Award No. 12226
Docket No. DC-14074

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

THE BROTHERHOOD OF RAILROAD TRAINMEN

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM:

CASE NO. 1

Claim of the following Dining Car Stewards for difference in time earned and time lost as a result of stewards' assignments being discontinued on regular dining cars, Trains 7 and 8, effective March 1, 1958, and inspectors and waiters-in-charge used to perform the duties of stewards:

Name	Date	Hours
Dining Car Steward C. L. Davis	October, 1958	169.9
	November, 1958	19.8
	December, 1958	123.2
	Total	312.19
Dining Car Steward Michael Kohut	April, 1958	62.15
	May, 1958	62.15
	September, 1958	39.15
	October, 1958	31.15
	December, 1958	21.45
	January, 1959	182.30
	February, 1959	125.00
	March, 1959	205.00
	April, 1959	205.00
	May, 1959	205.00
	June, 1959	98.30
	Total	1237.45

Name	Date	Hours
Dining Car Steward S. K. Robbins	September, 1958	184.15
	October, 1958	205.00
	November, 1958	205.00
	December, 1958	205.00
	January, 1959	205.00
	February, 1959	205.00
	March, 1959	183.45
	April, 1959	70.45
	Total	1463.45
Dining Car Steward A. J. Wilkinson	October, 1958	149.00
	November, 1958	63.05
	December, 1958	140.00
	January, 1959	177.07
	February, 1959	110.01
	March, 1959	37.02
	April, 1959	99.01
	May, 1959	124.00
	Total	889.16

Articles 1, 2, 14, 24, Dining Car Stewards' Schedule of Agreement; NRAB, Third Division, Award No. 11072.

CASE NO. 2

Claim of Dining Car Steward C. L. Davis in the amount of $93.82 to which he is entitled in accordance with the provisions of NRAB, Third Division, Award No. 11072.

EMPLOYES' STATEMENT OF FACTS: On January 25, 1963, the NRAB, Third Division, with Referee John H. Dorsey participating, rendered a sustaining Award No. 11072 on the following claim identified as Docket No. DC-10579:

> "Claim of Dining Car Steward C. L. Davis, March 1, 2, 3, 1958; Dining Car Steward A. J. Wilkinson, March 2, 3, 4, 1958; and Dining Car Steward S. K. Robbins, March 3, 4, 5, 1958, for time lost on these and all subsequent dates account assignment of Stewards being discontinued on regular dining cars, Trains 7 and 8, and inspectors and waiters-in-charge used to perform the duties of stewards. Rules 1, 2 and 14 of Dining Car Stewards' Agreement and NRAB, Third Division, Awards Nos. 1235 and 2533."

In its "Opinion" the Board stated in part,

> "For the foregoing reasons we will sustain the Claim that Carrier violated the Agreement as alleged. As to making whole the Claimants

> pany before a justice of the peace for the killing of one of the horses, and recovered judgment for $100, being the extent of the justice's jurisdiction, he could not afterwards maintain an action for the killing of the other horse. Brannenburg vs. Indianapolis P. & C. R. Co., 13 Ind. 103, 74 Am. Dec. 250. Many illustrations may be found in cases listed under Judgments, Key 591 et seq. Decennial Digest; and see, also, 34 C. J. 833, 834.'

Since the record reveals that the claim violates the foregoing rule of law, and since we are convinced that the rule is applicable herein, and is a good rule, the decision of the Board is that the claims should be denied, and accordingly it is so ordered.

The record reveals that this is an attempt on the part of the employes, or their representatives, to reopen the case settled by Award 63, and is a clear violation of a well established rule as to the splitting of causes of action.

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 petitioners are not entitled to an award for the reason that all controversies should have been settled by Award No. 63.

AWARD

Claim denied."

For the foregoing reasons this case is improperly before the Third Division and claims should be dismissed.

OPINION OF BOARD: This claim involves the same parties and stems from the same circumstances and conditions which were involved in Award 11072 (Docket DC-10579). We sustained the claim in Award 11072 and said:

> "As to making whole the Claimants named in the Claim for any loss of wages which they may have suffered because of the violation of the Agreement, we will order that each Claimant, respectively, be paid, by Carrier, such wages as each Claimant would have earned, absent the violation, less such wages as each Calimant, respectively, earned in the period from the date of the beginning of the violation, relative to each, to June 18, 1958."

Carrier contends that the claim in this docket must be dismissed "because the determination in Third Division Award 11072 was final and binding under the Railway Labor Act"; that it is the policy of the Board to reject resubmitted claims which have been determined and adjudicated; that the decision in Award 11072 is res judicata. We are not in disagreement with the

general principles enunciated in the many court decisions and Awards cited by Carrier. It is necessary to examine the facts and circumstances to determine if those principles apply to the claim under consideration.

It is the primary argument of Carrier that in Docket DC-10579, which was adjudicated in Award 11072, the claim was for time lost for March 1, 2, 3, 4 and 5 (different dates for separate Claimants) and all subsequent dates on account assignment of Stewards being discontinued on regular dining cars, Trains 7 and 8, and inspectors and waiters-in-charge used to perform the duties of stewards; that the Board did consider dates subsequent to those claimed in March; that the record in Award 11072 shows that the Board knew that Stewards were taken off in September 1958 and that the parties made an issue of the point in Award 11072. For this, Carrier relies on Petitioner's rebuttal statement in Docket DC-10579 and which is quoted in the record of this Docket. This statement reads:

> "The Carrier states on page 6 '. . . it was felt that the use of stewards could again be justified and they were restored June 18, 1958.' The fact of the matter is, stewards' assignments were again discontinued September 4, 1958, waiters-in-charge reassigned and continued at the present time."

The fact is, however, that the Board did not have clear and affirmative evidence that Carrier later again replaced Stewards with Waiters-in-charge subsequent to June 18, 1958 and again violated the Agreement. The record in Docket DC-10579 discloses the following:

1. In its Ex Parte Submission (R 17) which the Carrier filed with the Board on July 24, 1958, it said: **"It is to be noted that as soon as meals climbed from 3,855 in March, 3,464 in April, and 3,251 in May to 4,814 in June, it was felt that the use of stewards could again be justified and they were restored June 18, 1958."** (Emphasis ours.)

2. Later, in its Answer to Employe's Ex Parte Submission which was filed with the Board on March 10, 1959, Carrier, on page 26 of the record said: **". . . the Employes would have you think that during the period the stewards were off from March 1, 1958 to June 18, 1958, the Carrier was using the lounge end of the diner-lounge for dining purposes, increasing the seating capacity to 44. . . ."**

Nowhere in the record of Docket DC-10579 (Award 11072) does Carrier affirmatively state that the use of Stewards on the dining cars of Trains 7 and 8 was again discontinued after June 18, 1958 and inspectors and waiters-in-charge used instead.

A panel hearing before Referee Dorsey was held on December 13, 1962. The Brief presented on behalf of Petitioner said:

> "From March 1, 1958 until June 18, 1958 the self-same equipment was operated on the same trains **in charge of a waiter-in-charge and** a crew consisting of a chef, a cook and one waiter."

The Brief presented on behalf of the Carrier said:

"When the volume of business sufficiently increased to justify the use of a Steward, these positions were restored on June 18, 1958 (p. 17). These assignments were in effect at the time the Organizations filed this claim with this Division (i.e. July 7, 1958)."

Further in the same Brief, Carrier's member said:

"Since these positions were reestablished on June 18, 1958 or approximately two weeks prior to the filing of this claim with this Division (July 7, 1958), their claim for all 'subsequent dates' is of necessity limited to June 18, 1958. Any alleged subsequent abolishment after the filing of this claim (p. 42) would be a separate grievance and cannot be considered part of this present claim."

It is evident from the record in Docket DC-10579 that the Board did not have clear and affirmative evidence that Stewards were taken off the train in September 1958. The statement relied upon by Carrier, and which appeared in Petitioner's rebuttal statement previously quoted, is a mere assertion and not evidence. The undenied statements of Carrier in its Ex Parte Submission and rebuttal leaves it clear that the Stewards were restored on June 18, 1958. Nowhere did Carrier state that waiters-in-charge again replaced Stewards in September, 1958.

More important was the argument of Carrier's member made in December, 1962, that the Stewards positions were reestablished on June 18, 1958 and that all 'subsequent dates' were limited to June 18, 1958. Award 11072 was adopted by the Board based on that record. On the basis of these facts Award 11072 is not a final and binding claim on similar violations which occured after June 18, 1958; that similar claims which arose after June 18, 1958 were not adjudicated in Award 11072; that Award 11072 is not res judicata of the claim in this case.

Carrier also urges that the claims should be denied or dismissed under the doctrine of laches. The claims in Case No. 1 of Davis, Robbins and Wilkinson are for lost time for the month of September 1958 and for subsequent months. The claim of Kohut is for April, 1958 and for subsequent months. The months and amounts due for each of the Claimants are set out in the claim.

Award 11072 was adopted by this Division on January 25, 1963. It was received by the Carrier on February 1, 1963. The claims presently under consideration were instituted by Petitioner's Local Chairman on February 26, 1963; 26 days thereafter.

The claims in Case No. 1 of Davis, Robbins and Wilkinson arose in September and October, 1958. The claim of Kohut in Case No. 1 first arose in April 1958. In April and in October, 1958, similar claims involving the same parties were pending before this Division for determination. Award 11072 adopted on January 25, 1963 disposed of those claims up to June 18, 1958. No useful purpose would have been served to require Petitioner to file similar claims while the basic issue was pending before the Board. We recently held in Award 12128 that: "While it is desirable and necessary to dispose of disputes and grievances with reasonable dispatch, it is also desirable to avoid multiple cases before the Board involving the same parties and the same issue." Petitioner is not guilty of laches. The claims are properly before the Board.

Petitioner also argues that they are continuing claims. We have already said that Petitioner properly withheld filing of the Kohut claim until Award 11072 was adopted and that the doctrine of laches does not apply. With respect

the claims of Davis, Robbins and Wilkinson in Claim No. 1 we agree with the Carrier member in Docket DC-10579 which was adjudicated in Award 11072 when he said that that claim was limited to June 18, 1958 and that:

> **"Any alleged subsequent abolishment after the filing of this claim (p. 42) would be a separate grievance and cannot be considered part of this present claim."** (Emphasis ours.)

It is inconceivable how any other principle can apply. Each time Carrier abolished the Stewards positions and each time it again wrongfully used Waiters-in-Charge in lieu of Stewards, a new and separate claim arose. If there is evidence before the Board of subsequent violations before the Award is adopted, and if the claim is for past, present and subsequent violations, the Board may consider such subsequent violations in making determination. But it need not do so. Where each alleged violation is a separate and distinct act and each occurs on a different date, a new claim becomes available to the affected employes.

The claims in Case No. 1 do not arise out of a single contract violation. Each occurrence is a separate and distinct contract violation and, thus, a new claim.

Carrier is well aware of the nature of the claims in Case No. 1 and of the applicable Rules of the Agreement upon which these claims are based. They were fully presented and argued before this Division in Award 11072. It is not necessary to review them again. Award 11072 is complete and comprehensive and we reaffirm the principles upon which that Claim was sustained. Claims in Case No. 1 are sustained less such wages each Claimant, respectively, earned for the months set out in the Statement of Claim.

On the basis of the record we find that Carrier properly paid Claimant C. L. Davis in accordance with Award 11072. He is not entitled to the additional $93.82 as requested in Case No. 2.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreement with respect to the claims in Case No. 1 and did not violate the Agreement with respect to the claim in Case No. 2.

AWARD

Claims in Case No. 1 are sustained in accordance with the Opinion.

Claim in Case No. 2 is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1964.