

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas F. McAllister, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL NO. 645

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
OF TEXAS**

STATEMENT OF CLAIM: "Claim of the System Committee of the Joint Council Dining Car Employes, Local No. 645, of the Hotel and Restaurant Employes' International Alliance and Bartenders' International League of America that Eddie Robison should have been paid as a second cook between the dates of May 9, 1938, and July 31, 1939, (both dates inclusive) and William Blackwell should have been paid as a second cook between the dates of May 6, 1938, and July 31, 1939, (both dates inclusive), and that they are entitled to be paid the difference between what was paid them as third cooks and what should have been paid them as second cooks."

EMPLOYES' STATEMENT OF FACTS: "This will certify that there is an agreement in effect between the respective parties which is on file with the Third Division of the National Railroad Adjustment Board.

"Eddie Robison and William Blackwell were employed by the carrier in its Dining Service Department, between the dates of May 9, 1938, and July 31, 1939, and May 6, 1938, and July 31, 1939, respectively, as third cooks. During the time set forth, they were required to perform the work of second cooks.

"The employment of the two employes was in the 'Kansas City Pool.'

"The Kansas City Pool operated between Kansas City, Missouri, and Fort Worth, Texas, on trains 27 (4 & 5) (11 & 18) (6 & 26) with appropriate lay-overs en route.

"The kitchen crew in the said pool consisted of two employes, the chef and one other.

"This claim is supported by Article 8 of the agreement extant between the respective parties reading:

'Employes temporarily assigned to higher rated positions shall receive the higher rate. Assigned employes who are temporarily required to assume duties of a lower rated position, shall not have their rates reduced.'

POSITION OF EMPLOYES: "In Award No. 873, Docket No. DC-845, the following statement of claim appears:

'Statement of Claim: Claim of the System Committee of the Dining Car Cooks and Waiters Industrial Association that cooks

recovery can be had. This can only be regarded as an attempt to thrust a condition on the Carrier which the Carrier refused to contract for and against the Carrier's will.

"From the foregoing it will be seen the power to direct the work and manner in which it is to be performed is in the carrier; that the carrier did instruct it be performed in a precise manner; that the work was performed in the manner directed by the carrier; and that the carrier has completely discharged its obligation by payment in full settlement for all services rendered and contracted for.

"It is obvious that what the employees seek in this claim is what was sought in the case covered by Award 873, and in their later application to the Board for an interpretation of that award which would include all individual 3d cooks operating in the dining car pool in question to be paid at the second cooks' rate. The carrier denies the correctness of the findings in Award 873 as to the facts of the work of second cook having been performed by the individuals concerned in that award. There were no evidentiary facts submitted in that case showing that the work of second cooks' had been performed; and lacking such evidence the money award is inconsistent with the findings in the case that 'the service performed by the employee determines his classification.'

"In the instant claim it is clearly shown by the carrier that these men were assigned as third cooks; that they actually were on some days directed to perform the work of chef and/or second cooks; that they were actually paid for such work at the rates applying to the higher classification in which they were directed to perform work. The employees, notwithstanding the urging of the carrier that they present evidence that the men assigned as third cooks were directed by proper authority of the Carrier to perform second cooks' work, have not done so. See Carrier's exhibits D and E.

"For the foregoing reasons the Carrier respectfully requests that the Board deny the claim.

"The Carrier requests ample time and opportunity to except to any and all statements contained in the employees' submission and produce any and all evidence at the Carrier's disposal or otherwise to refute alleged facts and contentions made therein."

OPINION OF BOARD: The contention that Eddie Robison and William Blackwell should have been paid as second cooks during the period set forth in the claim, is based entirely upon Award 873 of this Division. In that dispute it was held that four cooks carried as third cooks actually performed the duties of second cooks and were entitled to pay for such positions. The Board said:

"The kitchen crews on the runs involved in this dispute consisted of two men, one classified as chef and the other as third cook. Petitioner contends that when two men are employed in the kitchen one should be classified as a chef and the other as second cook. The Board is unable to agree with this contention. The service performed by the employee determines his classification. The agreement provides no other basis of classification and the Board is without authority to supply one. * * *

"There is sufficient unchallenged evidence in the record to show that second cook's work is being performed by the employees in question with sufficient regularity to entitle them to second cook's pay. The claim will be sustained."

The carrier did not agree that all third cooks in the Kansas City Pool were performing the duties of second cooks. It is true that it is claimed on behalf of employees that the cooks here in question were performing such duties. But it is vigorously denied by the carrier. And there is no proof that the two employees in this claim actually performed the duties

of second cooks. Award 873 does not extend beyond the employees in that dispute with regard to whom it was found, from the unchallenged evidence, that second cook's work was "being performed by the employees in question." Such employees in question were the employees making claim in that dispute, and the only ones concerning whom proof was taken as to actual performance of the duties of second cooks. For failure of proof that Blackwell and Robison were actually performing duties of second cooks during the period in question, the claim should 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 employees involved in this dispute are respectively carrier and employees 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: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of May, 1941.