Award No. 2699
Docket No. DC-2660

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local No. 351, for and in behalf of H. B. Petrie, Waiter and other employes similarly situated for certain amounts deducted from their wages in violation of the agreed to past practice for more than twenty years and of Rule No. 4, of the current agreement. Further, that such payments be made retroactive to March 1, 1941, and in accordance with the provisions of this Agreement, Rule No. 4:

"Employes will be given a letter identifying them to be provided with meals in Dining Cars and sleeping accommodations."

EMPLOYES' STATEMENT OF FACTS: Effective July 1, 1936, an agreement was entered into between the carrier and our organization, known as the Schedule of Rules Governing Working Conditions of Employes in the Dining Car Department. Rule 4 of that agreement provided:

Rule No. 4—Deadheading

"Employes will be allowed one-half time at classified hourly rate of pay, on the minute basis, for actual time deadheading under instructions in the interest of the railroad company, computed from departing time to arriving time, with or without dining car, except between 10:00 P. M. and 6:00 A. M., when sleeping accommodations are available. Deadhead time resulting from the exercise of seniority will not be allowed. Employes will be given a letter identifying them to be provided with meals in dining cars and sleeping accommodations."

Rule 12 of the Agreement provided:

Rule 12—Sleeping Accommodations

"The Railroad Company will continue sleeping accommodations necessary to provide for lay-over."

For many years prior to the above agreement, the Carrier had adopted a policy of paying uniform wages for each class of work performed, and uniform hours of service and terms of employment such as generally prevailed for Dining Car Employes in the railroad industry. In addition to the wages paid to its employes, carrier also furnished at its own expense and as overhead costs, items necessary in the conduct of its dining car business,—i. e., furnished and laundered white linen jackets or coats and aprons, pencils, trays, meal checks and sleeping accommodations for dining car employes while away from home stations and meals while on duty or deadheading. The furnishing

In **Missel v. Motor Co.,** 126 Fed. (2d) 98 at 107 (16), the Court in referring to interpretative bulletins and regulations, issued by the Wage and Hour Division, said:

> "Although such interpretations are by no means binding on the Court, we consider them highly significant."

In the case of **Walling v. Peavy-Wilson Lumber Co.,** 49 Fed., Supp. 846 at 893, the Court said:

> "Because the Administrator's interpretations represent the contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly, while they are yet untried and new, they are entitled to great weight." (Citing U. S. v. American Trucking Assn., 310 U. S. 534 at 549.)

In **Bumpus v. Continental Baking Co.,** 124 Fed., (2d) 549, Syl. 4, a case involving the Fair Labor Standards Act, the Court in referring to an interpretation of the Administrator said:

> "The contemporaneous construction of those charged with the administration of the provisions of a new law is entitled to great respect."

In view of the foregoing judicial decisions and the interpretation by the Administrator of the Wage and Hour Division of the U. S. Department of Labor, the carrier submits that the intimation in the third paragraph of the Opinion of Board in Award No. 2445 to the effect that no deduction can be made for meals and lodging furnished, where the reasonable cost of same has not been determined by the Administrator, is without support in law, and under no circumstances could be applicable to the facts set forth in the carrier's position in the controversy with respect to the claim now under consideration.

In giving consideration to the information furnished herewith it is believed the Board will realize there is no merit in this claim and the same should be declined.

OPINION OF BOARD: On July 1, 1936, the Carrier and the Organization here involved entered into a collective agreement governing working conditions of employes in the Dining Car Department. For many years prior to the execution of the foregoing Agreement the Carrier had paid uniform wages for each class of work performed and had assigned uniform hours of service and terms of employment in accordance with prevailing customs for dining car employes in the railroad industry. In addition to the cash wages paid to its employes, the Carrier also furnished meals and sleeping accommodations at its own expense to dining car employes on duty or deadheading. We think the record shows that the furnishing of meals and sleeping accommodations to dining car employes prior to July 1, 1936, was a long established practice.

In the Agreement of July 1, 1936, the furnishing of meals and sleeping accommodations to dining car employes on duty was not mentioned. The Employes contend that the Carrier orally agreed to continue to provide them in accordance with the pre-existing practice. The Carrier denies that any such oral agreement was made. In any event, the Carrier did continue to provide meals and sleeping accommodations to these employes without charge for several years thereafter. There is no better yardstick in determining the intentions of parties to an agreement than the mutual interpretations which they themselves put upon it. It seems clear to us that the parties themselves intended, as demonstrated by their subsequent actions, that the furnishing of meals and sleeping accommodations to employes on duty or deadheading was a part of their pay in excess of the cash wages paid. It is just as much so as if the written agreement, after fixing the wage rate, had included the

words "plus meals when on duty or deadheading." See Awards Nos. 2436 and 2663. Meals and lodging are not gifts or gratuities. If they were they could be taken away by the carrier at will. They must be, therefore, a part of the compensation of the employe entitled to them.

The Carrier contends, however, that the written agreement limited the furnishing of meals to employes deadheading in the interests of the Company as provided by Rule 4 of that agreement. We think this provision has the effect of extending the Carrier's obligation rather than limiting or abrogating the previously existing practice. Award No. 2663. The provision in the rule providing that "Employes will be given a letter identifying them to be provided with meals in dining cars and sleeping accommodations" is clearly for the purpose of readily identifying such employes and not intended as a limitation of the practice.

The Agreement of July 1, 1936, was amended effective January 1, 1938. No changes were made which would in any way affect the question at issue here. The Organization alleges that the Carrier orally agreed to continue the practice of providing meals to employes on duty or deadheading. The Carrier denies any such oral agreement. The Carrier did continue to furnish such meals until March 1, 1941. For the reasons previously recited, we think that the furnishing of meals continued to be a part of their pay in excess of the cash wages paid. This was the situation existing when the Fair Labor Standards Act of 1938, as modified by lawful processes under that Act, required the payment of a minimum wage of 30 cents per hour, effective October 24, 1939. At that time the Carrier began taking credit for meals and lodging furnished to the extent only of the difference between the negotiated rate of pay and the 30 cents per hour minimum established by the Fair Labor Standards Act. Effective March 1, 1941, the minimum wage rate under the Fair Labor Standards Act was fixed at 36 cents per hour. The Carrier thereupon proceeded to take credit for meals and lodging furnished to the extent only of the difference between the negotiated rate of pay and the rate of 36 cents per hour established by the Fair Labor Standards Act, or, if the meals and lodging furnished did not absorb the full amount, then only the reasonable cost thereof was charged to the employe. The reasonable cost has been determined to be the actual cost. No issue is raised here as to the correctness of the amounts deducted. The contention here is that no amounts should be deducted at all.

The basis for the foregoing method of calculating the pay of employes whose negotiated rate is less than the minimum required by the Fair Labor Standards Act, is a provision within that Act providing:

> "'Wage' paid to any employes includes a 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. The term 'reasonable cost' is to be not more than the actual cost to the employer of the board, lodging or other facilities."

In Award No. 1727 this Board decided that the Carrier violated the agreement in charging the cost of meals against the difference between the negotiated rate and the minimum required by the Fair Labor Standards Act. That Award seems to have been followed in Award No. 2098. However, the Carrier in Award No. 1727 declined to put the Award into effect. In a suit to enforce the Award in the District Court of the United States, that court held that where the carrier is obligated to furnish board to employes, and that said board was customarily furnished as part of the basic wage before the passage of the Fair Labor Standards Act, as well as thereafter, the carrier is entitled to claim an allowance for the reasonable cost of furnishing such board to employes, and the court declined to enforce the Award. Brotherhood of Maintenance of Way Employes, etc., et al., vs. The Nashville, Chattanooga & St. Louis Railway, No. 400-Civil, District Court of the United States, Middle District of Tennessee. We feel obliged to adhere to the fore-

going court decision and to treat Award No. 1727 as having been disapproved by a higher tribunal having jurisdiction of the subject matter. Consequently, we are of the opinion that the Carrier had the right to charge for meals and lodging to the extent of the difference between the negotiated rate of pay and the minimum rate required by the Fair Labor Standards Act, up to the time, at least, when the wage increase effective December 1, 1941, become operative. In other words the deductions were legally made on August 31, 1941, a date that becomes important later in this opinion.

It must be borne in mind that the Fair Labor Standards Act did not affect collective agreements except in the cases of employes who received less pay than the minimum required by the Act and the regulation of maximum hours, a matter not here involved. Therefore, the negotiated Agreement of the parties is in effect except where it conflicts with the foregoing provisions of the Act.

On June 10, 1941, the Employes requested an increase in wage rates in the amount of 30 cents per hour with a minimum hourly rate of 70 cents. This was refused by the Carrier and the services of the National Mediation Board were invoked. Mediation resulted in an agreement that employes would abide by the result of pending negotiations for wage increases by the fourteen non-operating organizations, and any increases granted would be made effective as of the date they became effective for the fourteen non-operating organizations. An increase of 10 cents per hour, with a minimum hourly wage of 46 cents, was granted the fourteen non-operating organizations effective December 1, 1941, and a 9 cents retroactive increase from September 1, 1941 to December 1, 1941. The wage agreement contained this provision:

> "From this minimum it is permissible to make deductions provided for by the Fair Labor Standards Act, for the reasonable cost of any board, lodging or other facilities furnished the employe, to the extent such deductions were being made as of August 31, 1941."

It is clear, therefore, that employes were entitled to a retroactive 9 cents per hour increase in pay from September 1, 1941 to December 1, 1941, and thereafter to an increase of 10 cents per hour, with a minimum hourly rate of 46 cents. And it is just as clear that the Carrier was entitled by the agreement to charge the actual cost of board and lodging to employes receiving less than the minimum rate on August 31, 1941 to the extent of the difference between the negotiated rate on August 31, 1941 and the minimum rate provided in the Fair Labor Standards Act at that time.

The Organization contends however that as it was not a party to the mediated wage agreement, effective December 1, 1941, that it is not bound by the section providing for legal deductions for meals and lodging. We think these agreed to deductions were just as much a part of the wage settlement as the hourly wage increases and the minimum hourly wage therein prescribed. It is clear to us that in granting the cash increases, it was contemplated by the parties that where the carrier was required to provide meals and lodging the actual cost thereof, not exceeding the amounts allowed on August 31, 1941, was to be considered as a part of the minimum wage required by the wage agreement. The Organization in agreeing to accept the increases granted to the fourteen non-operating organizations, is bound to take the whole agreement as it is, both the favorable and unfavorable portions thereof. In prescribing the minimum rate of 46 cents per hour, it was clearly contemplated that wages included not only cash but meals and lodging as well, and in determining whether the minimum rate provided by the wage agreement is being paid, the value of the money paid and the actual cost of meals and lodging, not exceeding the amounts deducted as of August 31, 1941, should be added together, the sum thus arrived at constituting the wages being paid within the purview of the wage agreement.

We have therefore arrived at the following conclusions: 1. Meals and lodging while on duty or deadheading in the interests of the carrier was a

part of wages paid dining car employes prior to the agreement of July 1, 1936. 2. After July 1, 1936, such meals and lodging continued to be a part of the wages paid, the agreement being silent with reference thereto and the parties continuing to mutually treat it as such. 3. That when the Fair Labor Standards Act became operative upon dining car employes of this character, as to employes affected by the Act, the carrier could properly deduct the actual cost of meals and lodging to the extent of the difference between the negotiated rate of pay and the minimum rate provided by the Act. 4. That when the "stand by agreement" of September 30, 1941 was entered into, the parties mutually agreed to accept the wage increases agreed upon by the fourteen non-operating organizations and carriers in mediation proceedings then pending. 5. That the agreement resulting from the foregoing mediation proceedings became binding upon the dining car employes herein involved, including the right of the carrier to deduct meals and lodging from the minimum rate therein provided to the same extent deductions were made as of August 31, 1941. 6. That as of August 31, 1941, deductions for meals and lodging were being made to the extent and not exceeding the difference in the negotiated rate under the collective agreement and the minimum provided in the Fair Labor Standards Act. 7. That under the wage agreement, effective December 1, 1941, under which these employes are bound by reference by the mediation agreement dated September 30, 1941, the carrier may, in accordance with the provisions thereof, deduct from the wages of those entitled to the minimum rate, the actual cost of meals and lodging but not exceeding the difference in the negotiated rate on August 31, 1941 and the minimum rate prescribed by the Fair Labor Standards Act on that same date.

The record indicates that the Carrier has been paying the claimant in accordance with the views herein expressed. Consequently, there has been no violation of the current agreement or of the mediated wage agreement effective December 1, 1941. No basis for an affirmative award exists.

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 a violation of applicable agreements is not shown and no basis for an affirmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.