Award No. 12367
Docket No. DC-13638

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Bernard J. Seff, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES LOCAL 372

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes, Local 372, on the property of the Union Pacific Railroad Company for and on behalf of J. J. Palmer and all other Cooks adversely affected and roster in the Portland Seniority District as evidenced by Employes' Exhibit A, which will be attached to and made a part of Employes' Ex Parte Submission, that these employes be compensated on the basis of ½ day's pay for each day on which they serve meals on Trains 105-111-106-112 with less than full assignment of kitchen employes account of Carrier abolishing position of Fourth Cook on Trains 105-111-106-112 and Carrier's failure to pay claimants an additional ½ day's pay for each day on which they serve meals on the trains in question in violation of the existing Agreement.

EMPLOYES' STATEMENT OF FACTS: Prior to the 2nd day of March, 1962, cooks assigned to kitchen on each crew operating on Carrier's Trains Nos. 105-111-106-112 consisted of Chef-Caterer, Second Cook, Third Cook and Fourth Cook. In Bulletin No. C-56, dated March 2, 1962, Carrier abolished the positions of Fourth Cook (Employes' Exhibit B). On March 16, 1962 Employes filed a time claim on behalf of Chef-Caterers, Second Cooks, and Third Cooks assigned to the trains in question for one-half day's pay for each day they were required to work with less than full assignment of kitchen employes. Employes further advised Carrier that this was a continuous claim encompassing employes presently assigned to Trains Nos. 105-106 and any other Cooks that might be assigned to the trains in the future (Employes' Exhibit C).

Carrier in letter dated March 22, 1962 denied the claim (Employes' Exhibit D). On March 20, 1962, Employes appealed this denial to Mr. J. Hansink, Superintendent Dining Car Employes, the highest officer on the property designated by Carrier to consider appeals, and under date of April 9, 1962 this appeal was declined (Employes' Exhibits E and F).

POSITION OF EMPLOYES: Rule 9 of the Agreement between the parties provides:

"RULE 9 — CONSIST OF CREWS

(a) Where crew consists of four employes they shall be rated as follows:

ager, D.C.&H. Dept., J. Hansink (copy attached as Carrier's Exhibit H-1), protested the abolishment of the Fourth Cook positions and requested their reinstatement, **not, however, on the basis of any claim of contract right, but only on the equitable grounds that the reduction had been made "prematurely" in the season.** By reply letter of October 10, 1956, (copy attached as Carrier's Exhibit H-2), Mr. Hansink denied that the reduction of crews was "premature" and indicated that it was premised on reduction in passenger loadings just as in the instant case. The Organization did not further progress this protest and did not file any claims with regard to this action despite the fact that these Fourth Cook positions were not in that case re-established until January, 1957.

If there were any basis whatsoever under the Agreement for inferring that such allowances as are claimed herein were due when kitchen crew consists were reduced by proper bulletin abolishing the Fourth Cook positions, which has been a common and regular occurrence, it is apparent that such a claim would have been advanced by the Organization long prior to this. The failure to do so is a clear indication that the Organization, itself, has clearly recognized that such actions were within the scope of Carrier's rights and do not require additional payments under either the special agreement of November 7, 1951, or any other provision of the Agreement between the parties.

The Agreement between the parties clearly recognizes the right of the Carrier to abolish individual positions and thus reduce the number of positions in a dining car crew. It makes no provision whatsoever for additional compensation to the remaining members of the crew when this is done, and the Organization has not referred to any provision of the Agreement which requires the payment of the additional compensation for which claim is made herein. The special agreement of November 7, 1951, from which the one-half day's pay concept has apparently been derived, is by its terms applicable only when a dining car crew is required to work with less than the number of employes actually assigned to that crew, and has no application whatsoever to a situation such as this where the assigned number in the crew was itself reduced in full conformity with the provisions of the Agreement.

The claim is wholly unsupported by any provision in the Agreement between the parties and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Before March 5, 1962, the City of Portland had a crew consist of Chef-Caterer and three cooks. When Carrier's passenger traffic decreased, Carrier issued a bulletin dated March 2, 1962 abolishing the fourth cook position. Petitioner protested the action and filed a claim based on the assertion that the remainder of the crew was working shorthanded and was therefore absorbing additional duties. Petitioner demands an additional ½ day's pay for each of the 3 remaining crew members.

Petitioner bases its demand on a Special Agreement dated November 7, 1951, which provides, inter alia, that an additional allowance of one-half day's pay be granted to each dining car kitchen employe for each day on which they serve meals with less than a full assignment of kitchen employes.

It is not disputed by the Petitioner that the Carrier has the right to abolish service in accordance with fluctuations in business. The Carrier argues that nowhere does the Agreement or the Special Agreement provide for penalty

payments when the number of kitchen crew employes is reduced. The Carrier states that it agreed to provide an additional bonus payment of one-half day extra compensation in situations where one of the members of a kitchen crew failed to report for work and, as a consequence, the remaining crew members performed extra duties to make up for the absent crew member.

Petitioner supports its position by relying on Rule 9 and states that the words "full assignment" in the Special letter must be read together with the said Rule 9, which it contends, establishes that a full assignment consists of a Chef and three cooks. The Carrier rejoins by stating that Rule 9 does not determine the composition of a given crew on particular trains under all circumstances. Carrier argues that the obvious reason for varying the size of crews is determined by the requirements of the service. In other words, when traffic is heavy the crews will of necessity be larger than when business falls off.

In support of this argument the Carrier points to the fact that Rule 9 of the Agreement sets forth 4, 3, 2 and 1 man crews. Petitioner replies by stating that the size of the crew depends on the type of equipment used: a full assignment on a crack train is determined by the fact that such a train has facilities for a 4 man kitchen crew.

It should be pointed out that Rule 9 nowhere defines the size of crews by referring to train equipment. Furthermore, Carrier explains that the interpretation of Rule 9 and the Special letter being urged by Petitioner would lead to a ridiculous result: If a crew of 4 men would earn 4 days' pay then a crew of 3 men would earn at 1½ days' pay per man, 4½ days' pay. Petitioner answers by stating that even if the result of Carrier's example appears to be illogical, nevertheless that is the agreement of the parties and it is not the function of this Board to protect the Carrier from a bad bargain if they made one.

Despite the fact that both parties contend that Rule 9 and the Agreement of March 2, 1962 are clear and unambiguous, obviously this conclusion must be erroneous otherwise how can it be explained that both parties interpret the above provisions differently? The answer to the issue posed by the instant case is to be found in two basis rules of contract construction. Where two different interpretations can be made of language in a contract that interpretation will be applied which comports best with reason and logic. The Carrier's position is both reasonable and logical. Even more persuasive is the principle that where language in a contract is ambiguous the intention of the parties can best be ascertained by the past practice of the parties and this becomes conclusive when such past practice has continued for a long time and has not been objected to by the Petitioner. The record is clear that kitchen crews have been reduced many times in the past by bulletin and no protest or claim has been made by the Petitioner. The doctrine of stare decisis is strongly supported by the Board. Past cases on this point are legion and only a few will be adverted to:

First Division Award 13789 (Donaldson)

> "* * * where claimed rule application is questionable, as here, the past practice, unobjected to, does assist in the interpretation and application or rejection of the rule relied upon."

First Division Award 14328 (Weeks)

"* * * Where the terms of a contract are clear and unambiguous and set forth the intent of the parties, there is no need to look elsewhere. However, where a contract or agreement is susceptible of more than one meaning the conduct of the parties over a period of time is evidence of their intent * * *."

First Division Award 16623 (Yeager)

"* * * It appears reasonable to say that practice followed by the carrier and accepted by the organization should be regarded as reflecting the intended and accepted meaning of the agreement * * *."

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 did not violate the Agreement.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1964.