

Award No. 905
Docket No. DC-948

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

**NEW YORK CENTRAL RAILROAD COMPANY, INCLUDING
MICHIGAN CENTRAL AND BIG FOUR**

STATEMENT OF CLAIM: "This submission involves a dispute concerning the correct interpretation and application of Article 1, Sections (a) and (b), and Article 7 of the Current Agreement between the New York Central Railroad Company (including Michigan Central and Big Four), hereinafter referred to for brevity sake as THE CARRIER, and the Brotherhood of Railroad Trainmen, representing Dining Car Stewards, hereinafter referred to for brevity sake as THE TRAINMEN.

"The specific questions in dispute are:

- (1) Shall stewards W. J. Mauerman, H. A. Anthony, W. G. Berg, J. A. Rogers, J. C. Taylor, and F. LeFevre receive the rate provided in Article 1, Section (a) 'After the 5th Year'?
- (2) Stewards W. J. Mauerman, H. A. Anthony, and J. C. Taylor of the New York Central Lines East entered the service and established roster ratings as follows:

W. J. Mauerman	May 30, 1928
H. A. Anthony	May 16, 1929
J. C. Taylor	December 30, 1932

The above dates are taken from their service records and it will be noted that these three stewards had in excess of five years' service on March 1, 1938, or the effective date of the current agreement.

(a) Stewards J. A. Rogers, F. LaFevre, and W. G. Berg entered the service and established roster ratings on the Lines West as follows:

J. A. Rogers	June 24, 1933
F. LaFevre	June 25, 1933
W. G. Berg	July 9, 1933

The above dates are taken from their service records and it will be noted that these three stewards have completed a five year service period in the following order:

J. A. Rogers	June 25, 1938
F. LaFevre	June 26, 1938
W. G. Berg	July 10, 1938

and are, under the provisions of Article 1, Section (a), entitled to the rate for service 'After the 5th Year.'

- (3) Article 7 of the Current Agreement superseded former rules and practices which the agreement dated June 1, 1921, for stewards employed on the New York Central Lines East, contained.
- (4) Article 7 of the Current Agreement superseded former rules and practices which the Agreement dated September 1, 1935, for stewards employed on the New York Central Lines West, Michigan Central and Big Four, contained."

STATEMENT OF FACTS: The record reveals the following history of graduated scale of pay for Dining Car Stewards:

Supplement 18 to General Order No. 27 established graduated rates based upon service periods. It set up minima in each grade and provided for an increase of \$25.00 per month to be added to such minima. The rates thus established by Supplement 18 to General Order No. 27 of the U. S. Railroad Administration, set up a new minima in each grade of service, as follows:

Stewards, for the first year's service.....	\$115
Stewards, over 1 year to 2 years' service.....	125
Stewards, over 2 years to 5 years' service.....	130
Stewards, over 5 years to 10 years' service.....	135
Stewards, over 10 years to 15 years' service.....	140
Stewards, over 15 years' service.....	145

As the minimum rate in effect on this carrier prior to the application of Supplement 18 was \$105, the minimum rate established by Supplement 18 on this carrier became \$130 for service up to 5 years.

Decision No. 2 of the U. S. Railroad Labor Board, effective May 1, 1920, prescribed an increase in the then existing rates of \$26.52 monthly, and the rates then in effect on this carrier became:

Stewards, for the first five years' service.....	\$156.52
Stewards, over 5 years to 10 years' service.....	161.52
Stewards, over 10 years to 15 years' service.....	166.52
Stewards, over fifteen years' service.....	171.52

These rates remained in effect until March 1, 1926, when by agreement with the representative of the employees the graduations were reduced to two, as follows:

Minimum \$158 per month; maximum \$170 per month. "The minimum to be applied at the time of entering service. Maximum to be applied at the discretion of management or at the expiration of five years' service."

On July 16, 1929, these rates were increased to \$163 and \$175 respectively.

By Mediation settlement effective October 1, 1937, these rates were further increased by the addition of \$13.20, and became \$176.20 and \$188.20 per month respectively. The rates thus established are shown as Article 1 (a) of the current agreement, as follows:

	First 5 years	Pro Rata Rate	After 5th Year	Pro Rata Rate
Chief Steward on "Mercury"	\$193.20	80.5¢	\$193.20	80.5¢
Steward on "Mercury"	188.20	78.5	188.20	78.5
Stewards on other runs	176.20	73.5	188.20	78.5

The rules promulgated by the U. S. Railroad Administration were the first covering employees in this class of service. They continued in effect after the termination of federal control of railroads until June 1, 1921, when an agreement was negotiated with the Brotherhood of Dining Car Conduc-

"Steward W. G. Berg entered the service initially in the Chicago District on October 7, 1929, and was furloughed on January 21, 1932. He re-entered the service at New York on June 23, 1933, but worked only 5 days. On July 9, 1933, he returned to Chicago and with the exception of one period of furlough from January 20, 1934, to February 12, 1934, has been in continuous service in that district.

"When checking the records in March, 1938, it was agreed by the parties to establish Berg's dating on the combined roster as of June 23, 1933. The Brotherhood now contends that the datings should be July 9, 1933.

"Steward S. LaFevre entered the service initially in the Chicago District on September 28, 1928, and was furloughed on February 18, 1932. He re-entered the service at Chicago on June 25, 1933, and has not subsequently been out on furlough. It was agreed at the March conference to give him seniority on the combined roster as of June 25, 1933. The Brotherhood now contends that the dating should be June 25, 1933—the date he now enjoys."

OPINION OF BOARD: The claim consists of 4 parts:

Part (1). This asks that certain named stewards be given the rate provided in Rule 1 (a) "after the 5th year." These stewards have had more than 5 years of seniority, and more than 5 years of actual service, and upon any basis are entitled to the rate asked for. The pleadings indicate, however, that the real issue is whether the rate for these men should date from the completion of 5 years of actual service or from the completion of 5 years of seniority. We so construe this part of the claim, and will consider it hereinafter.

Part (2). This states that certain named stewards have certain seniority dates. No dispute is indicated and no claim is made. It appears from the pleadings, however, that there is a dispute, but that this dispute relates to only three of the six named. We construe this part of the claim as a request to change the seniority dates of the three in question.

It is not denied that in conferences between the parties in March, 1938, an agreement was reached definitely fixing the seniority dates of all stewards, including the three in question; and no facts are alleged to indicate that the seniority dates they now have are not those which were so fixed. It is not alleged that the agreement failed to represent a meeting of the minds, nor is there anything in the record that would justify us in setting it aside at the instance of one of the parties thereto. This part of the claim is therefore denied.

Parts (3) and (4) consist of bare statements which are repetitions of parts (3) and (4) of the claim presented in Docket DC-825 and remanded to the parties as too indefinite in Award 796. There is no more showing now than previously that any specific dispute is involved in these statements. They will therefore be treated as not susceptible of an award.

This leaves only Part (1) to be considered. The issue, as has been stated, is whether the "years" specified in Rule 1 (a) for application of the rates during the first 5 years and after the 5th year mean years of actual service, as contended by the carrier, or years of seniority, as contended by the employees.

In 1935, about three years before the present agreement was made, the Brotherhood became the representative of the stewards in the Buffalo and New York Districts. At that time there was in effect an agreement dated March 1, 1926, between the carrier and another labor organization, specifying a minimum rate to be applied at the time of "entering service" and a maximum rate to be applied at the discretion of the management or after 5 years "service." Under this agreement the payments were computed according to years of actual service and not according to years of seniority. The same method of payment had been used under earlier progressive rate arrangements going back ultimately to the Supplements to General Order No. 27.

The Brotherhood succeeded to this agreement in 1935 and operated under it till the present agreement was made, without protesting or questioning the established method of payment.

In the Chicago district the Brotherhood became the representative of the stewards in January, 1937, over a year before the present agreement was made. At that time there was in effect an agreement dated Sept. 1, 1935 between the carrier and another labor organization, specifying a minimum rate for "less than 5 years" and a maximum rate for "over 5 years" (the word "service" being omitted). Under this agreement, also, the payments were computed according to years of actual service and not according to years of seniority; and the same method of payment had been used under the earlier progressive rate arrangements.

The Brotherhood succeeded to this agreement in 1937 and operated under it till the present agreement was made, without protesting or questioning the established method of payment.

In February, 1938, negotiations began between the Brotherhood and the carrier looking toward a new agreement to take the place of the two other agreements. The new agreement, effective Mar. 1, 1938, specified in Rule I (a) rates for "first 5 years," and "After 5th Year." In the negotiations there was no discussion of this provision. A year previously the Brotherhood had asked that payment be made on a mileage basis, but the discussions did not touch on the "service" question and were not extensive because both sides knew that national conferences were about to take place to consider a general request for wage increases. These conferences culminated in the Mediation Agreement of Oct. 3, 1937, which had the effect of increasing the monthly rates of stewards.

In the February, 1938 negotiations there were no discussions of wage rates or their application, except that the Brotherhood asked to have incorporated the existing rates, as increased by the Mediation Agreement; and this was done by the insertion of Rule I (a). The omission, in the tabular headings of that rule, of the word "service" after the word "years," is, we think, of no particular significance, in view of the absence of any discussion of the point and in view of a similar omission in the Sept. 1, 1935 agreement covering the Chicago district and referred to above.

It is plain from the record that the carrier understood the word "years" to mean what it had always meant in the past—namely, years of actual service. It is plain from the record that the Brotherhood was familiar with the meaning which had thus been attached to the word. In the first place the Brotherhood had been representing the stewards for upwards of three years on the eastern districts, and for over a year on the Chicago district; and in the second place Portchmouth, who served on the negotiating committee, had, as the then General Chairman, executed the Mar. 1, 1926 agreement covering the eastern districts, which, like the agreement on the Chicago district, had uniformly been applied as relating to actual service. It is true that the Brotherhood in its submission denied the existence of the Mar. 1, 1926 agreement, but the evidence is incontestable that it was entered into and that the parties, including the Brotherhood when it took over the representation of the stewards on the eastern districts, operated under it; for the record contains not only a photostatic copy of the agreement with Portchmouth's signature, which is admittedly his, but a letter dated Mar. 2, 1936 from Local Chairman Sutton (also a member of the Brotherhood's negotiating committee) referring to its provisions.

Moreover, on January 10 and 18, 1938, respectively, over a month before the negotiations we are here concerned with began, the Brotherhood notified this Board of its intention to file submissions in two cases involving agreements with other carriers similar to the agreement now before us, the claims alleging that seniority and not actual service should be the test.

Therefore, when the negotiations of February, 1938 took place, it is

clear that the Brotherhood knew that actual service and not seniority had been the meaning attached to the agreements with this carrier; that for upwards of three years with respect to one of the agreements, and for over a year with respect to the other, the Brotherhood had raised no question respecting the propriety of that meaning; and that, prior to the negotiations, it had raised the question with two other carriers but did not raise the question in the negotiations with the carrier here at bar, or in any way indicate that it was preparing to challenge the interpretation previously acquiesced in.

In the light of the record, which we must take as we find it, we conclude (1) that the carrier relied upon a continuance of the customary interpretation of the rate provisions when, at the Brotherhood's request, they were inserted in the agreement; (2) that the carrier was entitled to such reliance in view of the Brotherhood's knowledge of the interpretation, its past acquiescence, and its failure to raise any question; and (3) that in these circumstances, upon elementary principles of contract law, the Brotherhood is estopped to assert as against the carrier a contrary interpretation.

The Brotherhood points to Article VII of the agreement, which provides that "all present rules and practices governing working conditions" are superseded. But we do not think this clause has any reference to the method of computing rates, and that if the Brotherhood had intended (as the two cases previously filed with this Board indicated that it did intend) to assert a new interpretation, it should have done so in the negotiations; the more especially since concessions were made by the carrier which might not otherwise have been made, viz., the total elimination of the 9 months period within which men laid off could exercise seniority and after which they would lose all seniority.

This case is distinguishable from Award 696, for in that case the Brotherhood had represented the employees for only about five months before the agreement was made with the carrier, and there was no such showing there as here of facts surrounding the negotiations upon which an estoppel could be raised. In Award 697 there was nothing in the record to show that the Brotherhood had any knowledge whatever of the prior interpretation.

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, under the circumstances of this case, stewards' rates should be determined according to actual service; and that the disputed seniority questions should be determined by the agreement between the parties which fixed seniority dates.

AWARD

As to part (1) of the claim, the rates should date from the expiration of 5 years actual service, and the carrier should put these rates into effect, retroactive to such date, and compensate the stewards named in part (1) accordingly. As to part (2), the agreement made by the parties in their March, 1938 conferences, governs, and this part of the claim is denied. Parts (3) and (4) present no issue for the Board to determine.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1939.