Award No. 9041
Docket No. DC-8887

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis B. Murphy, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYEES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Carrier improperly compensated Robert L. Freeman and members of his crew on Dining Car No. 3399, Train No. 48, when on October 4, 1954, Dinning Car No. 3399 was taken out of service and remained out of service October 5, 6 and 7 and departed at the regular scheduled time 4:25 P. M. October 8, Carrier compensated the employes involved four (4) hours per day for the three (3) days.

Claim is that employes involved herein be paid the difference between four hours per day and fifteen hours per day for three days as has been the practice and in accordance with the current Agreement.

EMPLOYES' STATEMENT OF FACTS: Attention is called to a typographical error appearing in our notice of intention to file this dispute. This error has been corrected in the above Statement of Claim.

There is in existence an Agreement between Southern Railway System and its employes in Dining Car, Cafe Car, Tavern Car, Dinette-Coach Car, Buffet-Smoking (club) Car, Service as Cooks, Waiters, Waiters-in-Charge, and Porters as represented by United Transport Service Employes, effective March 1, 1948, revised September 1, 1949 covering rates of pay, rules and working conditions.

The claimants in this case are employes of the Carrier and were regularly assigned in accordance with Rule 14 of the Agreement. The assignment shows the hours of service and rates of pay.

Dining Car No. 3399 on which claimants were performing their regularly assigned duties, was taken out of service for three days, October 5, 6 and 7, 1954, while enroute, thus they remained in New York three days. Carrier compensated these employes for four (4) hours a day at their prevailing rate of pay.

Claim was filed and processed in accordance with the provisions of the current Agreement up to and including the highest officer designated to handle employe matters, and was denied.

The General Chairman of the Employes also alleged in the handling of the claim that it had been the past practice to allow dining car employes fifteen hours per day in circumstances similar to those involved in the instant claim. He could cite but two such cases, however, one of which occurred in May 1950 when dining car operating in trains 47-48 was, as he described it, "cut out" in New Orleans from May 10 through May 16, 1950. The fact of the matter is that on May 10, 1950 the locomotive firemen on this and other carriers went out on strike which was not settled until May 16, 1950. As a result, this Carrier was forced to suspend all operations on the run held by the employes involved. The equipment in that train, including the dining car, was of necessity left in New Orleans until the strike was over and service restored on the morning of May 17. The members of the dining car crew remained at that point so as to be in place for the run when service was resumed. In the other case cited, which occurred in 1951, the regular diner in the run on Nos. 47-48 was shopped for repairs in New York for two days, November 30-December 1, 1951, and the dining car employes thereon remained in New York for those two days, resuming service in regular assignment on December 2, 1951. The members of the dining car crews involved were allowed fifteen hours each day held. The arbitrary allowance of fifteen hours per day made in these cases would more or less make the employes "whole". Neither party could be said to be bound by such payment. However, Carrier respectfully submits that in the absence of a specific rule, as here, in such cases which do not frequently occur and arise under circumstances beyond the control of the Carrier, the logical method is to allow the employes what they would have earned had their assignment not been interrupted, whether it be more than fifteen hours or less than fifteen hours per day. Thus, the employes would neither gain nor lose in such transactions. It was under this principle that Carrier made the fair and equitable "make whole" offer to the representatives of the Employes as described heretofore in Carrier's Statement of Facts but which the General Chairman declined to accept.

In conclusion, Carrier submits that it has conclusively shown that the claim before this Board is without merit and respectfully requests this Division to deny it.

All data submitted in support of Carrier's Position has been made known to Employe representatives.

Carrier, in making this response, reserves the right to present such additional facts and evidence which may be necessary.

OPINION OF BOARD: Claimants herein are members of crew assigned to a diner-lounge car operated by Carrier on Trains 48-47, between Atlanta and Washington, D. C., and over the tracks of the Pennsylvania Railroad between Washington, D. C. and New York.

Upon arrival in New York on October 4, 1954, the diner-lounge car in which Claimants were working was bad-ordered for mechanical defects which necessitated the car being shopped for repairs. It was expected that repairs would be completed and the car returned to service the next day, October 5. Carrier's Dining Car Superintendent notified Claimants that they

were released, but to remain in New York and report in the morning; however, the repairs were not completed until October 7. On the 8th day of October the car and crew resumed service leaving New York on that day. For reporting as directed on October 5, 6 and 7, Claimants were allowed four hours on each date. They were also provided lodging and meals for these days at the expense of the Carrier.

On November 16, 1954, claim was filed on behalf of the Claimants that they be allowed eleven hours on each date, October 5, 6 and 7, in addition to the four hours that they had already been allowed on each of those days. The claim was appealed up to and including Carrier's highest designated officer who declined same. During conference discussion thereon Carrier offered to allow Claimants credit for the number of hours they have made, had there been no interruption, less the hours allowed them. The offer was rejected and on May 17, 1956, Petitioner served notice of intention to file ex parte submission in the matter.

Claimants rely on Rule 2 and 14 together with an alleged past practice where in similar cases in the past employes have been compensated for fifteen hours per day's pay. It is their contention that there has been no change by Agreement that discards such practice. To support this last "past practice theory" we are asked to see Rule 32 of the current Agreement which provides that unless rules are specifically changed, working conditions now in effect are not altered or changed; also Rule 33, which prohibits arbitrary changing of basis of calculating pay.

The Agreement as revised effective September 1, 1949, is in evidence.

Rule 2 has no application here other than possible credit for service performed in the claimant's assignment, and for deduction of actual time where the interval of release is two hours or more at turning points. There is no dispute regarding the release of Claimants upon arrival in New York or that the interval of release exceeded two hours. Claimants did not perform any service on the days involved so Rule 2 cannot be involved.

Rule 14 has to do with Bulletins describing a job, and to provide orderly assignment of an employe thereto, but there is nothing in the rule that operates to create an additional guarantee. The only guarantee accorded Claimants is that provided in Rule 1 (a) which Carrier has satisfied. The Bulletin itself provides no guarantee nor does it operate to assure work assignment every day. Claimants worked every day that the assignment operated, without change in hourly rate nor monthly rate as provided in the Agreement.

We must admit there is no rule in the Agreement prohibiting Carrier from cancelling an assignment, which is what happened on the dates in question, and in this instance the Claimants were protected by the guarantee in Rule 1 (a). There is no claim here that they were paid less than the guarantee.

We are unable to find sufficient evidence to prove the existence of a past practice which would be binding upon the parties. The evidence presented to support this contention has to do with very few instances which are in our opinion isolated cases rather than the customary practice and could not be considered sufficient to establish a practice or precedent. Further the letters, or evidence, Claimants contend supports their claim refer to regularly

assigned employes filling an extra assignment which would have no application here as these Claimants were working their regular assignment.

Although the record shows that the Carrier in conference made some equitable offer of settlement to the Claimants we are unable to deal in equities but we suggest that the Oragnization investigate the possibilities of a reconsideration of Carrier's settlement offer.

The evidence presented to us in this case does not support the Claimants' contention that there has been a violation of the Agreement, so we must deny this claim.

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 there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October, 1959.