

Award No. 4105
Docket No. 3991
2-CMStP&P-EW-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Electrical Workers)**

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

1. That the current agreement was violated when General Foreman Ray W. Engstrom refused to compensate Relief Substation Operator R. B. Austin for time consumed in traveling from Tarkio, Montana to Primrose Substation, and return, when relieving the Substation Operator at the Primrose Substation.

2. That accordingly the Carrier be ordered to compensate Relief Substation Operator R. B. Austin for the time consumed in traveling from Tarkio, Montana to Primrose Substation, and return, at the straight time rate of pay for each day that he relieves the regular Substation Operator at Primrose Substation, starting with March 12, 1960 until this violation is discontinued.

3. That the current agreement was violated when General Foreman Ray W. Engstrom refused to compensate Relief Substation Operator R. B. Austin for automobile mileage, when the service required the use of his automobile to protect the relief of the Substation Operator at Primrose Substation.

4. That accordingly the Carrier be ordered to compensate Relief Substation Operator R. B. Austin, the established mileage rate for the use of his automobile from Tarkio, Montana to Primrose Substation, and return for each day that he relieves the Operator at Primrose Station, starting with March 12, 1960 until this violation is discontinued.

EMPLOYEES' STATEMENT OF FACTS: Prior to March 1, 1960 Relief Substation Operator R. B. Austin, hereinafter referred to as the claimant, when relieving the substation operator at the Primrose Substation, which is 40

ant Austin when, for his own convenience and of his own volition, he returns to Tarkio, or drives to any other point for that matter, during his tour of duty at Primrose.

The carrier submits that Claimant Austin has been properly compensated for all travel time and automobile mileage in accordance with schedule rules and agreements and/or understandings, therefore, there is absolutely no basis for the instant claim and we respectfully request that said claim be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved on June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Carrier maintains a substation at Primrose, Montana. It provides living quarters for the regular substation operator. Prior to March 1, 1960, the Carrier also provided living quarters for the relief substation operator. On or about that day, it sold the building used by the relief operator and temporarily ceased to furnish living quarters to him. Since April 16, 1960, the Carrier has again provided living quarters for the relief operator.

The Claimant whose home station is at Tarkio, Montana (about 40 miles from Primrose) relieved the regular operator at the Primrose Substation and, prior to March 1, 1960, stayed overnight at the building furnished him by the Carrier. During the period from about March 1, 1960, to April 16, 1960, when assigned to the Primrose Substation, he used his own automobile to drive both ways.

He claimed compensation at the straight time rate for the time spent each day in traveling from Tarkio to Primrose, and return, as well as mileage pay for the use of his automobile. The Carrier denied his claim which is now before us for decision.

1. In partial support of his claim, the Claimant relies on Paragraph 2 of Rule 26 ("Duties of Operators") of the applicable labor agreement which provides, as far as pertinent, that substation operators "shall maintain . . . the living quarters they occupy in a neat and presentable condition." He argues that the Carrier's obligation to furnish living quarters to substation operators is implied therein. We do not so construe the Rule. In our opinion, it can reasonably be construed only to mean that the operators shall properly maintain the living quarters if and when the Carrier furnishes them. No other Rule expressly requiring the Carrier to provide substation operators with living quarters has been called to our attention and we have found none in an examination of the labor agreement.

2. However, in reviewing the merits of the instant claim we are not confined to an examination of the express provisions of the labor agreement. Established practices not inconsistent therewith or with law are equally part of the labor agreement although not expressed in it. See: *United Steelworkers of America v Warrior and Gulf Navigation Co.*, 363 U. S. 574, 581-582: (80

S. Ct. 1347, 1352 (1960); Arbitration Award in re Great Atlantic and Pacific Tea Co., Inc., 62-1 Labor Arbitration Awards (Commerce Clearing House, Inc.) No. 8256, pp. 3972, 3977 (1962).

The record before us discloses that the Carrier has furnished both regular and relief substation operators with living quarters ever since substations were built about 1912, or for approximately 50 years. As a result, we find that a consistent practice of long-continued duration, well known to and mutually accepted by the parties has existed at the Primrose Substation under which the Carrier furnished living quarters to the relief operator prior to March 1, 1960. This practice is not in conflict with the labor agreement nor with law. The basic question requiring decision is then whether the Carrier was justified in discontinuing the practice unilaterally on or about that date. The answer is in the negative.

3. The demarcation line between unwritten practices which can unilaterally be discontinued by the employer and those which cannot has not been defined with finality in the law of labor relations. However, industrial arbitrators have generally held that an unwritten practice involving methods of operation, directing the working force or other typically managerial functions is not binding and can usually be changed unilaterally by management. On the other hand, they have frequently ruled that, when an unwritten practice involves a specific benefit of personal value to the employees, it can only be changed by mutual agreement. In the latter instance, the practice establishes a working condition which becomes a part of the labor agreement and, thus, cannot unilaterally be changed by management but only through negotiation. See: Frank Elkouri and Edna A. Elkouri, **How Arbitration Works**, Revised Ed. Washington, D. C., BNA Incorporated, 1960, pp. 269-276 and cases cited therein.

In applying the above principles to the facts underlying the instant case, we have reached the following conclusions:

There can be no doubt that furnishing living quarters to the relief operator is a benefit of peculiar personal value to him. Consequently, the Carrier could not unilaterally discontinue the practice because it had become a part of the applicable labor agreement which must remain in effect until changed pursuant to Section 6 of the Railway Labor Act.

4. In summary, we hold, that for each day on which the Claimant relieved the regular substation operator at Primrose, Montana, during the period from March 1, 1960, to April 16, 1960, he is entitled to be compensated at the straight time rate of pay for the time spent in traveling from Tarkio, Montana, to Primrose Substation, and return, as provided in Rule 4 (e) of the Labor Agreement as well as to mileage pay for the use of his automobile as indicated in the letter, dated September 27, 1956, of the Assistant to the Carrier's General Manager.

AWARD

Claim sustained in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December 1962.