

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: "Request of Northern District Stewards on extra board, Oakland, they be permitted instead of extra Southern District Stewards to relieve regular Northern District Stewards operating on Trains Nos. 69 and 70 between San Francisco and Los Angeles, and such extra Northern District Stewards be fully compensated for all time lost subsequent to and including, March 23, 1937."

EMPLOYES' STATEMENT OF FACTS: "Two Stewards are regularly assigned to Trains Nos. 69 and 70 between Los Angeles and San Francisco with home terminal at Los Angeles. These trains operate over portions of both the Northern and Southern Districts; therefore, one Steward from each district is assigned to the trains involved. Each man thus assigned is relieved three (3) round trips per month; however, an extra Southern District Steward has heretofore made the relief on the Northern District space.

"Account this manner of relief claim is made for compensation lost to extra Northern District Stewards subsequent to and including March 23, 1937."

POSITION OF EMPLOYES: "This case arises under following rules of Agreement covering pay and regulations for Dining Car Stewards:

'RULE 2. (f) Time allowances for deadheading shall be computed on same basis as for service trips as provided for in this rule.'

'RULE 5. A regularly assigned Steward will, each calendar month, be allowed not less than four (4) rest periods, each of twenty-four (24) or more consecutive hours, at his home terminal; except, where assignments permit of as much as twelve (12) consecutive hours off duty at home terminal within each forty-eight (48) hour period.

'NOTE: Layover periods at other than home terminal will be restricted as much as practicable consistent with proper rest and service requirements. Present practices as to providing sleeping accommodations at away-from-home-terminal will be continued.'

'RULE 6. (a) An extra board to be composed of Stewards not having sufficient seniority, fitness and ability to hold regular assignments, will be established at West Oakland and at Los Angeles, to provide relief for regularly assigned Stewards and protect extra service.

'(b) Stewards assigned to extra boards will be run first-in first-out, subject to the fitness and ability provisions of these rules. In

"As previously pointed out, Northern District stewards are now performing 50% of the relief required for the run in question and, therefore, there can be no controversy as to the division of the available relief trips as between Northern District and Southern District extra unassigned stewards.

"As previously pointed out (Section 1, TITLE III-FACTS) only two regularly assigned stewards are required to operate this run (one a Northern District steward and the other a Southern District steward). Relief is required for the stewards only in order that the provisions of Rule 5 of the Stewards' Current Agreement may be complied with. That rule provides that a specified number of 24-hour rest periods will be allowed each calendar month. Rule 6 of the Stewards' Current Agreement provides that extra unassigned stewards will provide relief for regularly assigned stewards. Neither of these rules, nor any of the other rules of the Agreement, restrict (either specifically or by inference) the Carrier as to the method by which relief shall be performed (with respect to whether an extra steward from one seniority district or another seniority district shall be used to relieve any particular regularly assigned steward), therefore, the Carrier submits that this feature of the Petitioner's request is not, in any way, supported by the Stewards' Current Agreement. The Carrier is, therefore, exercising its rights, under that agreement, in furnishing relief for the two regularly assigned dining car stewards in accordance with the provisions of Rules 5 and 6 of said agreement.

"The Petitioner requests that 'such extra Northern District Stewards be fully compensated for all time lost subsequent to and including March 23, 1937.'

"This request is not supported by the Stewards' Current Agreement. In his letter of June 3, 1937, Mr. R. J. Brooks, General Chairman, Brotherhood of Railroad Trainmen, addressed to Mr. H. A. Butler, Manager, Dining Car, Hotel, Restaurant and News Service, (See Exhibit A) refers to Rule 10 Section (a) of the Stewards' Current Agreement as supporting his contention that relief for the run in question should be assigned on a fifty-fifty basis, thereby allowing Northern District stewards to be relieved at San Francisco.

"Rule 10 (a) definitely refers only to **regular** assignments and as previously pointed out, there are but two regular assignments to this run, one steward whose seniority is carried on the Northern District and one whose seniority is carried on the Southern District. It is necessary that the relief be made at Los Angeles (see TITLE IV-paragraph 1), therefore, inasmuch as relief is made at Los Angeles, it must be made by extra unassigned stewards from the Los Angeles extra board of the Southern District under the provisions of Rule 6. If relief is not made in accordance with Rule 6, it would be a violation of that rule.

"It is the universally accepted practice for stewards carried on the extra boards to perform all the extra work, such as that provided for in Rule 6 of the Stewards' Current Agreement, originating at the home terminal where the extra board is maintained. The conditions with respect to the relief work performed on the run in question do not differ in any essential respect from the conditions with respect to relief work performed on any other dining car run on the lines of the Carrier, therefore there appears to be no reason for making an exception in the instant case.

"The Carrier requests the Board to deny the claim because of lack of jurisdiction, on the grounds that a change in rules of Dining Car Stewards' current Agreement is being requested by the Petitioner and that an award in favor of the Petitioner would change the rules of said Agreement; and further, because no evidence has been submitted reflecting a violation of the Stewards' Current Agreement."

OPINION OF BOARD: The carrier at the outset of its submission insists that the Division should not assume jurisdiction over this dispute because, as

it alleges, the claim filed here is not the claim which was presented to the carrier, and has not, therefore, been handled in conference between the parties.

The carrier's position in this respect cannot be sustained. It is true that the General Chairman in his letter of June 3, 1937 to the carrier states that "there has been appealed to this office request that Northern District Stewards operating Train Nos. 69 and 70, between Los Angeles and San Francisco be relieved at San Francisco instead of Los Angeles." On the basis of this statement and similar statements from other letters of the General Chairman, it might be inferred that the petitioner was primarily, if not solely interested in securing approval for a plan under which the regularly assigned steward of the Northern District would be relieved at San Francisco. On the other hand, the communication in question clearly indicates that the petitioner thought that the carrier had been guilty of a violation of Rule 10 in assigning all the relief work on the runs in question to extra men from the Southern District. The concluding statement in Mr. Butler's letter of October 5, 1937, written just before the conference between the parties on the subject matter of this controversy, is significant and strongly tends to prove that the carrier was informed that the claim now before the Division was before it at that time. The statement follows:

"For the reasons stated we cannot consistently make the change in our established practice which you request; however, in connection with the relief trips for this run, we will arrange that 50% of such trips be made by an extra steward from the Northern District."

The carrier also insists that the Division should not render an award in this dispute because the issue involved is now moot. It bases this contention on the fact that since the hearing on the dispute before the Division, the carrier has discontinued the practice complained of. While the claim for proper assignments in the future may be moot, the claim for monetary loss due to alleged wrongful assignments in the past is properly before the Division for decision.

In support of its claim, the petitioner relies upon Rule 10 (a) which provides:

"Regular assignments that overlap into the two seniority districts shall, unless otherwise agreed between the Brotherhood and Management, be filled as nearly as practicable on a fifty-fifty (50-50) basis from Stewards of the two districts."

The carrier urges that the rule just quoted has application only to regularly assigned stewards, and that since the two stewards on the runs involved were assigned in accordance with the provisions of Rule 10, it has fulfilled its obligation under it.

The Division, however, is of the opinion that the rule applies to positions and not to the occupants of the positions. In the situation under consideration the runs were "regular assignments" within the meaning of Rule 10, and the carrier should have applied its provisions to extra men as well as to regularly assigned men.

The carrier did not, in the opinion of the Board, apply this rule as it should have been applied during the period in controversy. The fact that extra boards were established by agreement in each of the two districts "to provide relief for regularly assigned Stewards and protect extra service" clearly indicates that extra men in each district were entitled to claim the extra service originating in the district. The plan of the carrier to make monthly assignments of extra men alternately from the two districts was not in the opinion of the Division, a compliance with Rule 10 (a).

The record in question does not furnish an adequate basis for determining the loss sustained by reason of the carrier's improper interpretation and application of the rule in question. Nor does it indicate what extra men have suffered loss. In view of the vagueness of the claim and the lack of adequate evidence with respect to the loss sustained, the Division is of the opinion that these issues should be remanded to the parties for determination in conference.

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 in taking the action complained of violated Rule 10 (a) of the agreement between the parties.

AWARD

The claim is sustained in accordance with the findings in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1938.

DISSENT ON AWARD No. 695, DOCKET DC-687

The Board, in my opinion, has no jurisdiction to entertain the claim at all, and having entertained it, the majority reach a result wholly inconsistent with the terms of the contract. It is plain we do not have jurisdiction under the Law (Sec. 3 (i)), or our rules, unless in the language of the rules the subject matter of the dispute has been "handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934." A dispute must have a subject matter. It involves assertion and denial that a right has been infringed and that a particular remedy should be allowed. Claims for remedy may take the form of a demand for the payment of money, or for an order requiring change of practice. The law itself distinguishes claims in disputes involving these separate remedies, providing that "awards shall be final . . . except insofar as they contain a money award." (Sec. 3, First, (m).) The spirit of the law as well as its letter, and the rules of this Board and awards of this Division establish that no demand against a carrier is cognizable by this Board which has not been presented to and handled in conference with the carrier. If not presented to the carrier, it is not part of the subject matter in dispute.

The whole claim upon the carrier was for a change in practice. The handling of the claim by the petitioner with the carrier from beginning to end was primarily that the regular Northern District steward have his layover changed to San Francisco, and secondarily that relief be provided from the Oakland extra board. No claim was ever made for compensation for Northern District extra men.

In order to clarify the facts, I briefly summarize them and quote the correspondence of record passing between the parties:

On March 21, 1937, a dining car run was established on Trains 69 and 70 operating in through service between Los Angeles and San Francisco, the established home terminal of the assignment being Los Angeles. There were two stewards regularly assigned to these trains, one a Northern District man, and the other a Southern District man, (Rule 10 (a)). The two regularly assigned stewards were each relieved for their three-round trip relief period each month (Rule 5) at Los Angeles, the home terminal, by extra men on the Los Angeles extra board (Rule 6).

Under long established practice, regularly assigned stewards are given monthly rest periods only at the established home terminal of the assignment, Rule 5 providing that such relief be afforded at "his home terminal."

The following constitutes the entire correspondence in evidence:

Letter March 24, 1937, from Local Chairman Andrews to Manager Dining Service Butler:

"At a meeting of this Local held on Tuesday, March 23, 1937, I was instructed to write you as follows, quote:

'Bulletin is now posted asking for bids on Trains 69 and 70, San Francisco to Los Angeles and return. This is an interdivisional run calling for two stewards, one from the Los Angeles district and one from the Oakland district. We ask therefore that the Oakland steward assigned to this run be relieved at the north end terminal as relief stewards would also be used on a 50-50 basis, a Los Angeles extra man to relieve the assigned steward from Los Angeles, and an Oakland extra man to relieve the assigned steward from Oakland. This would eliminate the necessity and expense of deadheading the relief steward to Los Angeles and return, and would allow the regularly assigned Oakland steward his full layover at home.'

"Thanking you in advance for giving this prompt consideration and awaiting your reply, I am"

Letter June 3, 1937, from General Chairman Brooks to Manager Dining Service Butler:

"There has been appealed to this office request that Northern District stewards operating on train Nos. 69 and 70, between Los Angeles and San Francisco, be relieved at San Francisco instead of Los Angeles.

STATEMENT OF FACTS: Two stewards are regularly assigned to train Nos. 69 and 70 between Los Angeles and San Francisco. One each from the North and South Districts. However, the relief work in the case of the Northern District stewards is performed by stewards out of the Southern District terminal at Los Angeles.

Request was made that the Northern District stewards be relieved at San Francisco by West Oakland relief men, which request was declined.

POSITION OF COMMITTEE: In accordance with Rule 10, Section (a) of the Stewards' Agreement, the relief stewards should be assigned on a fifty-fifty basis which would allow Northern District stewards to be relieved at San Francisco. The present arrangement not having been agreed to between the Brotherhood and the Management, as provided in Section (a) of Rule 10, you are respectfully requested

that relief be made at San Francisco, instead of Los Angeles as is now the practice for Northern District stewards."

Letter June 7, 1937, from Butler to Brooks:

"Referring to your letter of June 3, 1937, relating to arrangements in connection with operation of dining cars in Trains 69 and 70 between San Francisco and Los Angeles:

"Los Angeles is the home terminal of this run and operating conditions render it impracticable to relieve stewards at other than home terminal.

"Two stewards are assigned to the run, and in accordance with Rule 10, Paragraph (a), one of the assigned stewards is a Southern District steward, the other is a Northern District steward. To comply with Rule 5, it is necessary to relieve each of these assigned stewards for three (3) round trips each month, such relief is made at the home terminal of the run, that is, Los Angeles.

"Rule 10, Paragraph (a), refers to and applies only to regularly assigned stewards; it makes no reference to, neither does it apply to, extra stewards working in the place of regularly assigned stewards.

"Our practice in this instance is exactly parallel with arrangement agreed to for the 'West Coast' run, last year, wherein the home terminal of the run was transferred from Oakland to Los Angeles. In that instance the Oakland district stewards are relieved at Los Angeles, the home terminal of the run, and the relief trips are handled by a Los Angeles district extra steward.

"In view of the existing rules, and the facts herein related, we cannot consistently comply with your request."

Letter September 17, 1937, from Brooks to Butler:

"Referring to your letter of June 7, 1937, File 012-1-27 DCS, reading:

'Referring to your letter of June 3, 1937, relative to arrangements in connection with operation of dining cars in Trains 69 and 70 between San Francisco and Los Angeles:

'Los Angeles is the home terminal of this run and operating conditions render it impracticable to relieve stewards at other than home terminal.

'Two stewards are assigned to the run, and in accordance with Rule 10, Paragraph (a), one of the assigned stewards is a Southern District steward, the other is a Northern District steward. To comply with Rule 5, it is necessary to relieve each of these assigned stewards for three (3) round trips each month, such relief is made at the home terminal of the run, that is Los Angeles.

'Rule 10, Paragraph (a), refers to and applies only to regularly assigned stewards; it makes no reference to, neither does it apply to, extra stewards working in the place of regularly assigned stewards.

'Our practice in this instance is exactly parallel with arrangement agreed to for the "West Coast" run, last year, wherein the home terminal of the run was transferred from Oakland to Los Angeles. In that instance the Oakland district stewards are relieved at Los Angeles, the home terminal of the run and the relief trips are handled by a Los Angeles district extra steward.

'In view of the existing rules, and the facts herein related, we cannot consistently comply with your request.'

"This to advise your decision cannot be accepted; therefore, would appreciate your arranging for conference at your earliest convenience."

Letter October 5, 1937, from Butler to Brooks:

"Referring to your letter of September 17, 1937, and our letter of September 24, 1937, relating to request that Northern District steward operating in Trains 69 and 70, between Los Angeles and San Francisco, be relieved at San Francisco instead of at Los Angeles:

"Our position on this question, as pointed out in the conference on September 24, 1937, is as follows:

1. Every regularly assigned dining car run has a fixed home terminal at which point dining car crews report for service at the beginning of a trip and are released from service at the end of a trip. This practice has always been in effect and it is necessary in order that the many features peculiar to dining car operation, may be efficiently conducted.

2. The run, when inaugurated, was bulletined with Los Angeles as the home terminal, and the Northern District stewards who placed bids for the assignment were well aware of the established practice with respect to dining car runs in general and with this assignment in particular, by reason of the terms of the bulletin referred to. A steward who did not desire to conform with the conditions of the assignment, was not forced to place a bid, as this was a new run and no steward would have been displaced in an existing assignment by reason of his failure to bid for the assignment on the new run.

3. Rule 10 does not, by its wording or by inference, require that a steward, operating on a run which overlaps two districts, be relieved at a point other than the established home terminal of the run.

"For the reason stated we cannot consistently make the change in our established practice which you request: however, in connection with the relief trips for this run, we will arrange that 50 per cent of such trips be made by an extra steward from the Northern District roster."

Letter November 18, 1937, from Brooks to Butler:

"Referring to yours of October 5, 1937, reading:

"Referring to your letter of September 17, 1937, and our letter of September 24, 1937, relating to request that Northern District steward operating in Trains 69 and 70, between Los Angeles and San Francisco, be relieved at San Francisco instead of at Los Angeles:

"Our position on this question, as pointed out in the conference on September 24, 1937, is as follows:

- "1—Every regularly assigned dining car run has a fixed home terminal at which point dining car crews report for service at the beginning of a trip and are released from service at the end of a trip. This practice has always been in effect and it is necessary in order that the many features, peculiar to dining car operation, may be efficiently conducted.

- "2—The run, when inaugurated, was bulletined with Los Angeles as the home terminal and the Northern District stew-

ards who placed bids for the assignment were well aware of the established practice with respect to dining car runs in general and with this assignment in particular, by reason of the terms of the bulletin referred to. A steward, who did not desire to conform with the conditions of the assignment, was not forced to place a bid, as this was a new run and no steward would have been displaced in an existing assignment by reason of his failure to bid for the assignment on the new run.

'3—Rule 10 does not, by its wording or by inference, require that a steward, operating on a run which overlaps two districts, be relieved at a point other than the established home terminal of the run.

'For the reasons stated we cannot consistently make the change in our established practice which you request; however, in connection with the relief trips for this run, we will arrange that 50 per cent of such trips be made by an extra steward from the Northern District roster.'

"This to advise your decision cannot be accepted and that it is the Committee's intention to submit this case to the National Railroad Adjustment Board, Third Division, for final disposition; therefore, would appreciate your advising whether or not you care to join our Committee in a joint statement of facts for submission to the Board."

At the hearing before the Division, April 4, 1938, it was testified that the assignment operating through between Los Angeles and San Francisco, Trains 69 and 70, was discontinued effective February 15, 1938. Thereafter the diners on these trains were operated as follows:

Train 69, Los Angeles to Santa Barbara, where diner cuts out and returns to Los Angeles on Train 70.

Train 70, San Francisco to Watsonville Junction, where diner cuts out and returns to San Francisco on Train 69.

On and after February 15, 1938, the Southern District regularly assigned man operated diner on Trains 69 and 70 between Los Angeles and Santa Barbara; the Northern District regularly assigned man operated diner on Trains 70 and 69 between San Francisco and Watsonville Junction. There was no overlapping of seniority districts.

Under that arrangement, Los Angeles was established as the home terminal for the assignment operating between Los Angeles and Santa Barbara, the relief each month being afforded by an extra man from the Los Angeles extra board; San Francisco was established as the home terminal for the assignment operating between San Francisco and Watsonville Junction, the relief each month being afforded by an extra man from the Oakland extra board.

The majority say that the General Chairman's letter of June 3, 1937, clearly indicates that the petitioner thought the carrier had been guilty of violation of Rule 10 in assigning all the relief work on the runs in question to extra men on the Southern District. This conclusion is inconsistent with the letter itself. The effort was solely to get the layover point changed. Only if the carrier granted this request would there be a shadow of right in the Northern District extra men, and that under Rule 6 (b) and not Rule 10.

The next and sole remaining ground for assuming jurisdiction asserted by the majority is that the concluding statement in Mr. Butler's letter of October 5, 1937, is significant and strongly tends to prove that the carrier was informed that the claim now before the Division was before it at that time. The letter quoted was not written as recited just before the conference between the parties, but, as it plainly shows, after the final conference,

and the statement from it disproves, rather than proves, that any money compensation claim was ever made.

It has been very definitely established in awards of this Division that a claim for pay must first be presented to the carrier and handled in conference before it is cognizable by this Board. The claim for pay is a substantial part of the subject matter and cannot be brought to us prior to its having been handled in conference with the management.

In Award 562, Docket PM-540, it was held "The claim for lost pay was not presented within the rule but only at a later stage of the proceedings and is not cognizable." In Award 615, Docket CL-550, it was held "the claim is the same in substance except that that here seeks reparation, while that below did not. This would not deprive the Board of jurisdiction but simply limit it in the application of a remedy." See also Awards 549, 601, and 606.

Thus in assuming jurisdiction the majority have disregarded the record in the first instance, and necessarily violated the governing law.

I shall next deal with the merits which the majority have decided solely by a consideration of Rule 10 (a). Even assuming its applicability, the award is not justified. As interpreted, it means that the extra men relieving men filling regular assignments must be supplied "as nearly as practicable" on a 50-50 basis from stewards of the two districts. It was not shown that it was practicable so to supply them in this instance, and the evidence of record would support only the conclusion that it was not practicable. The home terminal of the regular assignment was Los Angeles. From this fact alone the impracticability of supplying the extra stewards from Oakland is conclusively apparent. Further assuming practicability, the rule does not specify the methods the carrier shall pursue or prohibit the expedient which it adopted as a concession to the employees; viz., adjustment of the distribution of the relief service by alternating monthly periods between the Los Angeles extra board and the Oakland extra board. The permission to the carrier to supply the extra service "as nearly as practicable" is certainly a permission and a direction to meet practical difficulties by practical methods.

The referee's holding that Rule 10 (a) governs the supplying of extra service in relief of regularly assigned men during their layover or rest period is arrived at by a consideration of Rule 10 (a) alone, and without consideration, indeed, in complete disregard and destruction of, further sections of the agreement which specifically apply and specifically control. Section 6 (a) provides that stewards assigned to extra boards shall be run first in, first out. The plain meaning of the rule is that the extra men on the Los Angeles extra board were entitled to run first in, first out, on all vacancies showing up at that point. The right to make overlapping assignments was provided for by Rule 10 (a); and Rule 10 (b), not mentioned by the referee, provides that a steward securing an extra assignment as covered by Rule 2 may retain the same within the limitations provided for in Rule 8 **without regard to seniority district limitations**. Rule 2 (e) deals with an extra steward relieving a regularly assigned steward. It is clearly apparent that Rule 6 (b) entitled the extra men on the Los Angeles extra board to all extra work out of Los Angeles, and that Rule 10 (b) explicitly provided that overlapping assignments would not be affected by seniority provisions.

Since the Division has no jurisdiction of the money claim, and the referee concurs that the dispute is otherwise moot, the case should have been dismissed. Not only has the Board erred in assuming jurisdiction on the merits; but on the merits it has also ignored the contract and rendered an award with no supporting basis.

/s/ J. G. TORIAN

I concur in this dissent.

/s/ GEO. H. DUGAN