Award No. 13864
Docket No. DC-15283

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

P. M. Williams, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 374

THE TEXAS AND PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees, Local 374, on the property of the Texas and Pacific Railroad Company, for and on behalf of Waiter-in-Charge W. H. Caldwell, Chef Cicero Young, Second Cook Hubert Bratcher and Waiter H. G. Horace and all other employes similarly situated, that they be compensated for actual time worked with a minimum of eight (8) hours for each day used in relief of employes regularly assigned to Carrier's Trains Nos. 22-2, 21-1 in accordance with the applicable rules of the Agreement between the parties hereto.

EMPLOYES' STATEMENT OF FACTS: Effective February 26, 1964, Carrier and Employes entered into the following agreement:

"MEMORANDUM OF AGREEMENT

between

THE TEXAS AND PACIFIC RAILWAY COMPANY

and

LOCAL NO. 374 — HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION

In connection with the operation of dining coaches on MP-TP Trains Nos. 1-21-22-2 through between St. Louis, Missouri, and Fort Worth, Texas, effective on or about February 26, 1964, IT IS HEREBY AGREED:

1. The Memorandum of Agreement dated February 21, 1964, in connection with two crews to be assigned to this run, etc., is hereby cancelled.

2. One Texas and Pacific crew will be assigned to this run and will operate in accordance with schedule of hours of service as issued by the Superintendent Dining Cars. Upon completion of their

The Organization has cited no rules to support claims and for reasons heretofore given, the Carrier respectfully requests the Board to dismiss or deny claims involved.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimants, both named and unnamed, are extra employes who were called to work on dining cars of certain trains on the days when the regular assigned dining car crews laid over. Each Claimant has been compensated for the work performed by receiving the same allowance as was given his regular assigned counterpart.

The instant claim is a request by Petitioner to compensate Claimants for a minimum of eight hours for each day used. Petitioner's allegation to support the claim is that Claimants as extra men were doing extra work and their compensation should be based on the minimum of eight hours, rather than on the actual time worked, as was done.

The Carrier's submission contains statements to the effect that Claimants were properly paid, both on the basis of the agreement terms as well as by past practice on the property. In support of this latter assertion Carrier submitted two instances, and alluded to others, where in almost identical factual situations the employe similarly situated to Claimants received the same allowance as had been provided the regular assigned man.

A careful reading of the applicable rules of the agreement — which rules have been quoted in the parties' submissions and will not be repeated here — reveals to us a latent ambiguity which gives credence to the position taken by Petitioner; however, we find that the more acceptable interpretation of these rules has previously been determined by the action of the parties themselves. We refer to the times during the past when Carrier started, then continued, the practice of paying employes similarly situated to Claimants herein the allowance given the regular assigned men, all during which time Petitioner remained silent. Petitioner's silence as to the method of payment must be presumed to be an acquiescence by it of Carrier's interpretation of the rules.

We find no violation of the agreement; therefore, we must deny the claim.

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 the Carrier did not violate 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 30th day of September 1965.

DISSENT TO AWARD NO. 13864, DOCKET NO. DC-15283

Award 13864 is in error and not only improperly adjudicated the dispute by ignoring the clear provisions of the Agreement, but likewise has the effect of attempting to rewrite the rules and strike from the Agreement the minimum guarantee of eight hours' pay for each day worked to which "extra employes" are contractually entitled.

The majority admits that Claimants were and are "extra employes."

The rules of the Agreement which the majority did not see fit to quote provide for "regular employes" a monthly guarantee and for "extra employes" a "daily guarantee", which is a minimum of eight hours' pay for each day worked.

The majority states:

> "A careful reading of the applicable rules of the agreement — which rules have been quoted in the parties' submissions and will not be repeated here — reveals to us a latent ambiguity which gives credence to the position taken by Petitioner; however, we find that the more acceptable interpretation of these rules has previously been determined by the action of the parties themselves. We refer to the times during the past when Carrier started, then continued, the practice of paying employes similarly situated to Claimants herein the allowance given the regular assigned men, all during which time Petitioner remained silent. Petitioner's silence as to the method of payment must be presumed to be an acquiescence by it of Carrier's interpretation of the rules."

Thus it is clear that the majority ignored the Agreement rules as written and permitted itself to indulge in presumption and conjecture.

This Board has consistently held that a practice in violation of the Agreement, no matter how long continued, does not change the Agreement, and that once this practice is challenged by either party, the rules as written must be adhered to. (See Awards 3979, 5079 and 5407.)

Even had a long-repeated past practice been established, which was not shown in this record, of improper payment made by the Carrier, such practice could not alter the clear provisions of the Agreement.

The majority should well know the difference between "extra men" and "regular men." The rules of this Agreement specifically provide for "regular men" to be protected by a monthly guarantee. Provision is likewise made that "extra men" be afforded a "daily guarantee" of a minimum of eight hours for each day worked. If Carrier desired the involved employes to work regularly in the relief service here in question, then they were within their rights to designate such relief service on layover days of the regular crews as "regular positions." However, under these circumstances, the employes would then be entitled to the "monthly guarantee", but as "extra employes" they were entitled to the minimum daily guarantee of eight hours for each day worked, and should have been so compensated, irrespective of how long previously Carrier had improperly paid others.

For these, and other reasons, dissent is hereby registered and no value whatsoever should be placed upon this Award which attempts to rewrite rather than interpret the Agreement Rules here involved.

R. H. Hack