Award No. 5150
Docket No. CL-5314

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(a) The Carrier violated and continues to violate the established practice of long standing in the Los Angeles Commissary (Dining Car, Hotel, Restaurant and News Service) Department when on January 24, 1943, it discontinued furnishing noontime meals free of charge to employes covered by the Clerks' Agreement;

(b) That Carrier be required to restore the practice of serving noontime meals free of charge, and that employes

Doris Gunderson	John T. Gallagher
Martin L. Adams	George H. Brock
Adolphus Williams, Jr.	Glen D. Earhart
Weimer R. E. Rather	Robert L. Garber
Ella W. King	John Bachiero
Josephine Brock	Robert J. Albright
Karl Lust	Marie Smolick
Frank L. Moore	Sylvester Clay
Helen V. Hensley	Irene A. Peters
Michael Cohen	Frank Krebs
Edward Leavitt	Olga Haleck
Mike Haggerty	Horace B. Tillette

and all other employes coming within the scope of the Clerks' Agreement similarly effected be reimbursed the amount of sixty cents (60c) per day for each working day that they are deprived of being furnished a noontime meal free of charge, commencing January 24, 1948, and until the noontime meal is again restored.

JOINT STATEMENT OF FACTS: 1. The carrier maintains a commissary at Los Angeles, California, where supplies of food, linen, crockery and glassware, utensils, etc., are furnished to dining cars, business cars and restaurants. Those employes of the carrier at this commissary who are named in Item (b) of the Employes' Statement of Claim (hereinafter referred to as claimants who are identified by name) and all other employes covered

CONCLUSION

Carrier asserts that in the light of the factual data presented in the foregoing it has proven:

1. That it is within the province of this carrier to discontinue a gratuity that is not only unwarranted and inequitable, but onerous and burdensome, without the concurrence of petitioner.

2. That there is no rule in the agreement nor any understanding, verbal or written which required the inception of the gratuity or requires its continuance.

3. That past practice and/or custom have no bearing on the instant claims.

4. That the carrier's action in discontinuing the gratuity of furnishing noontime lunches is fully supported by Fourth Division, National Railroad Adjustment Board, Award No. 501.

5. That awards cited by petitioner are not applicable to the claim in this docket.

6. That the gratuity of furnishing noontime lunches was not a condition of employment.

7. That the free noontime lunches could in no manner be considered a part of the daily compensation of claimants.

8. That the petitioner has failed to establish any sound basis for the daily monetary adjustment requested, and

9. That the entire claim is without basis or merit and should be denied by this Division.

Carrier submits, however, that should your Board sustain the claim of the employes in the instant docket and order an adjustment in favor of claimants set forth therein for the monetary remuneration requested by petitioner, it will be establishing a monetary inequity as between employes of the commissary department, claimants in this case, and other classes of clerical employes not receiving the adjustment. The agreement of September 14, 1945 provided for adjustment in rates of pay in conformity with proper work evaluations and carrier contends no further adjustments are necessary on positions of claimants.

Your Board is respectfully requested to find in favor of the carrier and deny the claim.

(Exhibits not reproduced).

OPINION OF BOARD: The parties have submitted a joint Statement of Facts. They may be summarized as follows: For a period of 30 years the Carrier has furnished clerks in the commissary at Los Angeles a free noontime meal. On January 24, 1948, this practice was discontinued; and the System Committee of the Brotherhood, on behalf of the affected employes, charges that the Carrier has violated an established practice and requests that the Carrier be required (a) to restore the practice of furnishing a free noontime meal, and (b) compensate each affected employe so that he be reimbursed at the rate of 60 cents for each noontime meal not furnished.

The joint submission also shows that after the Carrier commenced furnishing free noontime meals to certain employes of the commissary department at Los Angeles, an Agreement was entered into between the Carrier and the Clerks' Organization; that this Agreement was revised, effective October 1, 1940; and that on September 1, 1945, the parties made an Agreement classifying and adjusting the rates of pay of various positions covered by the Clerks' Organization, including the employes of the Los Angeles com-

missary. There was no interruption in the practice of furnishing free noontime meals, the subject of this claim, as these several Agreements were consummated. No mention of the meals is made in any of the Agreements, and it does not appear that such was ever the subject of negotiation.

Tht Petitioner shows that employment agencies informed prospective employes that free noontime meals were served to employes of the commissary. The Carrier does not offer a denial of this or show that it was done without authority. The Petitioner also quotes from a letter of a former supervisor of the department that the object of providing free meals was to "keep employes from helping themselves whenever they felt the urge and held the threat that employes eating between meals would be discharged." The Carrier concurs in this as the purpose of instituting the practice of free noontime meals.

The contention of the Brotherhood is that the custom and practice of furnishing a free noontime meal had by January 24, 1948, ripened into a fixed obligation of the Carrier; that under Rule 69 of the Agreement of October 1, 1940, only the prior Agreements were superseded and that all past practices not in conflict with the specific rules set forth in the Agreement were preserved; that the Carrier could not, therefore, by unilateral action discontinue the practice of serving free noontime meals to certain employes under the Clerks' Agreement.

The contention of the Carrier is that the matter of furnishing free meals to the employes of the commissary department is not embraced within the terms of the Agreement between the parties, and that the Carrier, when so furnishing meals, was granting a gratuity which it was at liberty to grant or withhold as it desired without consultation with the Brotherhood.

This Board has had before it a number of times the problem of evaluating the effect of a past practice. We are not here concerned with the type of case where past practice or custom, acquiesced in by both parties, is applied to determine the limitations of a rule, i.e., the Scope Rule. But here we have a practice which originated as a gratuity. Such a proposition was considered by this Board in Award 2436. In that case the practice had been established for the Carrier to permit certain employes to work less than eight hours daily; to have time off with pay to attend funerals of deceased employes; to have one day off each month without loss of pay. In the Opinion of the Board the following appears:

> "* * * The claim of the Carrier that these practices originated as mere gratuities is not a controlling fact. We do not doubt that many recognized practices were first considered as favors or gratuities and by long continued usage became such an integral part of railroad transportation as to deserve the name of 'practices.' A continuous recognition of them for 25 to 40 years, whether or not they had their beginnings as favors or gratuities, or as the result of oral understandings leads us to the conclusion that they are at the present time practices in the sense in which that term is used in the railroad industry.
>
> "It is fundamental that a practice once established remains such unless specifically abrogated by the contract of the parties.* * *"

The Opinion then considers whether the rule finally adopted by the parties there concerned abrogated the practice. The rule, after being amended, provided that the Agreement would continue until changed in accordance with the law. The parties here, in their Agreement of October 1, 1940, adopted a rule providing that all previous Agreements were superseded. No reference is made to prior rulings or practices. In that Opinion (Award 2436) the Board said that such rule "could not have the effect of abrogating or superseding all previous rules, practices and working conditions." In the rule here under consideration, "previous Agreements" are superseded but the contract is silent on the matter of previous practices and working conditions. The Board followed the principle adopted in Award 2436 when it

adopted Awards 3338 and 5005. Thus the Board on these occasions has held that practices, starting as a gratuity, may become a part of the Agreement.

The record does not show whether the question of practice with which we are here concerned was ever the subject of negotiation. In Award 501, cited by the Carrier, it appears that the parties were seeking to negotiate a rule on the one hand at about the same time they were seeking enforcement of it as an established practice. In Award 4989 the claim was rejected because the rental arrangement was not tied into the employer-employe relationship. We believe that the practice here under consideration was a part of such relationship.

No contention is made that the written Agreement contains all of the factors which create and surround the relationship of employer and employe. But after a period of 30 years, during which time contracts were negotiated and wage classifications and evaluations made without reference to the practice of furnishing free meals, we believe that such practice became an incident of the particular positions. We believe that as contracts were negotiated, that the parties could make the basic assumption that the conditions surrounding the work, in general, continue.

We conclude, therefore, that under the circumstances here involved, the Carrier was not at liberty to abolish the free noontime meal without consultation or negotiation with the Petitioner.

The only source of correct information as to the actual costs of the meals which have not been furnished to named employes is the Carrier's accounting office. The actual cost per meal as determined by the usual accounting practices of the Carrier should be paid to the named employes so long as they remain in the Los Angeles commissary department and until the practice is restored.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 dispute arises from a grievance created by the Carrier when it discontinued free noontime meals to certain employes of its commissary department at Los Angeles; and that the contention of the Petitioner is valid.

AWARD

Claim (a) sustained.

Claim (b) sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of December, 1950.

Serial No. 107

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 5150

Docket No. CL-5314

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Southern Pacific Company (Pacific Lines).

Upon joint application of the parties involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The parties in their joint request for an interpretation of Award 5150 present two questions. The first of these is as follows:

> "1. Did the Division, in sustaining Claim (b), 'in accordance with the opinion and findings,' intend thereby that moneys representing 'the actual costs of the meals which have not been furnished to named employes,' should be payable under the award to all employes (occupying positions 'coming within the scope of the Clerks' Agreement') who were actually employed in the Los Angeles Commissary on January 24, 1948, or did the Division intend the award to apply only to the 24 employes identified by name in Claim (b)?"

Claim (b) included certain identified employes and "all other employes coming within the scope of the Clerks' Agreement similarly affected * * *." When this claim was first presented on the property it included forty-one identified employes and "all other employes similarly affected." When the claim was presented to this Division it included twenty-four identified employes and "all other employes coming within the scope of the Clerks' Agreement similarly affected." It was reasonable to presume from this that the claim was on behalf of identified employes and should be distinguished from a general claim in behalf of a class. The phrase, therefore, "all other employes * * * similarly affected" was, and now is deemed to apply only to such employe who was, in all respects concerning his employment, situated similarly to the named claimants. This portion of the claim, in the light of the apparent attempt to name all employes of the Dining Car, Hotel, Restaurant and News Service Department who were, in effect, presenting Claim (a), must be held to include only such employes who might have been listed with the other employes of this Department and who were represented by the petitioner, but were omitted. Here, where the petitioner has listed by name the claimants we must construe the phrase "employes similarly affected" to mean employes affected under circumstances identical with that of the named claimants.

The second question presented by the joint request for interpretation is as follows:

"2. Was it also intended by the award that payments as contemplated should be made to employes at the Los Angeles Commissary who either (a) initially entered the service of the carrier at said commissary after January 24, 1948, but prior to the effective date of the award, or (b), may enter such service at some future date, subsequent to the effective date of the award?"

This matter came to the Division on the claim of the System Committee of the Brotherhood that (a) the carrier violated and continues to violate a practice of long standing when on January 24, 1948, it discontinued furnishing free noontime meals to certain employes; and (b) that the carrier be required to restore such meals and compensate certain employes that were, on January 24, 1948, deprived of such meals. It is apparent from the statements of claim that the question of the right of certain unnamed persons who did or might become employes after the date when the claim arose was not presented to the Division. As this request involves a proposition not encompassed in the claims before the Division when Award 5150 was adopted, it does not, therefore, present an appropriate question for an interpretation of an existing award.

Referee Robert O. Boyd, who sat with the Division as a member when Award No. 5150 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of July, 1951.