Award No. 18267
Docket No. SG-18399

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

SOO LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Soo Line Railroad Company:

> On behalf of Mr. R. J. Heinle, Signal Maintainer at Chippewa Falls, Wisconsin, and all other Signal Maintainers — members of and represented by Local No. 6, Brotherhood of Railroad Signalmen — for noon meal expenses incurred by them during March, or subsequently thereafter, in any future month until the claim is resolved.

[Carrier's File: 900-19-62]

EMPLOYES' STATEMENT OF FACTS: Claimants in this dispute are signal maintenance employes with headquarters at various locations on the Carrier's line and who are assigned to a maintenance section.

These employes and all other maintenance employes of the Carrier have received expenses for the noon meal when not at their assigned headquarters point for more then 25 years. In fact noon meal expenses when away from headquarters had been paid to maintenance employes for such a long and uninterrupted period of time that it was considered by all maintenance employes as one of the working conditions of a maintenance position.

However, without negotiations or discussions of any nature, on March 26, 1968, the Carrier issued instructions that "* * * Hourly rated employes who leave and return to their home station on the same day, will not be reimbursed for noon lunch expenses." (Brotherhood's Exhibit No. 1, page 2 of 2).

A continuing claim beginning on March 1, 1968 for expenses of the noon meal on behalf of the maintenance employes was entered by the General Chairman and handled in the usual and proper manner up to and including the highest officer of the Carrier designated to handle such disputes without obtaining a satisfactory settlement.

Pertinent correspondence exchanged during handling of the dispute on the property has been reproduced and attached hereto as Brotherhood's Exhibit Nos. 1 through 9.

There is an agreement in effect between the parties bearing an effective date of February 1, 1945, as amended, which is by reference made a part of the record in this dispute.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Mr. R. J. Heinle, an hourly rated Signal Maintainer headquartered at Chippewa Falls, Wisconsin, submitted an expense account for the month of March, 1968, wherein he claimed a total of $24.65 for noon meals on 15 days. On each of these dates, Mr. Heinle began and ended his day's work at Chippewa Falls. His expense account was returned to him with advice to delete these items, and to submit a corrected expense account in accordance with instructions issued Signal Department employes under date of March 26, 1968. A copy of these instructions is attached as Carrier's Exhibit "A".

Under date of April 29, 1968, General Chairman E. D. Hodsdon wrote a letter to the Assistant Chief Engineer taking exception to the letter of March 26, 1968, and instituting claim on behalf of Mr. Heinle. A copy of this letter is attached as Carrier's Exhibit "B". Assistant Chief Engineer J. H. Tone responded on May 6, 1968, denying the claim. See Carrier's Exhibit "C". General Chairman Hodsdon's reply of May 8, 1968, is attached as Carrier's Exhibit "D", and his appeal to the Director of Personnel is attached as Carrier's Exhibit "E". In response to the Director of Personnel's denial of July 26, 1968 (Carrier's Exhibit "F"), General Chairman Hodsdon requested conference on this dispute. Conference was held on October 18, 1968, and confirmed by letter that same date. See Carrier's Exhibit "G".

Under date of November 29, 1968, General Chairman Hodsdon wrote the Director of Personnel again, acknowledging that Rule 23 was applicable, but, at the same time requesting further consideration of Mr. Heinle's claim. He also listed 27 additional, previously unidentified, hourly rated Signal Maintainers for whom he was seeking noon meal expense allowances retroactive to March, 1968. See Carrier's Exhibit "H".

On December 11, 1968, the Director of Personnel acknowledged the General Chairman's latest letter and reiterated Carrier's position and cited additional Awards in support thereof. See Carrier's Exhibit "I".

Copies of schedule agreement between the parties to this dispute, effective February 1, 1945, and supplements thereto, are on file with the Board and are made a part of this record by reference.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 26, 1968, Carrier issued instructions to all Signal Inspectors, Signal Maintainers and Signal Foremen in regard to the basis for submission of future payrolls and expense accounts, the pertinent part thereof providing as follows:

> "B. For employees (other than those referred to in Section A) who are required in the course of their employment to be away from their headquarters point as designated by the Carrier, including employees filling relief assignments or performing extra or temporary service.

"1. When such employees are unable to return to their headquarters point on any day, they shall be reimbursed for the actual reasonable cost of meals and lodging away from their headquarters point. HOURLY RATED EMPLOYEES WHO LEAVE AND RETURN TO THEIR HOME STATION ON THE SAME DAY, WILL NOT BE REIMBURSED FOR NOON LUNCH EXPENSE.' (Emphasis ours)

Thereafter, the Organization filed this claim for noon meal expenses on the basis that the past practice has been for more than 25 years to pay noon lunch expenses if an employe was working away from his headquarters at noon and ate his noon meal away from his headquarters, and in support thereof submitted statements from 17 Signalmen alleging that they have always been paid for noon meal expenses whenever away from their assigned headquarters.

Carrier's position is that Rule 24 of the Agreement is not applicable herein (the Organization on the property later agreed); that when the Signal Maintainers were changed from monthly rated employes to hourly rated employes on August 1, 1958, they then became subject to among other Rules, Rule 23, which governs this dispute, and said Rule 23 makes no allowance for noon meal expenses; that if Claimants have continued to receive payment for noon meals even though returning to home station daily, then this resulted from oversight and at best can be considered a gratuity, which Carrier can discontinue at any time; that the practice relied on here is not of such long duration or widespread application so as to ripen into an agreement.

First, in the oral panel discussion of this claim before this Board, Carrier Member of the Board raised a procedural defect in contending that the claim should be dismissed because of failure of the Statement of Claim to allege violation of any rule or rules of the Agreement. However, this contention was not raised on the property and cannot now be considered herein.

If this claim is to be sustained, it must be on the basis of past practice.

Carrier argued on the property that "the only 'practice' that would have and relevancy would be the nine years that the Signal Maintainers have been hourly rated employes, and this period of time is much shorter than the periods involved in those cases where the National Railroad Adjustment Board has given weight to past practice."

Carrier thus admits to the "past practice" of paying noon meal expenses to employes away from their headquarters although returning later to their headquarters on the same day. Carrier further argues that this was an oversight ripening into a gratuity, which can be discontinued by Carrier at any time. With this contention, we do not agree. A "past practice" of some 9 to 10 years' duration, in our opinion, indicates that the parties amended the provisions of the Agreement by mutual action or consent. Evidence of past practice can be introduced to show such an amendment. Here the parties, by custom and practice, intended that "noon meal expenses" be paid to employes away from their headquarters although returning later on the same day. Thus, we are compelled to sustain the claim.

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

That the parties waived oral hearing;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November 1970.

CARRIER MEMBERS' DISSENT TO AWARD NO. 18267, DOCKET NO. SG-18399 (Referee Paul C. Dugan)

The conclusions of the Referee in Award 18267 are not supported by the record in the dispute, the rules of the applicable Agreement, or precedent Awards of the Division. The Award is, therefore, in palpable error and we dissent.

The claim as submitted to the Division did not allege an Agreement violation. The reason therefor is obvious. There is no rule in the Agreement providing for noon meal expenses for hourly rated employes, such as Claimants, who return to their home station each day. The claim constituted a naked demand for noon meal expenses for such employes without even alleging an agreement or contractual basis for such a demand. This Board, in the absence of a rule violation, is not empowered to act. See Awards 16663, 15533, 15604, 15143, 10994 and 8851, all of which were cited to the Referee. The Referee dismisses this basic principle, and ignores the precedent cited, on the flimsy pretext that "* * * this contention was not raised on the property and cannot now be considered herein." The Statement of Claim was framed by the Petitioner in its submission to the Board, and the Board must always look to the Statement of Claim to determine whether it has authority to act on the question at issue. The Carrier did contend from the beginning that there was no Agreement support for the demand.

The conclusion of the Referee that the Agreement was, by past practice, amended by "mutual action or consent" is also untenable, and not supported by the Agreement, by law, or by precedent Awards of the Board. The Agreement itself, in Rule 70, provides the manner in which it may be changed or amended, that it, in accordance with the provisions of the Railway Labor Act. The Railway Labor Act, in Section 6, prescribes the steps necessary to effectuate a change. The Petitioner was well aware of the action required to amend the Agreement as evidenced by the fact that on

June 15, 1960, it served on the Carrier a Section 6 notice to revise the Agreement. One of the proposals would have provided what the Petitioner demands herein.

In its submission the Carrier cited some ten Awards by eminent Referees to the effect that past practice under a rule on a specific subject that is clear and unambiguous does not change the rule itself and either Carrier can enforce or employes can require the enforcement of such a rule according to its terms. In the handling of the dispute with the Referee, numerous other Awards by equally eminent Referees serving on different Divisions of the Board were cited, to the effect that a practice having been continued as a unilateral and discretionary policy, may properly be modified or annulled by a Carrier at any time without incurring liability for rule violation. See Third Divison Awards 6144, 6912, 14130, 13217, 9316, 13619, 14190, 14311, 14594, 16818, 16807, 10796, 10182, 9606, 8836, 8691, 7339; Second Division Awards 1181, 2178; Fourth Division Awards 501, 740, 1070, 1069, 1170, 2015, and First Division Award 20132. All of the precedent cited by and in behalf of the Carrier was simply ignored by the Referee.

It has often been held that an Award is no better than the logic that supports it. In this case the author of the Award abandoned logic, disregarded the Agreement, and ignored the numerous precedent decisions upholding the action of the Carrier. Such an Award, which attempts to upset what should be settled matters, can only add to the fires of confusion.

P. C. Carter

G. C. White

R. E. Black

W. B. Jones

G. L. Naylor

Keenan Printing Co., Chicago, Ill. Printed in U. S. A.