Award No. 2663
Docket No. DC-2619

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes Locals 456 and 582, for and in behalf of Bertram Hicks, Waiter and other employes similarly situated that:

1st. By charging claimants for meals and lodging and deducting amounts charged from their wages, effective March 1, 1941, the Carrier violated the current agreement, particularly Rule 15, together with practices existing upon the premises of furnishing free meals to dining car employes on duty in service of the Carrier, and:

2nd. That Bertram Hicks and other employes similarly situated who have been charged for meals and lodgings and from whose wages deductions were made shall be reimbursed in the total amount thus deducted retroactive to March 1, 1941.

EMPLOYES' STATEMENT OF FACTS: Effective July 1, 1922, revised, effective March 10, 1928, the Southern Pacific Company and the representatives entered into an agreement governing hours of service and working conditions of its Dining Car Cooks and Waiters.

Rule 15 of that agreement provided:

"Room and bathing accommodations will be furnished employes when away from home terminal on Company business."

This rule is still in full force and effect.

Effective October 1, 1934, the Working conditions and certain rules established by Supplement 18 to General Order 27 were written into a Memorandum of Understanding between the Carrier and the Representatives as the Agreement governing Club and Buffet Car Porters, Observation Car Porters, Lounge Car Attendants, All Day Lunch Car Attendants, and All Day Lunch Car Helpers. The understandings as regards meals and lodgings for cooks and waiters also were kept in effect for this class of employes.

Under date of October 1, 1913, the Carrier issued a book of rules entitled Joint Rules and Regulations Governing the Operation and Accounting of Dining Cars, Hotels and Restaurants. On Page 6, Paragraphs 14 and 15, it is stated:

"Free Meals

14. Cooks must be notified by waiter or party turning in the order that it is a 'free meal for crew.' Same is to consist of articles already prepared, or such others as in the judgment of the chef and under

he was on duty, also without any deduction from the cash payments due him under the current wage schedule. Consequently no departure from the unamended schedule is shown, and upon this basis the claim is without merit.

3. If the claim is predicated upon the theory that the schedule provisions relating to wages were amended by the Wage Order, then the claim becomes in fact a demand for enforcement of the Fair Labor Standards Act, and hence not subject to consideration, decision or award by this Board. However, even if regarded as a claim under an amended schedule, such amendment cannot be restricted merely to the substitution of the figure contained in the Wage Order for the figures appearing in the schedule. The **entire** Wage Order must be imported into the schedule, including all of the elements which by the terms of the order go to make up the minimum "wage," for which that figure serves as the measure, if any part of said Wage Order is so imported. Otherwise, an essential part of the Wage Order, which derives from and reproduces the statute itself, will be nullified and disregarded. Neither the petitioner, nor this Division, can undertake to nullify the statute upon which the claim, under this alternative theory, must rely.

Treating the schedule as amended, if petitioner so elects, the facts show full compliance with the requirements of the Wage Orders according to their terms, and therefore the claim is untenable under the alternative theory.

4. The prior awards of this Division, involving claims phrased in language similar to the present claim, are either not in point because of different facts, or erroneous as a matter of law. Three of the most recent awards of this series are admitted by the author of the opinion therein to be open to serious question from the legal standpoint.

OPINION OF BOARD: As of July 1, 1922, the carrier promulgated seventeen rules governing the hours of service and working conditions of its dining car employes. The petitioner became the representative of said employes in 1934, and in 1936 said organization and the carrier entered into a memorandum wherein said rules were referred to as their "current Agreement" and which limited the application of one of said rules. During the following year the carrier filed said rules and memorandum with this Board, in compliance with a request for copies of its effective agreement with its dining car employes. Under these circumstances, we cannot sustain the contention of the carrier to the effect that there is no binding agreement between the parties. The fact that there is not in evidence a formal document bearing the signatures of the parties is of no consequence.

It appears that it was the established practice of the carrier at the time it promulgated its 1922 rules to furnish free meals to its dining car employes on duty enroute. This practice was continued after said rules were accepted by the parties as their working agreement. "Where a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself." Award 2436. Rule 15, providing that, "Room and bathing accommodations will be furnished employes when away from home terminal on Company business," relates to another subject-matter and must be regarded as extending the carrier's obligation, rather than as abrogating or restricting the prevailing practice. We conclude, therefore, that the carrier is under a contractual obligation to furnish free meals under the circumstances of this case and that this service is not a mere gratuity or one that may be charged for at will.

The carrier urges, however, that by virtue of the "Fair Labor Standards Act of 1938," it was authorized to take credit for the reasonable cost of meals furnished the claimant from March 1, through August 31, 1941, during which his minimum wage was established by law at 36¢ per hour and he was actually paid in money at the rate of 32.5¢ per hour. Reliance is placed upon Section 3 (m) of the federal act, which reads:

> " 'Wage' paid to any employe includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such

employe with board, lodging, or other facilities, if such board, lodging, or other facilities are **customarily furnished by such** employer to his employes." (Our emphasis.)

From its inception this Board has consistently held that its functions are limited to interpreting and applying the rules agreed upon by the parties. Having concluded that the parties before us had an effective agreement that obligated the carrier to provide the claimant with free meals under the circumstances and during the period in controversy we have, therefore, fully discharged our duty in the premises. It has not been suggested that the Fair Labor Standards Act has ever been construed as forbidding carriers from contracting to furnish free meals to their employes. The wages to which the claimant is entitled is a matter of law, rather than of contract. Section 16 of the act contains appropriate provisions for its enforcement, but this is not the responsibility of this Board. To say more would merely becloud the issue.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the effective agreement by charging the claimant for meals, as alleged in the claim.

AWARD

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1944.