

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Chef W. A. Maclean for 4 hours on September 28, 1943, and subsequent dates, based on Rule 7 of the Chefs' and Cooks' Agreement effective November 1, 1940."

EMPLOYES' STATEMENT OF FACTS: On September 28, 1943, W. A. Maclean was employed as Chef by the Northern Pacific Dining Car Department with home terminal at Saint Paul, and was regularly assigned as Chef on the Northern Pacific North Coast Limited which operates over the C. B. & Q. between Saint Paul and Chicago (Trains Nos. 50 and 51), and over the Northern Pacific between Saint Paul and Seattle (Trains Nos. 1 and 2).

It is customary for the Chefs and Cooks due out of Saint Paul on train No. 50 at 11:00 P. M., to stock the Diner at 7:00 A. M. for which they are paid not less than three hours as provided for under Rule 6, Chefs' and Cooks' Agreement.

On September 16, 1943, a Bulletin was posted on bulletin board at the Commissary, reading as follows

"BULLETIN

St. Paul, Minnesota,
September 16th, 1943.

DINING CAR STEWARDS:
Trains 1 and 2.

No. 50's Diner, 1697, was added to Train No. 7 from St. Paul, today, deadhead to Fargo for service on first section, Train No. 2, leaving Fargo, today, thence to St. Paul on No. 50 through to Chicago.

It is the understanding crews stocking at St. Paul Commissary 7:00 A. M., daily, are to come prepared to go out to protect moves of this kind.

Account three of the Waiters reporting at Commissary 7:00 A. M. unprepared to go out and necessary to go home for hand bag and other personal belongings, 1697 left St. Paul with only three Waiters on car.

Instructions to all concerned are renewed at this time that members of crews are to bring bags, etc., when reporting 7:00 A. M. to stock for Train No. 50.

A. W. Thomson,
Superintendent
Dining Car Department.

CC-Mr. E. Leighton
Mr. L. Waller."

time would not be considered as service under the reporting rule. At no time during these negotiations did Mr. Maclean or any other representative of the employes contend that an employe who reported for stocking prepared to go out should be paid compensation in addition to stocking time although at that time chefs and cooks were reporting for stocking prepared to go out in conformity with the bulletin of April 29, 1939. If, when the agreement of October 26, 1940 was negotiated, the employes had in mind the application of Rule 7 they now contend for, they failed to make this known to the Carrier and the Carrier had no understanding that the rule would be so applied. But that the employes did not then have any idea of this kind is evidenced by the fact that almost three years elapsed before any such claim was made. It was not until September 28, 1943, that Mr. Maclean who had signed the agreement that was in effect on April 29, 1939, and also who had participated in negotiating the agreement of October 26, 1940, made claim for additional compensation although from April 29, 1939 to September 28, 1943, both he and other chefs did precisely what Mr. Maclean did on September 28, 1943.

The employes have contended that the instructions issued on April 29, 1939, and those issued on September 16, 1943, were different but as a practical matter they were the same. Those issued on April 29, 1939, provided that employes should report for stocking at 7:00 A. M. and crews should report prepared to go out, if necessary. Those issued on September 16, 1943, also provided for reporting for stocking at 7:00 A. M. and that crews would come prepared to go out and that the instructions to this effect were being renewed. It is plain there is no difference in the instructions issued on April 29, 1939 and those issued on September 16, 1943, so far as their effect on the instant claim is concerned.

The current agreement covering Dining Car Chefs became effective November 1, 1940. For a period of almost three years Mr. Maclean and other chefs reported at the Commissary precisely as Mr. Maclean did on September 28, 1943, and no claims were made that they should be paid four hours' additional compensation. Mr. Maclean assisted in negotiating the current agreement. Why did he wait for almost three years to submit the claim now before you? The obvious answer is an attempt to place a new construction on the agreement.

This Division has recognized the principle that the acts of the parties to an agreement over a period of time signifies the intentions of the parties and will be adhered to by the Board in deciding disputes. Awards 1289, 1606, 1645, 1806, 1811, 2137, 2146, 2281 and 2576 sustain this proposition. In the instant case this principle is particularly applicable as one of the men who negotiated the agreement and who actually performed identical service for a period of almost three years now comes before this Board and asks for an interpretation of the agreement that is contrary to the interpretation he himself has placed on it by his own actions during the entire period the agreement has been in effect. This same party raised no question when the agreement was negotiated about payment under identical conditions although at that time he and other chefs did precisely what he did on September 28, 1943.

The actions of Mr. Maclean in failing to raise any question when the agreement was negotiated and his failure for almost three years thereafter to make claim for additional compensation under like conditions of service now forecloses him from being sustained in the claim here presented. The actions of the parties to the agreement during the three-year period show the common understanding of the Carrier and its employes as to the correct application and interpretation of the agreement.

OPINION OF BOARD: This is a claim of a dining car chef that under Carrier's Bulletins dated April 29, 1939, and September 16, 1943, he is entitled, by provisions of Rule 7 of the Agreement effective November 1, 1940, to four hours on account of reporting and not being used in road service, in addition to the allowance of three hours under Rule 6 for stocking his car at St. Paul.

The Bulletin dated September 16, 1943, reading in part . . .

"Instructions to all concerned are renewed at this time that members of crews are to bring bags, etc., when reporting 7:00 A. M. to stock for Train No. 50."

was cancelled May 31, 1944.

The record shows claimant was properly compensated under Rule 6 for stocking car and that the claim for four additional hours under Rule 7 is limited to the period September 28, 1943, to May 31, 1944.

There is sharp conflict between the parties as to whether or not the instructions to bring bags, etc., when reporting at 7:00 A. M. to stock car for train No. 50, constituted a "call" for road service under Rule 7.

To dispose of the dispute the Carrier offered as a compromise to pay a total of four hours, instead of three hours previously paid. Based on the facts and circumstances of this case, the payment of an additional hour on each date involved will dispose of this claim; this without prejudice to the rights of either party.

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 claim will be disposed of in accordance with the Opinion.

AWARD

Claim to be disposed of in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.