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Records No. 4908, 4909

In the Supreme Court of Appeals of Virginia at Richmond

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL. v. (Record No. 4908) D. L. FOLKES, ET AL.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY v. (Record No. 4909) D. L. FOLKES, ET AL.

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND, PART II

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held.

JAN 59

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4908

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of June, 1958.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., Appellants,

against

D. L. FOLKES, ET AL., Appellees.

From the Hustings Court of the City of Richmond, Part II

Upon the petition of Brotherhood of Locomotive Engineers and L. E. Timberlake an appeal is awarded them from a decree entered by the Hustings Court of the City of Richmond, Part II, on the 3rd day of December, 1957, in a certain proceeding then therein depending wherein D. L. Folkes and others were plaintiffs and Brotherhood of Locomotive Engineers, etc., et al., were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said Hustings Court in the penalty of three hundred dollars, with condition as the law directs.

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 4909

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of June, 1958.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, Appellant,

against

D. L. FOLKES, ET AL., Appellees.

From the Hustings Court of the City of Richmond, Part II

Upon the petition of Richmond, Fredericksburg and Potomac Railroad Company, a corporation, an appeal is awarded it from a decree entered by the Hustings Court of the City of Richmond, Part II, on the 3rd day of December, 1957, in a certain proceeding then therein depending wherein D. L. Folkes, and others were plaintiffs and Brotherhood of Locomotive Engineers, etc., et al., were defendants; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Hustings Court in the penalty of three hundred dollars, with condition as the law directs.

* * * * *

RECORD

ANSWER OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND L. E. TIMBERLAKE

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* * * * *

6. Your defendants admit the allegation of Sub-paragraph 5 of Paragraph 2 of the Bill that said Resolution No. 42 is now, and has remained, in full force and effect
page 22 } continuously since the date of its adoption (on June 25, 1956, however, instead of August as alleged), but defendants aver that the obtaining of a supplemental pension with compulsory retirement was solely a policy for negotiation and not a mandatory requirement.

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Filed by Order December 3, 1957.

Teste:

CHAS. R. PURDY, Clerk
By LOUISE C. FIELD, D. C.

OPINION.

Doubles, J. This is a suit in equity brought by several engineers of the Richmond, Fredericksburg & Potomac Railroad Company (hereinafter referred to as the "Railroad") to enjoin the enforcement of a collective bargaining agreement entered into March 7, 1957, between the defendant "Railroad" and the defendant Brotherhood of Locomotive Engineers (hereinafter referred to as the "Brotherhood") relating to compulsory retirement of engineers upon reaching the age of 70 years.

THE 1956 "BROTHERHOOD" CONVENTION.

At the Thirteenth Triennial Convention of the Grand International Brotherhood of Locomotive Engineers held in

Cleveland Ohio, June 11—July 17, 1956, the Proceedings of the Convention show that the question of adoption of a rule relating to the policy of the Brotherhood on the topic of retirement of engineers was before the convention on several occasions.

At least two proposed amendments of the Standing Rules (By-laws) were introduced and referred to the Committee on Constitution and By-laws, whose report thereon and the ensuing debate is found on pp. 784-792 of the Proceedings.

page 33 } One proposed resolution from Division 304 read as follows: "That retirement of Engineers not be made compulsory at any age, but that it be voluntary retirement on the part of the individual." The Committee recommended the rejection of this proposed resolution, and it appears that the reason for the recommendation to reject was because the proposal was not germane to Section 52a (now Section 50a) of the Standing Rules which it purported to amend.

The other proposed resolution was from Division 12, which purported to amend Section 52 (now Section 50) of the Standing Rules by adding a new paragraph (d) providing for compulsory retirement at age 65. The Committee recommended the rejection of this proposed amendment. The reason assigned by delegate Coughlin, a member of the Committee, was:

"My Brothers, it was our thought that you boys here did not wish to set a limit on the ages for terminating a man's seniority * * * Therefore, my Brothers, we recommend the rejection of this resolution, with the understanding that if you boys want to put a limitation on your employment it is perfectly all right with us."

In the course of debate on the matter twelve (12) delegates spoke in support of the Committee's recommendation to reject the amendment; one (1), the sponsor, delegate Cox of Division 12, spoke apologetically in favor of it; that "if you wish to turn it down there will be no objection from me. I am doing a job that I was told to do. I am the delegate from Division 12. I presented my case as I was instructed by my Division." The convention adopted the recommendation of the Committee and rejected the proposed amendment.

Three days later the matter came up again on the floor of the convention upon a motion to reconsider. (See Proceedings, pp. 841, 854). During the debates upon this motion, the moderator, Grand Chief Engineer Brown, who is the

supreme executive officer of the Brotherhood ruled as follows:

page 34 } "There is one other thing I wish to point out; that as the sense of this body now stands, the Grand Chief Engineer has declared it to be the policy not to approve any compulsory retirement which would provide for retirement at an age below 70. Unless you change it, that will be the policy for at least the next three years."

"I mention that merely as a fact, that that matter is taken care of insofar as the compulsory retirement is concerned. The Courts have decided that that is a matter that comes within the purview of the General Committee, but in view of the action taken at the last convention, I declined to go along with any agreement, any compulsory agreement at an age below 70, and I stated that unless you change it, that will be the policy for the next three years."

And again:

"* * * the Grand Office will not permit any General Committee to make an agreement with compulsory retirement below 70 unless you Brothers change it."

After further debate the motion to reconsider was lost.

Still later the same day (see Proceedings pp. 882-883) there was proposed from the floor of the convention Resolution No. 42, in the following language:

"Before any compulsory retirement agreement is made on any system or road, the General Committee of Adjustment will be required to take a referendum vote of the membership (as defined in Section 29(a) Statutes) on the road or system; and should the referendum vote be in the affirmative by a majority an agreement must be reached with the carrier, that the carrier will provide for a non-cancellable supplemental pension before the mandate of the referendum vote can be made effective. *Section 37(b) of the Statutes is so modified hereby.*" (Italics supplied.)

The moderator ruled this out of order because it purported to amend Section 37(b) of the Statutes without having been first submitted to the Committee on the Constitution and By-laws. The proposer of the resolution then deleted the reference to Section 37(b) of the Statutes, and Grand Chief Engineer Brown then entertained the resolution "as a

declaration of policy of the organization." There was no debate and the resolution was adopted.

The above adopted Resolution No. 42 therefore, it would appear, became the policy of the Brotherhood in place of or supplemental to the policy adopted at the convention held three years before.

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FACTS LEADING TO R. F. & P. CONTRACT.

At a meeting of the local union of engineers of the defendant "Railroad" (known as Division 561) held November 7, 1956, the following proceedings occurred:

"Resolution submitted to Division by Bro. J. C. Cross, second by Bro. E. M. Quann whereas the railroad retirement law provides for the payment of a pension at the age of fifty-five years:

"Whereas, many railroads and their employees have agreed that all employees must retire at the age of seventy years:

"Therefore, be it resolved that the matter of compelling all enginemen employed by the Richmond, Fredericksburg and Potomac Railroad to retire at the age of 70 years, be submitted to a referendum vote of such employees, that the ballots for said referendum vote be mailed to such employees at the very earliest date and not later than December 1, 1956, and if such vote is in favor of compulsory retirement at 70 years of age, the Committee is therefore instructed and authorized to negotiate a rule with the management of the Railroad requiring all enginemen to retire at age 70 if such employees do not retire before reaching that age.

"Motion carried—8 for 6 against.

"Amendment submitted by F. J. Jett—second by P. E. Tyler that the carrier will provide for a non-cancellable supplemental pension before the mandate of the referendum vote can be made effective. Amendment defeated."

Testimony at the trial indicated that whereas the voting membership of Division 561 is in excess of 125, the small attendance at the regular monthly meetings is due to the fact that some of the engineers are on duty at the time, others are just off of runs, and the homes of the members range from Richmond to Alexandria.

On November 17, 1957, Mr. L. E. Timberlake, General Chairman of the local union's bargaining committee known

in the "Brotherhood" as the General Committee of Adjustment, wrote to Grand Chief Engineer Brown (see Exhibit 2) advising him of the action taken at the November
page 36 } 7, 1957, meeting and making the following inquiry:

"Would it be satisfactory to circulate a referendum ballot as called for in the Resolution, and insert a copy of Resolution 42 of the Thirteenth Triennial Convention?"

Grand Chief Engineer Brown replied under date of November 26, 1957 (see Exhibit 3), the following extracts from his letter being pertinent here:

"You ask if it would be advisable to furnish a copy of Resolution 42 with the referendum ballot for the guidance of the membership. I will advise that this procedure would be in order."

"Dealing with the governing features of Resolution 42, I wish to direct attention to all concerned that the resolution, not having been incorporated in the Constitution and By-Laws as a governing law, merely establishes a policy to govern General Committees of Adjustment in negotiating compulsory retirement agreements. Realizing the fact that subjects of a negotiable nature are subject to change and modification during the procedure of negotiation, the policy set forth in this resolution would be governing as follows: The General Committee is required to take a referendum vote of the system membership and must, if a majority of the members favor the agreement, make formal request and persuasive argument for a non-cancellable pension plan.

"In the event that the committee is unsuccessful in obtaining the non-cancellable feature, then, of course, it is in a position to modify the request by adopting the best plan possible."

Ballots (see Exhibit No. 4) were mailed out, but were unaccompanied by any material referring to Resolution 42. After the January 1, 1957, deadline for return of the ballots, they were counted with the following results: For the resolution, 64; Against the resolution, 60; Disqualified, 2; Ballots unreturned, 16.

A bargaining conference was held in mid-January between representatives of the union and the railroad, the result of which was that the "Railroad" refused to agree to provide supplemental pensions for retired engineers, but expressed its willingness to enter into an appropriate agreement for compulsory retirement at age 70 without supplemental pen-

sion benefits. (See R. F. & P. Ex. I)

page 37 } After several exchanges of letters between Mr. Timberlake and Grand Chief Engineer Brown in later January and early February (see Exhibits 6, 7, 8 and 9) the Grand Chief Engineer, on February 14, 1957, wrote to Timberlake as follows:

"In reply I will advise that Resolution 42 of the G. I. D., like Section 38 of the Standing Rules, Constitution and By-Laws, is a matter of policy rather than law as both deal with subjects of negotiable nature and must be flexible to permit a G. C. A. to consummate the best agreement possible with its management.

"Of course, it is mandatory under the law, specifically Resolution 42, that the G. C. A. vote the system membership without deviation. I would understand that this procedure has prevailed on your property and that the only question remaining is whether you are in a position to negotiate the compulsory retirement agreement, excluding the supplemental pension plan in conformance with the requirements of G I. D. law and policy.

"You will understand that every effort must be made to establish the pension plan, even through the assignment of a Grand Officer. Should all efforts fail, then, of course, your committee may, if it so desires, negotiate the 70 year compulsory retirement agreement."

On February 13, 1957, another bargaining conference was arranged between the union and the railroad with the Assistant Grand Chief Engineer of the Brotherhood in attendance, but with the same result as before.

Thereafter, on March 5, 1957, a contract was entered into between the defendant "Brotherhood" and the defendant "Railroad" providing for compulsory retirement of engineers at age 70, the same to become effective September 1, 1957. (See Exhibit E).

A report of the foregoing was made by Timberlake to the regular monthly meeting of the Division held March 6, 1957, and the contract was approved.

page 38 } THE ISSUE.

As stated at the outset, this is a suit by several engineers against the "Brotherhood" and the "Railroad" to enjoin the enforcement of the above contract.

The narrow issue presented by the pleadings is: Did the General Committee of Adjustment of Division 561 have

authority under the "Brotherhood" rules and discipline to negotiate the contract in light of Resolution 42?

It may be observed that neither defendant has relied on the possible defense that General Committee of Adjustment, as the duly constituted bargaining agent of the local union membership, has the unqualified authority to make contracts—but all parties have submitted the case on the basis of whether the local "Brotherhood" has been duly authorized under Grand Brotherhood procedure to make the contract in question.

QUESTIONS TO BE DETERMINED.

It is apparent that the contract in question is in violation of Resolution 42 of the Convention which invalidates the vote of the membership unless compulsory retirement is accompanied by a supplemental pension agreement. To validate the contract, it is necessary, therefore, to ascertain whether the condition precedent of a supplemental pension agreement was effectively waived.

Two questions arise here: First, who, if anyone, has authority under the "Brotherhood" laws to authorize such a waiver; and Second, was any such authority effectively exercised in the present case.

THE BROTHERHOOD LAWS.

In order to answer the foregoing questions it becomes necessary to examine several of the sections of the
page 39 } Constitution and By-Laws of the "Brotherhood."

The national body of the "Brotherhood is known as the Grand International Division, and is referred to as the "G. I. D." The local unions are known as divisions and each is given a charter and assigned a number. The bargaining agency of the local division is known as its General Committee on Adjustment.

The Constitution of the "Brotherhood" provides as follows:

"Sec. 2. (a) In Convention assembled, the supreme governing body of the G. I. D. of the B. L. E. shall be composed of the Grand Chief Engineer, First Assistant Grand Chief Engineer, sixteen other Assistant Grand Chief Engineers, two of whom the Convention shall have elected as National Legislative Representatives, one to be located in Washington, D. C. and one to be located at Ottawa, Ontario, Canada, General Secretary-Treasurer, Editor and Manager

of the Journal, Grand Guide, Grand Chaplain, and the number of delegates required by law, as set forth in Section 21, Constitution—representation of Divisions to G. I. D.

"Sec. 2. (b) The Executive authority of the Grand International Division of the Brotherhood of Locomotive Engineers will be vested in the duly elected Grand Officers constituting the Advisory Board and the duly elected and qualified delegates when in convention assembled.

"Sec. 3. (a) The G. I. D. shall have exclusive jurisdiction over all subjects pertaining to the Brotherhood, and its enactments and decisions upon all questions shall be the supreme law of the Brotherhood and all Divisions, and members of the Organization shall render true obedience thereto."

Respecting the "Duties of the Grand Chief Engineer, the following sections are pertinent:

"Sec. 7 (a) * * * Between Triennial Conventions of the G. I. D., the Grand Chief Engineer shall be recognized as the G. I. D. and have authority to make any decision and perform any act or duty on behalf of the G. I. D. and such decision or act will stand as law for all Divisions and Members unless repealed by the G. I. D. in Convention assembled or in accordance with the provisions of Section 4, Constitution.

"(b) He shall interpret the law of the G. I. D. according to its plain and obvious meaning * * *."

Respecting the authority of a General Committee of Adjustment the following section of the Standing Rules is pertinent:

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"Sec. 45(c) All General Committees of Adjustment are prohibited from making agreements with the railroad managements, the terms of which will conflict with any law or policy adopted by the G. I. D., without first submitting same by the Grand Chief Engineer, who, in conjunction with the Advisory Board will determine proper disposition of the question at issue. * * *"

Bearing in mind that the present case is submitted to the Court as a dispute between certain members of a labor organization against the organization for a ruling upon a controversy involving an interpretation of action by the organization to the alleged detriment of the member, the following general statement of law is appropriate.

"Trade union constitutions should be read in their living

context. The interpretation of construction of the constitution and laws of a union is for the union, through its appropriate board or officers; and courts will accept such interpretation, as long as there is no claim of fraud, and as long as the officer or body on which this power of interpretation has been conferred does not substitute legislation or amendment for construction, does not transgress the bounds of reason, common sense, or fairness, or act arbitrarily, or contravene public policy or the law of the land, or does not trespass on, or destroy the property or contractual rights of, the members. Where the language of a rule is clear, no official may nullify it under the guise of interpretation. A construction by the tribunals of a union of the constitution and bylaws of a trade union which does not go to any of the fundamental rights of member is conclusive. The courts will not undertake to interpret such laws, even though there has been a disagreement among the officers of the union with respect to any particular provision.

"While the courts may decline to pass on the reasonableness of a bylaw to which a member has subscribed by becoming a member, the legality thereof under the law of the land and principles of public policy falls within the province of the courts. So, it has been held that questions concerning the reasonableness and validity of rules when adopted are a constant function of all courts. As between the union and a member, it must be presumed that the parties intended the contract to be reasonably construed. It is not to page 41 } be assumed that one section of a union's constitution was intended to contradict the terms of another, and the various sections should be construed in harmony with one another, if that can be done reasonably, in order to avoid repugnancy between the several sections. The rule, *Expressio unius, exclusio alterius,* as applied to the construction of the constitution of a trade union, must be subordinated to the primary rule that the intent shall prevail over the letter; and a provision of a constitution will not be construed as if it contained an added phrase, where such addition would destroy the apparent purpose. Any uncertainty in construing a bylaw must be considered in the light of the intention of the parties, and that intention must be determined from a consideration of the language employed and the subject matter of the bylaws. * * *" (87 C. J. S. pp. 776, 777, "Trade Unions," Sect. 13)

See also an annotation appearing at 142 A. L. R. 1050.

Section 7(a) of the Constitution.

Sec. 7(a) of the Constitution of the Brotherhood unquestionably reposes tremendous power into the hands of the Grand Chief Engineer during the interim between the triennial conventions. Indeed, it states that he "shall be recognized as the G. I. D." and shall "have authority to make any decision and perform any act or duty on behalf of the G. I. D." Taken literally he can legislate, adjudicate and administer concerning the Brotherhood to the same extent as the Convention; he can under such an interpretation, repeal and amend sections of the Constitution and Bylaws; he can ignore policies adopted as resolutions of the Convention; he is a czar and is clothed with the power of a dictator. He is granted leave, if he were so inclined by exercise of this power, to destroy property rights of members; to appropriate the finances of the organization to whatever purposes he desired. The present incumbent of the office of Grand Chief Engineer, the witness Brown, impressed the Court favorably as a man of candor, integrity and fairmindedness. But we are not at the moment discussing his attributes, but rather the authority vested in his office.

page 42 } It is not contended by counsel for the "Brotherhood" that all of the foregoing powers are placed in the hands of the Grand Chief Engineer; indeed, it is denied. But it is claimed that the power to disregard or waive a portion of a resolution affecting the right of a certain group of members to work, may be waived by him.

Will the courts give Sec. 7(a) the literal interpretation outlined above? The answer is—No!, and for several reasons. Despite the fact that a legislative body elected by and purportedly representing the rank and file of the union membership enacted the section, it would be contrary to public policy to give it any such wholesale interpretation. Railroad engineers have commanded the envy of the youth and the admiration and respect of the adult for decade upon decade in this country. Thousands of Americans daily trust their lives into the hands of this great body of men. They constitute an important integral segment of our society and public policy demands that no court sanction a literal interpretation of the aforementioned Sec. 7(a).

What interpretation is to be given it? The answer is, as liberal a construction as is possible consistent with reason, common sense, public policy and the rights of individual members of the Brotherhood vitally affected thereby. Under such a test is the Grand Chief Engineer empowered under Sec. 7(a) to waive action of the Convention adopting a

policy respecting the conditions upon which a compulsory retirement contract may be negotiated?

With respect to action by the previous Triennial Convention relative to compulsory retirement, the Grand Chief Engineer, as we have observed earlier herein, made it emphatic that he had in the past and intended in the future to continue it as the policy of the Brotherhood in his instructions to local General Committees of Adjustment unless the policy be changed by the Thirteenth Triennial Convention. The Convention by its adoption of Resolutions 42 clearly adopted a different policy, and except for the reason that a person in the position of the Grand Chief Engineer might for good reasons, disagree with the content of the said Resolution, there appears to be no other reason why he should not take the same attitude toward enforcing it as the policy of the Brotherhood as he had taken with respect to the policy adopted by the previous Triennial Convention. But however that may be, the Court is of opinion that where a national legislative assembly adopts a resolution of policy respecting so important a feature as that of compulsory retirement of its members, then it would be an unreasonable exercise of the power vested in the Grand-Chief Engineer to nullify the resolution by waiving any of its essential provisions. Resolution 42 is clear and unambiguous and there is left in it no room for interpretation, and the Court is of opinion that the Grand Chief Engineer has no authority under Sec. 7(a) and 7(b) of the Constitution of the Brotherhood to waive its provisions.

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Undoubtedly authority to act for and on behalf of the national Brotherhood must be vested somewhere for the interim between triennial conventions. And if it be the will of the convention to vest it in a single person, that is no affair of the courts. Nor would it be a matter of legal cognizance if the Grand Chief Engineer for good reason took actions contrary to that adopted by the convention on many of the numerous matters which come across his desk. But where the subject matter is as important as the one involved in this litigation, then the dictates of reason demand that a line be drawn. Seniority rights and the right under present contracts to work under those rights are hard earned and are protected by the courts, and in no field of labor are they more jealously held than in the railroad industry. Chief Engineer Brown in his testimony stated the various reasons which prompted him to waive the requirement of supplemental pension in the present case if it could not be gotten. The reasons were cogent—fewer train runs, younger men seeking advancement in seniority,

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etc.,—but these are factors well known to the Convention which only six months before had adopted Resolution 42, and no exigency existed which would warrant action by the Grand Chief Engineer in nullifying the action taken by the Convention. The fact that this Court would agree with Chief Engineer Brown that engineers should retire at an age not over 70, not only for the reasons assigned by him for his action, but also in the interests of public safety, is immaterial.

Section 45(c) of the Standing Rules.

(1) As observed earlier Sec. 45(c) of the Standing Rules of the Brotherhood (a portion of its by-laws) prohibits a General Committee of Adjustment from negotiating a contract the terms of which are in conflict with any law or policy adopted by the Grand International Division "without first submitting the same to the Grand Chief Engineer, who, in conjunction with the Advisory Board, will determine proper disposition of the question at issue."

Here is implied authority in the specific field of contract negotiating for a waiver of policies adopted by the G. I. D. While the section does not specifically grant authority to either the Grand Chief Engineer or the Advisory Board to authorize action contrary to a law or policy of the G. I. D., nevertheless some meaning must be given to the section. The Grand Chief Engineer in conjunction with the Advisory Board is authorized to "determine *proper* disposition" of any such issue presented to them.

What does "proper" disposition mean? Again the Court is faced with a question similar to that presented by Section 7(a) of the Constitution, only here the issue is not as strong because the authorization to override action of the G. I. D. is by implication only.

page 45 } The Court is of opinion therefore that "proper" disposition of a question contemplates a situation in which the subject matter is not of great deviation from the law or policy of the Brotherhood. For example—under the policy adopted by the Twelfth Triennial Convention apparently a floor of age 70 was put on compulsory retirement. Due to circumstances existing on a particular railroad it may be that a contract for retirement at age 69 could be satisfactorily negotiated, but not one for age 70. It would appear "proper" for the Grand Chief Engineer in conjunction with the Advisory Board to have made an exception in such a case. Numerous other examples might be cited where the exigencies of a particular situation would make it "proper" for an exception to be made.

In the present case no such exigencies existed. The circumstances were the same at the time the Grand Chief Engineer made the exception as existed at the time of the Convention. The only new factor was that the railroad would not agree to a supplemental pension, and that factor had been anticipated in the Resolution itself.

For the reasons heretofore given under discussion of Section 7(a) of the Constitution, "proper" disposition of the question here would not include a waiver of so important an issue.

(2) Furthermore, even if it be assumed that the subject matter here involved could be waived under Section 45(c) of the Standing Rules, it must be done by the Grand Chief Engineer "*in conjunction* with the Advisory Board." The evidence in the present case fails to show that the Grand Chief Engineer acted "in conjunction with" the Advisory Board.

What does "in conjunction with" mean? In another connection the Grand Chief Engineer threw some light on his interpretation of the phrase at the Thirteenth Triennial Convention. He had submitted to the Committee on Constitution and Bylaws an amendment to Sec. 6 (now Sec. 7) of the Constitution, in fact the preliminary draft of what ultimately became the paragraph in Sec. 7(a) previously discussed herein. The Grand Chief's preliminary proposed draft read: "Between quadrennial conventions of the G. I. D. the Grand Chief Engineer shall be recognized as the G. I. D. and have authority, *in conjunction with the Advisory Board,* to make any decision and perform any act or duty on behalf of the G. I. D. * * *.) (Italics supplied.) See Proceedings, Ex. 5, page 167. The Committee deleted the phrase "in conjunction with the Advisory Board," and in response to the question of a delegate as to why the phrase was deleted, Grand Chief Engineer Brown replied as follows:

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"May I answer that? The committee didn't feel that the Grand Chief Engineer was very consistent when he was recommending that the Call for the Convention should be left strictly in his hands, and at the same time, in this instance, he wanted to duck the responsibility of making these decisions, *and place it on the Advisory Board.* * * *" (Italics supplied)

A Committeeman also added:

"Now, as Brother Brown has already explained to you how

the Committee felt regarding the Advisory Board—all of us know that many times the Advisory Board is out on the various properties and individual decisions must be made immediately. There are times when it is somewhat inconvenient to convene all the members of the Advisory Board * * *."

It is apparent from the above that the Grand Chief Engineer and the reporting committeeman both interpreted the phrase "in conjunction with" to carry the regular dictionary meaning, viz. "1. Act of conjoining, or state of being conjoined; union; association; combination. 2. An instance of conjunction; union; association. 3. Occurrence together; concurrence, as of events." (Webster's Unabridged Dictionary, p. 565.)

The facts in the present case fail to show that the Grand Chief Engineer acted in conjunction with the Advisory Board. He just gave a ruling of his own contained in the letter to Timberlake, chairman of the General page 47 } Committee on Adjustment. This was of course without advice of or in concurrence with the Advisory Board.

In his testimony at the trial Grand Chief Engineer was not certain in his recollection of whether this matter was ever brought to the attention of the Advisory Board, much less whether it was acted upon. He testified that the procedure in such matters was that he would report to the monthly meetings of the Board any actions he had taken since the previous meeting and that if the Board disagreed with such action they would override him. He assumed that he made such a report to the December or January meeting of the Board. No copies of minutes of the meeting were introduced; no copies of any report made by Brown were introduced—indeed the witness testified that such matters would probably not appear in the minutes.

It is clear, therefore, that there has been no waiver of the terms of Resolution 42 under Section 45(c) of the Standing Rules of the Brotherhood by any action of the Grand Chief Engineer acting in conjunction with the Advisory Board.

CONCLUSION.

For the foregoing reasons the Court is of opinion that the General Committee on Adjustment of Division 561 had no authority under the procedures of the Brotherhood to negotiate the contract of March 7, 1957, with the Richmond, Fredericksburg and Potomac Railroad; that under the plead-

ings in this case the contract is invalid; and that the complainants herein are entitled to a permanent injunction restraining the enforcement thereof.

December 3, 1957.

page 48 } Virginia:

In the Hustings Court of the City of Richmond, part II, the 3rd day of December 1957.

* * * * *

The Court heretofore having heard this cause and having taken the same and the argument of counsel under advisement;

And the Court, for reasons appearing in a written opinion of the Court hereby filed as a part of the record, being of opinion that the complainant is entitled to the relief prayed for;

Therefore, the Court doth adjudge, order and decree as follows:

1. That the referendum and election held by Division No. 561 of the Brotherhood of Locomotive Engineers during December, 1957, authorized a compulsory retirement of its members upon reaching the age of 70 on condition that a collective bargaining agreement would be entered into with the defendant Richmond, Fredericksburg and Potomac Railroad providing for a supplemental pension; that the said referendum resulted in a valid election on the condition above stated; that when the General Committee of Adjustment of the said Division failed in its effort to obtain a supplemental pension for its said members upon retirement at age 70, the said General Committee of Adjustment had no authority under the Constitution, By-laws and discipline of the International Brotherhood of Railroad Engineers to negotiate the contract of March 7, 1957, providing for compulsory retirement of its members at age 70 without provision
page 49 } for supplemental pension, and that the said contract is unenforceable under the pleadings in this case.

2. Wherefore the Court doth permanently enjoin and restrain the defendants Richmond, Fredericksburg and Potomac Railroad and the Brotherhood of Railroad Engineers and the agents and employees of each defendant from enforcement of the contract entered into between them on

March 7, 1957, and the complainants are hereby restored to the status they and each of them occupied prior to the said contract of March 7, 1957.

To which foregoing action of the Court the defendants Richmond, Fredericksburg and Potomac Railroad, the Brotherhood of Railroad Engineers, and L. E. Timberlake, object and except by counsel.

And nothing further remaining to be done herein, this cause is stricken from the docket and placed among the ended causes of the Court, subject to appeal by any of the aggrieved parties herein.

Enter this Order.

M. R. D., Judge.

* * * * *

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Filed on the 31st day of January, 1958.

CHAS. R. PURDY, Clerk
By MARGERY A. TEAL, D. C.

NOTICE OF APPEAL AND ASSIGNMENT OF ERRORS.

To: Leith S. Bremner, Esquire
Attorney at Law
Mutual Building
Richmond, Virginia

William C. Parkinson, Esquire
Attorney at Law
Mutual Building
Richmond, Virginia

You are hereby notified of the intention of the defendants Brotherhood of Locomotive Engineers, L. E. Timberlake, and Richmond, Fredericksburg & Potomac Railroad Company in the above-styled case to apply to the Supreme Court of Appeals of Virginia, or one of the Justices thereof, for a writ of error from the final judgment entered by the Hustings Court, Part II, of the City of Richmond, on December 3, 1957, granting a permanent injunction in favor of the complainants.

The following are assigned as errors:

1. The trial court erred in failing to grant the motion of the defendants to strike the evidence at the conclusion of the complainants' case in that the complainants had failed to introduce any evidence to support injunctive or any other type of relief.

page 51 } 2. The trial court erred as a matter of law in ruling that as a matter of public policy Section 7(a) of the Constitution of the International Brotherhood of Locomotive Engineers would not be given its plain and literal meaning.

3. The trial court erred as a matter of law in ruling that the Grand Chief Engineer had no power to authorize a deviation from the terms of Resolution 42 of the Thirteenth Triennial Convention of the International Brotherhood of Locomotive Engineers and that Resolution 42 was binding on the Grand Chief Engineer in its requirement that a supplemental pension be obtained before a compulsory retirement agreement could be put into effect.

4. The trial court erred as a matter of law in substituting its interpretation of Section 45 (c) of the Standing Rules of the International Brotherhood of Locomotive Engineers, a private unincorporated association, for the interpretation of that section by the duly constituted officers of the Brotherhood.

5. The trial court erred as a matter of law in ruling that under the provisions of Section 45(c) of the Standing Rules, the Grand Chief Engineer, acting in conjunction with the Advisory Board, did not have the authority to waive the supplemental pension requirement of Resolution 42.

6. The trial court erred as a matter of law in ruling that the Grand Chief Engineer's waiver of the supplemental pension requirement of Resolution 42 was ineffective under the provisions of Section 45(c) of the Standing Rules of the International Brotherhood of Locomotive Engineers as to action in conjunction with the Advisory Board.

page 52 } 7. The trial court erred as a matter of law and fact in ruling that the Grand Chief Engineer had not acted in conjunction with the Advisory Board because of the evidence introduced to show the past practice of the Advisory Board.

8. The trial court erred as a matter of law and fact in granting a permanent injunction against the defendants to prevent them from putting a negotiated contract into effect on the ground that the Brotherhood of Locomotive Engineers had no authority to make such a contract when as a matter

of law the Brotherhood did have the power to make such a contract and as a matter of fact did conclude such a contract with the defendant railroad.

L. E. TIMBERLAKE
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
By PATRICK A. GIBSON

* * * * *

page 2 } Virginia:

In the Hustings Court of the City of Richmond, Part II.

D. L. Folkes, William F. Cannon and L. O. Holmes

v.

Brotherhood of Locomotive Engineers, L. E. Timberlake and Richmond, Fredericksburg and Potomac Railroad Company.

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page 3 }

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Mr. Parkinson: I wish to call Mr. Timberlake as an adverse witness.

The Court: All right.

L. E. TIMBERLAKE,
one of the defendants, called as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Parkinson:

Q. You are L. E. Timberlake, are you not?

A. Yes, sir.

Q. You are an engineer for the RF&P Railroad, are you not?

A. That is right.

L. E. Timberlake.

Q. On November 7, 1956 and thereafter you have been General Chairman of the Brotherhood of Locomotive Engineers? Is that not true?

A. That is true.

page 4 } Q. On November 7, 1956, Resolution No. 42 adopted by the Grand International Brotherhood of Locomotive Engineers was in effect, was it not?

A. Yes, sir.

Q. That resolution was in effect at the time of the meeting of the Brotherhood of Locomotive Engineers for the RF&P Railroad, was it not, which was held on November 7, 1956?

A. Yes, sir.

Q. November 7, 1956 was the date that the Brotherhood of Locomotive Engineers of the RF&P Railroad voted as to whether or not a referendum should be held for the compulsory retirement for engineers age of 70 years, was it not?

A. Voted, yes, sir.

Q. The resolution for the referendum was passed by a vote of 8 to 6 on the 7th of November, 1956, was it not?

A. I think so.

Q. The vote on that resolution was taken when?

A. In January, our first Wednesday in January; that is our regular meeting. We have one meeting each month.

Q. That vote was predicated upon this vote for the referendum taken on the 7th day of November, 1956, was it not?

A. Yes, sir.

page 5 } Q. It was not until after November 7th that you communicated with the Grand Chief Engineer regarding Resolution No. 42, was it not?

A. No, sir.

Q. Sir?

A. That is not right.

Q. When did you communicate with the Grand Chief Engineer, sir, regarding Resolution No. 42?

A. (Referring to file) A letter dated November 17, 1956.

* * * * *

By Mr. Parkinson: (Continued)

Q. I want to get this straight. Your local union voted as to whether or not there would be a vote on a referendum on November 7, 1956? Isn't that true?

L. E. Timberlake.

A. I rather put it this way if it is all right with
page 6 } Your Honor. We had the vote, yes, or no vote,
whether we should take a referendum in the November meeting.

Q. Yes, sir.

A. And our ballots didn't go to the printer until after the December meeting on account of our reconsideration rule.

* * * * *

Q. But the referendum that was held was pursuant to the resolution passed on November 7, 1956?

A. Yes, sir.

Q. Ten days later you communicated with the Grand Chief Engineer inquiring about the effect of the Resolution No. 42, is that correct?

A. Yes, sir.

Q. Then he wrote you a letter dated November 26, 1956, regarding Resolution 42? Isn't that correct?

A. That is correct.

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page 7 }

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By Mr. Parkinson: (Continued)

Q. Mr. Timberlake, the Grand Office of the Brotherhood of Locomotive Engineers issues a monthly statement, do they not?

A. Yes, sir.

Q. This is a copy of that statement issued for the month of September, 1956, is it not, sir?

A. (Examining) Yes, sir, this is September, 1956.

Q. That contains a copy of Resolution No. 42, does it not?

A. I think so.

page 8 } Q. Look in the back of that, sir, and see if it isn't
indicated with some colored ink?

A. Yes, sir, that is in here.

* * * * *

L. E. Timberlake.

Q. Did you state how long you had been employed by the RF&P Railroad?
A. No, sir.
Q. How long have you been there?
A. I was employed in 1918.
Q. Isn't that 39 years?
A. Yes, sir, over 39 years.
Q. You are not yet a regular passenger engineer, are you?
page 9 } A. No, sir.

* * * * *

Q. Mr. Timberlake, how long have you been a member of the Brotherhood of Locomotive Engineers?
A. I am not positive, but it is somewhere I think after 1939 to 1940, 1942. I am not clear, but it was somewhere along in there at that time, just time the war was starting I believe.

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page 11 }

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By Mr. Parkinson: (Continued)
Q. Mr. Timberlake, the vote on the resolution
page 12 } to terminate the seniority of engineers 70 years of age or more resulted in a vote of 64 in favor and 60 against the resolution at the January, 1957, meeting?
A. Yes, sir.

* * * * *

Q. The Brotherhood of Locomotive Engineers was not successful in obtaining a supplemental pension for the engineers who were 70 years of age or more, who were affected by the resolution, or to be affected by the resolution passed at the January, 1957, meeting, was it?
A. We were not successful in obtaining a supplemental pension.
Q. Irrespective of the fact that the supplemental pension was not obtained, you signed an agreement along with the General Superintendent of the RF&P Railroad providing for

the termination of the seniority of the engineers in excess of 70 years of age, did you not?

A. Signed an agreement in March, yes, sir.

page 13 } Q. That agreement was dated the 5th day of March, 1957, was it not?

A. Yes, sir.

* * * * *

Q. As yet a supplemental pension has not been obtained as provided by its Resolution 42, has it?

A. Up to now that is true.

Q. Mr. Timberlake, at the present time there are engineers working for the RF&P Railroad whose ages are considerably in excess of 70 years? Is that not true?

A. Excess of—

Q. 70 years of age.

page 14 } A. It is a few.

Q. Sir?

A. I think it is four or five; I am not positive. It is five I believe.

Q. During the first part of this year there was an engineer working for the company who was 81 years of age? Is that not true?

A. I think it was 80; it might be 81.

Q. Mr. Hargraves was 80 or 81, was he not?

A. Yes, sir.

Q. Are you familiar with a little booklet, sir, bearing on the front of it "Richmond, Fredericksburg and Potomac Railway Company Rules and Rate of Pay for Locomotive Engineers Effective October 1, 1937"?

A. Yes, sir.

Q. That booklet contains the provisions as to the rights of seniority of the engineers, does it not?

A. Yes, sir.

Q. Among other things, that booklet provides on page 30 that the oldest engineer in the service of the railroad, if competent and reliable, shall have preference of runs in his seniority territory, does it not?

A. I think that is correct what you have read.

Q. On page 21, Section B, it provides in part "The oldest engineer in road service shall have preference of

page 15 } runs when competent and worthy," does it not?

* * * * *

L. E. Timberlake.

CROSS EXAMINATION.

By Mr. Gibson:

Q. Will you turn to Article 32 of the agreement you have in front of you and read the first paragraph?

A. You want me to read it, sir?

Q. Will you please read into the record the first paragraph of Article 32 on Page 28?

A. (Reading) "The Committee of Adjustment of the Brotherhood of Locomotive Engineers will repre-
page 16 } sent all locomotive engineers in making of contracts, rules, rates and working conditions and the interpretations thereof."

* * * * *

Q. I hand you a letter dated November 17, 1956, and ask you if that is the letter you wrote to Grand Chief Engineer Brown asking for an interpretation as to the requirements of Resolution 42 in respect to retirement agreement?

A. (Examining) Yes, sir.

* * * * *

Q. Do you have your file copy of the letter of
page 17 } November 26, 1956?

A. Yes, sir.

* * * * *

Q. Is that document Grand Chief Engineer Brown's reply to you with respect to Resolution 42?

A. Yes, sir.

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page 19 }

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By Mr. Gibson: (Continued)

Q. Mr. Timberlake, was Grand Chief Engineer Brown's letter of November 26th read to the December meeting of the division?

A. Yes, sir.

L. E. Timberlake.

Q. Was there any motion made at that meeting for reconsideration of the resolution to submit the retirement question to referendum ballot?
A. No, sir.

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page 20 }

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Q. I hand you this which is marked Brotherhood Exhibit No. 4 and ask you if that is one of the ballots on which the referendum vote was held?
A. (Examining) Yes, sir.
Q. Did you vote in that referendum?
A. No, sir.

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page 22 }

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Mr. Parkinson: It is stipulated that there were 20 members present at the December 5th, 1956 meeting?

A. (Continued) I have 31.

* * * * *

page 23 }

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Mr. Parkinson: The actual count shows 32 I believe. I believe the stipulation should be 32.
Mr. Gibson: That is agreeable.

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page 24 }

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L. E. Timberlake.

By Mr. Gibson:

Q. How was the referendum conducted?

A. The referendum ballot was drawn up by Secretay-Treasurer of the GCFA, Mr. R. A. Granger, in
page 25 } cooperation with the Secretary of the Division, Mr. F. H. Jett, and they sent out the ballots.

Q. They were sent through the mail?

A. Through the mail to each qualified member to vote and to be back in the meeting before January the first, sent out.

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page 26 }

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By the Court:

Q. The question is whether the contents of Chief Engineer Brown's letter to you, which was read at the December meeting to those present, whether the contents were distributed to those who voted in the referendum who were not present.

A. It was not distributed by mail, but it was distributed verbally.

By Mr. Parkinson: (Continued)

Q. What do you mean by "distributed verbally," sir?

A. Those that I had contact with, I made it clear.

Q. How many people did you show Chief Engineer Brown's letter to that were not at the meeting prior to the meeting held in January, 1957?

A. Your Honor, I am not too familiar with being a witness, but I would like to state this. In our work we do not take our letters and carry them around to our members. We will tell our members the contents of our letters, but we try to do our business in our division with our letters and things of that kind.

page 27 } Q. How many people did you tell the contents of Chief Engineer Brown's letter to, sir, before the meeting in January of 1957, or before the ballot was mailed by those persons voting?

A. I wouldn't like to stipulate any particular number.

Q. As to the attendance of the meeting, that is limited by reason of the fact that a part of the engineers are on the

road or in Alexandria or in Washington at the time your meetings are held? Is that not true?

A. That is true.

Q. Another portion of your members are at home in bed resting from the labors of the previous trip at the time your meetings are held. Is that not true?

A. Some are.

By the Court.

Q. Is that why you carry on the balloting by mail?

A. No, sir, it is a law in our Constitution that we have a referendum ballot on things that are important that is binding on the committee that it is carried out. That is in rough words, but the exact words are in our Constitution.

Q. My question was why you do it by mail rather than by person. Is it because some of the men cannot be there in person?

page 28 } A. Yes, sir, so every member can have a ballot that is eligible to vote.

* * * * *

By Mr. Gibson:

Q In connection with what you mailed the members, did you with the ballot mail a copy of Resolution 42?

A. No, sir.

Q. Why not?

A. Because our committee didn't want to mislead our members of anything pertaining to Resolution 42, because we had been fully instructed by Guy L. Brown, Grand Chief Engineer, in his letter dated in November, and we was mighty careful in not to mislead anyone.

By the Court:

Q. Did I understand that what was going on in the committee's mind was to not mail out Resolution No. 42 because he didn't want to mislead anyone?

A. Yes, because we had the letter from Brother

page 29 } Brown saying it is not binding, and we didn't want to mislead them.

RE-REDIRECT EXAMINATION.

By Mr. Parkinson:

Q. Mr. Timberlake, didn't you write to Chief Engineer

L. E. Timberlake.

Brown and ask him about putting on the ballot a copy of Resolution 42?

A. Yes, sir.

Q. Didn't he write you back that you could do it?

A. I rather take the exact words from the letter, read the exact words that he said, because I don't want to say yes or no, because it didn't say yes or no.

Note: At this point Brotherhood Exhibit No. 3 is shown to the witness.

A. (Continued) This is a quotation in it: "You ask if it would be advisable to furnish the copy of Resolution 42 with the referendum ballot for the guidance of the membership. I will advise that the procedure would be in order."

Q. So your committee was uncertain about putting that Resolution 42 in at one time?

A. We had that question in our mind, but we didn't say we were going to put it in there.

page 30 } Q. Even though your Grand Chief Engineer seemed to think it was proper, that was omitted from the ballot?

* * * * *

Q. I ask that the question be corrected. It was not placed on the ballot?

A. It was not placed with the ballots, no, sir.

* * * * *

Mr. Parkinson: It is stipulated between counsel that the complainant, D. L. Folkes, will be 70 years of age on November 11, 1957 and has 47 years and nine months in the employment of the RF&P Railroad as a fireman and engineer; that the complainant, William F. Cannon, is 72 years of age and has 45 years of employment with the RF&P Railroad as a fireman and engineer; and that L. O. Holmes will be 69

page 31 } years of age on December 28, 1957, and has 47 years and nine months employment with the RF&P Railroad as an engineer and fireman.

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page 32 }

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Guy L. Brown.

Mr. Gibson: May it please the Court, I did not hear a great deal of the evidence that I might have surmised from the allegations of the Bill of Complaint as intended, and I submit the plaintiffs have not proved anything on the face of the papers, and that a motion to strike the plaintiffs' evidence should be sustained.

Mr. Christian: If Your Honor please, we join in the motion to strike.

Note: Argument on the motion to strike the complainants' evidence is hereby deleted in the interest of brevity.

The conduct of the hearing continues as follows:

The Court: I will overrule the motion to strike at this time.

* * * * *

page 35 } Friday, November 8, 1957
10 o'clock A. M.

* * * * *

Mr. Gibson: I would like to call Mr. Guy L. Brown to be sworn as a witness for the defense.

The Court: All right.

GUY L. BROWN,

a witness introduced on behalf of the defendant Brotherhood, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Gibson:

Q. State for the record your name and your occupation?

A. My name is Guy L. Brown and I am Chief Executive or known as the Grand Chief Engineer of the Grand International Brotherhood of Locomotive Engineers.

Q. Will you state your background in the rail-
page 36 } road industry?

A. I hired out as a fireman on the Chicago Northwestern Railroad February of 1909. I passed the area examination and qualified as an engineer in August of 1914 and worked as a locomotive fireman and engineer until 1936, when I was promoted and have done no firing since. I be-

Guy L. Brown.

came a member of the Brotherhood of Locomotive Firemen and Engine Men in 1910, and in 1933 I served as a local chairman and a member of the Executive Committee of the General Grievance Committee of that organization until 1939, when I resigned the positions that I held and became local chairman of the Brotherhood of Locomotive Engineers in approximately 60 days and was elected Vice General Chairman of the General Committee of Adjustment, and I succeeded to the position of General Chairman, or Chairman, of the General Committee of Adjustment in 1945, and I was elected as an alternate and Assistant Grand Chief Engineer of the Grand International Brotherhood of Locomotive Engineers in 1947 and succeeded to the position of Assistant Grand Chief Engineer in June of 1949.

In August of 1950 I was elected First Assistant Grand Chief Engineer, and in 1953 just prior to the opening of the Grand International Convention on the death of my predecessor succeeded to the position of Grand Chief Engineer, and I was re-elected by the 1953 Convention and again in 1956 re-elected.

page 37 } Q. Were you presiding in the Chair at the 1956 Convention when Resolution 42 was presented?

A. I was.

Q. Did you permit a vote upon Resolution 42 as first presented?

A. Not as it was originally presented, because it was presented as an amendment to one of the basic laws from the floor of the convention, and under the law of the convention, or under the law of the organization, it was necessary that it be submitted prior to the convention so it could be referred to the Constitution and By-laws Committee. Therefore, I declared it out of order and in the form as it was presented.

Q. Did that terminate the proceedings upon Resolution 42?

A. It did not. The maker of the Resolution later—in fact, just a few minutes later—introduced it by striking out the reference to the basic law.

Q. What further proceedings took place in connection with Resolution 42?

A. After a brief discussion it was adopted as being a statement of policy of the convention.

Q. Did you make any explicit ruling as to the status of

Guy L. Brown.

Resolution 42 at the time that it was accepted for consideration?

page 38 } A. That it would be accepted with the understanding that it was a statement of policy, yes.

Q. Going back to your experience in your various assignments with various branches of the brotherhood, have you had direct experience with the problems of negotiating of collective bargaining contracts with the railroads?

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page 39 }

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A. As a member of the Executive Committee of the Firemen's organization I had some experience, although was not charged with the prime responsibility of being the officer in charge of negotiations, as Chairman of the General Committee of Adjustment for the Northwestern Railroad for the Brotherhood of Locomotive Engineers I, along with the other members of the General Committee, had full authority to negotiate the contract between—

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page 40 } Q. Do you remember, Mr. Brown, at what convention Section 7(a) of the Constitution as it now stands was adopted?

A. That was—

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page 41 }

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By Mr. Gibson: (Continued)

Q. I will ask this question. Do I understand that Section 7(a) in its present form was amended and adopted at the 1956 Convention?

A. That is correct.

Guy L. Brown.

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page 42 }

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By Mr. Gibson: (Continued)

Q. Did you, yourself, make a recommendation for an amendment of Section 7(a) at the 1956 Convenpage 43 } tion?

A. I did.

Q. What was the nature of your recommendation?

A. I recommended that in the provisions of Section 7(a) there should be included some language or a paragraph specifically specifying the authority of the Grand Chief Engineer between sessions of the Grand International Division, and in that recommendation I proposed that the Grand Chief Engineer be so recognized in conjunction with the advisory board.

Q. Was that the form in which the amendment was passed as a direction that you should take that action in conjunction with the advisory board?

A. It was not. The Constitution and By-laws Committee saw fit to recommend to the convention the last sentence of paragraph (a) of Section 7, which in substance was my recommendation with reference to the advisory board, be stricken out.

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page 46 }

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Q. What was the status, Mr. Brown, of Brother Coughlin designated as 758?

A. He is the Secretary of the Constitution and page 47 } By-laws Committee.

* * * * *

A. "Brother Coughlin; 758: Well, Brothers, in answer to Brother Buckley's objection, I might call your attention to an addition we made to the Grand Chief's recommendation at the bottom of our proposal to you, in which we state: 'In

accordance with the provisions of Section 56, the Constitution.'

"Now, as Brother Brown has already explained to you how the Committee felt regarding the Advisory Board—all of us know that many times the Advisory Board is out on the various properties and individual decisions must be made immediately. There are times when it is somewhat inconvenient to convene all of the members of the Advisory Board so we felt that the Grand Chief Engineer, as the Executive Officer, should be given that authority.

page 48 } "However, we reserved for the members, under Section 56 of our Constitution, the method whereby, if you boys out here and the rest of us at home, or wherever we may be, do not agree with the Grand Chief we have, under the provisions of Section 56, which is the 'Initiative, Referendum and Recall,' means and methods whereby we can have recourse to a decision that is not to our liking."

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page 55 }

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By Mr. Gibson: (Continued)

Q. What is your interpretation of Section 7(a) with reference to your powers there expressed in respect to procedure under Section 45-c?

A. My interpretation is to a certain extent based on precedent of my predecessors. It has to do with the method of consulting with the Advisory Board. I have the authority to say in what manner the consultation and when the consultation will take place.

Q. What is the Advisory Board, Mr. Brown?

Mr. Parkinson: If Your Honor please, the Constitution defines that.

page 56 } The Court: I read it somewhere last night.

Q. How many are there of it?

A. At the present time there are 19 members of the Advisory Board made up of 16 Assistant Grand Chief Engineers, the First Assistant Grand Chief Engineer, the General Secretary and Treasurer and the Grand Chief Engineer.

Guy L. Brown.

Q. Are they all in Cleveland in your office?

A. They are not. The Grand Chief Engineer, the First Assistant Grand Chief Engineer, the General Secretary and Treasurer are located permanently in Cleveland. The other officers are scattered over the entire United States and Canada, one being located in Montreal, another one in Ottawa, another one in Winnipeg, one in San Francisco, one in Houston, Texas, one in Kansas City, Missouri, one in Chicago one in Washington, D. C., one in New York, and the others are assigned to work wherever they are needed. Sometimes one might have an assignment in one part of the United States and the next assignment would be clear to the other side of the continent.

By the Court:

Q. Are these permanent personnel of the brotherhood or are they working at some railroad job and perform these duties?

A. No, they are full-time employees of the brotherhood, and the locations that I have designated are page 57 } usually their home and where their headquarters are maintained.

By Mr. Gibson: (Continued)

Q. How often does the Advisory Board meet?

A. Once each year unless there is reason for additional meeting, special meetings.

Q. How frequently do you have special meetings?

A. There has been two special meetings that I can recall since 1950.

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page 58 }

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By Mr. Gibson: (Continued)

Q. Let's take the second question. First, can you say whether or not there has been any long and continuous practice in respect to the way in which you proceeded under Section 45-c as to action in conjunction with the Advisory Board?

A. There has been, and I might point out that there is a difference between acting in conjunction with and acting in

accordance with other sections of the law which require concurrence.

Q. How have you in practice proceeded in acting under Section 45-c as to action in conjunction with the Advisory Board?

page 59

A. The practice has been to give the ruling, and when the Advisory Board is convened in their regular session, the Grand Chief Engineer makes the report to them, usually a verbal report on the various matters, such as this, and describes it. Sometimes there are discussions and other times there are no comments whatsoever made, which has always been accepted as the Advisory Board's concurrence.

By the Court:

Q. Let me ask you this. I take it you are thoroughly familiar with the case we are trying here?

A. Pretty familiar.

Q. In a case of this sort when did the Advisory Board meet after your letter of November 26, 1956 that you wrote to Mr. Timberlake?

A. The Advisory Board was in session beginning on January 3rd, 1957, approximately just roughly 40 days.

Q. You say they did meet after that?

A. Yes, sir, 40 days after that.

By Mr. Gibson: (Continued)

Q. Did you, Mr. Brown, handle your ruling in November, 1956, in any manner differently from your other actions under 45-c as to action in conjunction with the Advisory Board?

page 60

A. I handled it no differently from my previous action to the action of my predecessor in this office in making the report to the Advisory Board.

Q. How frequently do you have occasion to act under Rule 45-c?

A. That varies. Sometimes it is every day or two. Other times we will go for several days, but quite frequently during a period of a year's time.

By the Court:

Q. Are the minutes kept at those meetings?

A. Minutes are kept of the meetings if there are any pertinent discussions. If there is no question asked about a particular point, it probably is not made a matter of record. There are minutes kept of all Advisory Board meetings,

Guy L. Brown.

yes.

Q. Do you know whether this is in the minutes of the meeting of January, 1957, concerning this RF&P Railroad matter approving your action or disproving it or anything?

A. So far as I know there was no objection made. This was reported in conjunction with some other agreements of similar nature which had been passed.

By Mr. Gibson: (Continued)

Q. Was any exception expressed by the Advisory Board on that report?

A. There was not.

Q. Was a copy of your letter of November 26th
page 61 } distributed to any file except your own?

A. Well, it was placed on the interpretation file I believe, and I couldn't say without referring to the letter itself whether or not copies were given the Advisory Board. It was given to, I believe, the officers of the Division here.

Q. In the exercise of your power to interpret the requirements of 45-c on the issuance of your ruling on November 26 in the letter to Mr. Timberlake, did the General Committee of Adjustment in your interpretation have the authority to negotiate and execute a compulsory retirement agreement with the RF&P Railroad without a supplemental pension?

A. Provided the vote of the membership was in favor, yes, they would have.

Q. Did you have any occasion to rule on this matter again?

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page 62 }

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A. In response to further questions from Mr. Timberlake sometime in February I in substance reiterated my November 26 ruling.

By Mr. Gibson: (Continued)

page 63 } Q. Did Mr. Timberlake write you in January to ask you again what he could to as to negotiation of a compulsory retirement agreement?

A. He did.

* * * * *

Guy L. Brown.

Q. Will you please read into the record the last paragraph of that letter?

A. On January 7, 1957—

page 64 } Q. I think you are reading the middle paragraph. I asked about the last paragraph.

A. I beg your pardon. (Reading) "Please advise at your earliest convenience what we should do next. (Signed) L. E. Timberlake."

Q. That letter advised you of the results of the ballot, did it not?

A. It did.

Q. What was your action in response to that inquiry, Mr. Brown?

A. Practically a reiteration of my letter of November 26 and instructions contained therein. I might point out that was subsequent to the meeting of the Advisory Board where it was reported to them.

Q. Did you give any instructions at that time as to efforts to be made to seek the supplemental pension from the RF&P Railroad?

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page 67 }

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By Mr. Gibson: (Continued)

Q. Did Mr. Turner proceed to Richmond to assist the General Committee of Adjustment of Division 561 in their negotiation?

A. He did.

Q. Did you have any further communication as to the outcome?

A. I had a report from Mr. Turner subsequent to the meeting with representatives of the RF&P Railroad wherein he advised that they had declined to make an agreement containing a supplemental annuity.

Q. Did you also have a further report from Mr. Timberlake stating the outcome and asking instructions?

A. Again I would have to refer to the file, but I believe I did, yes.

Guy L. Brown.

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Q. I show you Brotherhood Exhibit No. 9 for identification and ask you if you received that letter from Mr. Timberlake?

A. (Examining) I did. It was received on February 11.

Q. Did you receive any report from Mr. Timberlake or Mr. Turner as to negotiations by the Committee with the RF&P Railroad?

A. I have talked or did talk to Mr. Turner and Mr. Timberlake both. I couldn't tell you how many times, but I talked to them during that period between January 20 and along about this time. I talked to them over the telephone, more or less, receiving a verbal report of their negotiations and where they were.

Q. Did they report the outcome of those nego-
page 69 } tiations?

A. I remember particularly Mr. Turner telling me that the carrier had indicated that they were not willing to agree to any supplemental annuity plan at this time.

Mr. Gibson: I ask to be marked as Brotherhood Exhibit No. 10 for identification a copy of a letter from Mr. Brown to Mr. Timberlake dated February 14, 1957.

* * * * *

Q. With reference to this Exhibit No. 10, Mr. Brown, is this a copy of a letter sent by you to Mr. Timberlake under date of February 14, 1957?

A. (Examining) It is.

* * * * *

Q. Did you by this letter respond to Mr. Timberlake's letter of January 20, Exhibit No. 6, asking instructions, and his letter of February 8, Exhibit 9, asking instructions?

A. I did.

Guy L. Brown.

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By Mr. Gibson: (Continued)

Q. Mr. Brown, in your interpretation of the Standing Rule 45-c and the law of your brotherhood, did you page 74 } in your interpretation rule that the General Committee of Adjustment, Division 561, had the right to negotiate a compulsory retirement agreement at that stage without a supplemental pension?

A. We did.

Mr. Parkinson: If Your Honor please, I object to that.

The Court: I understand your previous objection would go to this answer. You may answer. In fact, he did answer.

Q. In your interpretation of the law of the brotherhood was Resolution 42 any barrier to execution of such an agreement?

A. Not after all means or efforts to get a supplemental pension had been exhausted.

CROSS EXAMINATION.

By Mr. Parkinson:

Q. Mr. Brown, I believe you stated that there was an Advisory Board meeting held in January, 1957, is that correct?

A. That is correct.

Q. What was the date in January, sir?

A. January 3rd they were convened.

page 75 } Q. That was after the vote had been cast by the Brotherhood of Locomotive Engineers for the RF&P Railroad, was it not?

A. I understand that it was, yes.

Q. I understand that there were minutes made at the meeting of the Advisory Board.

A. There are minutes made of the meetings of the Advisory Board. However, they do not carry all of the items discussed, unless there are items that there is some question about.

Guy L. Brown.

Q. Do you have the minutes of the meeting of that Advisory Board with you, sir?

A. I do not.

Q. Mr. Brown, this Resolution No. 42 was passed by how many delegates, sir?

A. There was about 380 delegates in the convention.

Q. It was passed by that group that meets at a cost of about $800,000.00 for the convention, isn't that true?

A. That is right.

Q. You tell the Court that you were dealing with the waiving of a part of a Resolution passed by that group, is that correct?

A. In accordance with the practice that had been
page 76 } in existence.

Q. The meeting of the Advisory Board is to discuss problems existing among the divisions of the union, is it not?

A. Not exclusively.

Q. There are not many occasions when they wipe out or waive the teeth of a resolution, are there?

A. There is not too much instance of resolution. On the other hand, there are many instances where decisions of this kind have been made with reference to negotiable matters.

Q. But the most momentus job that the Advisory Board undertakes to amend or modify or change a resolution passed by the august body of all of the legislature of the International Brotherhood of Locomotive Engineers, is it not?

A. No.

Q. It is not?

A. It is not the most serious thing; it is a routine matter with them to handle questions of this kind.

Q. Yet, with the wiping out of this provision for the protection of these engineers, no mention was made in the minutes, is that correct?

A. I don't recall that there was any mention made in the minutes.

page 77 } Q. Mr. Brown, you knew the purpose of your coming to testify today, did you not?

A. Yes, sir.

Q. If there had been anything in those minutes, you would have brought them, would you not?

A. I probably would have certainly had I known the importance that was going to be attached to them.

Q. You knew of this pending litigation since August, did you not?

Guy L. Brown.

A. Yes, sir.

Q. Mr. Brown, who was present at that Advisory Board meeting January 3, 1957 besides yourself?

A. Who were present?

Q. Yes, sir.

A. The first Assistant Grand Chief Engineer, Mr. R. E. Davidson; General Secretary-Treasurer, Mr. H. F. Hempy; Mr. Paul M. Smith, Editor and Manager of the Journal, who is since deceased; T. J. Harkens, Assistant Grand Chief Engineer; H. C. Hobart, Assistant Grand Chief Engineer; C. W. Kealey, Assistant Grand Chief Engineer; L. V. Byrnes, Assistant Grand Chief Engineer and National Legislative Representative; J. W. Turner, Assistant Grand Chief Engineer; A. F. Kummer, Assistant Grand Chief Engineer; John Marshall, Assistant Grand Chief Engineer; E. B. Lantz, Assistant Grand Chief Engineer; B. F. Davisson, Assistant Grand Chief Engineer; C. B. Gwinn, Assistant Grand Chief Engineer; P. S. Heath, S. L. Brink—all of these are Assistants—S. D. Thompson, Assistant Grand Chief Engineer; H. E. Campbell, Assistant Grand Chief Engineer and National Legislative Representative in Canada; O. J. Travers, Assistant Grand Chief Engineer, and H. W. Haskins, Assistant Grand Chief Engineer, and myself.

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Q. Mr. Brown, there were 19 present at that meeting?

A. No, there were more than that present at that meeting because Mr. Smith was still alive then.

Q. There are only 19 members of the Advisory Board? Is that not true?

A. Well, including myself makes the 20th. At the present time there are only 19.

Q. Mr. Smith is the only one who is deceased, sir?

A. That is correct.

Q. So there are 18 others other than yourself that are now living?

A. That is right.

Q. Are any of those 18 others here today?

A. No, sir.

Q. Although you knew of this litigation since August, none of the others who were present at that meeting other than yourself are here to testify regarding what took place there, is that correct?

page 79

A. That is correct.

Q. After February 14, 1957, has there been any further meeting of the Advisory Board?

Guy L. Brown.

A. There was a meeting of the Advisory Board held immediately subsequent to the death of Paul Smith, which occurred in June. I can't give you the exact date.

Q. In June of this year?

A. 1957.

Q. In February, 1957, you were still insisting that the brotherhood or the General Committee of Adjustment negotiate a pension plan with the RF&P Railroad, a supplemental pension plan, isn't that correct?

A. I was not insisting it, no.

Q. Didn't you state in your letter of February 14, 1957, which is designated as Exhibit 10—

A. I said they might, yes. I didn't insist that they do it.

Q. Do I understand your language in that letter to mean might? Is that the way you have placed the interpretation upon the Constitution and By-laws when you say every effort must be made to establish—

A. I interpreted that when all efforts had been exhausted by the General Committee and the Assistant Grand Chief Engineer, the Committee may if it so desires.

page 80 } The Court: The only question is did you insist that they try and negotiate a supplemental pension plan at that time?

A. The answer to that is no, I did not so insist.

By the Court:

Q. What is that letter he handed you a minute ago?

A. My letter to Turner. It is marked Exhibit No. 10 I believe.

Q. When you told Timberlake on February 14 "You will understand that every effort must be made to establish the pension plan even to the assignment of a Grand Officer," what did you mean for him to do?

A. I meant that he should work with the officer, if they were desirous of getting a compulsory retirement rule and endeavor to get a supplemental annuity with it.

Q. And that is not insisting that they do it?

A. No, it is not; it is up to the Committee.

By Mr. Parkinson: (Continued)

Q. Between the time of your letter dated February 14,

1957 and June, 1957 there was no meeting of the Advisory Board?

A. Between what dates?

page 81 } Q. The 14th of February, 1957 and the first of June, 1957?

A. No, there was not.

Q. Then there was no occasion for you to take up or confer with the Advisory Board during that period regarding the waiver of the supplemental pension?

A. I had taken that up with the Advisory Board subsequent to my letter of November at that meeting in January.

Q. After you persisted that they should seek the supplemental pension and delegated Mr. Turner, an Assistant Grand Chief Engineer, to work with them to do that, you did that, did you not?

A. Yes, sir, to try to get the supplemental annuity, if possible.

Q. Mr. Brown, you state in your letter of February 14 that a portion of Resolution 42 is mandatory. How do you distinguish between the portion that is mandatory and the portion that is not mandatory, sir?

A. Because we have control over whether or not a vote will be taken. We do not have control of whether or not the RF&P Railroad will agree with us on some request we make.

Q. Resolution 42 did not say that the RF&P had to do anything, did it?

page 82 } A. No.

Q. It provided that could be a retirement provided a supplemental pension was first obtained, isn't that true?

A. That is true, but don't overlook this: It is a negotiable matter.

Q. So you considered that part of Resolution 42 was mandatory?

A. The part that we have full control over, yes.

Q. You consider that part of Resolution 42 was beyond the scope of your powers to waive or do anything with? Isn't that true?

A. It is beyond the scope of our powers to enforce.

Q. Didn't you say here that part of Resolution 42 was mandatory and it was beyond your authority to do away with it?

A. No, I don't say it is beyond our authority to do away with it. If they still want a compulsory retirement rule,

they have the right to get the best agreement they can get.

Q. You did state that part of Resolution 42 was mandatory, did you not?

A. Taking the referendum vote, yes.

page 83 } Q. You considered you had no power to change that?

A. That is correct.

By the Court:

Q. Why not?

A. Well, I wouldn't say—perhaps, I should amend that answer, Your Honor. I wouldn't say that I did not have the power to change it, but it is a very extreme exercise of authority if I would attempt to waive something of that kind under the provisions of Section 7.

If I may just make one further statement in respect to that, I think that Section 7 as it is written, perhaps, places more power or authority in the hands of the Grand Chief Engineer than he would ever want to exercise, and there has to be judgment used in exercising that authority and power.

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By Mr. Parkinson: (Continued)

Q. Do you think, sir, it is not a very great exercise of authority to cut men who have worked most of their entire working lives to achieve something without first obtaining a contract for a supplemental pension?

A. The Courts of the land have stated that the question of compulsory retirement is a negotiable matter under the provisions of the Railway Labor Act, and under those circumstances what I may think about that decision doesn't mean anything.

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Guy L. Brown.

The Court: Here is the question. I am still not sure it is stated correctly, but the Section 42 has in it these two thoughts, one as to referendum and one of a supplemental pension plan, and Mr. Brown has told Timberlake that he will not waive the referendum feature of it, and Mr. Brown has testified today that the reason he told him that is that he considers that portion of Section 42 as mandatory, and then he later qualified that answer in saying that he considered it mandatory in his judgment; that he felt maybe he did have full power even to waive that, but that in his exercise of moral judgment he wouldn't waive such an important thing as that. Now the other part of it
page 86 } he permitted Mr. Timberlake in the local bargining group to waive. Mr. Parkinson's question is that was a part of 42, namely, the securing of a supplemental pension. Mr. Brown permitted him to waive that. Now he is asking him this type of question: Did you think that that particular feature, the obtaining of a supplemental pension plan, was of not such vital interest that it could not be waived.

* * * * *

By the Court:

Q. Now you may answer the question. You
page 87 } may answer as to what your attitude was toward the part that you did waive. Did you consider that an important feature of Resolution 42 in the category of the referendum part or not, and, if so, why not?

A. Well, certainly it is an important feature. However, this organization is a democratic organization and is governed by the will of the majority, and the information furnished me was that the majority of the members of the organization were desirous of a compulsory retirement rule.

By Mr. Parkinson: (Continued)

Q. Mr. Brown, it actually meant the difference between these men getting between $150.00 and 200.00 a month by way of Railroad Retirement and about $800.00 a month by way of salary. That is what it actually meant to those who were actually 70 years of age, does it not?

A. I don't know.

Q. You mean you do not have some general idea of the Railroad Retirement at this time?

A. Yes, sir, I have a general idea, but you are asking me

if there is that much difference. I don't know what the average—I don't know what the engineers here would receive. I don't know what pay that they earn each month or how much that amounts to.

By the Court:

Q. You mean you acted upon this without knowing?

A. I acted upon this without knowing exact
page 88 } figures that every man would receive in the way
of annuity, and the difference between his wages, because again I come back to say that it was purely a ruling as to whether the General Committee could do this if they so desired. As far as my asking them to do it, I didn't ask them to do it. I didn't insist on it; I wouldn't to this day.

By Mr. Parkinson: (Continued)

Q. Mr. Brown, you expressed your opinion as to Resolution No. 42 in your letter to Mr. Timberlake dated November 26, 1956, did you not?

A. Yes, sir. May I answer that just this much more as to what he and his committee could do?

Q. Follow that up, until the 14th day of February, 1957, when you wrote your letter, you then told them that they would have to use every effort to obtain the supplemental pension?

A. I think that information was contained in the original letter.

Q. During the period between November 26, 1956, and February 14, 1957, when you wrote your letter, you told them that they would have to try to obtain a supplemental pension?

A. Yes, and that is taking a referendum vote, too.

Q. Did you communicate with Mr. Timbelake at
page 89 } any time between February 14, 1957 and March 5,
1957?

A. Not unless the file so indicates, unless it was a telephone conversation of which no record was made.

Q. You have no knowledge of any other communication after February 14, 1957, do you?

A. Not unless it was contained in the general file; no, I have no knowledge of it at this time.

Q. Do you have any such communication in your file?

A. I don't have the file here. Do we have any such communication in the file?

Guy L. Brown.

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By Mr. Parkinson: (Continued)

Q. So far as is known your letter to Mr. Timberlake on February 14, 1957, was the last communication with Mr. Timberlake until after March 5, 1957? Is that correct, sir?

A. As far as I know, yes.

* * * * *

RE-DIRECT EXAMINATION.

By Mr. Gibson:

Q. Mr. Brown, Mr. Parkinson has asked you
page 92 } about your consideration of the effect on the older
men in dealing with the Resolution 42. Are they the only men that you have to consider in connection with your rulings under Resolution 42?

A. I have to consider all of the men and the effect that any agreement will have on the entire membership of the organization. It would involve practically the entire seniority list of engineers and, in fact, go down to the seniority roster of firemen.

Q. What is the nature of that effect?

A. Of course, if the senior men come off at age 70, it creates whatever vacancies there are on the number of jobs that they are filling, which automatically promotes the same number of men, or approximately that, and that reaches down all the way to the entire seniority roster, giving the younger men in point of seniority a little better job and finally getting down to the firemen where it means the question a man will be promoted from a job as a fireman to a job as an engineer, and that then carries on down to whether or not it will bring more men on the firemen's roster as well. So it really affects all of the men who may be on either roster below the ones who come off because of the 70-year compulsory retirement to a greater or lesser degree.

Q. In recent years have the railroads been increasing or
decreasing their engine men force?

page 93 } A. They have been decreasing.

Q. So there have been less spaces for men to work?

Guy L. Brown.

A. Approximately one-third of the jobs of locomotive engineers have disappeared in the last seven years because of dieselization, changes in business conditions and so forth.

Q. Anyone in the engine men's force suffer on account of that?

A. Well, at the bottom of the seniority list, the firemen's list, some of them are completely out of jobs as far as the railroads are concerned, and it means the difference whether some of the regulars will continue working and can also, whether the senior firemen will work as engineers or continue as firemen.

* * * * *

Q. What chance would there be for compulsory retirement agreement if supplemental pension requirements
page 94 } were not relaxed in interpretation in Resolution No. 42?

Mr. Parkinson: If Your Honor please, I object to that question as being irrelevant and immaterial. The question here is whether or not Resolution 42 and the rules and regulations have been complied with.

The Court: Objection overruled.

Mr. Parkinson: I note an exception.

A. There are good chances of it. Wait a minute. You are asking what chances there would be if they are not relaxed? At the present time there would be no chance of making a compulsory retirement rule because there isn't a single instance that I know of that any railroad has agreed to a supplemental annuity, unless it be some line that is connected with some other industry such as a steel industry.

RE-CROSS EXAMINATION.

By Mr. Parkinson:

Q. Mr. Brown, one of the primary objects of the Brotherhood of Locomotive Engineers is to preserve and protect the seniority of the engineers, is it not?

A. All of them, yes.

Q. Yes, that was one of the things for which the Union was founded, was it not?

page 95 } A. Yes, sir.

Q. You are primarily interested in protecting

the seniority and the rights of the engineers rather than the firemen, are you not?

A. Primarily so; however, we are very much interested in protecting the firemen's seniority as well.

Q. They have a union to protect their rights, do they not?

A. That is correct.

Q. It is the primary function of your union to look after the rights of the engineers when there is any conflict between the rights of engineers and firemen, is it not?

A. Yes, sir.

Q. There is little or no change in railroad affairs now from what they were a year ago, is there?

The Court: In what respect?

Q. As to the number of crews in operation now as compared with a year ago.

The Court: I do not believe the question ought to be "now." I am concerned with what has happened from January to March.

By Mr. Parkinson: (Continued)

Q. There is little or no difference in it, taking into consideration the seasonal feature of the railroads,
page 96 } there is little or no change in the situation as to employment between the period of June 25, 1956, and November 26, 1956? Is that correct?

A. I would not be able to pin it down all the actual difference, if any, other than, as I said a moment ago there has been sufficient change over the past seven years to eliminate the jobs of approximately one-third of the locomotive engineers that were then employed.

Q. Mr. Brown, most roads that employed diesels employed those prior to June 25, 1956, did they not?

A. I think that is probably true. I don't know to what extent it happened on the RF&P Railroad, and I might add to that that railroad managements are still trying to see if they can't get another couple of cars on the diesel locomotive today over what they had last year.

Q. It has been more than five years since a steam locomotive operated along the railroad bed of the RF&P Railroad. Isn't that a fact?

A. I don't know. I know there have been steam locomotives operating on some of the railroads since that and a few still operating.

Q. But there has been no appreciable change, taking into

consideration the seasonal features of the railroad, between June 25, 1956 and November 26, 1956, has there?

page 97 } A. I don't know other than the proportion of the approximately one-third that I previously testified to.

Q. So that conditions on November 26, 1956 were substantially the same as they were on the date that Resolution 42 was adopted? Isn't that true?

A. That may be your conclusion, I don't know.

Q. You do not deny that, do you?

A. I don't deny it; neither would I affirm it.

* * * * *

RE-REDIRECT EXAMINATION.

By Mr. Gibson:

Q. Mr. Brown, the railroads are still cutting down on the number of passenger trains a good deal, are they not?

The Court: I do not care what is going on right now. I want to know what was going on from January to March.

A. In response there has been a general re-

page 98 } duction in passenger service throughout the United States.

Q. As of back last March railroads you say were still adding to the length of freight trains?

A. Yes, they are doing that everytime they get the opportunity.

Q. Does that ultimately result in cutting down the number of freight runs?

A. It does; it eliminates crews.

* * * * *

By the Court:

Q. Mr. Brown, you testified at some length con-

page 99 } cerning items and the facts which go into your having to make a decision on waiving this or that resolution, in addition to the seniority of what percentage of men might be reaching the age of 70 and stated conditions in the industry itself and conditions of the roster of the men and so on as going into your making the decision of the matter. Now wouldn't a person who had that philosophy be

opposed to Resolution 42 which has no exception at all but simply says that a vote for a compulsory retirement program shall be entered into, and if the membership shall vote yes on it, then it shall not be effective unless the supplemental contract is gotten? Now that leaves no room, does it, for consideration of the things that you would have to take into consideration in exercising your judgment as to whether that part would be waived, and would not anyone who supported the philosophy that you support have to vote against Resolution 42?

A. Well, I presume, Your Honor, that wherever one of these men in the convention—Resoultion 42 would not have been adopted because, well, it takes some explaining—but there is a continual conflict between the bottom of the seniority roster and the top.

Q. I understand.

A. I have to administer the laws,or interpret the laws that are written here for the benefit of approximately 42,000 or 43,000 engineers that are working throughout the
page 100 } United States and another 7,000 or 8,000 that are working in Canada and try to be consistent in my ruling as to what will meet with the wishes of the majority of the men and be to the benefit of the majority of the membership.

Q. I can understand that, but I am asking, as a matter of fact, wouldn't the elements that you have to take into consideration in arriving at a judgment on those very things that you have just mentioned be a philosophy that is opposed to the language of Resolution 42?

A. Perhaps, the language used in Resolution 42 was unfortunate as it was actually written, because I believe I know what the delegations were trying to do.

Q. I would imagine so, being the Chief Engineer and being at the convention.

A. You go through one of those conventions of approximately 60 days, you get a pretty good idea of what they are trying to do. I might add that, perhaps, I should have ruled the entire resolution out of order at the time it was presented.

Q. However, it was adopted?

A. It was adopted and it was left to me to interpret it to the best of my ability in accordance with the requirements of the organization, and I am speaking now of the fact that—what it referred to was a negotiable question, and in nego-

Guy L. Brown.

tiations I don't know of any time when a labor
page 101 } organization has ever got all it thought they were entitled to.

* * * * *

Q. I understood from some of the testimony yesterday that the local division has an official meeting once a month. When the voting on the ballots is involved, in order that everyone can have a chance to vote, some of them not being able to attend meetings because of runs they are on or because of their living distance and so on, it is done
page 102 } by mail ballots, and ballots are mailed to everyone for them to return?

A. In taking a referendum, that is true.

Q. I meant referendum. In so doing on this particular question, the ballot which went out without Resolution 42, without any statement of contents of your letter of November 26, 1956, would the engineers who received this ballot have voted under the assumption that it was governed by Resolution 42?

A. I rather doubt if they would because it was not contained in there. In fact, the ballot as it was sent out gave the least that could be had. Had he obtained supplemental pension as a result of these negotiations, it would have been something that at least some of the men—it would have been a bonus, say, that they were not expecting to receive.

Q. If you had not written the letter of November 26 or any similar letter to it, would the local bargaining group have had authority to contract with the carrier to put in a compulsory retirement plan without a supplemental pension?

A. No, they would not have had authority without getting permission from my office.

Q. If that be true that they would not have authority, why would an engineer receive this ballot, who
page 103 } did not know of the authority that you reportedly gave, assume that contract would be made without Resolution 42 being complied with?

A. Well, the ballot doesn't contain, as I understand it—I haven't seen one of them for a long time—any reference to it. The question of whether or not they wanted a compulsory retirement rule, as I said a moment ago, had he been able to negotiate a supplemental pension along with that, it would have been just that much more in their favor, but they, apparently, wanted this regardless of whether they were get-

ting a supplemental annuity. Some of them, I presume, didn't have any knowledge of Resolution 42, not withstanding the fact of all the publicity we could give.

Mr. Gibson: If Your Honor please, your questions prompt a few that I would want to follow.

The Court: I would imagine it would on both sides.

By Mr. Gibson:

Q. Would there or would there not be as much reason for a member of Division 561 to know about your powers as to know about the contents of Resolution 42?

A. Yes, the Constitution is made available to Divisions. They can get them and, unfortunately, sometimes even our officers do not read them enough.

page 104 } Q. If a ballot was issued by a General Committee of Adjustment to its division on the question solely of whether or not there would be a vote for or against agreeing to compulsory retirement and if at that time there had been no ruling for you in the relaxing of a requirement of Resolution 42 and the vote were in favor of compulsory retirement, would you thereafter have the authority to give a ruling relaxing the requirement of Resolution 42 and authorizing the General Committee of Adjustment to make a compulsory retirement agreement without supplemental pension?

Mr. Parkinson: If Your Honor please, I object to that for the same reasons previously assigned.

The Court: He can answer that.

Mr. Parkinson: Exception, if Your Honor please.

A. I would have the authority to do it, but I will say that if a ballot was put out by any general committee without first getting the concurrence of the Grand Office, the committee would receive instructions to cancel the ballot. It would have no effect until the matter was discussed and an official ruling put up.

Q. In that connection there is testimony in this case that your ruling of November 26 was read at the December meeting of Division 561. If you had had an appeal

page 105 } from your ruling at that time, would you have stayed the ballot pending your ruling on the appeal?

A. Let me see if I understand your question. If I under-

stand it, if there had been an appeal made on my ruling as to whether or not I had the authority to relax the provisions of Resolution 42, if that appeal had been filed in accordance with the law for repeals, would I have held it in abeyance? Is that it?

Q. Yes.

A. Yes, I would.

Q. Was there any appeal?

A. No, there was not.

Q. Was there any appeal at any later stage?

A. No, there has been no appeal in any instance.

Q. The Constitution provides the method of appeal, does it not?

A. It does.

By Mr. Parkinson:

Q. Mr. Brown, at the time that the vote was taken as to whether or not there should be a referendum, you had rendered no opinion. Is that not true?

A. The proper procedure, that was because of the November letter as to the proper procedure.

Q. At the meetings of the local unions, at those times some of the members are on the road or resting from their previous trips, are they not?

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A. Yes, that is the reason for taking a referendum ballot.

Q. You do advocate the putting of Resolution 42 on the ballot?

A. I recommend that it should be included with the ballot.

Q. As to Resolution 42 the only notice that the International Union gives is to the officers of the locals, is that not correct?

A. That is pretty generally correct. It is included in the monthly statement which is sent out each month. It is a matter of record in the minutes.

By the Court:

Q. To whom does that go?

A. That goes to the Chief Engineer, Secretary and Treasurer, the chairmen of all divisions, all general chairmen, all local division legislative representatives, all state legislative representatives and all Grand Officers.

By Mr. Parkinson:

Q. To get down to the local for the RF&P Railroad, that

goes to about four or five of the members, does it not?

A. It goes to four or five of the officers of the

page 107 } division.

Q. I am talking about here in Richmond with the RF&P Railroad where they have one division. It would go to the General Chairman and about three or four others, is that correct?

A. That is correct, all officers of the division.

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L. E. TIMBERLAKE,

one of the defendants, recalled for further examination, testified as follows:

DIRECT EXAMINATION.

By Mr. Gibson:

Q. You were asked to check on your records as to the number of eligible voters in December, 1956. Do you have the report on that?

A. Yes, sir, we had 133 active members, 9 excused members, making a total of 142 members.

Q. You have testified that Chief Brown's letter of November 26 was read to the December meeting. Was that letter read to the January meeting of the division?

A. Yes, sir.

Q. Was it read to the February meeting of the division?

A. Yes, sir.

Q. Did you endeavor with Mr. Turner to negotiate a supplemental pension agreement with the railroad?

page 110 } A. Yes, sir.

Q. What was the outcome of those efforts?

A. It was we could not get a supplemental pension.

Q. Did you know of any way short of a strike in which you could have gotten a supplemental pension, if at all?

A. No, sir.

Q. Did the General Committee of Adjustment meet to consider what action to take at the end of your negotiations with the railroad?

A. Yes, sir, we had several meetings.

Q. Did you reach a decision as to the action to take?

L. E. Timberlake.

A. We voted 100 per cent—it was three of us on the committee—voted that it wasn't any other position under our rules of referendum vote rules.

Q. There wasn't any other action besides what?

A. Than to follow the instructions of the referendum vote after we had exhausted all efforts to try to get the supplemental pension with the help of the Assistant Grand Chief engineer, Brother J. W. Turner.

Q. There has been introduced in evidence in this case as Exhibit B a compulsory retirement agreement of March 5, 1957, between the General Committee of Adjustment of Division 561 and the RF&P Railroad. Did you execute that agreement on that date?

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A. Oh, March meeting? Yes, sir.

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By Mr. Gibson: (Continued)

Q. Was any appeal taken to the division or the membership of the division from the action taken in your General Committee in making that agreement?

A. No, sir, no appeal.

* * * * *

page 116 By Mr. Parkinson: (Continued)

Q. Mr. Timberlake, in Chief Brown's letter to you of February 14, 1957, he suggested "I am furnishing Brother Turner, AGCE, a copy of this letter and suggest that you await his arrival on the property before handling the matter further with your management."

You and Mr. Turner didn't negotiate after February 14, 1957, did you?

A. I will have to look and see the date (referring to file). 10:30 a.m., Wednesday, February 13, was the date that—

The Court: It is not a full answer.

A. (Continued) What would he like me to answer?

The Court: He wants to know whether after February 14 you and Mr. Turner had any negotiations with the railroad. Is that right, Mr. Parkinson?

Mr. Parkinson: Yes, sir.

A. Not after that date, but I would like to put in that I had talked to Brother Brown on the telephone before the letter, as he mentioned in his letter of February 14 that it was coming.

By Mr. Parkinson: (Continued)

page 117 } Q. Mr. Brown suggested you and Mr. Turner negotiate further, but that was not carried out? Is that true?

A. It was carried out as per instructions.

Q. When did you and Brother Turner negotiate with the railroad for a supplemental pension after February 14, 1957?

Mr. Gibson: I do not know that that is a fair question.

By the Court:

Q. Just answer this question: Did you and Mr. Turner negotiate with the officials of the railroad after February 14, 1957?

A. No, sir, because we was up there on February 13.

* * * * *

page 119 } CHARLES E. MERVINE, JR.,

a witness introduced on behalf of the defendant railroad, first being duly sworn, testified as follows:

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page 120 }

* * * * *

Q. What officer of the RF&P Railroad is charged with the responsibility of collective bargaining with representatives of its employees?

A. Mr. Stuart Shumate is your Chief Operating Officer and is designated by our company, the RF&P Railroad, to conform with the provisions of the Railway Labor Act as our Chief Labor Officer.

Charles E. Mervine, Jr.

Q. Where is Mr. Shumate today?

A. Mr. Shumate is confined to his home with illness. I believe he has the flu.

Q. What responsibility do you have with regard to collective bargaining negotiations with representatives of the employees?

A. It is my responsibility, sir, to administer the provisions of the various labor agreements. We have approximately 19 I believe under Mr. Shumate's direction. It is my responsibility to advise as to the interpretation and the application of those agreements to assist in collective bargaining and the settlement of grievances and claims.

Q. Are there any instances when you represent Mr. Shumate?

page 121 } A. Yes, and in Mr. Shumate's absence I have the authority to represent him and also to assist him when he is present.

Q. For how long have you had this responsibility?

A. Responsibility that now rests upon my position I have held since March of 1955.

Q. Are you familiar with the collective bargaining negotiations that have taken place since 1955?

A. Yes, sir.

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Q. Subsequent to November 1, 1956, when did the matter of a supplemental pension for the locomotive engineers come up as far as the management of the company is concerned?

A. Well, on January 7, 1957, we received a letter, a letter addressed to Mr. Shumate as General Superintendent from Mr. L. E. Timberlake as General Chairman of the Brotherhood of Local Engineers in which he advised our management that—would you like for me to read Mr. Timberlake's letter?

Q. Suppose you do.

A. I quote: "On November 7, 1956 a resolution was presented and adopted by our division to spread a referendum ballot among our membership regarding the compulsory retirement of our enginemen at age 70 years. This was done

and on January 2, 1957, our membership voted in favor of compulsory retirement for enginemen upon
page 123 } reaching the age of 70 years. We would like a conference with you at your earliest convenience pertaining to this and also we would appreciate it if at the same time you would give further consideration to the supplemental pension plan that we have discussed before."

Q. Was a meeting held in response to that letter?

A. Yes, sir, a meeting was arranged for 3 o'clock the afternoon of Wednesday, January 14, or, rather January 15—

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Q. Was the matter of a supplemental pension again brought up by the representatives of the locomotive engineers?

A. You mean subsequent to January 15?

Q. That is right.

A. Yes, sir, it was.

Q. When and under what circumstances?

A. A conference was next arranged for February 13, 1957, at the request of Mr. L. E. Timberlake, General Chairman, who advised us that Assistant Grand Chief Engineer, Mr. Turner, was in the city and that he would like a conference arranged immediately, if possible, to consider that matter, and as a result of that request a conference was arranged for February 13.

Q. Mr. Mervine, do you have in your files a letter dated February 15, 1957, addressed on behalf of the General Superintendent to Mr. Timberlake confirming the position which the railroad took at that February 13 meeting?

A. Yes, sir, I do.

Q. I hand you this letter and ask if you will read that?

A. Yes, sir, this letter is dated February 15,
page 125 } 1957. It is addressed to Mr. L. E. Timberlake, General Chairman, Brotherhood of Local Engineers, from Mr. S. Shumate, who at that time was General Superintendent and has since been made Vice President and General Manager.

Charles E. Mervine, Jr.

"Dear Mr. Timberlake: This will confirm our conference held on February 13 with you and your committee, including Mr. J. W. Turner, Assistant Grand Chief Engineer, at which time we discussed further your proposed agreement to provide for the termination of seniority and retirement of locomotive engineers at age 70 and your request for a supplemental pension plan. As explained to you in conference concerning the supplemental pension plan, we have carefully considered this matter, but because of the reasons indicated to you in conference we cannot consistently accede to such requests. As to the proposed request of seniority and time agreement, it is my understanding that you will advise us within the next few weeks concerning the proposed draft sent you with my letter of January 18."

Q. Does the RF&P Railroad have agreements with the other operating employees providing for compulsory retirement at age 70?

A. Yes, sir.

Mr. Parkinson: If Your Honor please, I object to that question and answer as being irrelevant and immaterial.

The Court: What is the materiality of that?

page 126 } Mr. Christian: If Your Honor please, other than to show the reasonableness of the fact that there are agreements with other operating employees—

The Court: I do not think it makes any difference whether they do have or whether they do not have.

Mr. Gibson: Your Honor, it does seem to me it is a very strong circumstance.

The Court: It may be a practical matter, but from the standpoint of what we have here, you can make it with engineers and not make it with anyone else, and you can make it with everyone else and not with engineers, so I do not think it will have any effect on me whether a contract was valid or not. Objection sustained.

By Mr. Christian: (Continued)

Q. Can you give us a general statement of the benefits to which the locomotive engineers who might be retired by reason of this agreement being put into effect would receive under the Railway Retirement Act?

Charles E. Mervine, Jr.

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A. Yes, sir. Generally, in accordance with the benefits under the Railway Retirement Act which provide for an annuity upon reaching the age 65, in the case of the plaintiffs in this case and in others similarly situated, page 128 } they would be entitled to—this is an estimate because there is a formula that has to be followed to get this right down accurately, depending upon the number of years of service and the amount of earnings, but generally I would say that these gentlemen would get an annuity of somewhere between $160.00 and $170.00. Then if their wives can qualify, if they have reached the required age of 65, they are entitled to an annuity equivalent to one-half of the employee's annuity, but it is not to exceed $54.30 a month.

The maximum, I believe that could be obtained, that is, joint annuity between husband and wife for railroad employees retiring about this time, would be around about $238.00 a month.

For the individual employee alone the maximum I believe is $184.00. Now that will go up over the next year or so when it will reach its maximum amount. Does that answer your question?

By Mr. Christian: (Continued)

Q. The figures you have given, were they for monthly benefits?

A. Monthly benefits, yes, sir.

Q. In making lay-offs, on what basis are lay-offs made on?

By the Court:

Q. Just a minute. Is there any Social Security page 129 } involved in this, too?

A. It could be involved, sir. If any of these people had worked in employment covered by Social Security, it would be worked in with their railroad retirement, and they would get the full benefit of that, but I don't believe in this case—

Q. A railroad engineer is not under Social Security?

A. No, sir. The Railroad Retirement Act of 1937—you see,

prior to 1937 the railroads had their own individual pension.

By Mr. Christian: (Continued)

Q. On what basis are lay-offs made? I am speaking of locomotive engineers.

A. In the case of locomotive engineers, to properly answer that question I must explain that before a man can become a locomotive engineer and acquire seniority as a locomotive engineer he must be employed as a fireman and work up, and in time when the need for engineers arises and he takes his promotion, then he will acquire seniority as an engineer. He does not lose all rights to his work as a fireman, and if we have a reduction in the number of engineers that we need to man our trains, when he is cut off, as we speak of it in our business, he can then go back and displace a junior fireman, and, of course, he can work as a fireman. Con-
page 130 } sequently, when we make our reduction, they are first felt among the firemen because they are the ones that feel the effect and, of course, the unemployment that follows.

Engineers either usually move back from more preferable or desirable runs as an engineer to less desirable runs as an engineer, or they go back to positions as firemen.

Q. At the present time are there any lay-offs which affect the locomotive engineers?

A. Well, at the present time, I believe, as of today—in fact, the junior engineer holding a job as engineer here in Richmond—do you have the seniority roster? May I refer to this, sir?

The Court: All right.

A. (Continued) The youngest engineer, and when I say youngest I mean youngest in seniority, holding a job as engineer in Richmond now is Mr. P. P. Williamson. He is shown as No. 95 on the roster with a seniority date as engineman of May 29, 1940. That is the date that he was promoted to engineer.

Following Mr. Williamson the men below him in seniority are now cut back to positions of fireman until you get down to No. 143 which is L. E. Norton, and he is I believe running an engine at Potomac Yards as an engineer, and from Mr.

Charles E. Mervine, Jr.

Norton over to S. T. Pearson, shown as No. 160
page 131 } in the next column, they are holding positions
as engineer at the present time at Potomac Yards. Some of these men are on the extra list. They do not hold regular positions.

Following Mr. Pearson with No. 161 to the end of the roster, which goes to No. 226, J. T. Hunter, those men are cut back to positions as firemen, and actually this roster represents just about almost all of our people that are now in engine service both as enginemen and firemen.

There is on this roster, which is the firemen's roster, a great number of those men who do not have any position whatsoever. They are completely furloughed and laid off from railroad service.

Q. Approximately how many men are so laid off at the present time?

A. I would say—this is an estimate—between, oh, 65 and 75, maybe a few more. They are firemen, sir. There are about 110 enginemen that are now back working as firemen.

CROSS EXAMINATION.

By Mr. Parkinson:

Q. You stated Mr. P. P. Williamson was promoted to an engineer on May 29, 1940. When did he first become fireman?

A. I can't answer that question, sir. I do not
page 132 } have his date before me. It was considerably
previous to 1940.

Q. Mr. Mervine, would you say it would be a fair statement to say that he went with the railroad about 1920?

A. I would think somewhere about that time, yes, sir, within several years one way or the other.

Q. So it took him about 37 years to get a job running regular or running at this time?

A. That is correct, sir.

Q. The three plaintiffs stand for passenger runs by reason of their seniority, do they not?

A. Yes, sir, they do.

Q. I believe you stated that the railroad retirement would yield from $160.00 to $170.00 for the plaintiffs and then a maximum of $54.30 for a wife. Is that correct?

A. If she could qualify, yes, sir.

Q. If she could qualify?

A. Yes, sir.

Q. What does she have to do to qualify?

Charles E. Mervine, Jr.

A. Well, I believe under the present law she has to be 65 years of age.

Q. So the maximum they could get would be $224.30, is that correct?

page 133 } A. It might not be the maximum. The figure that I gave you was an approximate figure. It is possible for a husband and wife to draw up to about $238.00 a month at the present time, and the plaintiffs in this case may be able to get benefits in excess of the estimate I gave, but that is the approximate figure.

Q. But your estimate was $160.00 to $170.00?

A. That is right.

Q. Then $54.30 is the maximum for the spouse?

A. Yes, sir.

Q. These engineers pay 6 per cent of their salary, do they not?

A. They pay 6 1/4 per cent, sir, and the railroad pays a like amount into the fund.

Q. The plaintiffs are earning at this time approximately $750.00 a month, isn't that true?

A. That is approximately correct, yes, sir.

Q. On this conference between Mr. Timberlake and Mr. Shumate on January 7, how long did that conference last?

A. Do I understand your question, sir, to be the conference of January 7?

Q. January 15, 1957 is the one.

A. I cannot answer that question, sir. I do not know how long the conference lasted.

page 134 } Q. When does the business day end for Mr. Shumate?

A. Sir?

Q. When does the business day end for Mr. Shumate?

A. Sometimes quite late in the evening, sir, but ordinarily five o'clock.

Q. The meeting was arranged for 3:00 p. m.?

A. That is correct, sir; that is the customary hour that we arrange our conferences.

Q. What time of day was the conference held on February 13, 1957?

A. I cannot answer that question, sir. The request for the conference was made by telephone to Mr. Shumate and I was out of the city the day of the conference, but I believe that they met in the morning.

Q. Do you know on what day the arrangements were made for the conference?

Charles E. Mervine, Jr.

A. No, sir, but it was just two or three days ahead I believe. It was not more than that.

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By Mr. Lowden:

Q. Is it not true that some of the engineers who have been demoted back to firemen who are now working as firemen, in order to take a job as a firemen they had to either go away from home or else change their place of residence in order to do that?

A. That is correct, sir.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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