adopted. *Id.* at 33. The contrast between the Commission's recommendation in this area and that of

The BLF&E declined to accept the Report and, after further mediation and unproductive negotiation sessions, a strike was threatened. Presidential Emergency Board No. 154 was created which, in its Report of May 13, 1963, substantially agreed with the 1962 Report of the Commission. The Board's Report affirmed the carriers' contention that other crew members can perform the lookout function as well as firemen and recommended the discontinuance of firemen on road freight and yard diesels.[82]

B. *The Award and Its Life in Court*

The strike threat continued when the BLF&E declined to accept the Reports. In response to the threat, Congress passed Public Law 88-108 which required the issues in dispute to be referred to a national board of arbitration for a final and binding decision.[83] On November 26, 1963, Arbitration Board No. 282 made its award providing for the elimination of all but ten percent of the firemen's jobs in road freight and yard diesel service and the elimination of national and local rules requiring firemen to be used in such service. On the specific issue of the lookout function, it was concluded:

> 2. The lookout function presently assigned to the fireman is also performed by the head brakeman in road freight service and by all members of the train crew in yard service. In the great majority of cases the lack of a fireman to perform the related functions of lookout and signal passing will not endanger safety or impair efficiency because these functions can be, as they are now, performed by other crew members.[84]

The Award was put into effect immediately on virtually all Class I carriers.

Subsequent to the rendering of the Award, considerable litigation ensued as to its effect and application. Since the law provided that the Award would expire two years after its effective date, what work rules would regulate firemen after that date became an important issue.[85]

In the three years following the Award, the courts decided this and related issues in a manner consistent with past interpretation of the Railway Labor Act.[86] Under the Act, the terms of a collectively bargained contract continue in effect until they expire by their own terms (which is rare) or until they are replaced or rescinded after new proposals and bargaining. The courts held that while the Award expired, its rules continued in effect until changed by legal

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the Kellock Commission is discussed in Horowitz, *The Diesel-Firemen Issue—A Comparison of Treatment*, 14 LAB. L.J. 694 (1963).

82 PRESIDENTIAL EMERGENCY BOARD NO. 154, REPORT 7-9 (1963).

83 77 Stat. 132 (1963). Section 1 prohibited any strike over disputes to be submitted and prohibited any changes in the contracts, both prohibitions being designed to preserve the status quo while the seven-man Board decided the case.

84 ARBITRATION BOARD NO. 282, OPINION OF THE NEUTRAL MEMBERS 25-26 (1963) (emphasis added).

85 77 Stat. 132 (1963). Sections 4 and 5, provided that the Award would take effect sixty days after its filing and would remain in effect for two years thereafter.

86 45 U.S.C. §§ 150-88 (1964).

action of the parties taken under the provisions of the Act.[87] It was also held that a carrier may not take any unilateral action to reduce the use of firemen or change a work rule after the expiration of the Award, even if the only reason for continuing the use of firemen on particular runs was the existence of a full-crew law which was repealed after the expiration date. Moreover, it was held that the Award did not repeal the 1937 National Diesel Agreement[88] so that new runs would have to be manned by firemen if the runs were created after the expiration date, although carriers could remove firemen after that date from crews on which they were not required to be used prior to that date.

While the unions were active in court trying to restrict the direct effects of the Award, the carriers went to court in an attempt to use the Award to strike down full-crew laws in Indiana, Arkansas and New York. The attacks all urged the same constitutional grounds in asserting the invalidity of the laws. The primary grounds relied on were: (1) Public Law 88-108 and the 1963 Award made pursuant thereto pre-empted state laws under the Supremacy Clause, (2) the state laws were discriminatory in violation of the Equal Protection Clause due to the various classes of restriction imposed in some carriers and not others, (3) the laws were arbitrary and capricious and in violation of the Due Process Clause of the Fourteenth Amendment and (4) the laws were an unreasonable and intolerable burden on interstate commerce under the Interstate Commerce Clause. Except for two three-judge United States District Court decisions which were later reversed, all of these attacks failed.

In *Chicago, R.I. & Pac. R.R. v. Hardin*,[89] a three-judge court held in favor of the pre-emption contention. On appeal, the Supreme Court reversed, holding that while "Congress unquestionably has power" to regulate crew consists, there was nothing in the law which indicated an intention to do so.[90] In the absence of pre-emption, the states were free to regulate crew consists under their police powers.[91] The Court also held that an exemption for railroads with

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[87] For a detailed discussion of the decisions discussed in this paragraph, *see* 1967 A.B.A. REP., SEC. ON LAB. REL. L. 108-15, and 1968 A.B.A. REP., SEC. ON LAB. REL. L. 87-93. *See* Bhd. of R.R. Trainmen v. Akron & B.B. R.R., 358 F.2d 581, 607 (D.C. Cir. 1967) (supplemented and amended 1967 and 1968), *cert denied*, 390 U.S. 923 (1968).

[88] *Supra* note 14.

[89] 239 F. Supp. 1 (W.D. Ark. 1965).

[90] Bhd. of Loco. Engineers v. Chicago R.I. & Pac. R.R., 382 U.S. 423, 429, 432-37 (1966). Justice Douglas dissented on this point after showing why he believed the legislative history justified a finding of pre-emption. *Id.* at 438-47.

[91] *Id.* at 429, relying on Missouri Pac. R.R. v. Norwood, 283 U.S. 249, 256 (1931). *Accord*, New York Cent. R.R. v. Lefkowitz, 46 Misc. 2d 68, 259 N.Y.S.2d 76, 93-95, 109-15 (Sup. Ct. 1965), *aff'd*, 23 N.Y.2d 1, 294 N.Y.S.2d 519 (1968); Public Serv. Comm'n v. New York Cent. R.R., 247 Ind. 411, 417-18, 216 N.E.2d 716, 720-21 (1966). *But cf.* Bessemer & L. E. R.R. v. Pennsylvania Pub. Util. Comm'n, 430 Pa. 339, 243 A.2d 358 (1968), *cert. denied*, 393 U.S. 959 (1969), in which the Court split 4-3 and held that section 25 of the Interstate Commerce Act (49 U.S.C. § 26) requiring automatic block signal devices and an I.C.C. order pursuant thereto constituted preemption of the signalling field sufficient to invalidate Pennsylvania regulations requiring manual flagging by trainmen (relying on Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926), and Pennsylvania R.R. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919), disapproving *In re* Complaint of Bhd. of R.R. Trainmen, 49 N.J. 174, 229 A.2d 505 (1967)). Justice Musmanno, in a typically literary dissent, thought the Court had forced a "Casey Jones collision with the decision of the Supreme Court . . .," 430 Pa. at

less than fifty miles of track was not unconstitutional discrimination against interstate commerce and remanded the case for consideration of the remaining issues.[92]

Less than four months after the Court's decision, the Indiana case was decided, following the decision closely on the pre-emption question.[93] The Indiana decision also disposed of the other constitutional issues, which the Supreme Court had held required determination of evidence on technological advances, *without any evidentiary hearing having been held.* In an unusually fatuous opinion, Judge Jackson devoted only two paragraphs to these complex issues and found that the technological changes occurred "by reason of necessity, to meet competition, and we observe that on the whole they have not resulted in any appreciable available increase in service to the public."[94] Nowhere did the opinion even discuss the problems of craft function and definition nor that of safety. With only one judge objecting, final judgment was entered.[95]

Conversely, the New York trial court and the federal court on remand wrote well-documented opinions after lengthy hearings, but came to opposite conclusions. In New York, Judge Nolan examined the history of the dispute and the pertinent law and technological changes at great length and concluded that while it was apparent that firemen no longer performed their traditional primary functions, their performance of the secondary functions was sufficiently related to safety and not so unsubstantial as to cause the invalidation of N.Y. RR. Law § 54-6 requiring firemen on diesels.[96] Two years later, the federal district court after hearing evidence on remand, also extensively analyzed its impact and concluded that there was no showing that the fireman had a "substantial effect on safety of operations" as would justify the "substantial financial burdens" placed on carriers by the Arkansas law.[97] Both decisions were immediately appealed.

While the appeal to the Appellate Division was pending in New York, the legislature repealed two of the three sections under attack leaving in effect only Section 54-b relating to firemen. After the Appellate Division affirmed,[98] appeal was taken to the New York Court of Appeals. In a 4-3 split decision, that court affirmed, relying in part on the legislature's refusal to

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353, 243 A.2d at 365. It is possible that this case represents a new mode of attack by the carriers on state laws and regulations.

92 Bhd. of Loco. Engineers v. Chicago, R.I. & Pac. R.R., 382 U.S. 423, 437-38 (1966).

93 Public Serv. Comm'n v. New York Cent. R.R., 247 Ind. 411, 216 N.E.2d 716 (1966).

94 *Id.* at 421, 216 N.E.2d at 723.

95 *Id.* at 422, 216 N.E.2d at 724.

96 New York Cent. R.R. v. Lefkowitz, 46 Misc. 2d 68, 259 N.Y.S.2d 76, 95-100 (Sup. Ct. 1965).

97 Chicago, R.I. & Pac. R.R. v. Hardin, 274 F. Supp. 294, 302-04 (W.D. Ark. 1965), *rev'd sub nom.* Bhd. of Loco. Firemen & Enginemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968).

98 New York Cent. R.R. v. Lefkowitz, 28 App. Div. 2d 735, 282 N.Y.S.2d 68 (1967), *aff'd* 23 N.Y.2d 1, 294 N.Y.S.2d 519 (1968).

repeal the section.[99] While conceding that firemen no longer performed their historical primary function, the decision upheld the trial court's interpretation of the statute that the required extra crew member be what is now understood to be a fireman.[100] Finally, the decision concluded that the purpose of the legislature in retaining the statute was not to merely insure the employment of firemen, but was reasonably related to safety and was not an unconstitutional burden on interstate commerce.[101]

On month later, the Supreme Court decided the appeal on the Arkansas law and reversed the district court, holding that it had invaded the area of legislative judgment on public policy.[102] The Court's holding, that the posture in which the safety issue was presented still had sufficient variables in it to be a matter to be resolved in the legislative and bargaining arenas,[103] implies that the Court wishes to avoid hearing the issue again unless there are truly significant changes in the future in methods of operations and further technological advances which go much further towards increasing safety. It is possible that recent experiments in wholly automatic trains may bring the issue back into the courts before the end of the next decade.

The 1963 Award also provided for a National Joint Board composed of two carrier members and one member each from the BLE and BLF&E to report as to the effect of the Award after it had been in effect for at least two years. This Board issued its Report on January 5, 1966. The Report found that: (1) there had been no increase in work burden from operating without firemen and there had been some decline in hours worked per gross-freight-ton-mile; (2) through August 30, 1965, though there had been a general increase in accidents, it was part of a long-term increase due to the continuing rise in rail traffic; and (3) in none of the accidents involving trains operating without firemen could the accident be attributed to the lack of a fireman.[104] The Board concluded that there was "no relationship between increases in accident and casualty rates and the elimination of firemen's jobs" and that operations without firemen were as safe, or safer, than operations with them because "the rate of increase of accident and casualty frequencies has declined as the percentage of service operated without firemen has increased."[105] The findings on safety were confirmed by

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99 New York Cent. R.R. v. Lefkowitz, 23 N.Y.2d 1, 6, 294 N.Y.S.2d 519, 521 (1968).

100 *Id.* at 7-11, 294 N.Y.S.2d at 522-25.

101 *Id.* at 11-12, 16-17, 294 N.Y.S.2d at 525, 529-30.

102 Bhd. of Loco. Firemen & Enginemen v. Chicago, R.I. & Pac. R.R., 393 U.S. 129 (1968). The Court relied on an analysis of various paragraphs in the 1963 Award which found that firemen did perform some secondary functions which were safety related, but only in a limited number of circumstances.

103 *Id.* The Court also found that because of the safety problems in the industry, there was no unreasonable burden on interstate commerce and that mileage differentiation in regulation had a sufficient rational basis as to avoid being invalidated as unreasonable discrimination.

104 ARBITRATION BOARD NO. 282, NATIONAL JOINT BOARD, REPORT 30-33 and 64-65 (1966).

105 *Id.* at 73, 75.

a separate report from the BLE, but were disputed in a dissent filed by the BLF&E.[106]

C. *The Interpretation and Application of the Award*

The most important subsequent history of the Award as it relates to the craft definition of firemen is not found in the court decisions nor in conclusions of the National Joint Board. It is found, instead, in the later interpretations of the Award made by Arbitration Board No. 282 and in the application of the Award and its interpretation to individual carriers through Special Boards of Adjustment (hereinafter, SBA) and the NRAB.[107]

Despite the clear statements in many of the NRAB awards and national emergency board reports set out earlier that the lookout and signal passing and calling functions do not and never did exclusively belong to firemen, but have always been shared with trainmen, switchmen and engineers, the BLF&E submitted certain questions to Arbitration Board No. 282 which appeared to be an attempt to lay a ground on behalf of extra firemen (or, perhaps, for the benefit of switchmen and trainmen) for filing claims when this work was performed by someone other than a fireman. The two most important of these questions were answered by the reconvened Board on September 16, 1964.

> BLF&E QUESTION # 32:
>
> May the carrier, as a method of operation in road freight and yard service, place a yardman or brakeman on the left side of the locomotive cab *to perform lookout or pass signals*; in effect performing duties formerly assigned to a helper-fireman?
>
> ANSWER:
>
> It is not the intent of the Award that the removal of firemen-helpers from yard engines should be followed by the *substitution* of other yard service employees in the cab to perform signal-passing and lookout functions formerly performed exclusively by fireman-helpers. *If, however, other yard service employees formerly shared signal-passing and lookout functions in the cab with firemen-helpers, they may now continue to perform such functions.*
>
> BLF&E QUESTION #86:
>
> Is it the intent of the Award to allow the carrier to place a *switchman, brakeman*, company official or other employee on the left side of the locomotive cab to perform *lookout duties, pass signals*, or correct engine malfunction, said employees having been formerly stationed at another point on the train or in normal operation, not present at all?
>
> ANSWER:
>
> This question is controlled by the principle expressed in the Board's

[106] As this Report was part of the record before the Supreme Court last year, it is apparent that its findings were not regarded as sufficient to settle the safety issue surrounding the retention of full-crew laws.

[107] As of publication, no cases involving the Award had reached the decisional stage before the First Division, NRAB.

answer to B.L.F. & E. Question 32. As the Board stated in its Opinion:

> "Moreover, we wish to emphasize that our conclusions are not based on the assumption that members of any other craft will henceforth perform duties within the *exclusive* jurisdiction of firemen. *Head brakemen will, as in the last, continue to perform, in addition to their other duties, forward lookout functions on the fireman's side of the engine cab. Indeed, in road freight operations there will be, with only infrequent exceptions a brakeman in the cab with the engineer at all times.* In neither road freight nor yard service, however, do we contemplate that brakemen will be asked or expected to perform mechanical repairs and inspections formerly assigned fireman. To the extent that these functions continue, they will be performed in the manner previously described, either by the engineer or by shop maintenance employees."[108]

Question No. 32 is erroneously framed as it presupposed that the duties involved uniquely belong to firemen. The Answer, as well as the Answer to Question No. 86, expressly reaffirms the fact, so often stated herein, that the lookout and signal passing and calling functions are not craft rights, i.e., they do not belong exclusively to firemen but are common to firemen, trainmen and switchmen and may be performed by any or all of them.

It is clear, from the Answer to Question No. 32, that it was not intended a yardman could be placed on the engine to replace a fireman. Obviously, this means that it is not permissible to increase the size of a yard crew so as to place a yardman on the engine full-time in lieu of a fireman. However, it is not yet clear to what extent an employee who is already a member of a yard crew may occupy the fireman's seat for relaying signals and keeping a lookout during yard switching operations. The Answer seems to indicate that the solution to such problems depends on the past practice on each specific carrier. If this is so, and some of the following awards take this approach, then the burden is on the carriers to offer evidence which will show, or tend to show, that such a practice has existed and the resulting decisions will vary greatly from one carrier to another.

While Question Nos. 32 and 36 referred to both road freight and yard operations, it is important to note that the Answer to Question No. 32 was limited to yard service. In its Answer to Question No. 86, the Board, in quoting from its Opinion, took a different approach with respect to road freight service. This quotation indicates that the Board had recognized the lookout and signal functions as an integral part of the duties of a head brakeman for which past practice probably need not be shown on specific carriers. Whether or not later interpretations and applications of this Answer will uphold this position, remains to be seen.

Some awards have already been rendered by Special Boards of Adjust-

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[108] INTERPRETATIONS, RECONVENED ARBITRATION BD. No. 282 at 40 and 54-55 (1964) (footnote omitted, emphasis added).

ment (SBA) on the yard service switching problem. *Brotherhood of Locomotive Firemen & Enginemen v. Portland Terminal Co. (Northern Pacific Terminal Co. of Oregon)*[109] seemed to be outside the scope of the Answer to BLF&E Question No. 32 when it awarded a yard day to a fireman not used because a ground crew member allegedly assumed a position on the seat box on the fireman's side of a locomotive to pass signals to an engineer. The BLF&E argued that this constituted an invasion of the fireman's right to perform the service. The referee found a violation because, "the passing of signals from the seat box of the locomotive is one of the few remaining duties reserved to the fireman," and under the facts involved, the claim was proper. However, in a later Interpretation to the Award, the SBA changed the effect of the Award by indicating that the finding was based on a failure of the Carrier to adduce evidence in its favor. After quoting Question and Answer No. 32, the Interpretion held:

> The disposition of the claim therefore turned upon a question of the proof of whether, on this Carrier, "other yard service employees formerly shared signal passing and lookout functions in the cab with firemen-helpers". The question was just that narrowly drawn, for this Special Board No. 692 has no authority to quarrel with or depart from the interpretative [*sic*] holdings of Arbitration Board No. 282 in its original jurisdiction.
>
> *The testimony and evidence at the hearing established the custom, tradition and practice as having been that other crew employees had shared these functions in the cab, with firemen-helpers so that, in practice, there was no reserved special character in such functions wholly exclusive to firemen-helpers.* However, there was also here in evidence the fact, *without rebuttal and without probative evidence of it being custom,* that Engine Foreman Phillips of this particular Job No. 16 did on this claim date order and instruct Switchman Ertsgaard to ride in the cab and on the fireman's seat box for the sole purpose of receiving and transmitting signals from his engine foreman and other crew members and that he did this and nothing else for two hours.[110]

Conversely, *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co. (Texas & Louisiana Lines)*[111] found that merely showing that an engineer rode on the left side of the engine does not prove that he was performing duties which belonged exclusively to firemen. It is not clear whether this engineer was operating an engine with dual controls, whether he was sitting on the left side to receive signals or whether this was an engineer in addition to the one operating the engine. *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co. (Texas & Louisiana Lines),*[112] after quoting Question and Answer No. 32, found that a fireman was entitled to pay for a day at yardmen's rate when it held:

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109 Award #6 of SBA #692, Sustained (Gallagher, Referee).
110 *Id.* (emphasis added).
111 Award #435 of SBA #88, Denied (Moore, Referee).
112 Award #436 of SBA #88, Sustained (Moore, Referee).

> The evidence herein is insufficient to determine past practice on this property with regard to other employees sharing lookout and signal passing duties in the cab with or without firemen-helpers. However, we find that when a yardman is *directed by the Carrier to sit in the seat opposite the engineer and perform this type of work for a substantial part of three hours*, that the yardman is performing work formerly done by firemen prior to Arbitration Award 282.[113]

This Award, when read together with the Portland Terminal Award and Interpretation, seems to set a standard for determining when such claims will be allowed. Three elements, if present, may result in a sustaining award: (1) *insufficient proof* by a carrier of an *established practice* of employees other than firemen having performed the fireman's lookout and signal passing duties, (2) *specific orders* from a carrier directing an employee other than a fireman to *occupy the fireman's seat* and *perform these duties*, and (3) the actual performing of these duties in a continuous manner by such an employee for *a substantial period of time.*

The gist of these elements, drawn from the two awards, was approved in *Brotherhood of Locomotive Firemen and Enginemen v. Southern Pacific Co. (Texas & Lousiana Lines).*[114] That award denied runaround claims of firemen when a head brakeman performed lookout and signal passing on road freight runs, by finding a proven past practice, holding:

> In interpretating [*sic*] this Award [Arbitration Board 282], we find that a switchman or yardman may, in the course of his duties, sit in the seat opposite the engineer and perform lookout and signal passing for a short period of time. However, if he does so for a substantial period of time the agreement is violated, unless the practice on the property shows that they formally [*sic*] shared signal passing and lookout functions in the cab with firemen-helpers.
>
> In Award No. 6 SBA 692 which was [*sic*] held that two (2) hours was a substantial period of time and in Award No. 436 SBA 88 it was held that a sufficient part of three (3) hours was sufficient time to constitute the substitution of a yardman and a fireman.
>
> In this dispute herein, there is no allegation to [*sic*] the period of time involved. Furthermore, we find from the record that it has been the past practice on the property for head brakemen to also perform lookout and signal passing duties. For the above reasons the Claim cannot be sustained.[115]

It should not be forgotten that there are other grounds under which runaround claims of firemen may be sustained. Two claims were sustained because of yard engines being operated without effective deadman controls.[116]

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113 *Id.* (emphasis added).

114 Award #441 of SBA #88, Denied (Moore, Referee).

115 *Id.* (emphasis added).

116 Awards #447-48 of SBA #88, Sustained (Moore, Referee). *See also* Bhd. of Loco. Firemen & Enginemen v. Bangor & A. R.R., — F.2d —, 70 L.R.R.M. 2797 (D.C. Cir., Nos. 20909-10, Feb. 28, 1969) (per curiam) which held that carriers may abolish firemen's jobs on yard diesels where deadman controls were installed prior to the date of abolition but after the expiration date of the 1963 Award. *Cf.* Bhd. of Loco. Firemen & Enginemen v. Bangor & A. R.R., —F.2d —, 70 L.R.R.M. 2796 (D.C.

One of these opinions gratuitously observed that the sharing of lookout and signal-passing functions was not sufficiently shown.[117]

CONCLUSION

The advent of the diesel was a technological advance whose impact on the craft of railroad firemen was massive and may not yet be complete. The technological nature of the diesel made it impossible for the firemen to turn to make-work rules which would have paralleled their obsolete primary function of fueling in the way that typesetters make up bogus type.[118] Moreover, due to the new nature of diesels, when introduced, it was not possible to justify the continuance of the firemen's craft by having them watch, or oversee, the diesel. This was especially due to the complexity of the new engine which required for its repair and maintenance a technical knowledge beyond that of almost all firemen. Accordingly, in defending the firemen's craft rights, the BLF&E turned to the secondary functions of keeping lookout and passing and calling signals.

The full-crew laws provided a ready target for the carriers which they attacked with vigor. However, the carriers' attacks on the craft were most effective when the arbitration processes of the NRAB were used. The awards of the NRAB began a process of erosion of the remaining functions which the firemen regarded as their craft rights by decisions which removed the exclusivity of the firemen's claim to the right to perform those functions.

These awards, when coupled with the repeated recommendations of national emergency boards adverse to the firemen's claims, spurred the carriers to try the bargaining impasse which brought about the 1963 special compulsory arbitration law. The BLF&E side of the impasse was due to the same causes for, while the carriers recognized an opportunity to all but do away with firemen, the BLF&E realized the probable bleak future and possible end of the craft. Due to this background, it is apparent that the Award of Arbitration Board No. 282 was not a major departure. Rather, it was the virtually inevitable confirmation of a decisional trend in the arbitral process of the Railway Labor Act.

The previously untried compulsory arbitration solution to this craft definition dispute was dreaded by many who feared its impact on the collective bargaining process. Whether or not they were right is yet in doubt as the underlying dispute is still not at an end. Neither the courts nor the Award have provided a complete end to the dispute.

Cir., Nos. 20472-73 and 20647, Feb. 28, 1969) (per curiam), *cert. denied*, 38 U.S.L.W. 3129 (U.S. Oct. 13, 1969), on a similar issue involving the Award's expiration date and the abolition of unprotected firemen's jobs.

117 Award #447 of SBA #88, Sustained (Moore, Referee).

118 The bogus type procedure requires that typesetters manually set type which is simultaneously set by machine. The machine-produced type is used for printing, while the bogus type is disassembled and returned unused to the type bins.

Subsequent to the expiration of the Award, the BLF&E and other operating unions regained some ground with strike threats and actual strikes against selected carriers.[119] With the expiration of the current no-strike pledges and a new round of bargaining starting next year, it is entirely possible that the events which were prelude to the 1963 Award may be repeated. Conversely, it may be hoped that the parties will examine other settlement possibilities including, but not limited to, the institution of retraining programs or better settlements on job transfers and attrition payments as done by the longshoremen's unions,[120] the Kaiser Steel plan,[121] and the Armour Automation Committee.[122] A broader view should be taken by the parties as future problems in craft definition and technological change will probably not be limited to firemen.

The last few years have seen even more technological advances in the railroad industry. One of these, the development of the fully automated diesel holds the seeds of a re-enactment of the firemen's dispute, with the engineers being the craft seeking to protect its rights.[123] Just as with the firemen, the loss of the engineer's primary function would leave him only with secondary func-

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119 Levine, *The Railroad Crew Size Controversy Revisited*, 20 LAB. L.J. 373 (1969); Lewin, *Rail union's crew-size fight nearly settled*, Chicago Daily News, June 2, 1969, at 14, col. 7; Frailey, *U.S. Panel To Issue Belt Ry. Report Friday*, Chicago Sun-Times, Dec. 12, 1968, at 28, col. 1. However, the firemen's gains have so far been small compared with their losses and with gains made by the BRT. While Levine is correct in observing that this may change with new bargaining in 1970 and with the merger of the four unions into the United Transportation Union, there are errors in his analysis, e.g., the size of the NRAB, and it is unabashedly biased being based largely on a newspaper article, Fandell, *Railroad Labor Battle Seemingly Ended in 1963 Flares Up Once More*, The Wall Street Journal, Oct. 3, 1968, at 1, col. 1 and on publications of the National Railway Labor Conference, the management and information coordinating agency set up by the carriers.

120 *See* Killingsworth, *Collective-Bargaining Approaches to Employee Displacement Problems (Outside the Railroad Industry)* in REPORT OF THE PRESIDENTIAL RAILROAD COMMISSION, APPENDIX VOL. IV, 193, 204-06 (1962).

121 *Id.* at 214-15.

122 *Id.* at 208-10.

123 Another function which the BLF&E had traditionally guarded as a craft right was the training of apprentice engineers. Until the Award and its effect on firemen's jobs, engineers were usually promoted from the ranks of firemen. Now the BLE and the BLF&E are engaged in an inter-union dispute as to which union has the right to represent apprentice engineers. Each union issued notices to various carriers to bargain over the issue. Some carriers reached agreements under which the BLE was recognized as the bargaining representative for the apprentices. The BLF&E sought injunctions against implementation of the agreements. In Bhd. of Loco. Firemen & Enginemen v. Louisville & N. R.R., 400 F.2d 572 (6th Cir. 1968), *cert. denied*, 393 U.S. 1050 (1969), the dismissal below for want of jurisdiction was affirmed on the ground that the case involved a jurisdictional dispute over which only the National Mediation Board could have jurisdiction; if, indeed, any governmental forum had jurisdiction. Similarly, in Bhd. of Loco. Firemen & Enginemen v. National Med'n Bd., and National Med'n Bd. v. Bhd. of Loco. Engineers, 410 F.2d 1025 (D.C. Cir. 1969), *cert. denied*, 38 U.S.L.W. 3141 (U.S. Oct. 20, 1969), a BLE request to enjoin the BLF&E from bargaining and striking over the issue was denied. The court held that because the BLF&E had historically represented persons training to be engineers and part of a fireman's job expectation was eventual promotion to engineer, the BLF&E had a right to bargain over the issue. It further held that the National Mediation Board was correct in its determination that it could not take jurisdiction over the dispute until the nature of the apprenticeship program sought by the BLF&E was made clear. The potentiality for peaceful resolution of the dispute seems small, especially since the BLF&E's merger with the other three operating unions into the UTU did not include the BLE.

tions which, insofar as they are identical to those of the firemen, have already been determined not to be exclusive craft rights. While the development of this potential dispute need not follow the same lines as that of the firemen, in the absence of new approaches by the BLE, the past may well be prelude. Similar disputes may arise from further technological changes affecting car classification yards, high speed trains, automatic track controls and computerized operations. As these technological changes are implemented, the arbitration process again will have to analyze craft definitions to decide claims arising out of these changes.

SURVEY OF IOWA LAW

The SURVEY SECTION is a new feature of the Drake Law Review, formulated primarily for the convenience of the Iowa practitioner. It is the intention of the law review staff to provide in this section a summary of the important cases and developments within various fields of the law which have taken place approximately twelve months prior to the publication of the Review.

The reader should not construe the Survey as an attempt at exhaustive coverage of the general area treated, but rather, as a comment upon a topic encompassing materials which the author feels merit emphasis and clarification.—Ed.

DOMESTIC RELATIONS

Kamilla Mazanec†

CHILD CUSTODY

Much of the Iowa supreme court's activity in the family law area was concentrated on child custody determinations. Except in one case, the court required a showing of a change in circumstances, plus a showing that the child's welfare would be best served by the change.

In *Wells v. Wells*,[1] the parties had stipulated that "[t]he matter of custody of the children . . . may be reviewed at the request of either party, . . . and without the burden on either party of having to show change in circumstances."[2] Divided custody was decreed under both the original decree (the father had custody for nine months; the mother, for the three month vacation period) and under the subsequent decree being appealed (the mother granted sole custody of two sons; the father, sole custody of the third son). The court strongly opposed continuing the extended visitation rights, as in the original decree, and separating the three children, as in the subsequent decree. Therefore, the court awarded the custody of all three boys to the mother. Without the stipulation in the divorce action that custody could be reviewed without a showing of change in circumstances, it is doubtful that the court's opposition to divided custody alone would have justified a change in custody.[3]

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1 168 N.W.2d 54 (Iowa 1969).

2 *Id.* at 56. Contrast the less strongly worded decree in Betzel v. Betzel, 163 N.W.2d 551, 553 (Iowa 1969): "[T]he question of custody [will] come on for review after the expiration of one year from the date hereof upon the application of the [mother], at which time the Court will consider whether the mental and physical condition of [mother] has improved, and at which time the Court will make such order as to custody as the circumstances shall warrant."

3 *See* Ladd v. Ladd, 188 Iowa 351, 176 N.W. 211 (1920) where the court modified