PUBLIC LAW BOARD NO. 3460

Award Nos. 76 & 77
Case Nos. 76 & 77

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railroad Co.

STATEMENT OF CLAIM:

"1. The Carrier violated the Agreement when it failed and refused to reimburse Division Welder, B. J. Kooren, for noon meal expense incurred during March, April and May, 1983 at Helena, Montana.

2. Because of the aforesaid violation, Claimant B. J. Kooren shall be allowed two hundred and thirty-six dollars and seventy cents ($236.70) noon meal expenses."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant herein had a seniority date of June 15, 1953 and had been employed by one of Carrier's predecessor railroads, the former Northern Pacific Railway Co. During his tenure with Northern Pacific Railway Co., Claimant did not carry his noonday lunch but customarily received reimbursement for meal expenses from Carrier, whether or not he was required to be away from his regular headquarters. Following the merger of the Northern Pacific into the Burlington Northern in 1970, Carrier continued the practice of

reimbursing Claimant for the cost of his mid-day lunch until March, 1983 when it refused to continue the reimbursement practice for expenses incurred during March, April and May, 1983.

Petitioner insists that the thirty-year practice of Claimant being reimbursed for his noon day lunch cannot be arbitrarily and unilaterally disturbed by Carrier. It is noted by Petitioner that the Agreement is devoid of any provision which would preclude such payment under the circumstances. Neither Rule 36 of the current Agreement nor former Rule 49, under the Northern Pacific Agreement, addressed the type of situation involved. In short, Petitioner relies entirely upon the long-established past practice to support its claim. Rule 49 of the old Northern Pacific Agreement provides as follows:

> "Actual, necessary expenses incurred in purchasing meals and lodging, while away from regular section, headquarters or outfits, to work at the direction of the railway company, will be allowed, except that no expense will be allowed for the first mid-day lunch while away from regular section, headquarters or outfits, to work if customarily carried by the employee."

Rule 36 of the current schedule contains the following language:

> "A. Employees, other than those covered by Section B of this Rule, will be reimbursed for cost of meals and lodging incurred while away from their regular outfits or regular headquarters by direction of the Company, whether off or on their assigned territory. This Rule not to apply to mid-day lunch customarily carried by employees nor to employees travelling in exercise of their seniority rights. Note: It is understood that the phrase "mid-day lunch customarily

> carried by employees" applies to those employees whose program of work takes them out and back each day so that they can eat their morning and evening meals at headquarters and prepare their lunch before leaving in the morning. Also, that under those circumstances, an employee is not entitled to reimbursement for the noon day meal, regardless of where he eats it. On the other hand, an employee whose duties take him away from headquarters and/or regular outfits for lodging will be reimbursed for the cost for all regular meals away from headquarters or outfits the day he leaves as well as other days while on a trip."

Carrier argues that nothing in the former Northern Pacific nor current expense rules specifies that employees will be reimbursed for expenses for noon lunches when they are returning to their headquarters or outfit point each day. Therefore, even proof of a past practice of reimbursing this type of meal would not contravene the clear language of the Agreement. The practice is particularly inappropriate to rely on, according to Carrier, since there is absolutely no evidence that this past practice was done with the knowledge and approval of Carrier's highest designated officers. Carrier notes further that there is not only no rule support for the claim herein but the issue has been resolved on this property between the parties in Award No. 48 of Public Law Board No. 2206.

It is important to note the reasoning of the Board in Award No. 48 referred to supra. In that award, the Board stated:

> "Thus, the initial step to determine whether Claimant had a "pre-existing right" to reimbursement for all non-lunch expense which could be preserved by Rule 60 (c) is to determine whether 38 (a) on the former SP & S was silent or

ambiguous on the subject of meals customarily carried by employees. A lot of phrases have been interpreted to mean that, if an employee had the opportunity to carry his lunch from home in the morning, even if he chose to buy his lunch, should not be reimbursed for the cost of such lunch (see PLB 1844-25). We conclude that the language of former Rule 38 (a), just as present Rule 36, precluded noon meal expense reimbursement unless the employee is lodged away from headquarters. Accordingly, the practice under Rule 38 (a) is not controlling and could not create a pre-existing right which is preserved in Rules 1 (c) and 69 (c)...."

The Board believes that since the issue has been resolved by the Board decision indicated above between the parties, no useful purpose could be served in discussing it further. The principle of stare decisis is appropriate and applicable in this instance. The claim must be denied.

AWARD

Claim denied.

I. M. Lieberman, Neutral-Chairman

W. Hodynsky, Carrier Member

F. H. Funk, Employee Member

9/20/88

St. Paul, Minnesota
August , 1988

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