Award No. 6680
Docket No. DC-6593

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Ex Parte submission of the Brotherhood of Railroad Trainmen in —

Claim of Dining Car Steward, Northern District, standing to be used for service on Overland Limited, Train No. 27, in Coffee Shop Car, March 10, 11, 22 and April 8, 1952, for earnings he would have received if used for such service, in addition to all other compensation received for service performed on those dates.

EMPLOYES' STATEMENT OF FACTS: On March 10 and 11, 1952, the crew consist in dining room section of Coffee Shop Car on Train No. 27 (Overland Limited) was 4 employes including a waiter-in-charge.

On March 22 and April 8, 1952, the crew consist in dining room section of Coffee Shop car on Train No. 27 (Overland Limited) was 3 employes including a waiter-in-charge.

A dining car steward was not employed on the Coffee Shop car in Train No. 27 on the dates involved.

Claim presented as set forth in the "Statement of Claim" was denied by the Carrier.

POSITION OF EMPLOYES: This claim was submitted to the carrier's assistant manager of personnel by employes' general chairman under date of October 21, 1952, discussed in conference with carrier's assistant manager of personnel, November 12, 1952, and denied by the carrier's assistant manager of personnel by letter dated November 14, 1952. Copies of submission and denial of claim are attached hereto as Employes' Exhibit "A".

Under date of November 18, 1952, the employes' general chairman advised carrier's assistant manager of personnel that his decision was not accepted, notified him that the claim would be referred to the National Railroad Adjustment Board, Third Division, for decision and requested carrier to join in the submission.

Under date of December 17, 1952, file DC 152-17, carrier's assistant manager of personnel agreed to join in the submission, providing joint statement of facts could be agreed upon.

Under date of December 19, 1952, employes' general chairman submitted a proposed statement of claim and joint statement of facts to carrier's

"Section 2. The term 'DINING CAR' shall be applied to all cars used for the purpose of preparing and/or serving food for sale."

The carriers declined such proposal and the matter finally went to a Presidential Emergency Board, which Board made no recommendation in regard to such proposal. An identical proposal was again presented to the carriers in June, 1947; however, in the final settlement which was reached between the parties in December, 1947, consideration was given to the above-quoted proposed rules, but the adoption of the proposed changes was not recommended. In March, 1949, the petitioner again served notice on this and other carriers of a desire to negotiate similar rules. The proposals of March, 1949 went to concerted handling and ultimately to a Presidential Emergency Board. That Board, in its report to the President, declined to recommend a rule because "There is no doubt that any rule that might be suggested would interfere with seniority of persons not before this Board."

In view of what has been shown above, it is obvious that the instant claim is another attempt on the part of petitioner to encroach upon the employment rights of waiters-in-charge and evidence that dining car employes consider that a sustaining award would be an infringement upon their rights, attention is directed to carrier's Exhibit "C", which is copy of letter addressed to Secretary Tummon of the Board by the Secretary-Treasurer of the Joint Council Dining Car Employes. Carrier asserts that, since the Presidential Emergency Boards, which had the right to propose new rules, declined to do so on the grounds that it would interfere with seniority of persons not before said Boards, it would be entirely improper for this Board to render a sustaining award which would have the same effect.

3. **The issue involved has been previously decided.**

Carrier directs attention, first to Award 493 of this Division (Brotherhood of Railroad Trainmen vs. Southern Pacific Company) decided without a referee, wherein the Board in 1937 upheld the carrier's action in assigning a waiter-in-charge instead of a steward on cafe cars on this property. Attention is also directed to Award 5517 of this Division (Brotherhood of Railroad Trainmen vs. Southern Pacific Company) rendered some fourteen years later, wherein the Board sustained this carrier's action in assigning a waiter-in-charge, instead of a steward, on snack-lounge cars. No change in the applicable rules has occurred since either of those awards; hence, it is obvious that the meaning and intent of said rules have been clearly defined and the issue involved has been definitely decided by Awards Nos. 493 and 5517. It will thus be seen that petitioner's action in seeking a sustaining award in this case is merely an attempt to have the Board reverse its previous decisions and confuse an otherwise settled situation. Therefore, carrier asserts that the instant claim should be dismissed.

CONCLUSION

Carrier reiterates that the instant claim is without merit and basis, and requests that said claim, if not dismissed, be denied.

All data herein submitted have been presented to the duly authorized representative of the employes, and are made a part of the particular question in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: This docket will have to be disposed of on the ground of lack of jurisdiction to proceed. Your referee has been furnished with most of the material, including several federal court opinions touching on the matter including the decision of Hon. John P. Barnes, Judge of the U. S. District Court for the Northern District of Illinois (E.D.) rendered on May 6, 1953, entitled Allain et al vs. National Railroad Adjustment Board, Third Division et al, Defendants, and the very recent decision of the United

States Circuit Court of appeals in the Illinois Central case against the Third Division Board (No. 10959 October Term, 1953, January Session, 1954) decided March 19, 1954, in which Judge Swaim wrote a strong dissent.

In the Allain case, supra, the facts are almost identical with those in the instant case except that it was a different carrier, and any attempt to write an award to escape the impact of that decision is not one to be undertaken by this referee. In that case this Board failed to give notice to the Dining Car Cooks and Waiters Union, Local No. 456 and the Joint Council Dining Car Employes, which are the same groups that gave written notice in this case that in the event a sustaining award should be entered it "would be a violation of the rights under the agreement between the Southern Pacific Company and its employes represented by the Dining Car Employes Union Locals No. 456 and No. 582 and the traditional practices thereunder." In the Allain case, the claimants were, as here, Dining Car Stewards and were, as here, represented by the Brotherhood of Railroad Trainmen.

The Allain case had its origin in Award No. 5123 of this division, where a sustaining award in favor of the Stewards was entered, which if carried into effect would undoubtedly have displaced the "waiter in charge" of the "lounge-buffet" car on the California Zephyr. The effect of Judge Barnes' opinion was to enjoin the Carrier from displacing the Waiter in charge, and the reason assigned was the failure on the part of the Board to give notice to the Local Unions representing the Waiter in charge.

Some referees have found ways to differentiate that award from others which have come before this Board, but this referee has seen no awards in which the factual situation was as close as the case we have before us, since May 6, 1953, the date of Judge Barnes' decision, which was affirmed by the U. S. Court of Appeals on April 13, 1954.

In addition to that this referee has been furnished with a copy of the Opinion of the Circuit Court of Appeals in the Illinois Central case, which says "This brings us at once to the contention advanced by the Carrier that the referee is without authority to participate in a decision as to whom notice shall be served upon but that such determination must be made by the Board as originally constituted. No authority is cited and we know of none where this question has been decided but we are convinced from our study of the statute **that the contention is sound."** (Emphasis supplied).

The statement just quoted is directed at this referee because later the Court goes on to say that when the required notice has not been given "the Board has the choice of two alternatives, (1) proceed no further or (2) comply with the statutory requirement and proceed to a hearing on the merits, with an opportunity for all parties to be heard."

It is significant that Judge Swaim should write such a forceful dissenting Opinion. No Federal Judge of the acquaintance of the referee is better equipped to do that, because of Judge Swaim's experience in writing awards on this Division. Now that he is on the Circuit Court of Appeals, this referee's sincere belief is that Judge Swaim would be the first one to say that the majority opinion is the law and must be followed until changed by the Supreme Court of the United States or suitable legislation in Congress, if that should be desired.

It may be noted in the closing sentence of the Court's Opinion, that the giving of notice was apparently such a minesterial duty, that the Board could be compelled to give the notice.

Under the circumstances there is nothing for this Board to do except to dismiss the claim without prejudice.

FINDINGS: The Third Division of the Adjustment Board 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 claim should be dismissed without prejudice.

AWARD

Claim dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1954.