

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Frank J. Dugan, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES LOCAL 351

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 351 on the property of the Erie Railroad Company for and on behalf of D. W. Turner and other employees similarly situated be paid 8 hours' compensation for failure of Carrier to provide proper sleeping accommodations on March 21, 1956 and 8 hours' compensation for carrier's failure to provide proper sleeping accommodations on March 22, 1956, such compensation to be paid in addition to any compensation paid for service hours constituting assignment.

EMPLOYEES' STATEMENT OF FACTS: Under date of April 19, 1956 Employees submitted instant time claim to Carrier. Employees Exhibit A.

Under date of May 8, 1956 Carrier's Superintendent Dining Car Department denied claim. Employees Exhibit B. Under date of May 12, 1956 Organization's General Chairman appealed the denial of the claim to Carrier's Assistant Vice President, the highest officer designated on the property to consider such appeals. Employees Exhibit C. Under date of May 25, 1956 Carrier's Assistant Vice President denied the appeal. Employees' Exhibit D.

On November 30, 1956 Organization's General Chairman called to the attention of Carrier's Assistant Vice President that the factual basis which that officer assumed in denying the appeal was not accurate and renewed request for allowance of the appeal. Employees Exhibit E. The appeal was again denied under date of December 6, 1956 over the signature of Carrier's Assistant to Vice President. Employees Exhibit F.

The facts appear to be that claimant and other employees similarly situated were assigned as dining car crew on extra car attached, Train No. 5, departing Jersey City March 21, 1956. Claimant and the other employees similarly situated were instructed to sleep in the dining car. As no sleeping accommodations are provided in the dining car, these employees were not afforded sleeping accommodations within the meaning of the effective agreement.

On March 22, 1956 this same crew returned to Jersey City on Train No. 6. The dormitory car attached to the train had a sufficient number of beds available for members of the regular crew. Therefore, there were no sleeping

fore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called 'burden of proof' doctrine. See Awards 3469, 5345, 5962, 6829, 6839."

Award 7362 (Larkin):

"The burden of establishing facts sufficient to require the allowance of a claim (and proper language in the agreement covering the situations), is upon those who seek the allowances." Emphasis ours.

The claim herein must be decided upon the agreement between the parties, and since the Carrier has established that the claimant was provided with sleeping accommodations, as agreed to by the parties, he is not entitled to the compensation which he claims.

The Carrier submits that the claim is without merit and it should be denied.

All data herein have been presented to or are known to Petitioner.

(Exhibits not reproduced.)

OPINION OF BOARD: The initial question presented in this case is whether the claim was appealed to this Division within the time limit stipulated in the Agreement. The pertinent part of Rule 8(b) is:

"The right of appeal through regular channels to the Chief Operating Officer designated is conceded. However, appeals from decisions rendered must be made within thirty days."

The Carrier contends that inasmuch as more than thirty days elapsed from the time the Chief Operating Officer denied the claim and the date that the Organization appealed to this Board, this Division cannot hear the case. It appears, however, that this time limitation applies only to appeals handled on the property.

The facts show that on March 21-22, 1956 claimants were furnished cots to sleep on in dining cars. On March 22-23, 1956 the claimants were accommodated in a dormitory car. As to the claim made for March 22-23, 1956 the Organization does not meet the burden of proof required of a claimant and this part of the claim is denied.

The major issue in this case is whether the furnishing of cots are proper sleeping accommodations under Rule 6(g) which provides:

"All deadhead hours, with or without the dining car, that are properly authorized, will be considered as service hourage, when deadhead to cover work on regularly assigned cars. Time will be allowed on a minute basis, except that no allowance will be made between the hours of 10:00 P. M. and 6:00 A. M., when deadheading, if sleeping accommodations are furnished.

"All deadhead hours with or without car for extra or special service, properly authorized, will be considered as service hourage, and time will be allowed on minute basis with a maximum of eight (8) hours for each 24 hour period (not calendar days). No allowance will be made between 10:00 P. M. and 6:00 A. M. when deadheading, if sleeping accommodations are furnished.

"Deadhead and service hourage under these provisions may be combined when the deadheading is continuous with service either before or after. These rules do not apply to employees deadheading in the exercise of their seniority rights."

It has been the practice of the Carrier to provide cots in dining cars for dining car employees working special tours. This practice existed prior to and since the execution of the present agreement. When a contract is executed and existing practices are not changed by its terms, those practices are just as valid and enforceable as if authorized by the Agreement, Award 8538. This part of the claim is 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 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 Agreement was not violated.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1961.