Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35981
Docket No. MW-34943
02-3-98-3-684

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to compensate the Claimants listed below the per diem linen allowance provided for within Rule 38 of the Agreement for the first half of February 1996 (System File T-D-1133-H/MWB 96-08-08AA BNR).

(2) As a consequence of the violation referred to in Part (1) above, the Claimants listed below shall be compensated as follows:

D. J. Holmes	$18.90
L. E. Brost	$27.90
D. W. Alley	$ 7.50
L. L. Lesmeister	$ 8.10
A. Koble	$34.80
E. C. Boser	$34.80
J. G. Faul	$33.00
T. Selfors	$31.80
J. C. Shipman	$34.80
T. J. Haider	$35.40
M. N. Boser	$35.10
K. L. Berg	$32.70
L. A. Swenson	$34.20
K. L. West	$29.10
J. E. Bohlman	$ 9.90
M. Dahlin	$33.30

L. J. Viall	$41.90
O. H. Thompson	$21.90
J. L. Tracey	$ 4.80
J. F. Lake	$32.70
A. A. Boser	$34.50
L. J. Eslinger	$ 4.80
M. G. Fliflet	$22.20
R. G. Gottskalson	$ 4.50
W. K. Kender	$26.40
S. R. Podtburg	$24.60
D. J. Knoll	$28.20 "

FINDINGS:

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

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

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

Parties to said dispute were given due notice of hearing thereon.

During the period of July 1, through December 31, 1995, the 27 Claimants listed in this dispute were assigned to various positions for which the assignment bulletins specified, in pertinent part: "Headquartered mobile. No Outfit. Rule 38 to apply." The contract language at issue in this case reads as follows:

"RULE 38. MOBILE HEADQUARTERS (WITH OR WITHOUT OUTFIT CARS) - LODGING MEALS

A. Other than as provided in Rules 37 and 39, the Company shall provide for employes who are employed in a type of service, the nature of which regularly requires them throughout their work week to live

away from home in outfit cars, camps, highway trailers, hotels or motels as follows:

(1) If lodging is furnished by the Company the outfit cars or other lodging furnished shall include bed, mattress, pillow, bed linen, blanket, towels, soap, washing and toilet facilities.

(2) An expense allowance for furnishing and laundering pillows, bed linens, blankets and towels in the amount of thirty (30) cents will be allowed for each day that per diem meal allowance is paid. In the event the Company arranges to furnish and launder pillows, bed linens, blankets and towels, this expense allowance will not apply.

B. Lodging facilities furnished by the Company shall be adequate for the purpose and maintained in a clean, healthful and sanitary condition.

C. If lodging is not furnished by the Company the employe shall be paid a lodging allowance of $12.75 per day.

D. If the Company provides cooking and eating facilities and pays the salary or salaries of necessary cooks, each employe shall be paid a meal allowance of $2.50 per day.

E. If the Company provides cooking and eating facilities but does not furnish and pay the salary or salaries of necessary cooks, each employe shall be paid a meal allowance of $5.00 per day.

F. If the employes are required to obtain their meals in restaurants or commissaries, each employe shall be paid a meal allowance of $9.00 per day." (Emphasis added)

It is not disputed in this record that from July 1, 1995 through the first half of February 1996, each Claimant received the maximum allowable per diem allowance of $23.80, calculated as follows: $0.30 linen, $13.75 lodging and $9.75 meal per day. Nor is it

disputed that those payments were approved by the appropriate Roadmaster(s), in accordance with instructions issued on July 28, 1988, by then Manager, Region Accounting, T. P. Sullivan, which read, in pertinent part:

"TO: Roadmasters

SUBJECT: Rule 38, Mobile Headquarters Meals & Lodging

There have been several inquiries concerning Rule 38 expenses and the intention of this letter is to answer any questions you may have and to assist you in determining the proper allowances.

Rule 38 expenses are payable to MW&S employees who are required to live in mobile quarters, hotels or motels.

The following allowances are payable when the condition listed is applicable to the employee.

Allowance	Amount	Condition
Linen	$ 0.30 per day	If the Company doesn't provide linen.
Lodging	$13.75 per day	If the Company doesn't furnish lodging.
Meals	$ 3.25 per day	If the Company provides cooking facilities and cook.
	$ 6.50 per day	If the Company doesn't provide the cook.
	$ 9.75 per day	If the Company doesn't provide for cooking facilities and cook.

Maximum allowance is $23.80 ($0.30 linen, $13.75 lodging and $9.75 meal) per day.

> The expenses are paid for each day of the calendar week the employee is available for work (not voluntarily absent) and work is available to him. . . ."

In mid-February 1996, however, apparently because of recommendations from internal financial auditors, the Carrier notified the Claimants that the "30 cent linen allowance not payable." The instant claim arose when, in the paycheck for the first half of February 1996, payable February 28, 1996, the Carrier "recovered" the 30 cents per diem linen allowance previously paid to the Claimants. After the deductions were made from pay checks issued February 28, 1996, the Organization filed this claim on behalf of the named Claimants, under date of April 12, 1996, alleging violation of Rules 21, 22 and 38 of the Agreement. The Organization premised its claims on the plain language of the first sentence of Rule 38.A(2), supra, and "past practice" thereunder, as memorialized in the Sullivan Memorandum of July 28, 1988. The Carrier denied the claims and disavowed the Sullivan Memorandum; asserting that prior such linen allowance payments had been made "in error" and that such payments were not required under a "common sense" reading of the plain language of Rule 38 of the Agreement.

Careful consideration of the record evidence and the respective positions of the Parties convinces us that the Organization must prevail in this case. When conflicting interpretations of a contract are plausibly demonstrated, as they are under the language of Rule 38, the language in dispute must be considered to be ambiguous. If the language of a Collective Bargaining Agreement is ambiguous, parol evidence of mutual intent may appropriately be utilized to resolve a dispute as to the meaning of the unclear contract language, especially including mutually recognized and accepted "past practice." In United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82, 80 S.Ct. 1347, 46 LRRM 2416 1960), the Supreme Court of the United States recognized the efficacy of clear, consistent and mutually recognized past practice for resolving disputes over the mutual intent underlying ambiguous contract language:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law-practices of the industry and the shop is equally a part of the collective bargaining agreement although not expressed in it. . . ."

So far as the record shows, since at least July 1988 the Carrier paid the $.30 per diem linen "for each day that per diem meal allowance is paid," in strict accordance with the literal language of the first sentence of Rule 38.A(2). [The second sentence of Rule 38.A(2) has no application in the facts of this case]. Notwithstanding arguable latent ambiguity or inconsistencies in other parts of Rule 38 regarding such payments, prior to February 1996 that mutually recognized past practice, as memorialized in the Carrier - authored Sullivan Memorandum of July 28, 1988, supra, was accepted by both Parties as the proper interpretation and application of Rule 38 to employees in the Claimants' situation. Latter day revisionist reading of the controlling contract language by internal financial auditors does not justify the Carrier's unilateral abrogation of the mutually recognized and accepted interpretation and application of that contract language in this case. Because the Organization persuasively demonstrated that the Carrier violated Rule 38 and the established past practice thereunder in the factual record in this case, the claims are sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of March, 2002.

Carrier Members' Dissent
to Award 35981 (Docket MW-34943)
(Referee Eischen)

We understand the majority's conclusion of coupling the linen allowance with the payment of the per diem meal allowance. If one looked at Rule 38A (1) and (2) as separate entities, then one goes with the other.

However, Rule 38(A) is not separate provisions but one. The condition precedent is clear, "If lodging is furnished by the Company...." the enumerated facilities and services are to be provided. If lodging is not provided, then the employees are compensated in accordance with paragraph (C) of the rule. That is what was done here. Paragraph (A) and (C) of Rule 38 are mutually exclusive. It was never the intent of the parties that employees would be entitled to both provisions at the same time.

The quoting of Rule 38 (A) at pages 2-3 of the Award, including the indentation of items (1) and (2) under paragraph (A) substantiates that paragraph (A) covers both subsections. Further the $.30 cent allowance was for the employees "furnishing and laundering" their bed linen. There is no evidence in this record that any of the Claimants furnished or laundered any bed linen for themselves. That was provided by the motel. Obviously, since the Claimants were not required to provide or launder any bed linen the raison d'etre for the linen allowance ceased to exist. And regardless of who, other than the employees, provided the bed linen, the expense allowance would not apply per the second sentence of Rule 38 (A)(2).

The reliance of the majority on a 1988 memorandum, quoted at pages 4-5, and on "past practice" ignores the foregoing. That the allowance had been paid in the past, erroneously or not, does not warrant the continued payment of the allowance when the purpose for it ceases. Possibly, the Carrier could have recouped the money differently but the fact remains that none of the Claimants was required to secure his own bed linen and certainly none of them laundered it.

We Dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik