Award No. 871
Docket No. DC-844

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

DINING CAR COOKS AND WAITERS INDUSTRIAL ASSOCIATION

MISSOURI-KANSAS-TEXAS LINES

STATEMENT OF CLAIM: "Claim of the System Committee of the Dining Car Cooks and Waiters Industrial Association, that since William Darthard—(Third Cook)—entered the service of the carrier in December, 1934, that he is entitled to receive a rate of $75.00 per month, as provided for in the agreement as applying to Third Cooks with more than three years service, retroactive to December 1st, 1937."

EMPLOYES' STATEMENT OF FACTS: "William Darthard (Third Cook) entered the service of the Missouri-Kansas-Texas Lines in its Dining Car Department in December of 1934. On November 1, 1937 he was promoted to Second Cook and subsequently reassumed the duties of Third Cook. He is paid at the rate of $70.00 per month for the service performed. Since his first entry into service he has been in the continuous employ of the carrier."

"This will certify that there is an agreement in effect between the respective parties to this dispute, and which is dated February 1st, 1927, and which is on file with the Board together with subsequent addendums."

POSITION OF EMPLOYES: "William Darthard, Third Cook, entered the service of the carrier in December, 1934. In December of 1937 he completed three full years of service with the carrier. He has since his first entry into service enjoyed an employe relation with the carrier. The agreement extent between the Missouri-Kansas-Texas Lines and the Dining Car Cook and Waiters Industrial Association, and which was signed at Dallas, Texas on the 24th day of November 1937, among other things provides for the following rates of pay based upon the service of the employe with the carrier:

Third Cooks	Per Month
1 to 3 years service	$70.00
3 to 5 years service	75.00
5 to 7 years service	80.00
After 7 years service	85.00

"It is the contention of the employes that since Darthard has actually been in the service for more than three years that he is entitled to a rate of $75.00 per month as provided for in the foregoing and for the reason herein mentioned.

"The carrier disputes the employes contention that the employe has been in the service for more than three years and explains its position, in this respect, as set forth in the following letter:

"Since the carrier has in the opinion of the employes failed to properly apply 'Service' to the theory established in determining proper rates of pay, it has violated its agreement with the employes.

"It is the position of the employes that service in the Dining Car Department, as the term is generally regarded, i.e.;—'from the actual time the employe entered the service and including in that time, the time that he performed actual service, was held for service, or enjoyed an employe relationship with the carrier and was considered by the carrier as its employe—' is governing in this case and that the employe has had more than three 'accumulated' years service with the carrier and is therefore entitled to a rate of $75.00 per month, retroactive to December 1st, 1937."

CARRIER'S STATEMENT OF FACTS: "Exhibit A is a copy of the current agreement as to rates of pay in the different classifications in the dining service and this contains the following:

> 'The accumulation of service in the different classifications for the purpose of applying the proper rate under the graduated scale begins January 1, 1929.'

"Exhibit B is copy of letter of petitioner dated September 29, 1938, in which reliance is placed on Decision 696 of this Board."

POSITION OF CARRIER: "We repeat for convenience from the current agreement:

> 'The accumulation of service in the different classifications for the purpose of applying the proper rates, etc.' (Underscoring added.)

"It is not clear to us how the underlined portion of the current agreement:

> 'Service in the different classifications'

can properly be converted into:

> 'Service within the Dining Car Department,'

as is apparently attempted to be done by the employes as reflected by the following quotation from Exhibit B:

> 'It is our position that service within the dining car department is the determining factor in fixing the rate of pay, and not service within any one classification covered by the agreement.' (Underscoring ours.)

A comparison of this quotation with that from the agreement shows the specific question for decision.

" 'Service in the different classifications' does not say nor mean 'service in all classifications,' which would be the equivalent of what the petitioner contends.

"We ask that this claim be disposed of on the basis of the agreement which covers it and not by the application of an award of this Board in a case where the working agreement reads differently. We do not believe Award 696 is applicable in this case as either determining or influencing.

"We respectfully request that the Board deny the claim of the petitioner."

OPINION OF BOARD: Article No. 12 of the prevailing agreement sets up a schedule of rates of pay depending upon the length of service in the different classifications enumerated in the schedule. The question presented is whether employes shall be compensated in accordance with the rates set up in the schedule on a calendar basis or the time worked in the different classifications.

Present Article No. 12 of the prevailing agreement became effective under the auspices of the National Mediation Board and is in every respect

a Mediation Agreement. The claim involves rates of pay fixed by this article of the agreement and of necessity brings into question its meaning and application. The jurisdiction of this Board to interpret and apply the article was not raised by the parties but jurisdiction of the subject matter of a dispute is not a matter that may be waived and the Board feels constrained to inquire into its jurisdiction of this claim.

Section 3 (h) of the Amended Railway Labor Act confers jurisdiction in this Division of the National Railroad Adjustment Board over disputes involving "dining-car-employes" and subsection (i) of the same Section provides:

> "(i) The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 5. First of said Act provides in part:

> "Sec. 5. First. The parties, or party, to a dispute between an employe or group of employes and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> "(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> "(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

The Act, also, confers upon the National Mediation Board broad powers for the mediation of disputes between carriers and their employes involving changes in rates of pay, rules, working conditions, and certain other matters, and Section 5. Second provides:

> "Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

In commenting upon the respective jurisdictions of the Adjustment Board and the Mediation Board, in its Fourth Annual Report for the fiscal year ended June 30, 1938, the Mediation Board said:

> "INTERPRETATION AND APPLICATION OF AGREEMENTS
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> "Agreements consummated under the provisions of the Railway Labor Act are of two kinds; first, straight out-and-out labor agreements negotiated between carriers and representatives of their employes establishing rates of pay, rules, and working conditions of employment; and second, mediation agreements which may be said to be labor agreements negotiated with the assistance and under the auspices of the National Mediation Board. The meaning or application of the terms of both of these kinds of agreements occasionally leads to differences between the parties to the agreement.

"The Railway Labor Act, by section 3, established the National Railroad Adjustment Board for the purpose of interpretating the terms of agreements duly negotiated in keeping with the other provisions of the Act, in the event question should arise as to their meaning or application."

"INTERPRETATION OF MEDIATION AGREEMENTS

"On the other hand, section 5, second, of the Railway Labor Act provides that the National Mediation Board shall, when requested so to do, render interpretations under certain limited conditions of agreements arrived at through mediation."

The Mediation Board has not to date (beyond the statement quoted above) made a determination of the extent of its jurisdiction to render interpretations of agreements arrived at through mediation, and it is not within the province of this Division of the Adjustment Board to determine the jurisdiction of the Mediation Board to render an interpretation of the Mediation Agreement in question. The duty does devolve upon this Division, however, to determine whether it has jurisdiction over this dispute and what is said hereafter upon this question relates only to this case.

The prevailing agreement between the parties bears an effective date of February 1, 1927. Article No. 12 of the agreement sets up a scale of wages applicable to employes covered by the agreement. This article was superseded by Addendum No. 1, effective January 1, 1929. A dispute concerning changes in the rates of pay fixed by Addendum No. 1 was settled through mediation. The Mediation Agreement in part provides:

"The accumulation of service in the different classifications for the purpose of applying the proper rate under the graduated scale begins January 1, 1929."

The dispute involves the meaning of this provision of said Mediation Agreement. However, the Mediation Agreement, by its own terms became and is now, a part of the prevailing agreement between the parties and the dispute in question involves (as we shall point out later) the consideration of other articles of the prevailing agreement along with that part of said agreement arrived at through mediation. Such a dispute is clearly one within the jurisdiction of this Board.

The question presented by this dispute is entirely different from the original controversy which arose between the parties over the meaning or application of the Mediation Agreement recently before this Board in Docket SG-794, Award No. 854. The prevailing agreement between the parties involved in that case did not guarantee six days per week employment. The employes sought to secure such guarantee which could be obtained only by a change in the agreement—a matter over which this Board has no jurisdiction. Employes contended the Mediation Agreement there involved gave them such guarantee. Obviously, this Board had no jurisdiction over that dispute and the parties took the question to the Mediation Board for determination. However, that Mediation Agreement required carrier to terminate all share-the-work practices and the Board held in Award No. 854 that it had jurisdiction to determine whether carrier had fully complied with this provision of the agreement.

In the case here under consideration, the Mediation Agreement sets up a new wage scale which provides for successive increases in pay upon certain conditions precedent. The employe involved contends that he has fulfilled these conditions precedent and is entitled to an increase in pay. Carrier denied that he has fulfilled the necessary conditions precedent. Whether they have been met can be determined only upon a consideration of the prevailing agreement in its entirety. The Board is of the opinion and holds that it has jurisdiction over the question presented by this dispute.

Article No. 12 as incorporated in the original agreement of February 1, 1927 sets up a scale of wages that allowed carrier considerable latitude in fixing the amount paid employes in the different classifications. This led to dissatisfaction among the employes and Addendum No. 1 set up a wage schedule based entirely on years of service. The Addendum was agreed to and executed December 5, 1928, and became effective January 1, 1929. It provided in part as follows:

> "The accumulation of seniority in the different classifications for the purpose of applying the proper rate under the graduated scale will begin January 1, 1929."
>
> "All rates of pay for any of the above classes that are now in excess of the period of service in such assignments beginning January 1, 1929, will not be disturbed."

The Mediation Agreement, after setting up a different scale of wages to those fixed by Addendum No. 1 retained the first paragraph quoted above (with a change of one word) and eliminated altogether the second paragraph.

The change in the first paragraph was to substitute the word "service" for the word "seniority" so the paragraph now reads:

> "The accumulation of service in the different classifications for the purpose of applying the proper rate under the gradulated scale begins January 1, 1929."

Petitioner, relying upon Awards Nos. 696 and 697, contends that seniority schould be used as the measure of service and that to hold otherwise will lead to hopeless chaos and confusion in applying the agreement. The Board's attention is directed to the fact that unless seniority is used as the measure of service the agreement provides no definite yardstick for the determination of the amount of service accumulated by employes in the different classifications.

There is much merit to this contention and were there doubt as to the effect of the change, the doubt should be resolved in favor of employes to avoid the chaos and confusion that may flow from a literal application of the terms of the agreement. However, this Board must construe and apply agreements as the parties make them, and it has no authority to change them even to avoid inequitable results from their application. (See Award No. 794).

The Board is of the opinion that the changes made in the above quoted provision of Addendum No. 1 by the Mediation Agreement has a most important bearing upon the rights of employes under the prevailing agreement. Article 5 of the prevailing agreement sets up the basis of seniority. Addendum No. 1 exempted Article 12 as amended by the Addendum from this seniority rule. It fixed January 1, 1929 as the date on which seniority began for the purpose of applying the proper rate of pay under the graduated scale of wages. Thereafter, seniority conferred by Article 5 was no longer applicable in the determination of the proper rate of pay of any employe covered by the agreement. While the second paragraph of Addendum No. 1 quoted above, protected employes as to rates then being paid, their rights to increases thereafter depended upon seniority accumulated after January 1, 1929.

The Mediation Agreement not only changed the word "seniority" to "service" but also left January 1, 1929 as the date from which accumulation of service is to be reckoned. Had the parties intended that seniority would constitute the measure of service for the determination of the proper rate, there was no need to fix January 1, 1929 as the date on which such accumulation begins. December 1, 1930 would have sufficed as seven (7) years is the longest service requirement to reach the highest rate of pay in any classification.

What we have said above makes it unnecessary to consider the general significance that should attach to a change as fundamental as the one made in this agreement. A careful analysis of the agreement as a whole leads to the inescapable conclusion that the Mediation Agreement changed the basis for the determination of the proper rate of pay under the graduated scale of wages from the "accumulation of seniority" to the "accumulation of service" in the different classifications. The words as used are not synonymous. The claim, therefore, must be denied.

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 employe involved in this dispute are respectively carrier and employe 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 no violation of the agreement is shown.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois this 28th day of June 1939.