Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31498
Docket No. MW-31007
96-3-92-3-865

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

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 actual expenses incurred by Brush Cutter Operator N. H. Brown from June 3 through June 28, 1991 [System File 12(26)(91)/12(91-1541) LNR].

(2) As a consequence of the violation referred to in Part (1) above, Claimant N. H. Brown shall now be allowed the expenses submitted by him from June 3 through 28, 1991 on the expense report form submitted to the Carrier, which will be reproduced and attached to the correspondence of this claim."

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 waived right of appearance at hearing thereon.

This dispute involves the Carrier's refusal to reimburse Claimant a total of $21.94 for meal expenses (during the period of June 3 through 28, 1991) in excess of $20.00 per day submitted on his June 1991 Expense Report as incurred while away from home on his assigned position as a Brush Cutter Operator. There is no dispute that the Carrier's normal practice has been to accept a detailed expense form for full reimbursement, rather than requiring receipts or other supporting documentation for meal expenses.

The Organization contends that the Carrier is precluded from requiring Claimant to submit after-the-fact receipts in order to get reimbursement. It argues that Carrier's view of what is reasonable is in the nature of an affirmative defense which it failed to support with any evidence, and that an assertion as to the range of average lunch bills received is insufficient to meet its burden of proof. The Organization further contends that Rules 46 and 47 require reimbursement of "actual necessary" meal expenses without any monetary limitation, and to permit the Carrier to arbitrarily cap the meal allowance at $20.00 per day would be to amend the Agreement, which the Board has no power to do.

The Carrier initially argues that the Organization's claim must fail for lack of specificity as to what portions of Rules 46, 47, or 48 were violated. It contends that Rule 47(I)(B)(a)(3) a special provision, only requires reimbursement for "reasonable" meal expenses, and must be relied upon over the general "actual necessary expense" language of Rule 46(a). The Carrier asserted on the property in response to the claim that none of the 300-400 expense reports it normally processes each month claims between $7.00 and $8.00 for lunch, as did the Claimant in this case. It argues that the Claimant's meals expenses were excessive and not reasonable based upon what others routinely submit, and that it properly denied the excessive amount in the absence of requested receipts to determine the Claimant's actual expenses.

The pertinent provisions of Rules 46 and 47 are reprinted below.

"RULE 46. TRAVEL SERVICE

* * *

When meals and lodging are not provided by the railroad, actual necessary expenses will be allowed, ..."

"RULE 47. TRAVEL TIME AND EXPENSES

I. The railroad company shall provide for employes who are employed in a type of service, the nature of which regularly requires them throughout their work week to live away from home in camp cars, camps, highway trailers, hotels or motels as follows:

* * *

(B) Meals:

* * *

3. If the employes are required to obtain their meals in restaurants or commissaries, they shall be reimbursed for the actual reasonable expenses thereof."

On the basis of the undisputed practice of the parties, the Board is convinced that the Claimant's entitlement to reimbursement for the amounts submitted on his June 1991 Expense Report for meal expense, cannot depend upon his failure to submit receipts for these meals after-the-fact. The record does not reflect that the Claimant or other employees were placed on notice prior to this time that receipts would be required, or were to be retained, in the event a question arose as to the reasonableness of the claimed expense.

While general Rule 46 allows reimbursement for "actual necessary expenses," special Rule 47 injects a standard of reasonableness on the meal allowance. The Agreement does not define what the parties consider to be a reasonable limitation on meals. Under such circumstances, in order for the Carrier to be permitted to impose a $20.00 per day figure as it did in this case, it is incumbent upon it to present evidence substantiating that this is a reasonable figure based upon other approved meal expenses from individuals similarly situated. Its mere assertion that Claimant's lunch expenses far exceeded the routine submissions of others is insufficient to meet its burden of proof in this case. Therefore, the claim is sustained and Claimant is to be paid the additional amount of $21.94.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders than 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 23rd day of May 1996.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 31498 , DOCKET MW-31007
(Referee Margo R. Newman)

One of the most fundamental and well-established precepts in cases before this appellate review Board is that our consideration is limited to issues, evidence and **arguments** which were properly joined during the on-property handling of the dispute. Our dissent is necessary because the Majority failed to follow that precept in deciding this case.

The Majority notes on Page 2 of the Award:

> "It [the Organization] argues that Carrier's view of what is reasonable is in the nature of an affirmative defense which it failed to support with any evidence, and that an assertion as to the range of average lunch bills received is insufficient to meet its burden of proof."

This contention was raised by the Organization, for the first time, at Page 9 of its Submission to this Board, where it stated:

> "It will be noted that the Carrier did not present a single copy of the three to four hundred monthly expense reports it referenced during the handling of this dispute on the property. This is noteworthy because the referenced expense reports were in the Carrier's sole possession."

As the Majority correctly noted further on at Page 2 of the Award:

> "The Carrier asserted on the property in response to the claim that none of the 300-400 expense reports it normally processes each month claims between $7.00 and $8.00 for lunch, as did the Claimant in this case. It argues that the Claimant's meals expenses were excessive and not reasonable based upon what others routinely submit,..."

In Second Division Award 11332 (Muessig) the Board held, in relevant part, as follows:

> "The Organization, on the property, did not refute the Carrier on this point. Accordingly, we follow a long line of Awards which have held that when material statements are made by one party and not denied by the other party, thereby leaving the contention standing as unrebutted, the material statements are accepted as fact, particularly when there is both the opportunity and the time to refute the contention."

Simply stated, the Carrier's on-property assertion went unrefuted on the property and should have been accepted as fact. Absent the Referee succumbing to the Organization's **new affirmative defense argument** we trust this claim would have been denied in its entirety.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

5/23/96