Award No. 5865
Docket No. DC-5410

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David R. Douglass, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD

STATEMENT OF CLAIM: Claim for the payment of all time lost from October 1, 1949, by dining car steward J. P. Noonan, Jr., et al., who are or have been deprived of regular or extra employment as a dining car steward on the New York, New Haven and Hartford Railroad as the result of the Management's act of assigning employes other than dining car stewards to be in charge of dining cars designated as grill cars and coffee shop cars or any other type of dining cars other than self service cars on trains Nos. 27-26-25-8-23-22-67-54-85-416, or an any other trains, in violation of the provisions of Rule 19 of the applicable Agreement.

EMPLOYES' STATEMENT OF FACTS: Under date of January 16, 1936, Mr. E. B. Perry, Assistant to General Manager of the New Haven, was officially notified that the Brotherhood of Railroad Trainmen had taken over representation of the Stewards from the Dining Car Conductors' Organization (Employes' Exhibit "A"). For the time being, it was agreed that the then existing contract between the Stewards and the Carrier was to remain in effect (Employes' Exhibit "B").

On July 7th, 1936, General Chairman Donoghue of the Brotherhood of Railroad Trainmen served the Carrier with the required thirty days notice for a change in the agreement covering the employment of Stewards (Employes' Exhibit "C"). As Mr. Donoghue's letter shows, a proposed agreement was submitted by the Organization. Numerous conferences were held until December 29, 1937, on which date the agreement was finally signed, to become effective three days later, on January 1, 1938. The date of signing and the facts surrounding the negotiations leading up to it, have a most important bearing upon this case.

Mr. J. J. Bailey, Secretary of the General Grievance Committee who was in attendance, kept very careful notes of the many conferences between Assistant to General Manager Perry and Superintendent of Dining Car Service Quinlan representing management, and General Chairman Donoghue and Local Chairman Stone, representing the Stewards. Rule 19 was first considered as Organization's "proposed Rule 23". From the very beginning, management was reluctant to incorporate any such rule. It received long and careful consideration in conferences. The final language of the rule was not agreed upon until the very day (December 29, 1937) on which the parties signed. Rule 19 provides that:

> "Where more than two Cooks and two Waiters or a total of more than four of either or both classes are used on any regular

That that certification, R-2028—June 15, 1948, includes Hostesses as a part of the entire craft or class of Dining Car Employes. We would hold that it is not within the jurisdiction of the Third Division to pass upon disputes regarding representation or to take certified representation from one organization and give it to another. In effect, that is just what the Trainmen's request would contemplate being done;

That by action of Local 370 they have given up to the Stewards, without prejudice to their rights in the premises, Grill Car runs manned by male Waiters;

That, apparently as an afterthought, the employes have introduced a time claim from October 1, 1949;

That it is shown in the Statement of Fact in Dining Car Docket No. 12 that Grill Cars, including the so-called Coffee Cars, have been and are operated under the jurisdiction of a Hostess and manned by employes classified as Countermen and Attendants;

That the employes are prosecuting this case on a double-header basis; (1) On the idea that their Rule 19 has been violated since October 1, 1949, evidenced by the presentation of time claims from that date, and (2) Through a national rules movement which is still in progress as of this writing.

All of the facts and matters herein outlined have been affirmatively presented to the representatives of the Stewards.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim brought by Dining Car Stewards of The New York, New Haven and Hartford Railroad Company because of the Carrier assigning persons other than Dining Car Stewards to be in charge of grill cars and coffee shop cars, or any other type of dining cars other than self-service cars, in violation of the provisions of Rule 19 of the applicable Agreement.

Rule 19 provides that:

> "Where more than two Cooks and two Waiters or a total of more than four of either or both classes are used on any regular or special assignment a Dining Car Steward will be placed in charge. This will not apply to cafeteria, grill or other types of self service cars."

On July 7, 1937 the Brotherhood of Railroad Trainmen gave notice to the Carrier of proposed new rules covering Dining Car Stewards.

The Carrier placed in operation on November 29, 1937 a new type of car for the serving of food and drink. This was called a grill car. It was the original plan of the Carrier to use this particular type car for the service of simplified, inexpensive meals, with patrons carrying their trays from the service counter to their tables. This particular plan was followed for one day, November 29, 1937. A Hostess was placed in charge of this type car, and Hostesses have been in charge of the several grill cars ever since.

It was not until December 29, 1937 that Rule 19 of the effective Agreement was written and signed. Its effective date was January 1, 1938.

During the Spring and Summer of 1942 the Carrier put in operation five additional cars which were substantially the same as grill cars, but which were known as Coffee Cars. On March 22, 1943 a formal complaint was made because of Hostesses being used in Coffee Cars. Nothing was said regarding the use of Hostesses in charge of Grill Cars. Coffee Cars have since been taken out of service. On September 22, 1949 a request was made

by the Organization that Dining Car Stewards be placed in charge of all Grill Cars. This was declined by the Carrier.

It is the contention of the Organization that the last sentence of Rule 19 of the Agreement limits the exception to self-service cars. The Organization maintains that a Dining Car Steward must be in charge of a Grill Car if the Grill Car is not a self-service type car. The Carrier insists that a Grill Car is a special type car and that at the time of agreeing upon Rule 19 it was not contemplated that Dining Car Stewards were entitled to the work, and that the words "self-service" referred to a simplified type of service afforded by the Grill Cars.

Without deciding the question of whether or not Grill Cars are self-service cars and taking into account the circumstances which existed prior to the establishment of Rule 19 and the length of time which expired after Rule 19 became effective, and before protest was made, we are of the opinion that it was not contemplated that Dining Car Stewards should be in charge of Grill Cars. A period of over five years elapsed before a formal protest was made, and then it concerned the wartime Coffee Cars. The Organization had been aware that Hostesses were in charge of Grill Cars from the date of the first use of the Grill Cars.

The Organization alleges that the transition from self-service was a gradual process, but no proof is offered as to the length of time of that gradual change. The Carrier states affirmatively that the change was made after the first run.

While we do not believe that past practice is all controlling, we are of the opinion that it should be considered in trying to reach a just conclusion as to the meaning and understanding of a rule.

We believe that this Board has jurisdiction over the claim at hand. We are asked only to interpret a provision of the Agreement between the Dining Car Stewards and the Carrier.

If a Carrier should sign Agreements with A to perform certain work and then contract with B for the performance of the same work, then it follows that A and B are each entitled to the things for which they individually contracted, or else pay in lieu thereof. A Carrier should not be permitted to act in such a manner and then come to this Board and ask that it be freed from its obligation to one party because it has contracted the same work to another, and this other party has not been given notice to appear before this Board. For example, in the case at hand, the Carrier had no dispute with the Hostesses as to the right of Hostesses to be in charge of Grill Cars. Therefore, Section 3 (j) of the Railway Labor Act is complied with.

Based on the merits of this claim and not on the question of jurisdiction, this claim must be denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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 has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 18th day of July, 1952.

SPECIAL CONCURRENCE OF CARRIER MEMBERS

IN DOCKET DC-5410—AWARD 5865

This case presented a question of what craft or class of employes shall be in charge of the carrier's grill, or coffee shop, cars. The Carrier employes Hostesses in this capacity; Petitioner claims that Rule 19 of his agreement grants Stewards the exclusive right to such service. In deciding the issue the majority looked to the conditions existing at the time Rule 19 was written, then decided, and properly so, that the rule must have been negotiated in anticipation of the circumstances then prevailing. They found that the Hostesses held the disputed positions when the rule was made, thus:

> "The Organization (Petitioner) had been aware that Hostesses were in charge of Grill Cars from the date of the first use of the Grill Cars."

Therefore, according to the majority, the issue turns on three propositions, i. e.:

> (1) The rights of Stewards are found in their agreement.
>
> (2) The applicable Stewards' rule was framed in anticipation of and reflected the then existing status of Hostesses.
>
> (3) Hostesses have performed the disputed service both before and since the Steward's rule was written.

Then, notwithstanding these conclusions the majority looks back and says:

> "We are asked only to interpret a provision of the agreement between the Dining Car Stewards and the Carrier."

They had done much more than "only to interpret" a rule between the parties before them. They had held that the Hostesses rights are so intermingled with rights of Stewards in this regard, they could not decide the rights of one without constant reference to the rights of the other. Yet they say that it is perfectly lawful to proceed with this decision with just one of these parties, the Stewards, before the Board. Therefore, if they had not decided the merits as they have, the Hostesses would have lost their jobs without having a chance to be heard.

Then they go on to say that this unconscionable result could not really have been bad, because it would have been the Carrier's fault. If the Carrier had contracted the work to both parties, they urge, then thereafter the Carrier could be compelled to employ the members of one and pay the members of both. * * * However, by prior reasoning, which we heartily endorse, it would have been impossible for the Carrier to have bargained the same work to both parties because they decided that question by taking into account the circumstances which existed prior to Rule 19 and what was

"contemplated" thereby. Thus, if the Hostesses had the rights, the Stewards did not, and vice versa. The two were mutually exclusive.

We concur in this award because it has been correctly decided on its merits. It is valid and binding because the only party affected adversely, the Stewards, has had notice and an opportunity to be heard. However, we cannot agree with the pronouncement that the Hostesses had no rights under Section Three, First (j) of the Act. It is true that "the Carrier had no dispute with the Hostesses", * * * but that is not the criterion for notice which is found in the act. There it provides that notice be given to all employes "involved in any disputes". The majority's findings on the merits demonstrate that the Hostesses were directly "involved" here, and if the claim had been sustained the award would have been null, void and unenforceable. See **Third Division Awards Nos. 1193, 1400, 5432, 5433, 5599, 5600, 5627, 5644, 5751; First Division Awards Nos. 14475, 14763, 14837 and 14903; Nord vs. Griffin,** 86 F. 2nd 481, cert. denied 300 U. S. 673; **Estes vs. Union Terminal Company,** 89 F. 2nd 768; **Hunter vs. AT&SF Ry. Co.,** 78 F. Supp. 984, aff'd 171 F. 2nd 594; **R. Y. of N. A. vs. I. H. B. Co.,** 166 F. 2nd 326; **B. of R. T. vs. Templeton,** 84 F. Supp. 152; **M.K. & T. R.R. vs. B. of R.S.S.C.,** 188 F. 2nd 302.

(s) **R. M. Butler**

(s) **W. H. Castle**

(s) **C. P. Dugan**

(s) **J. E. Kemp**