

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company
(former St. Louis-San Francisco Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it allowed the members of Rail Gangs 1 and 2 and Tie Gangs T-1-10 and T-2-11 living in camp cars a daily meal allowance of six dollars (\$6.00) per day instead of nine dollars (\$9.00) per day (System File B-2016/EMWC 86-5-13A).

(2) Because of the violation referred to in Part (1) hereof, the claimants shall each be allowed an additional three dollars (\$3.00) per day beginning sixty (60) days retroactive from April 9, 1986 and continuing until such time as the violation is corrected."

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 employees 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 waived right of appearance at hearing thereon.

Section 1-B of the Award of Arbitration Board No. 298 was incorporated within Rule 81 of the parties Agreement. It reads:

"(a) If the Carrier provides cooking and eating facilities and pays the salary or salaries of necessary cooks, each employee shall be paid a meal allowance of \$1.00 per day.

(b) If the Carrier provides cooking and eating facilities but does not furnish and pay the salary or salaries of necessary cooks, each employee shall be paid a meal allowance of \$2.00 per day.

(c) If the Carrier provides camp cars but does not provide cooking or eating facilities, each employe shall be paid a meal allowance of \$3.00 per day."

(The daily amounts have since been raised to \$3.00, \$6.00 and \$9.00 respectively).

As a result of that Award the parties executed a Memorandum of Agreement on May 7, 1969, which provided in pertinent part:

"B. Meals

* * *

2. If the railroad 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 \$2.00 per day.
3. If the employes are required to obtain their meals in restaurants or commissaries, each employe shall be paid a meal allowance of \$3.00 per day."

Again, the dollar amounts have been raised.

It is undisputed that for in excess of twenty years Carrier has provided stoves, refrigerators, hot and cold water, electricity and fuel while the employees have furnished their own cooking and eating utensils.

Third Division Award 23434 issued November 3, 1981, held in part:

"under Rule 81 the phrase 'cooking and eating facilities' includes utensils for the preparing of food and cutlery for eating the food...."

The Organization contends that as Carrier is not providing cooking or eating facilities within the definition of those terms announced in Third Division Award 23434, Rule 81(c) applies. Carrier argues it provides accommodations which exceed the requirements of Arbitration Award 298 and therefore Rule 81(b) applies. Carrier further argues it had consistently applied 81(b) to this situation since 1969 with no objection and the Organization is now estopped from making a claim such as this citing Third Division Award 22708. Further Carrier notes Award 23434 relied upon by the Organization included the following:

"However, we cannot overlook Carrier's unrefuted evidence of a consistent past practice of not furnishing such utensils. Organization's unexplained failure, heretofore, to assert its rightful objection to this practice persuades us that it would be inequitable in all the circumstances to honor the claim for compensation in this dispute. Accordingly, the claim for compensation in the instant case will be denied."

In view of the consistent long standing application of the 1969 Agreement and the Organization's acquiescence therein and in reliance on the precedent of Third Division Award 23434, we shall dismiss this claim.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 10th day of August 1989.