Award No. 11007

Docket No. PM-12245

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of William Webb, who is now, and for some years past has been, employed by The Soo Line Railroad Company as a sleeping car porter, operating out of Minneapolis, Minnesota.

Because the Soo Line Railroad Company did, deny the claim filed by this Organization for and in behalf of William Webb, under date of March 9, 1960, in which it was contended that the Soo Line Railroad Company did, through its Superintendent of Dining and Sleeping Car Department, Mr. J. Christensen, deny claim filed for and in behalf of Porter Webb because of the violation of the Agreement wherein Porter Webb was deprived of the right to make a trip on his assignment given to an employe who was not entitled to said assignment because he was on the seniority roster of another group of employes not under the Agreement covering the working conditions and wages of the sleeping car porters on said carrier as a result of which he lost wages to the sum of $74.93.

And further, for the Soo Line Railroad to be directed to pay the above-mentioned sum which Porter Webb lost as a result of the violation of the above-mentioned Agreement.

EMPLOYES' STATEMENT OF FACTS: Your Petitioner, the Brotherhood of Sleeping Car Porters, respectfully submits that it is duly authorized to represent all employes of the Minneapolis, St. Paul and Sault Ste. Marie Railway Company designated as sleeping car porters, and in such capacity, it is duly authorized to represent William Webb, who is now, and for some time past has been, employed by the Minneapolis, St. Paul and Sault Ste. Marie Railway Company as a sleeping car porter operating out of the Minneapolis-St. Paul District.

Your Petitioner further sets forth that on or about December 30, 1959, Mr. Webb, who was regularly assigned on an operating between St. Paul-Minneapolis and Portal, North Dakota on Train No. 14, was arbitrarily pulled out of the service on December 30, 1959, and not allowed to make the trip in this particular assignment that he was due to make because of his having been regularly assigned to this operation.

on Trains 9 and 10, and five porters holding regular assignments on Trains 13 and 14. Due to the limited number of regular sleeping car porter assignments, and, therefore, limited opportunities for extra men, the extra list was small and the men thereon not always readily available, as they could not depend on such extra service alone for their livelihood. Under such circumstances Carrier frequently was faced with the necessity of recruiting men on short notice to augment its extra list. This same situation obtained with respect to the dining car employes' extra list. In order to meet this situation and in order to provide more work opportunities for its extra list employes, it has been Carrier's custom and practice to turn first to idle employes from other crafts in preference to outsiders. Thus, when the waiters' extra list is exhausted idle men from off the porters' extra board are offered employment in dining car service, and, conversely, when the porters' extra board needs to be augmented, idle extra-list waiters are offered employment in sleeping car service. This policy has worked to the mutual benefit of employes of both crafts as witnessed by the fact that this is the only protest Carrier has ever received from either craft.

During the course of handling this claim on the property, First International Vice President M. P. Webster in his letter of May 9, 1960, stated:

> ". . . this Organization does not question your right to hire wherever you please, whomever you please, and whenever you please. It is none of our business whom you hire."

At no time did the Brotherhood contend that it was improper to relieve Claimant Webb with an extra employe, nor did they contend that Carrier could not augment its extra list as service might demand. Their sole basis of complaint is that the extra employe utilized holds rights on the dining car employes' roster. Had this individual held a regular job anywhere else he might properly be hired for extra sleeping car work, but not if he were an extra-list employe of the Carrier in another craft. Carrier can see no logic in such discrimination. Neither can Carrier find any prohibition against this long-standing practice in the applicable rules agreement. If there be one, the Brotherhood has not pointed it out.

The Third Division, in Award 9251, recognized that in the absence of a specific prohibition, extra employes might hold jobs elsewhere. There, as here, an extra employe holding rights under one agreement was utilized as an extra employe under another agreement.

In summary, Carrier maintains that the practice of augmenting the sleeping car employes' extra list by utilizing idle employes from the dining car extra list is of long standing, the practice has not been protested heretofore, and Claimant Webb suffered no loss as he received more than his 205-hour guarantee. Carrier contends that the claim is not supported by the applicable rules agreement and is entirely without merit. Carrier therefore respectfully prays that the claim be denied.

All data submitted in support of the Carrier's position has been submitted to the employes' representatives and made a part of the particular question in dispute.

OPINION OF BOARD: The Claimant held a regularly bulletined assignment as a sleeping car porter and there was in effect a collective

bargaining agreement covering this work. On December 30, 1959, he was held off of his assignment for one trip. An employe who held seniority under; and was assigned to the extra board of, another agreement but not working on the days of the trip the Claimant was refused was used in place of the Claimant. This employe held seniority as a dining car waiter on this Carrier. He held no seniority as a sleeping car porter. The Carrier asserted it held the Claimant off his assignment because if permitted to make the trip he would have accumulated overtime. Under our Awards 10381 and 10382 which involved the same parties as are now before the Division, we held that this Carrier may hold out a porter from a regularly scheduled trip to prevent overtime. However, the problem presented by this Docket is whether the Carrier may use in such instances another employe holding rights under another Agreement. The employe used in place of Claimant was not a furloughed employe.

As a general proposition the Carrier may hire, subject to any pertinent contractual limitation, whomever they wish. It is not questioned here but what the Carrier could have employed a new man or any furloughed employe. The complaint is that an employe of this Carrier holding seniority under another craft whose work was controlled under a separate collective bargaining agreement and having no rights under the Sleeping Car Porters' Agreement was used to perform work which under the scope of the Porters' Agreement belonged to employes holding seniority thereunder.

It does not appear from the Awards 10381 and 10382 that an employe of another craft was used to prevent overtime. Because it was not an issue there we assume it was a new hire or one holding seniority in the Sleeping Car Porters craft. Nevertheless, the Carrier insists that by long practice they have used as porters idle men from the dining car waiters extra board. We have many times resorted to the use of past practice to put meat on and meaning to the bare bones of the scope provisions of a contract. But past practice cannot be used to place the stamp of validity on what is in fact a violation of the Agreement (Award 5407).

Based upon the facts of record we have concluded that the Agreement was violated when the Carrier used an employe from the waiter's extra board to perform sleeping car porter work. This is not to say that the Claimant had to be used (Award 10381); but, in the absence of hiring a new employe or any furloughed employe of another craft, or the use of any other employe covered by the Scope Rule, he should have been.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1962.