

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CLINCHFIELD RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement when they eliminated the positions of Camp Car Cooks and permitted employes of the Unaka Stores Company, to perform the work previously performed by the Cooks;

(2) That all Cooks coming within the scope of the Maintenance of Way Agreement, be protected by the provisions of said agreement, and the rates applicable to such positions be paid to Cooks, less amounts received as Cooks for Unaka Stores Company, retroactive to the date that such employes were assigned to this work;

(3) That the seniority of Cooks be restored as of the date that they first performed service within their class.

EMPLOYEES' STATEMENT OF FACTS: Prior to April, 1948, Cooks in the Maintenance of Way and Structures Department were assigned and compensated in accordance with the provisions of the Maintenance of Way Agreement.

In the latter part of 1948, the Carrier contracted with the Unaka Stores for the feeding of employes in Camp Cars. This contract provided that henceforth, Cooks assigned to Maintenance of Way Camp Cars would be supplied by the Contractor. Thereafter, these Cooks were no longer recognized as employes of the Carrier but were considered as employes of Unaka Stores. As such, they were not covered by nor compensated in accordance with the provisions of the Maintenance of Way Agreement.

The Brotherhood contended that the Carrier's actions in removing the Cooks from the scope of the Agreement was in violation thereof.

A claim was filed in behalf of employes holding seniority in the Cook's class. In substance, the claim requested that the employes adversely affected by the changed status, be continued as Carrier employes with seniority rating unimpaired. In addition, it was requested that these employes be recognized as Cooks under the provisions of the Maintenance of Way Agreement, and that the rate specified in the Maintenance of Way Agreement be paid to the individuals affected, retroactive to the time that they were employed in this capacity by the Unaka Stores.

Claim was declined.

for the additional reason that no claimant is named by the employees and that Carrier, therefore, does not know for whom such payment is claimed. For your Honorable Board to award retroactive payments to unknown persons would be highly prejudicial to the rights of Carrier.

Carrier respectfully requests that for the reasons given the claim of employees should be denied.

Carrier certifies that all matters referred to in its submission have been made a part of negotiations for settlement of the dispute on the property.

(Exhibit not reproduced).

OPINION OF BOARD: The question to be resolved is whether or not the Carrier has, as the Union alleges, acted in contravention of the existing agreement in relation to the Classification of Cooks.

The Organization alleges that the Carrier has refused to recognize that an employee performing the cook's duties comes within the Scope of the Agreement and has, in the instant case, through the execution and performance of a "Third Party Contract" improperly refused to permit certain individuals to establish and accumulate seniority in accordance with contract provisions.

The Carrier has, by a long established practice, existing over 40 years, provided cooks for Extra Road Gangs (such a group being here involved) through a contractual arrangement with a third party, by virtue of which, no cooks have been employed and paid by Carrier, who were assigned to camp cars used in the service of Extra Gang Crews.

It is further asserted by the Carrier that the service so performed was in behalf of the holder of the Third Party Contract (Unaka Stores, Inc.) in view of which it was impossible for the individuals in question to initially establish, or subsequently accumulate, seniority under the agreement which governs the relations of the parties hereto. Article 5(a) and Appendix A of the effective agreement establish the classification of Cook and indicate the monthly salary and equivalent hourly overtime rate therefor.

Article 2(a) provides the manner, and sets out the conditions under which seniority is established for this classification of employees. Article 9(c)—

"In camp cars, when there are six (6) or more men in a gang, a cook but not food supplies will be furnished at the expense of the company."

clearly states that under specified conditions cooks will be assigned to camp cars at no expense to the employees which make up the crews thereof.

This Board has previously held that:

"The mutual continuance of a practice after the negotiation of an agreement eliminating it, does not have the effect of changing the agreement. The provisions of the agreement supersede practices incompatible therewith. The acquiescence of the employees in the continuance of the practice after the contract became effective, has the effect of estopping the parties from the collection of retroactive penalties resulting therefrom. It does not estop either party from enforcing the contract and the collection of penalties accruing after demand for compliance has been made. See Awards 4281, 3979, 3503, 2137."

Facts of record disclose that the Organization made demand of the Carrier for compliance of contract provisions relating to the inclusion of, and the establishment of seniority for employees performing the duties of cooks for camp car crews on June 12, 1950.

It is clear that the existence of the third party contract with Unaka Stores, Inc., did not relieve the company of their duty and responsibility to make effective the provisions of the agreement governing the relations of the parties hereto upon demand by the Organization.

Awards of this Division have uniformly held that work of a class covered by the agreement belong to employees coming under the agreement.

Employees of the Unaka Stores, Inc., or other employees performing cook's duties, should have then and there, on June 12, 1950, become employees of the Carrier, within the scope of the effective agreement.

The question as to what extent, if any, employees of the Unaka Stores, Inc., who performed the service, required under Article 9(c), will be granted seniority within the Classification of Cooks, is remanded to the parties for disposition.

The monetary relief sought by the Organization in part (2) of the claim cannot be granted since there is no evidence of record as to what extent, if any, the wages paid by Unaka Stores, Inc., for the work contemplated by Article 9(c), varied with the contractual rate established for the classification.

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 agreement was violated to the extent indicated.

AWARD

Claim disposed of in accordance with the above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of April, 1952.