PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

THE BALTIMORE AND OHIO RAILROAD COMPANY—BUFFALO DIVISION

STATEMENT OF CLAIM: Claims of Fireman G. A. Adamson, August 17, 18, 19, 21, 22, 23 and 24, 1930; Fireman C. W. Tuck, October 1, 2, 3, 4, 5 and 6, 1930; Fireman C. H. Weaver, August 26, 1930; Fireman A. C. Byers, November 9, 1930; Fireman Frank G. Stigers, October 25 and 31, 1930, and claims of these and all other firemen on these and all other dates required to perform the miscellaneous service, in violation of schedule rules, of supplying their engines with water at Riker, Pennsylvania, for a minimum day’s pay, on each date obliged to perform the service, under Article 43 (a), Firemen’s and Hostlers’ Agreement.

EMPLOYEES’ STATEMENT OF FACTS: These claims were formerly designated as Cases 1433, 1433-A, 1433-B, but as they are practically the same in fact and identical in principle, they have, for the sake of convenience, been combined.

Prior to the origin of these claims it had been the recognized custom for shopmen to place water in the tenders of all locomotives at Riker, whether being dispatched for service, or actually in service. August 17, 1930, the date of the first claim, Fireman Adamson was firing yard engine No. 533. When the engine required water, and was stopped at the water crane about 100 feet from the engine house for that purpose, Road Foreman of Engines James Egan and Yardmaster Clair Mikeshell were on hand. They informed Adamson that henceforth it would be necessary for him to place water on his own engine. Adamson remonstrated; calling attention to Article 52 (a) of his contract; pointing out that the well established and long recognized practice had been for shopmen to take water at this point; that for firemen to do this work was an infringement upon the rights of shopmen; that he would only perform the work under pressure and protest, and that he would file claim for extra compensation. The Officers in question made it plain that they were not there to listen to opposition or argument, but to see that Adamson supplied his engine with water; not only in that particular instance, but in the future, and they made it real plain that unless Adamson complied with their directions, he would sever his relationship with the Company. Under these circumstances, Fireman Adamson supplied his engine with water, August 17, 1930, as well as on following dates. Following this, the claims of certain other firemen at this particular water crane developed under similar circumstances.
The claim of Fireman Stigers, October 31, 1930, and that of Fireman Byers, November 9, 1930, developed at another water crane south of the roundhouse, about 20 cars, from another water crane, where a shopman was employed to place water, coal and sand on locomotives. Prior to October 18, 1930, it had never been the practice for firemen to place supplies, such as coal, water or sand on their locomotives at the points just referred to. On this date, Fireman A. C. Byers (also Local Chairman of the B. of L. F. & E.) was firing yard engine No. 340. When water was needed on the engine, and movement was being made to get it, the crew was informed that water would have to be taken at the water crane about 20 car lengths from another water crane where shopmen were available to take water, and that the fireman would have to take the water, regardless of the fact that the track to the water crane where a shopman was on hand was clear, and irrespective of the further fact that the fireman had to get drinking water, and less delay would have taken place by taking water at the usual point. Moreover, it had been the practice for shopmen to take water at the very water crane where Byers was instructed to take it on October 18. Byers declined to take water; first, because Article 52 (a) of his contract relieved him of such work; and second, because it was much easier and less delay was involved by taking water at the water crane where an attendant was on hand for that very purpose. He also took the position that for him to place water on his engine was an encroachment upon the rights of shopmen. Fireman Byers was dismissed for his action in the premises, but on November 6, 1930, was reinstated by General Superintendent E. J. Devans. Water on other occasions was taken by firemen under penalty of losing their jobs if they did not.

The claims are in each instance for one day’s pay at the miscellaneous rate of pay ($5.63), in addition to pay received as firemen, under Article 43 (a), Firemen’s and Hostlers’ Agreement.

POSITION OF EMPLOYEES:

“ARTICLE 52

“Cleaning And Supplies

“(a). Firemen and hostlers will be relieved of cleaning engines, tanks, fires and flues, scouring of brass, cleaning of stacks, smoke arches and front ends. Lubricators will be filled, headlights, markers and other lamps cared for (including filling, but not lighting), and all supplies placed on engines at points where roundhouse or shop force is maintained. Firemen and hostlers shall be relieved from placing on and removing from engines of all tools and supplies. The Firemen shall not be relieved of the responsibility of knowing that engines for which they are called are properly equipped for service. Firemen will be relieved from cleaning ash pans at Gainesville, Clarion Junction and Butler Junction.”

That part of the paragraph underlined (by the writer) has appeared in the Firemen’s Agreement since June 1, 1910. It is plain and positive, and can only mean that firemen are not required to place supplies on their engines. Coal, water and sand have always been considered “supplies” under this rule. Other portions of the paragraph quoted relating to supplies came into being with the Eastern Arbitration Award for firemen and hostlers of April 23, 1918, Article VII, but under the saving clause contained in Article IX of said Award, the underscored matter, being a more favorable rule in connection with supplies, was retained, and under it firemen at Punxsutawney were not obliged to place water on their engines until the claims at issue arose, when the “hardboiled” tactics described were resorted to.

Several controversies have arisen with respect to firemen placing such supplies as coal, water and sand on their engines at certain points. Such controversies were disposed of on the basis of the rule just referred to. For
example; May 1, 1916, the following settlement was reached under this rule in relation to firemen and hostlers having been required to place coal, water and sand on their engines at East Salamanca, DuBois, Cummings and Butler Junction:

"Hostlers at East Salamanca will be relieved from placing coal, water and sand on engines. Firemen will be relieved from placing coal, water and sand on engines at DuBois, Cummings and Butler Junction."

Only hostlers, as the agreement indicates, were required to do the work specified at East Salamanca—not firemen—while at the other three points, as the settlement also shows, only firemen—not hostlers—were required to supply their engines. The settlement, which was in response to request that the same rule invoked in this instance be complied with, was signed by Grand Lodge Officers Ash Kennedy and D. B. Robertson, B. L. E. and B. L. F. & E., respectively, and General Superintendent E. J. Devans.

The record shows that prior to the origin of the claims now in consideration, some difficulty was experienced at the two water cranes involved in these claims, and that in each instance the officers of the Company freely and wholly agreed that the work of placing water on locomotives was not that of firemen. For instance; December 22, 1919, engine 784 was delayed 35 minutes, account tender not filled with water, and this occurred at the water crane where Adamson and the several other firemen were obliged to take water. December 30, 1919, 40 minutes delay was incurred by the same engine and crew (Engineer H. W. Monahan and Fireman C. H. Keenen). In each instance the Superintendent advised the shop force that water would have to be taken by shopmen, which was done. January 5, 1920, complaint of the matter was filed with Superintendent A. B. White and Master Mechanic E. E. Cope, by Local Chairman Keenen. January 8, 1920, Mr. Cope replied, while Mr. White answered on January 14, 1920; both agreeing that the work of placing water on engines was that of shopmen, and that in the future shopmen would do it without question. Several complaints with respect to taking water at the other water cranes involved in this case were disposed of in the same manner. The record is replete with statements and evidence showing that firemen were not obliged to perform the work in question before these particular claims arose; not only at Riker, but at other points, such as Clarion Junction, New Castle, Butler Junction, Cummings, East Salamanca, etc.

"ARTICLE 43

"Miscellaneous Service

"(a). Firemen called to watch or care for engines, or to perform service other than firing or hosting, will be paid not less than $5.63 per day of 8 hours or less, with overtime on the minute basis, at one and one-half times the hourly rate."

"8 hours or less" is the guarantee set up in this rule, at the rate of $5.63, for such service as watching engines, supplying engines, cleaning fires, and miscellaneous service of this account. Article 13, setting up the Basic Day in yard service, provides that: "Eight hours or less shall constitute a day's work." Therefore, not less than a minimum day's pay in each class of service performed by the firemen in question can be properly paid to the claimants.

"ARTICLE 42

"Combination Of Yard And Other Service

"A man used as yard fireman for part of a day, and then placed in hostling or other service or sent out on the road to make a road trip (except where such road service is covered by the provisions of Article
20. Paragraph (b), or vice versa, will not be regarded as coming within the provisions of Paragraph (a) of this Article, and he will be compensated by payment of a minimum day in each class of service. If a fireman or hostler is used as hostler, hostler helper or engine watchman, for part of a day, and is then placed in other service, or vice versa, he will also be considered as coming within the provisions of this Paragraph."

There are a number of cases of record wherein firemen have been required to perform miscellaneous service as engine watchmen, coupling it up with and paying for it as firing service, instead of independent service on the basis of a minimum day. The following cases and decisions show settlements reached in such cases, which clearly show that the miscellaneous service was paid for separately and at the basic day guarantee applicable to such service:

"CASE 14"

"Request is made that Rochester Division Fireman J. Driver be paid 8 days' service, account of being held at Rochester on arrival of Train 2, to care for engine, under dates of November 23rd, December 18th and 22nd, 1917."

"DECISION: Agreed to, it being decided that Mr. Driver had completed his assignment on arrival at Rochester after passengers and baggage had been discharged and other employees released and that when held to watch the engine he had engaged in another assignment."

Fireman Driver was held 37 minutes on one date, 20 minutes on another date and but a few minutes on the other date.

"CASE 332-1"

"Request is made that Fireman F. H. Legg be paid one day's pay under dates of June 19 and 21, 1920, account having been assigned to watch engines after completion of regular trip."

"DECISION: Allowed, without prejudice or precedent to future cases."

"CASE 343-12"

"Request is made that Fireman Nessie Carr be allowed one day as engine watchman and one day as pusher fireman on account of having been used in pusher service after having been assigned to engine watching service, under date of June 20, 1920."

"DECISION: Allowed."

"CASE 344-13"

"Request is made that Fireman H. D. Deitter be allowed one day as engine watchman and one day as pusher fireman, account of having been used in pusher service after having been assigned to engine watching service, under date of June 2, 1920."

"DECISION: Allowed."

"CASE 364"

"Request is made that Fireman R. R. Harold be paid 100 miles at engine watchman's rate for service performed in that capacity at East Salamanca, under date of May 16, 1920."

"DECISION: Allowed without prejudice to future cases."
October 19, 1927, Fireman Chas. Falvo was used at DuBois, Pa., to watch an engine, prior to starting on road trip in passenger service, for which he was paid for the two services on the basis of a minimum day in each.

In Award No. 961 (Docket No. 725) the National Railroad Adjustment Board, First Division, sustained many claims similar to the claims at issue, account hostlers at Clarion Junction on our line required to perform miscellaneous service.

Oral hearing is desired.

CARRIER'S STATEMENT OF FACTS: Prior to about May 1, 1930, yard engines at Riker were returned to the engine terminal, after expiration of 8 hours on duty, to be coaled. The engines were supplied with coal and water and the crew on the succeeding shift took charge of the engine. About May 2nd some engines were equipped with built up tanks to increase the coal capacity making it unnecessary for the engines to return to the engine terminal for coal at the expiration of 8 hours' work. After the change was made the 11:35 P.M. yard assignment relieved the second trick 3:35 P.M. crew at the Middle Yard Office, and the engine was continued in service 16 hours before it was returned to the engine terminal. For a time after the relieving point of the second and third trick crew was changed to the yard office, the third trick crew took water sometime during the course of their day's work at a standpipe located north of yard office between the running track and the outgoing engine track directly opposite the roundhouse.

Investigation shows that firemen made complaint about taking water at the standpipe in the yard and requested the local officer in charge to send a shopman to this standpipe when water was needed to fill the tank. No shopmen have ever been stationed at the standpipe to supply yard engines with water, but some yard crews did take water at this standpipe when necessary, during their day's work. As a result of the complaint shopmen were sent to the standpipe to fill the tanks of double crewed yard engines that worked 16 hours without shop attention. This practice started about July 15 and was discontinued about August 17, 1930, and the yard crews on these engines were required to take water at the penstock in the yard during the course of their day's work.

POSITION OF CARRIER: The above claims for the various firemen on the dates specified were based on the alleged violation of Article 52 (a) of the Firemen and Hostlers' Agreement, which provides as follows:—

"(a). Firemen and hostlers will be relieved of cleaning engines, tanks, fires and flues, scouring of brass, cleaning of stacks, smoke arches and front ends. Lubricators will be filled, headlights, markers and other lamps cared for (including filling, but not lighting), and all supplies placed on engines at points where roundhouse or shop force is maintained. Firemen and hostlers shall be relieved from placing on and removing from engines of all tools and supplies. The firemen shall not be relieved of the responsibility of knowing that engines for which they are called are properly equipped for service. Firemen will be relieved from cleaning ash pans at Gainesville, Clarion Junction and Butler Junction."

The claim for a minimum day's pay when required to take water is made under Article 43-A, which provides as follows:—

"(a). Firemen called to watch or care for engines, or to perform service other than firing or hostling, will be paid not less than $5.24 per day of 8 hours or less, with overtime on the minute basis, at one and one-half times the hourly rate."

The Carrier contends that Article 52-A of the Firemen's Agreement was not violated in this case as this rule has never been construed as relieving firemen from taking water during the course of their day's work when neces-
sary, either in road or yard service, and it was the practice on the former B. K. & P. for firemen to take water during the course of their trip or day's work when necessary.

The fact that the local officers complied with the request of the yard firemen at Riker and furnished a shopman to supply water on double crewed engines for a period of about one month in July and August 1930, has no bearing on the proper application of Rule 52-A nor did it change a practice of long standing with regard to firemen taking water during the course of their day's work.

Rule 43-A has no application for the reason that the employees were not called to watch or care for engines and on the dates in question they performed no duty other than that regularly performed by firemen when and as required. Moreover, Article 20-A of the Firemen's Agreement expressly provides against the allowance of such claims. Article 20-A reads as follows:—

“(a). Where it has been the practice or rule to pay a yard engine crew or either member thereof arbitraries or special allowances, or to allow another minimum day for extra or additional service performed during the course of or continuous after the end of the regularly assigned hours, such practice or rule is hereby eliminated, except where such allowances are for individual service not properly within the scope of yard service, or as provided in Section (b).”

The Board's attention is directed to Awards Nos. 782, 783 and 784 covering three cases on the Buffalo Division of the Baltimore and Ohio Railroad in which firemen made claim for an additional day's pay account of being required to take coal and water on engines at Cummings, Butler Junction and Clarion Junction.

The findings of the Board in these cases were substantially as follows:—

The evidence is to the effect that the interpretation or rules and agreements upon this railroad has heretofore been regarded as relieving firemen of taking coal and water at the three above mentioned points. This Division decides that until changed by agreement such interpretations and/or agreements should be continued in effect until changed by mutual agreement.

The Board also decides that the rules cited to cover payment for taking coal and water heretofore are not properly applicable.

For the foregoing reasons as above set out, we respectfully request your Honorable Board to deny the claims in this case.

Oral hearing is desired.

FINDINGS: The First 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 June 21, 1934.

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

The parties to said dispute were given due notice of hearing thereon.

Taking coal or water is not "supplies" as that word is used in Article 52 (a). See Award No. 2205. However as stated in that award this does not mean that the carrier, unilaterally, can, arbitrarily, change the practice with respect to which the agreement was made. This is an elementary
principle of law. The second paragraph of Article 10 (a) (a standard rule coming down from Federal Control) so recognizes this principle and merely declares it, apparently out of abundance of caution. It would be implied even if the agreement was silent.

Practice, except as agreed upon, is obviously the creature of manage-
ment since it alone has power to impose it, but it may not, properly, exercise this power to make changes in agreed upon or existing practice with respect to which the schedules were adopted, except by agreement. Of course no amount of practice in direct conflict with the written rules will operate to create a novation of the agreement, unless shown to have been consciously acquiesced in by authority as high as that which agreed upon, or is author-
ized to agree upon modification of, the schedule.

The agreements generally are silent on the question of taking coal and water and consequently the matter is one governed wholly by practice as are many other details of operation.

It is well known to all that the practice as to taking coal or water varies widely not only on different systems but under different circumstances on an individual system. It is quite a common practice for road crews them-
selves to take coal and water, enroute, when needed, at places where no shop or other forces are maintained to furnish them; on the other hand it is equally common practice that they do not do so at terminals. Such seems to be the general practice upon this road except that there are apparently also numerous special local agreements covering it.

The evidence in this case is extremely conflicting and the whole record most unsatisfactory showing quite a lack of that cooperation in the develop-
ment of the facts which is the duty of the parties. The matter is adverted to because this case is but one of a large number coming from the same parties showing the same situation.

However, as best we can ascertain them, the facts giving rise to the controversy in this case appear to be as follows: The operation involved was a three shift twenty-four hour yard operation. Seemingly the engines used by each shift were serviced, including coal and water, by shop forces before the shift took it out and the yard crews had nothing to do with servicing after finishing their operating trick. Presumably, although this is by no means clear, if in the course of operation during the shift, water ran short the yard crew might themselves take it wherever convenient. With a view to running engines through two shifts without the necessity of being serviced at the end of eight hours, some of them were equipped by built up tender sides to hold more coal. These engines were placed in operation August 17, 1930, and the yard fireman ordered, over his protest, and under threat of discharge if he failed to obey, thereafter to take water where an attendant formerly had supplied it. Other firemen were likewise required to do the same. How long the practice continued does not appear. This was the origin of the dispute and it clearly involved a change in practice constituting a violation of the rules.

The claim however does not appear to be confined to this violation alone, but rather to be that under no circumstances may a fireman be required to take coal or water. The carrier on the other hand appears to contend that it has the unlimited right to change the practice any place and any time by requiring firemen to take coal or water there because it happens to be a part of their duty to do it elsewhere. The carrier also contends that Article 10 (a), first paragraph, (the abolition of arbitraries provision) bars this claim. That provision has no relation to the matter.

It follows from what was said previously that both these claims are too broad. The claim for a minimum day under Article 48 (a) will be sustained
for each day upon which firemen were required to perform service at this point under circumstances involving a change in practice from shop or other forces performing it.

AWARD

Claims sustained to extent indicated by Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

ATTEST: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 21st day of August, 1939.