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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35301
Docket No. MW-34191
01-3-97-3-752**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Messrs. J. L. Maxwell, M. A. Strecker, S. D. Slyder, S. D. Hall and D. M. Olsen the forty-one dollars (\$41.00) mobile expense reimbursement per diem as provided within the provisions of Rule A-9C (System File MRL-128).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants shall each be allowed forty-one dollars (\$41.00) for each day worked during the period of April 8 through 30, 1996.”

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.

The claim seeks payment of a mobile crew expense reimbursement per diem in the amount of \$41.00 for each day worked by the Claimants during the period of April 8 through April 30, 1996.

Rule A-9C states:

“... Employees assigned to these Fixed Headquarters seasonal crews who are required to travel forty (40) miles or more from the siding on the Railroad closest to their residence to the fixed headquarters point, will receive the mobile crew expense reimbursement per diem as provided for in Rule A-11 for each day worked only and will not receive the additional per diem when required to travel to the Headquarters Point on their rest day.”

As agreed by the parties on October 3, 1994, the applicable mobile crew expense reimbursement per diem is \$41.00.

The Claimants are seasonal employees headquartered in Billings, Montana, and assigned to Gang 1957. The Organization asserts that the Claimants were required to travel in excess of 40 miles between the West Switch at Columbus, Montana, and Billings and thus are entitled to the claimed per diem.

In response to the claim, the Carrier stated:

* * *

“You state that all parties involved live closer to the west switch of Columbus, so the Railroad must use the west switch as a starting point to determine the mileage. Nowhere in the Agreement does it say that it must be the west switch, east switch, or center. It only states that it is the siding closest to their home to be used. The Railroad is using the siding, which is less than 40 miles to the location of the headquartered job site.”

* * *

The Organization replied:

“ . . . The siding closest to the Claimants’s residence is the West Switch of Columbus, Montana, The distance from the West Switch, a starting point, to the headquartered point at Billings, Montana tool house, and ending point, is 42.3 highway miles. Even if you were to use the East Switch of Columbus siding as a starting point, which we do not agree is appropriate, the most direct route by highway to the tool house at Billings, Montana is 40.2 miles. Therefore, the distance from the siding on the Railroad closest to the residence of the Claimants is more than 40 miles no matter which part of this siding the Railroad uses as a starting point.”

The Organization also stated:

“In addition, the Claimants in this case as well as employes who reside in the same town have been assigned to this same crew off and on since the effective date of the agreement in September of 1990. In each case, employes residing in Columbus reporting to Billings have been entitled to and been paid the per diem allowance. The length of the highway route has not changed. . . .”

The Carrier then responded:

“ . . . Your claim states that no matter what part of the siding the Railroad uses, it is more than 40 highway miles to the Columbus siding. This is inaccurate, as the closes highway road to the siding is 39.1 highway miles from the headquarter point in Billings, the location the gang is reporting to. Therefore, your claim is not valid.”

With respect to the Organization’s asserted past practice, the Carrier stated:

“You also state that the per diem had been paid in the past so it now must be paid. First of all, you are correct that it had been paid in some instances, but it was paid in error. As you know, we had discussions about it and we both agreed it was unclear in the Agreement. My position was that we would not be paying it. Secondly, because it was paid by mistake in the past doesn’t mean it changes the whole Agreement and that now it must be paid.”

And finally, according to the Organization:

“Employees from the Columbus area have always been paid the applicable per diem since the agreement was effective. The Company has always recognized the distance to be 40 or more miles. When employees are reimbursed for mileage from Columbus to Billings, they are reimbursed at the rate of 42 miles one way or 84 miles round trip. The Company recognizes the distance to be more than 40 miles. When you review an Official State Highway Map, the distance is more than 40 miles. The State Highway Department recognizes the distance to be more than 40 miles. For all these years, from all of these sources, they can’t all be wrong. All of them have recognized the distance to be in excess of 40 miles.

That State has not ‘shrunk,’ the distance remains more than 40 miles. . . .”

For the sake of discussion, we will agree with the Carrier that the exact measuring tool is open to debate and is “unclear in the Agreement.” However, a fundamental Rule of contract construction is to look to past practice in order to attempt to ascertain the meaning of unclear language.

Here, there is a demonstrated past practice. The Organization has shown that in the past employees have been paid on the basis of a computed distance in excess of 40 miles. The Carrier effectively admits to the existence of that practice. According to the Carrier, “. . . you are correct that it had been paid in some instances. . . .” The Carrier cannot now negate the existence of that past practice by now taking the position that “it was paid in error” or that “it was paid by mistake.” The demonstrated fact is that, in the past, it was paid.

The demonstrated past practice resolves the alleged ambiguity. The mobile crew expense reimbursement per diem should have been paid. The claim will be sustained.

AWARD

Claim sustained.

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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 24th day of January, 2001.