

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(Bessemer and Lake Erie Railroad Company

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

(1) The Carrier violated the Agreement when, on October 2, 4, 10, 14, 22 and 23, 1985, it required Messrs. J. R. Churchill, J. A. Macri, H. O. Wilson, A. D. Northcott and T. C. Engstrom, Jr. to work during their assigned meal period and failed and refused to compensate them therefor in conformance with Agreement rules.

(2) Messrs. J. R. Churchill, J. A. Macri, H. O. Wilson, A. D. Northcott and T. C. Engstrom, Jr. shall each be allowed three (3) hours of pay at their respective straight time rates because of the violation referred to in Part (1) hereof."

FINDINGS:

The Third 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 employes 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.

Rule 12(b) of the Agreement provides:

"(b) When a meal period is allowed, it will be between the ending of the fourth hour and the beginning of the seventh hour after starting work, unless otherwise agreed upon by the employees and the Company."

For at least forty years Carrier, whenever it advertised and assigned positions with allowed meal periods, specifically designated the time the meal period was to be taken in the bulletin establishing the position and/or the bulletin effecting changes, such as starting times occasioned by daylight saving time, etc. Such meal periods were regularly assigned with a fixed time each day.

On March 27, 1985, Carrier requested that the Organization enter into a Memorandum of Agreement which would interpret Rule 12 so that meal periods need not be regularly assigned. Instead, the requirements of the service on a particular day would govern when meals would be taken. This proposed Agreement read:

"It is agreed that Rule 12 shall be interpreted as follows, effective April 1, 1985:

Meal periods need not be regularly assigned, but may be assigned on a daily basis, within the time limits set forth in Rule 12(b), based on the requirements of the service on that particular day."

The Organization refused to enter into the interpretation. Thereafter Carrier continued to issue bulletins with a specific assigned meal period for Track Department employees such as the one issued on April 26, 1985, reading:

"Effective Monday, May 6, 1985, the new working hours for the Track Department will be 6:00 a.m. to 2:30 p.m.

Lunch will be from 11:00 a.m. to 11:30 a.m.

Rest Days: Saturday and Sunday."

On July 2, 1985, Carrier's Assistant Engineer Track requested permission from the Organization to issue a General Order altering assigned meal periods for track forces. The General Chairman refused to consent to the alteration which would accomplish the result sought in the rejected interpretation. Following this discussion meal periods continued to be set by bulletin with specific assigned times.

On September 20, 1985, Carrier posted a notice to all track employees assigning floating meal periods. This notice provided:

"Effective Monday, September 30, 1985, in accordance with Rule 12(b) of the Agreement between the Bessemer and Lake Erie Railroad Company and the Brotherhood of Maintenance of Way Employees, the 30 minute Meal Period will be observed between the ending of the fourth hour and the beginning of the seventh hour after starting work and as directed by your supervisor.

For example, with the present working hours of 7:00 a.m to 3:30 p.m. the meal period can start any time between 11:00 a.m. and 12:30 p.m. as directed by your supervisor."

(Underscoring in original.)

On six days in October 1985 the employees named in the Statement of Claim were not allowed to take their meal periods at the times previously assigned by bulletin. Each filed a Claim for three hours additional compensation, (six meal periods at thirty minutes each), at straight time rates.

In denying these Claims, Carrier contended that even though there may have been a past practice on setting fixed times for meal periods, the language of the Rule was clear and unambiguous and supported its right to have flexible meal periods on a daily basis. No amount of past practice can abrogate specific contract language. Thus it had license to have supervisors assign meal periods on a daily basis so long as the assignment occurred after the end of the fourth hour and before the start of the seventh hour.

We are not persuaded that Carrier's contentions are at all sound in this matter. Prior to its efforts to have the Organization participate in an interpretation which would allow it the day to day flexibility it claims it can achieve unilaterally and is attempting to secure through a Board decision, Rule 12(b) was administered, with the mutual concurrence of the parties, so that when a meal period was assigned, it was assigned by bulletin to occur between the ending of the fourth hour and the start of the seventh hour. Flexibility occurred in the initial decision as to when the meal period should be taken but it did not occur thereafter on a day to day basis.

While the Rule gives Carrier flexibility to set the times of meal periods this flexibility is no different from flexibility to establish starting times of assignments or rest days of assignments. ~~X~~ Each of these ingredients of an assignment must be established by bulletin, (or some other appropriate mechanisms), as provided in the Agreement. Meal periods cannot be changed on a day to day basis, (by direction of a supervisor conditioned on service requirements), any more than starting times can be changed on a day to day basis, or rest days can be changed on a day to day basis.

This Board has had three previous occasions to consider whether Rules such as Rule 12(b) allow a Carrier to assign meal periods on a flexible basis from day to day. The first, Award 131, concluded:

"This rule permits the carrier to indicate a meal period between the ending of the fourth and the beginning of the seventh hours of service period, but does not require him specifically to designate the period."

The second, Award 11367, held:

"To us 'hours of assignment' cannot be construed to connote any open-endedness. Therefore, it follows, that Carrier is obligated by the Agreement to assign the position here involved a fixed lunch period within the period of time agreed to in Rule 6(a)."

The third, Award 16192, considered both of the earlier decisions and concluded:

"We are constrained to agree with the conclusion reached in said Award 11367, rather than in said Award 131, for the reasons stated in said Award 11367, and, therefore, find said Award 11367 to be controlling in this instant dispute."

It is manifestly clear that the parties here have historically applied Rule 12(b) in a manner which required a fixed lunch period within the time parameters agreed upon in the Rule. This application would be consistent with that of Awards 11367 and 16192.

Rule 12(b) was violated when Carrier did not assign a specific meal period following the ending of the fourth hour and the start of the seventh hour.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1990.