Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32982
Docket No. SG-33702
98-3-97-3-22

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad (UP):

Claim on behalf of R. G. Behrens for payment of $46.43, account Carrier violated the current Signalmen's Agreement, particularly Appendix 1 (Vacation Agreement), when it did not pay the Claimant the regular daily compensation of his regular assignment during his vacation period of September 11 to September 15, 1995. Carrier's File No. 960097. General Chairman's File No. 50a16434. BRS File Case No. 10199-UP."

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 were given due notice of hearing thereon.

This claim, submitted by a System Centralized Dispatching Center Electronic Technician ("CDCET"), seeks an additional 30 minutes pay per day for each of the five vacation days for which he received eight hours pay in mid-September 1995.

Neither the claim nor the Carrier's opposition to it can be understood without reference to three interrelated Agreements: Rule 6 - MEAL PERIODS; Appendix 1 (Vacation Agreement of 1941); and a letter of Agreement dated October 24, 1990 which addressed the compensation of CDCET's. The pertinent portions of those understandings are as follows:

RULE 6 - MEAL PERIODS

"(b) The meal period will be between the end of the fourth hour and the end of the sixth hour after starting work. If the meal period is not afforded within such allowed or agreed time limit it will be paid for at time and one-half rate and twenty minutes for lunch allowed at the first opportunity without loss of pay. In instances where twenty minutes for lunch is not allowed it will be paid for at time and one-half rate.

* * *

(d) General C.T.C. Maintainers and Retarder Yard Maintainers, Paragraphs (g) and (h), respectively, of Rule 2, shall not have assigned meal periods, and the employes assigned thereto will be allowed thirty (30) minutes at the straight time rate for each shift worked, or major portion thereof (over four hours), and will eat their mid-shift meal when possible."

APPENDIX 1 (Vacation Agreement of 1941)

"7. Allowances for each day for which an employee is entitled to a vacation with pay will be calculated on the following basis:

(a) An employee having a regular assignment will be paid while on vacation the daily compensation paid by the carrier for such assignment."

LETTER OF AGREEMENT - October 24, 1990

"As you know, the time demand on the electronic technicians in the CDC are very heavy. Consequently, scheduling of meal periods has become a constant problem. To resolve this problem I suggest that CDC Electronic Technicians be classified as covered by Rule 6 Meal Periods paragraph (d) reading as follows:

'General C.T.C. Maintainers and Retarder Yard Maintainers, Paragraphs (g) and (h), respectively, of Rule 2, shall not have assigned meal periods, and the employes assigned thereto will be allowed thirty (30) minutes at the straight time rate for each shift worked, or major portion thereof (over four hours), and will eat their mid-shift meal when possible.'

If you approve of this arrangement which will have the effect of giving each CDC Electronic Technician an additional thirty minutes' pay per day, please sign in the space provided below. . . ."

The Organization argues from these provisions that a vacationing CDCET is entitled to be paid the meal period allowance. The Carrier resists the claim essentially on grounds that the additional 30 minutes pay agreed upon applies only when an employee actually works, and not while he is on vacation.

CDCET's work in the Centralized Dispatch Center at Omaha, Nebraska, seven days a week, 24 hours a day, and are monthly rated. The record suggests that for the most part, although not required to do so, they often eat at their desks due to the needs of the service.

The Organization's argument runs along these lines: 30 minutes of time was added to the Electronic Technicians' daily compensation under the October 24, 1990 Agreement in consideration for frequently relinquished meal periods. Carrier itself conceded that these employees traded assigned meal periods for an enhanced daily rate when it stated that the new arrangement would "have the effect of giving each CDC Electronic Technician an additional thirty minutes' pay per day." Because it is indisputable that the additional 30 minutes became part of the daily rate for such

positions, pursuant to Article 7 (a), Claimant was entitled to 8.5 hours per day at the straight time rate while he was on vacation.

The Organization puts heavy reliance on Third Division Award 4498, which held in part:

> "That Article 7 (a) of the Vacation Agreement contemplates that the daily compensation could be something more than the assigned rate of the position is evident from a reading of the agreed-upon interpretation to Article 7 (a). The latter evidences an intention that all compensation earned on the position except casual or unassigned overtime, fixes the compensation to be paid during the vacation period."

Carrier's position can be summarized as follows: What Claimant is seeking here is not his normal rate of pay for vacation, but the extra 30 minutes of meal allowance granted to employees in his classification under the 1990 Letter of Agreement. That letter merely extended Rule 6 (d) to Claimant's class for not eating at scheduled times - and the terms of Rule 6 (d) only confer an additional 30 minutes at straight time rates "for each shift worked." Because there is no deprivation of the 20 minute meal period while on vacation, the condition for which the meal period allowance was intended to compensate is lacking. Moreover, during the five years the Vacation Agreement has been in effect, never once has Carrier paid vacations other than as it did in this case, and not a single objection has been raised. Nor have employees eligible for this allowance ever received the extra payment when work shifts have been missed for reasons other than vacation.

The Carrier cites Fourth Division Award 2799 in support of its position. In that decision, the Board found that "the meal period allowance is conditional and only comes into play when a yardmaster is not afforded an opportunity for an interrupted [sic] twenty minutes meal period between certain hours of work. The prescribed condition is not satisfied when the yardmaster is on vacation and clearly is not part of his pay during that period."

For the sake of continuity, the Board turns first to an examination of Award 2799 that Carrier sees as controlling. The Board in that dispute held that lunch allowances were inapplicable during vacation based upon the following language of the applicable Agreement: "Yardmasters who are not afforded an opportunity for an uninterrupted

meal period of twenty (20) minutes between the ending of the fourth and beginning of the seventh hours after starting work . . . shall be paid an allowance of twenty (20) minutes at the time and one-half rate of the position."

In this dispute, the identical issue facing the Board in Award 2799 is before us, but the language by which the parties chose to accomplish their objectives is more ambiguous and makes the bar code trickier to read. Here the difficulty of setting regular meal schedules for CDCET's prompted an Agreement to place them under the terms of Rule 6 (d). That Rule unequivocally provides an additional 30 minutes pay for each "shift worked." It does not provide an additional 30 minutes pay for each workday missed, whether for vacation or otherwise. And, as suggested, the principle underlying Award 2799 - the missing of the meal is the consideration for the extra pay - is manifest here, although the parties' Letter of Agreement contains the distinguishing gloss that placing CDC Electronic Technicians under Rule 6 (d) "will have the effect of giving each CDC Electronic Technician an additional thirty minutes' pay per day. . . ."

The issue, then, boils down to this: Did the parties by their 1990 understanding intend to establish a new "daily compensation" rate for people in Claimant's classification? Stated another way, was the intention of the drafters to provide an extra half hour of pay in lieu of a paid meal every day, or just every workday?

The parties' positions are unquestionably both strong, and in our view in near equilibrium. On the one hand, the Organization contends that the issue has already been resolved by Award 4498, which on its face establishes overtime as the only pay component excepted from "daily compensation" for purposes of vacation pay. (The term "daily compensation" appears to be undefined in the Agreement.) On the other, the Carrier directs the Board to Award 2799 rejecting an analogous claim substantially on the time-honored basis of failure of consideration. [1]

Under these circumstances, while the Board believes the enshrinement of past practice often presents the slipperiest possible basis for decision making in disputes not

---

[1]Although Fourth Division Award 2799 rendered October 19, 1972 long post-dated Third Division Award 4498 rendered July 29, 1949, it does not appear that the Board considered it in its analysis.

heard de novo, the conduct of the parties in applying the 1990 Letter of Agreement over the years is useful in understanding the intent of that arrangement.

The record reveals that for more than five years, no vacationing CDCET received pay for eight and one-half hours daily while on vacation. Second, no objection was ever raised to such application of the 1990 understanding prior to submission of this claim. And third, the meal premium has never been considered earned on other days when no work is performed but for which pay is generated.

The administration of the Agreement, therefore, appears to meet the traditional tests the cases never tire of reciting as applicable before past practice may be considered as binding: it is an unequivocal, established one; it has been accepted by both parties over a reasonable period of time; and it is not flatly inconsistent with any contractual provision.

Examination of past practice, then, favors denial of the claim. That result can be harmonized with the provisions of the Agreement because the actual rendering of services as a condition for eligibility is perfectly consistent with Rule 6 (d). It is also consistent with the 1990 Letter of Agreement if "pay per day" is read to mean pay "for each shift worked" as Rule 6 (d) contemplates. And it is consistent with Appendix 1 as well, because it rests on a finding that the parties did not intend to make the additional 30 minutes a part of "daily compensation," but considered it as in the nature of overtime for services performed, and therefore included within the express exceptions to "daily compensation" as that term was interpreted by Award 4498.

The practical import of that reading is in the view of the Board also compelling. The purpose of the 1990 Agreement was to protect the earnings of CDC Electronic Technicians and correlate them with those of their fellow employees.[2] Without it, CDC

---

[2] In regard to equating CDC Electronic Technicians' terms with those of other employees, when it agreed to consider Claimant's classification as falling within the purview of Rule 6 (d), Carrier committed to treating them the same as "General C.T.C. Maintainers" and "Retarder Yard Maintainers," who also apparently do not have assigned meal periods. The record of case handling on the property is silent with respect to the question of how vacation pay for those classifications, if they are still utilized, is

(continued...)

Electronic Technicians would spend a full eight hours on duty, work through their meal period, and get paid for eight hours. Other covered employees would spend seven hours and 40 minutes on duty, take scheduled breaks, and get paid for the same eight hours. Secondly, it would be somewhat anomalous for the parties to have intended that working time lost because of, for example, sick leave, would not generate the 30 minutes of pay at issue, but vacation time would. In short, as found in Award 2799, while Claimant is on vacation and not working, the monetary value assigned to the discomfort of not eating at scheduled times away from his work area is not relevant.

For the reasons recited above, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of December 1998.

(...continued)
handled. In the absence of proof to the contrary, this Award is predicated on the assumption that neither of those classifications receives the additional 30 minutes of pay at straight time rates for vacation days.