Award No. 5000
Docket No. DC-4920

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas C. Begley, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES LOCAL 351

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes, Local 351, on the property of Chicago & North Western Railway Company, that Thomas Levy, waiter, regularly assigned in service on Trains 101-102 be paid difference between the amount he was paid for service in such assignment during the month of December 1947 and the amount he should have been paid for such service in accordance with existing agreement and that he shall be compensated for additional service rendered during lay-over period at Home Terminal, Chicago, to the extent of 16 hours during the month of December 1947.

EMPLOYEES' STATEMENT OF FACTS: Claimant was assigned as Fifth Waiter in Coffee Shop, Trains 101-102 on November 21, 1947 and transferred to such assignment from his previous regular assignment. Carrier continued this assignment until December 27, 1947. Carrier stated, in correspondence between it and claimant's representative that it decided to make the position to which claimant was assigned a permanent position on December 15, 1947. It further stated that it posted bids to cover this assignment. A senior waiter bid for the position and claimant was notified of this fact upon arrival of Train 102 on December 27, 1947.

On December 28, 1947 claimant was assigned on Trains 211-212 and on December 29, 1947 he was assigned to Second Section—Trains 400-401. It further appears that claimant's entire compensation for the month of December 1947 was 27/31s of his full monthly wage.

POSITION OF EMPLOYES: The Organization contends that claimant is entitled to a full month's compensation for December 1947. Rules 12 (a) and 3(a) of the current agreement make it very clear that claimant should have been compensated for a full month for his assignment on Trains 101-102, Rule 12(a) provided as follows:

> "Employes required to take out runs in lieu of their regular assignment and are not required to perform other service until they again take out their regular run, will be compensated at regular rates on the actual minute basis, with a minimum of what they would have earned on their regular assignment. **Allowance equal to the hours of the regular assignment will be used to make up the basic month's work as provided in Rule 3(a).** Any excess hours will be paid for as overtime as provided in Rule 4(b)." (Emphasis supplied.)

The clear intent of Rule 12 (a) is to guarantee employes such as Claimant that when they take out runs other than their regular assignment they will

standing that instead of exercising his seniority rights to another assignment at the time he was advised of his displacement he deferred taking such action until January 5, 1948. He was used to perform service on trains 211-212 on December 28 and on trains 401-400 on December 29, but lost time for December 30 and 31 due to having failed to exercise his displacing rights as soon as he was eligible to do so.

"Superintendent J. C. Ryan advises me it is the contention of System Chairman Cain that Levy should have been paid the monthly guarantee for his service in December on trains 101-102 plus additional compensation for his extra work on December 28 and 29. I do not concur in Mr. Cain's contention in that regard. Levy was compensated for the actual hours he worked in December 1947, viz., 216 hours 15 minutes on trains 101-102, 8 hours on trains 211-212 and 8 hours 15 minutes on trains 401-400, or a total of 232 hours 30 minutes. In the circumstances involved in this case, I concur in Superintendent Ryan's decision that Levy has been properly compensated in line with the provisions of schedule rules applicable."

The carrier did not hear anything further from General Chairman Seltzer or any representative of the Joint Council Dining Car Employes, Local 351, in regard to the claim subsequent to the Director of Personnel's letter, and the carrier, therefore, had every reason to consider that the decision in that letter had been accepted by the organization. In fact the carrier had no intimation to the contrary until over one year and six months later, i.e., upon receipt of a copy of Secretary-Treasurer Richard W. Smith's letter of October 13, 1949, to the Acting Secretary of the Third Division, National Railroad Adjustment Board, serving notice of the organization's intention to file, within thirty days, an ex parte submission on the claim outlined in that letter.

Further, Thomas Levy is no longer in the service of the carrier, having been dismissed for cause effective May 4, 1949.

POSITION OF CARRIER: The fifth waiter position on trains 101-102 was only a temporary position during the period Levy was working on that position during the month of December 1947. He was to all intents and purposes working as an extra man and did not hold a regular assignment or an assigned run under the meaning of those terms as referred to in rules 3 and 12, quoted above, and the provisions of such rules would not be applicable in his case.

It is also the position of the carrier that any loss of compensation suffered by Levy for the month of December 1947 was due solely to his failure to exercise displacing rights as soon as he was eligible to do so.

It is the further position of the carrier that Levy was properly compensated for his services during the month of December 1947 under provisions of schedule rules applicable, that therefore the claim presented in his favor is not justified and that such claim must necessarily be denied.

OPINION OF BOARD: The facts are not in dispute in the claim, so they will not be repeated in this opinion. The only question presented by the facts is whether or not the claimant was working this position as an extra employe or as a regular occupant of a regularly assigned position during the month of December 1947.

The claimant was assigned to this temporary position on November 21, 1947, the position not having been bulletined. On December 15th, the Carrier decided that the position should be a permanent one and bulletined it. It was bid in by an employe senior to the claimant and he started to work the position on December 31, 1947.

From a careful reading of the facts presented in the claim and the reading of the rules in the applicable Agreement, it would seem to this Board that under Rule 24 (a), which reads as follows:

"New positions and permanent vacancies known to be for thirty days or more will be promptly bulletined for a period of ten days. Employes desiring such positions will file their written applications with the designated officer within that time and assignment will be made within five days thereafter. The name of each employe assigned by bulletin will be posted where the run or vacancy was bulletined. Such positions and vacancies may be filled temporarily from the extra board pending assignment. When train schedules are changed one hour or more or when home terminal of an assignment is changed for a period of five consecutive days or more the run will be considered a new run and bulletined as provided herein."

that this being a new position which was not known by them to be for thirty days or more, the position was not bulletined by the Carrier until it was ascertained by the Carrier to be a permanent position, that is, December 15, 1947. The rules are silent as to the filling of temporary positions. However, Rule 24 (a) permits a position to be filled temporarily by an extra employe before it is assigned and while it is being bulletined. This being the case, a temporary position must be filled from the extra list and the claimant must have been an extra employe. Extra employes are compensated under the terms of Rule 14 which reads as follows:

"Extra employes will be paid for actual road service performed on the following basis:

(a) When relieving a regularly assigned employe, will receive the same compensation such regular man would have received.

(b) When used for extra service will be paid for actual time worked with a minimum of eight hours for each day so used."

The claimant, being an extra employe, he is not entitled to the benefits of the rules cited by the Organization. The claim 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 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 did not violate the terms of the Agreement.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 4th day of August, 1950.