Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30862
Docket No. SG-31168
95-3-93-3-70

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Kansas City Southern Railroad

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railroad (KCS):

Claim on behalf of all employees assigned to positions of signal Maintainer, Signal Inspector and Relief Signal Maintainer for payment of all necessary meal expenses, beginning November 1, 1991, and continuing until payments for necessary meals are properly provided, account Carrier violated the current Signalmen's Agreement, particularly Rule 52(d), when it denied payment of meal expenses. Carrier's File No. 013.31-445 (1)(2)(3). General Chairman's File Nos. 52-1044, 1050, 1051. BRS File No. 8931."

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 waived right of appearance at hearing thereon.

The dispute as outlined in the STATEMENT OF CLAIM, supra, is a combination of three separate but related claims involving separately named claimants each of which was presented and progressed through the normal on-property grievance handling procedures on a concurrent basis. The genesis of these claims is found in a notice dated November 23, 1991, issued by Carrier's Signal Engineer which reads as follows:

"ALL SIGNAL EMPLOYEES:

The K.C.S. has been inadvertently been (sic) paying meals when an employee does not spend the night away from his home, this was done in error.

Effective immediately, if you do not spend the night away from home, then you are not entitled to meals (breakfast, lunch or dinner)."

At the initial level of handling, the separate claims were each denied by Carrier as follows:

"After careful review of this claim, I respectfully deny it on the following basis.

Item (a) Rule 17(b), the Carrier does allow the employee to take a meal period after his tour of duty. The Employee generally returns home to take his meal and does not meet the requirements of this rule. Also Rule 52(d), if the employee has been at his residence the night before and returns the next night then he has not been away from his home point or point of residence, and does not meet the requirements of this rule."

When the claims were advanced to the intermediate level of claim handling on the property, each claim was denied by Carrier as follows:

"After careful review of this claim, I am in agreement with each respective Supervisor and respectfully deny these claims. The denial of each Supervisor is attached."

Upon appeal to the highest level of on-property claim handling, Carrier denied the claims in the following manner:

> "My investigation of this matter reveals that the facts and position as shown by Signal Engineer S.R. Taylor in his letter of March 11, 1992, are well stated and I concur completely with his decision to deny the instant claim."

In this series of communications, it is noted that the Vice President was in agreement with the Signal Engineer; the Signal Engineer was in agreement with the Supervisor and the Supervisor's sole basis for denial was his interpretation and application of agreement rule 52(d).

Subsequently an on-property conference was held to consider these claims after which the Carrier responded as follows:

> "Referring to our conference of June 29, 1992, concerning the above Carrier file numbers:
>
> (1) Claim on behalf of all Kansas City Southern Signal Maintainer's (sic), Signal Inspector's (sic), Relief Signal Maintainer's (sic) and all personnel assigned to these positions in the future, who are under the jurisdiction or supervision of Signal Supervisor R. E. Broom. Carrier violated, and continues to violate the current Signalmen's Agreement, particularly Rule 17(b) and Rule 52(d), when Carrier denied to pay meal expenses for the whole month of November. When Mr. Taylors (sic) letter shows the effective date of this new policy to be November 23, 1991. All meal expenses denied after November 23, 1991 will also be in violation of the aforementioned rules.
>
> Carrier should now pay all meal expenses denied to J. E.Abbot, R. D. Craig, M. G. Jones, L. Pigeon, Jr., R. A. Shelton, P. K. Stutz, G. D. Taylor, F. D. West and J. S. Williams.

(2) Claim on behalf of all Kansas City Southern Signal Maintainer's (sic), Signal Inspector's (sic), Relief Signal Maintainer's (sic) and all personnel assigned to these positions in future, who are under the jurisdiction or supervision of Signal Supervisor V. A. Jones. Carrier violated, and continues to violate the current Signalmen's Agreement, particularly Rule 17(b) and Rule 52(d). When Carrier denied to pay meal expenses for the whole month of November. All meal expenses denied after November 23, 1991, will also be in violation of the aforementioned rules.

Carrier should now pay all meal expenses denied to C. D. Brossett, M. J. Ciurej, C. E. Frank, C. R. Jones, S. E. Jones, G. L. Lansdale, C. L. Rose, R. E. Thomasson and R. W. Walley.

(3) Claim on behalf of all Kansas City Southern Signal Maintainer's (sic), Signal Inspector's (sic), Relief Signal Maintainer's (sic) and all personnel assigned to these positions in the future, who are under the jurisdiction or supervision of Signal Supervisor W. A. Johnson. Carrier violated, and continues to violate the current Signalmen's Agreement, particularly Rule 17(b) and Rule 52(d). When Carrier denied to pay meal expenses for the whole month of November. When Mr. Taylor's letter shows effective date of this new policy to be November 23, 1991. All meal expenses denied after November 23, 1991, will also be in violation of the aforementioned rules.

Carrier should now pay all meal expenses denied to L. D. Beisley, D. E. Bullington, R. L. Graham, J. E. Joplin, J. M. McDonald, L. J. Milligan, D. A. Newburn, R. J. Pigeon and B. J. Robertson.

Carrier is arranging to allow the following for the claims for November and December 1991.

	NAME	NOVEMBER	DECEMBER	TOTAL
(1)	J.M. McDonald	$ 88.42	$102.46	$190.88
(2)	C.E. Frank	110.25	52.75	163.00
(3)	J.E. Joplin	81.03	37.50	118.53
(4)	B.J. Robertson	83.75	72.25	156.00
(5)	L. Pigeon, Jr.	96.65	89.63	186.28
(6)	M.J. Ciurej	56.75	74.00	130.75
(7)	G.L. Lansdale	102.25	110.46	212.71
(8)	J.E. Abbott	124.88	124.70	249.55
(9)	C.L. Rose	124.45	135.60	260.05
(10)	R.L. Graham	110.90	71.15	182.05
(11)	F.D. West	59.00	53.00	112.00
(12)	G.D. Taylor	125.25	78.00	203.25
(13)	P.K. Stutz	139.24	103.55	242.89
(14)	R.E. Thomasson	83.50	92.00	175.50
(15)	L.D. Beisley	47.50	96.80	144.30
(16)	S.E. Jones	28.00	35.00	63.00
(17)	R.W. Walley	180.43	127.95	308.38
(18)	D.E. Bullington	128.82	103.70	232.52
(19)	L.J. Milligan	112.25	105.66	217.91
(20)	D.A. Newburn	33.45	40.30	73.75
(21)	R.A. Shelton	49.00	87.39	136.39
(22)	J.S. Williams	50.50	63.50	114.00
(23)	C.R. Jones		12.60	12.60
(24)	C.D. Brossett		53.34	53.34
(25)	R.J. Pigeon	95.60		95.60

Our Accounting Department will arrange for such allowances.

Yours very truly,
/s/ R.W. Comstock
Senior Vice President
Administration"

It is noted in this communication that there is no reason given for the allowance of these claims; that there are no allowances listed for Claimants R. D. Craig and M. D. Jones; and there is no reference made to any claims beyond the months of November and December, 1991. Nowhere in the case record is there any explanation for any of this.

These letters from the Carrier contain the total of on-property position to be found in this case record.

The agreement rule which is in question in this case is Rule 52 which reads as follows:

"RULE 52

(a) Inspectors, Foremen, Signal Maintainers and Special CTC maintainers will be paid a monthly rate as shown in Addendum No. XV. The monthly rates for such positions are based on 213 hours per month. Future wage adjustments shall be made on the basis of 213 hours per month. Except as otherwise provided, employees filling these positions shall be assigned one regular rest day per week, Sunday, which is understood to extend 24 hours from their regular starting time. Rules applicable to hourly rated employees shall apply to all service on Sunday and to ordinary maintenance or construction work on holidays or on Saturdays.

(b) Except as provided herein the monthly rate shall be for all work subject to the Scope of this Agreement on the position to which assigned during the first five days of the work week, Monday to Friday, inclusive. Also, the monthly rate shall be for other than ordinary maintenance and construction work on Saturdays.

(c) When Signal Maintainers are required to perform service on holidays for other than ordinary maintenance and construction work, they will be compensated at the pro rata rate on an actual minute basis with a minimum of three (3) hours.

(d) While away from home point, or point of residence, employees will be paid actual necessary expenses."

Of particular concern in our consideration of this dispute is paragraph (d) of Rule 52.

There exists in this case a procedural argument which must be addressed as a threshold issue. The Carrier's position during the on-property handling of this dispute was as set forth in the above quoted references. However, for the first time in their ex parte submission to this Board, Carrier argued that rule 52 had been amended and/or superseded by a Section 6, RLA negotiated agreement which had been signed by the parties on November 15, 1991, and additionally by the Addendum No. 13 Memorandum of Agreement which was signed by the parties on July 21, 1992, each of which, Carrier insisted, amended and/or replaced the meal allowance provisions of rule 52(d).

In accordance with the Uniform Rules of Procedure of the National Railroad Adjustment Board, the Organization voiced objection to the introduction by Carrier of this new evidence and argument which had not been made a part of the on-property and handling of the dispute.

The Board has long held that neither party to a dispute can prevail before the Board on the basis of allegations or issues that were not discussed during the handling of the claim on the property.

Section 3 First (i) of the Railway Labor Act requires that all disputes must be "handled in the usual manner" on the property before they may be submitted to the NRAB. This requirement is jurisdictional. The law requires a minimum of handling which the parties cannot waive. Section 2, First and Second, Railway Labor Act, require that carriers and their employees shall "exert every reasonable effort to settle disputes" arising between them, and that such disputes "shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized to so confer."

The highest federal courts have rules that such provisions in the Railway Labor Act establish minimum requirements to which carriers and employees must conform. The U.S. Courts of Appeals for the Second and Seventh Circuits (307 F. 2d 21, 41; 361 F. 2d 946, 954) have held that in order to satisfy these minimum requirements "..men of good faith must in good faith get together in a sincere effort to resolve their difference." The Court of Appeals for the Second Circuit went on to say that "...the representatives of management should meet with those of labor. Each side should listen to the contentions of the other side and each side should explain its position clearly and honestly."

The U.S. Supreme Court (325 U.S. 711, 721 n. 12) has said that "...one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. [Citations omitted] This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it."

Thus, the manifest objective of the Railway Labor Act is to require both sides to a dispute to come together on the property and make a complete, open and honest disclosure of their respective positions in an effort to reach agreement. It is impossible for a party to comply with the Railway Labor Act requirements without disclosing to the other side during handling on the property all of the arguments and contentions specifically relied upon. This fact has been repeatedly recognized by this Board.

Award 10789, Third Division

". . . It is a well established rule that this Board will not consider contentions or charges which were not made during the handling of the case on the property. Award 5469 (Carter) . . ."

Award 12790, Third Division

". . . It is well established that the Board will not consider new evidence or issues raised for the first time subsequent to the consideration of a dispute on the property by the parties. Therefore, we find that such evidence is not properly before us."

Award 14641, Third Division

"Our well-settled rules of procedure require that we limit our consideration to the issues properly raised on the property. NRAB Circular No. 1, Award 11128 and others."

Award 18656, Third Division

"It is so well settled as to require no citation that this Board, in adjudicating disputes, may not consider issues or defenses not raised by the parties in the handling of the dispute on the property."

Award 19101, Third Division

"Upon presentation of the claim to this Board the Employes introduce argument to the effect that . . . No such contention or showing was specifically made during handling on the property, and Carrier objects to its injection at Board level.

Carrier's objection must be sustained on the authority of a multitude of awards holding that only issues that were raised during handling on the property may properly be considered by the Board."

Award 20540, Third Division

"We have noted Carrier's contention before our Board that in several instances in recent years similar work has been similarly performed at other places. The instances cited, however, differ from those raised during handling on the property and are therefore not properly before us. similarly, Carrier's entrapment defense was not placed in issue on the property and when raised for the first time before us, comes too late."

Award 22806, Third Division

"The Organization states in its submission that they did very little on the property to establish that the illness was bona fide. It maintains that the sick leave agreement does not place that requirement upon the employes. The Statute and Rules and Procedures of the Board place a responsibility on both parties to fully develop the case on the property and the Organization cannot rely on the agreement to avoid that responsibility."

From our review of the record of this case, it is abundantly clear that Carrier's position before the Board is entirely new argument. At no time during the on-property handling of this dispute did Carrier refer to the Section 6 negotiation or to the provisions or alleged application of Addendum No. 13 or to the alleged modification or replacement of the clearly stated provisions of Rule 52(d). The Board cannot, and will not in this case, accept such new argument and issues in our consideration of the instant dispute.

The position of the Organization is convincing on the basis of the case record as it exists in this case. The language of Rule 52(d) is clear and unambiguous. As was said in Third Division Award 4480, "It means, just as it says, that while away from home point, employees assigned under Rule 76 [now 52] will be paid necessary expenses. The cost of a noon meal is a necessary expense." This conclusion in no way affects, modifies or interprets any negotiated agreement other than Rule 52(d). Any other negotiated agreements which may be properly in place and which may be properly introduced into any subsequent claim handling are not part of this conclusion. This decision addresses and disposes of only the issues which are contained in this particular case on the basis of the record which is properly before the Board for consideration. On that basis, this claim is sustained, less what has already been allowed.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.