

Award No. 2700
Docket No. DC-2678

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES

THE ALTON RAILROAD

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employees, Local No. 351, for and in behalf of Raymond Russell, S. J. Barnett, C. M. Bolden, George Hayes and other Chefs similarly situated, that they be paid the difference between what they have been paid and what they should have received as Chefs, since the first date an agreement between the Carrier and the Organization became effective, establishing rates of pay for this class of employees in accordance with the terms of said agreement.

EMPLOYEES' STATEMENT OF FACTS: Effective July 15, 1936, an Agreement between The Alton Railroad Company and our International Union was executed by representatives of both parties. This Agreement governed the hours of service and working conditions of Dining Car Employees and provided in Article No. 1, as follows:

"Agreement between the Alton Railroad Company and Employees Represented by Dining Car Employees' Union of Chicago Local 351, Covering Rules and Working Conditions for Dining Car Chefs, Cooks, Waiters-in-Charge and Waiters."

Article No. 6, Paragraph (b) of that Agreement provides:

"Seniority will be restricted to each classification of employees as defined in Article No. 1, except that employees promoted will retain seniority in the class from which promoted. Seniority as between Cooks and Waiters is not interchangeable."

Article No. 9 of the Agreement provides:

"Within thirty (30) days after the signing of this Agreement, a seniority roster of all employees will be posted in the commissary office in a place accessible to all employees, together with a schedule showing the assignment of runs. The seniority roster will show the names and date of entering each classification. The roster will be corrected and reposted as of the first day of January of each year and will be open for correction for a period of sixty (60) days on proof of error by an employee or his duly accredited representative. A copy of the roster will be given the chairman upon request."

In accordance with the foregoing rules, Carrier prepared and posted a seniority roster, but, included on that roster a classification designated as "Cafe Car Chefs." No such classification is spelled out in Article No. 1 of the Agreement.

1. The compensation of the employees involved in the dispute was established and in effect for many years prior to the first agreement with the Employees, which became effective July 15, 1936.

2. Prior to and subsequent to the execution of the agreement of July 15, 1936, the Employees have always known that the cafe car chefs on these two midnight trains were paid on the basis of the established rate of pay for second cooks, and have accepted and approved this condition until the origination of the present dispute.

3. The rate of pay of the employees involved was not changed by the agreement of July 15, 1936. On the contrary, by mutual agreement during the negotiations incident to the execution of the agreement of July 15, 1936, these employees were to continue being paid on the basis of the second cook's rate.

4. The roster designation applied to these employees by agreement with the Employee representatives when the agreement of July 15, 1936, was entered into shows that they were to be considered as a group separate from regular chefs.

5. In the memorandum of understanding jointly signed by representatives of the Carrier and the Employees, dated May 4, 1938, the Employees agreed that no dispute then existed as to the rates of pay of these employees, thereby validating the rates paid, which are now in dispute. In this agreement they waived any right to make any claim on the basis that the rate paid was in violation of any agreement. As of the date of this memorandum of understanding, May 4, 1938, the same condition existed then as now forms the basis of the Employees' claim.

6. The rate of pay of the cafe car chefs on these two midnight trains, having been established as being the same rate paid to second cooks; whatever rates were shown on subsequent rate tables for second cooks thereby also became the rates for the employees here involved.

7. The Employees, at conference on July 16, 1937, proposed that similar positions be established on other trains, and at the same rate paid these employees, which was the second cook's rate. This proves that they then knew that the employees herein involved were receiving only second cook's rate, and their approval and acceptance of such fact is indicated by their proposal that we establish additional such positions, and at the same rate.

8. When the general chairman of the Employees, under date of September 14, 1938, handled grievance involving rate of pay of the employees on these midnight trains, he dropped the prosecution when he became informed as to the facts of the case and found the claim without merit.

9. During the negotiations in 1941 relative to proposed changes in rules of agreement, the Employees did not protest the rate of pay for these employees submitted in rate rule proposed by the Carrier. Their only objection was to the title of the employees, which they stated was only "questionable."

10. The voluntary statement of Mr. Leo Metzl, former general chairman of the Employees' organization, dated September 27, 1943, is convincing evidence that the Employees, when they negotiated the agreement of July 15, 1936, agreed that the employees involved in this claim would continue to be paid on the basis of the rate established for second cooks.

11. As a matter of equity, based on the relative duties, responsibility and experience required, and in keeping with long established practice on the lines of this and other carriers, employees of the class involved in this dispute are not entitled to the same compensation paid regular chefs.

OPINION OF BOARD: Effective July 15, 1936, a collective agreement was entered into between the Carrier and the Organization covering Dining Car Chefs, Cooks, Waiters-in-Charge and Waiters. Seniority was restricted

to each classification of employees as defined in Article 1 except that promoted employees retained seniority in the class from which promoted. Article 5 (b). In accordance with Article 9 of the current agreement, Carrier posted a seniority roster which included a classification designated as Cafe Car Chefs, a classification not included in the agreement. Carrier fixed the rate of pay of Cafe Car Chefs at \$112.70 per month, the same rate paid second cooks, although the chef's rate was \$140.20 per month. As a result of subsequent wage increases, the present chef's rate is \$191.00 per month. No wage increases were made for Cafe Car Chefs but they continued to receive the pay of second cooks and are now receiving \$165.90 per month.

The Agreement provides for only one classification for Chefs and wage rates subsequently fixed provide no rate for Cafe Car Chefs other than that shown for Chefs generally. Under the agreement as made, Cafe Car Chefs are entitled to a Chef's rate of pay even though it may not express the real intentions of the parties. Award 1429.

The Carrier urges that for many years prior to the making of the current agreement, Cafe Car Chefs had been paid the same wage rates as second cooks although their duties were not the same. After the agreement of July 15, 1936, the Carrier continued to pay Cafe Car Chefs the same rate as second cooks and has done so up to the present time. The record shows that the Organization had full knowledge of this fact and made no objection thereto until January 8, 1943. No claim for monetary loss was ever presented until June 17, 1943. During all these years, the Organization acquiesced in the manner in which Carrier was classifying and paying Cafe Car Chefs. While this cannot change the agreement, it does have the effect of estopping a claim for monetary loss prior to the time actual demand was made therefor. We think the correct rule was stated in Award 2695, wherein we said: "We must adhere to the principle that the contract supersedes an existing practice and when the practice is continued after an agreement is made, the agreement may be enforced at any time even though the parties may have estopped themselves from any retroactive benefits by their acquiescence in the continuance of the practice."

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 the Carrier violated the current agreement to the extent shown in the opinion.

AWARD

Claimants awarded difference between pay received and the established rate for Chefs on and after June 17, 1943.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.