Award No. 4708
Docket No. DC-4855

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES—LOCAL 351

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local 351, on the property of the Chicago and Eastern Illinois Railroad Company, for and in behalf of Mr. Thomas S. Coleman, bartender, that he be paid the difference between what he actually earned and what he should have earned in the classification of service as bartender from November 13, 1946 to date, said employe having been deprived of said amount of wages in violation of Article II of the Current Agreement.

EMPLOYES' STATEMENT OF FACTS: The facts in the instant matter are few, simple, and not in dispute. Insofar as they are pertinent here, they are that Claimant entered Carrier's service as a waiter on April 16, 1938. He was assigned to the classification of bartender on the Dixie Flagler on December 12, 1945 and was promoted to classification of bartender on February 4, 1946. On November 13, 1946 Claimant was displaced by an employe named McCauley who was a waiter in charge prior to that date and who was displaced as such. McCauley entered Carrier's service as a waiter on June 22, 1926 and was promoted to waiter in charge on July 15, 1937. The seniority roster published and posted by the Carrier in January, 1947, revised to January 1, 1947 shows that Claimant's seniority as bartender dates from February 4, 1946 and that seniority of McCauley in that classification of service dates from November 13, 1946. The issue herein involved is whether Carrier acted correctly in permitting McCauley to displace Claimant as bartender on November 13, 1946.

The provisions of the Current Agreement effective March 1, 1943, as amended as to scope rule to include bartenders, among others, effective November 9, 1945, which are pertinent here, are as follows:

"ARTICLE II—SENIORITY

(a) Promotion shall be based on seniority and qualification, the management to be the judge as to qualification.

(b) New employes will be considered on probation for six (6) months. If retained in service more than six (6) months, his seniority shall date from the first day service was performed. **Seniority will be restricted to each classification of employes except, an employe** entering the service in a classification higher than third cook shall at the same time acquire and accumulate seniority in all lower classifications. (Emphasis supplied.)

(c) Seniority rights of employes referred to herein—first new positions; second, vacancies, will be governed by Paragraphs (a) and (b) of this Article.

* * * *

It should be apparent that if it was the intent of Article II (b) that employes assigned to bartender positions shall acquire seniority separate and apart from that of waiter, then Coleman, being regularly assigned as bartender on trains 3 nd 4, would not be subject to displacement by a senior employe who had not acquired seniority as bartender. In contending that Victor Rice, who had never worked as bartender, should be permitted to displace Coleman from his regular assignment as bartender on trains 3 and 4, the organization places upon the Agreement the same interpretation as does the Carrier—that bartenders are not a separate and distinct class for seniority purposes but merely one of the several occupations in the Waiter class. It will be noted that the case of Rice and Coleman arose while the instant claim was under discussion, that the Carrier complied with the request of the organization that Victor Rice be permitted to displace Coleman from his position as bartender, and that the circumstances in that case were identical with those at issue here. Having accepted the decision in the Rice case, how the General Chairman can justify a claim based on a directly contrary interpretation of the Agreement is beyond our comprehension.

Coleman accepted as proper displacement by an employe holding greater seniority in the Waiter class and made no complaint for a period of two years thereafter. It is admitted by the General Chairman, see Carrier's Exhibit "E", that the System Chairman had knowledge of action herein made a cause for complaint. Assuming for the sake of argument, but without admitting same, that Coleman was improperly displaced by McCauley, the Carrier submits that inasmuch as the claimant and his representatives let the cause for action continue for a period of two years without protest, any claim for compensation is without merit and patently unfair. The Organization as well as the Carrier has a responsibility to see that the Agreement is properly applied, and if a bona fide representative of the Organization knowingly permits a condition to exist for a period of two years without protest as was done in the instant case, then most certainly they should likewise bear the responsibility for continuance of the alleged violation. Obviously, it was within their power to demand a correction at any time. The fact that this was not done until after an elapse of two years' time, makes any claim for compensation unwarranted.

It is further the Carrier's position that inasmuch as complaint was not made until after Coleman had been restored to a position of comparable status and pay, cause for complaint had ceased to exist prior to date claim was filed, and the question of compensation is, therefore, moot. In view of the controversy with respect to application of the rules agreement, the Carrier joins the organization in requesting an interpretation that will clarify the question for future handling. We believe, however, that any claim for compensation based on circumstances that had ceased to exist prior to date claim was filed is wholly without merit.

It is the Carrier's position that for seniority purposes, bartenders are included in the Waiter classification, and that the agreement rules relied upon have not, therefore, been violated. We respectfully request that the Board so hold and that this claim be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: There is complete disagreement between the parties as to the intent of the seniority provisions of the Agreement.

The dispute turns squarely on the question of whether or not Bartenders constitute a separate seniority classification under the applicable Agreement. The employes rely on Article II, paragraphs (b) and (n) of that Agreement.

The Carrier offers as evidence in support of its position that a separate seniority classification of Bartender does not exist, the roster revised and posted as of January 1, 1949 in compliance with paragraph (n) of Article II. This roster shows no separate classification of Bartender. The employes offer no evidence contesting the validity or legality of the January 1, 1949 roster. Acquiescence by the Carrier with action requested by the employes in a similar case indicates that the January 1, 1949 roster is correct.

Therefore, no evidence of record supports the claim in the instant dispute, and it cannot be held that the Carrier violated the Agreement in permitting the displacement of Claimant.

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 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 the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 3rd day of February, 1950.