

Award No. 5714

Docket MW-5718

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CLINCHFIELD RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement when they increased the deductions made for meals served Extra Gang employes, above the deductions being legally made as of August 31, 1941;

(2) That employes who have had deductions made from their rates in excess of the deductions being legally made as of August 31, 1941, be reimbursed for the difference between the amount they should have received and the amount they have received since said reductions were increased.

EMPLOYES' STATEMENT OF FACTS: In September, 1948, the Carrier increased the deductions made for meals served to employes assigned to Extra and Floating Gangs. These increased deductions are still in effect.

A claim was filed in behalf of the above referred to employes who have had deductions made from their rates in excess of the deductions that were previously in effect, wherein it was requested that they be reimbursed for the difference between the amount they should have received and the amount they have received since the deductions were increased.

The Carrier made wage agreements with the Brotherhood of Maintenance of Way Employes in 1941, 1946, 1947, and 1949. These wage agreements are by reference made a part of this Statement of Facts.

The Agreement in effect between the two parties to this dispute dated September 1, 1949 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Fair Labor Standards Act of 1938 set a wage rate of thirty-six cents per hour as the minimum wage for the Railroad industry. In meeting that minimum the Carriers were entitled to the benefits of Section 3 (m) of the Fair Labor Standards Act, which section allowed as a portion of wages paid, the reasonable cost, as determined by the administration, of furnishing board, lodging, and other facilities, if such facilities were customarily furnished by the Carrier. For your ready reference we quote Section 3 (m) of the Fair Labor Standards Act:

"(m) 'Wage' paid to any employe includes the reasonable cost, as determined by the Administrator, to the employer of furnishing

Carrier certifies that all matters referred to in its submission have been made a part of negotiations for settlement of the dispute on the property.

(Exhibits not reproduced).

OPINION OF BOARD: It is asserted by the Organization that the terms of the effective Agreement have been violated by the Carrier when increased deductions were made for meals served members of extra gang crews. Restitution of the amounts so deducted that are in excess of those in effect on August 31, 1941, is sought.

It is contended by the Organization that the National Mediation Agreement took into account Section 3 (m) of the Fair Labor Standards Act of 1938 and in relation thereto provided as follows:

"Deductions or allowances, under the Fair Labor Standards Act, made during this period for the reasonable cost of board, lodging or other facilities, furnished the employes shall be unaffected by this Section (4) and shall be retained as a credit by the Carrier in computing retroactive payments required by this Section (4)."

and that the parties hereto did, by mutual agreement, place a provision in all subsequent contracts that had the effect of freezing the amount so deducted.

Article 8 (d) of the 1949 Agreement reads as follows:

"ARTICLE 8—Maintenance of Earnings

"(d) Deductions—Insofar as concerns deductions which may be made from the rates resulting from the increase herein granted, under Section 3(m) of the Fair Labor Standards Act of 1938, they may continue to be made to the extent that such deductions were being legally made as of August 31, 1941."

It is further contended that the above contractual provision clearly places a limitation on the amounts to be deducted; and that such sum can only be increased by negotiation and agreement.

The Organization cites that Awards 4141 and 4337 properly sustain the principle that charges or deductions once agreed upon and pegged at a certain level can not later, by unilateral action, be increased by one of the parties to the Agreement.

The Respondent explained that meals were provided the Employees in question by a "third party contractor" (Unaka Stores, Inc.), that the Employees were in no way obligated to trade with the said Company (other than to advise when meals were not desired) and that the Carrier made no deductions for meals except when presented with a properly executed authorization.

It was further asserted that Section 3(m) of the Fair Labor Standards Act was not here at issue since the wages paid did not include the reasonable cost of furnishing meals, the same never having in the past been furnished to employes.

There is no evidence of record that the Respondent ever furnished meals to employes here concerned. The basis of Award 4141 was that this Carrier had agreed to furnish housing to its employes and had by contract limited the amount it could charge therefor. While the award in that instance was in all respects proper, it can not be applied in this docket since the Carrier has not either by custom, practice or contractual provision placed itself in the position of agreeing to pay for, or furnish meals. The Respondent has, however, by contract agreed to furnish a cook to extra gang crews when composed of six or more men.

ARTICLE 9 (c)

"In camp cars, when there are six (6) or more men in a gang, a cook but not food supplies will be furnished at the expense of the company."

Needless to say the salary of a cook was an integral part of the cost of meals furnished by the Unaka Stores, Inc., that was by contract provision, to be borne by the Carrier.

The record indicates that the Organization protested this practice and demanded compliance with the contract on June 12, 1950.

This Board in Award 4428 held:

"... continuance of the practice after the contract became effective, has the effect of estopping the parties from the collection of retroactive penalties resulting therefrom. It does not estop either party from enforcing the contract and the collection of penalties accruing after demand for compliance has been made. See Awards 4281, 3979, 3503, 2137."

Members of Extra Gang Crews when affected by the failure of the Respondent to furnish a cook as provided in Article 9(c) are entitled to reparations in the amount of the salary paid the cooks by the Unaka Stores, Inc., on a pro rata basis, from June 12, 1950.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was violated by the Carrier.

AWARD

Claim sustained to the extent above set out.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of April, 1952.