Award No. 6701

Docket No. DC-6843

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: Claim of Dining Car Steward H. L. Lein, Northern District, for additional compensation in the amount of 15 hours and 40 minutes, February 19 and 20, 1948.

JOINT STATEMENT OF FACTS: 1. There is in evidence an agreement between the Southern Pacific Company—Pacific Lines (hereinafter referred to as the carrier) and its employes represented by the Brotherhood of Railroad Trainmen (hereinafter referred to as the petitioner), bearing an effective date of July 1, 1936 (hereinafter referred to as the current agreement), a copy of which is on file with the Board and is hereby made a part of this dispute.

2. On the dates of claim, the position of regularly assigned dining car steward on Trains Nos. 19 and 20 was scheduled to operate as follows:

DAY	TRAIN	REPORT	RELEASED
1	19	Portland 5:30 A. M.	
2	19		Portland 10:00 P. M.
2	20	Oakland 7:30 P. M.	
3	20		Oakland 10:00 A. M.

Normal trip allowance 39 hours

On February 16, 1948, the regular assigned dining car steward laid off by giving short notice during the layover period at Portland. Since there is no extra board for dining car stewards maintained at Portland, it was necessary to use Mr. N .T. Nelson (who does not hold seniority as a steward) to fill the emergency vacancy of the regular steward on Train No. 19, leaving Portland, February 16, 1948, and arriving at Oakland, February 17, 1948.

3. Mr. Nelson was next used on the Oakland to Portland portion of the same assignment on Train No. 20, leaving Oakland, February 17, 1948, and arriving Portland, February 18, 1948. For the above service, Mr. Nelson was allowed the following:

in service to which entitled in an amount equal to what they would have earned had they been properly used, it is significant that there is not now nor has there ever been included in the current agreement covering dining car stewards, effective July 1, 1936, any such provision by implication or accepted settlement. However, the carrier, considering that it was hardly equitable for dining car stewards to suffer a loss of earnings under such circumstances of its own initiative and without any agreement rule to cover, inaugurated the practice of compensating dining car stewards in the amount they otherwise would have earned had they been permitted to perform the service to which entitled, with no allowance if no time is lost or if their earnings on the dates involved exceeded the amount they would have earned in their proper turn. In fact, by agreement dated October 3, 1940 (Carrier's Exhibit "B"), the petitioner recognized that such remuneration was proper. There certainly is no basis for the attempt now being made to expand the concession granted dining car stewards to include payment of what the steward would have made had he performed service to which entitled in addition to his earnings on the dated involved.

To establish a basis for the claim in this docket, the employes must point to a rule of the agreement that was violated. Carrier maintains that there is no rule in the agreement covering dining car stewards, even by implication, to support the claim. To sustain the employes' position in this docket would result in writing into the agreement a new rule which, under the Railway Labor Act, is a matter subject to negotiation between the parties and not one over which the Board has jurisdiction. In this connection, attention is called to Awards 42, 871, 1149, 1248, 1290, 3407 and 5971 of this Division.

The attention of the Board is respectfully directed to Awards 549 and 550 of this Division wherein the matter here in dispute has already been decided. In Award 550 the Board stated in its opinion:

> "If the combined earnings for the entire service performed by each of the stewards involved in this case in July, 1936, was less than they would have earned had they remained on their regular assignments, they would be entitled to the difference between what they actually earned and what they would have earned in their regular assignments. If the combined earnings for the month were equal to or in excess of what the earnings would have been in regular assignments, the Board rules that they suffered no wage loss and have been properly compensated under Rule 2(b)."

Carrier asserts that it has conclusively established that the claimant has not suffered any wage loss on the dates involved in this dispute; that the agreement contains no provision, even by implication, that supports the claim and, therefore, respectfully submits that it is incumbent upon this Division to deny the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: On February 16, 1948, the regularly assigned Dining Car Steward laid off on short notice at Portland on the Oakland-Portland run. Nelson, possessing no seniority as a steward, was used to fill the emergency vacancy on Train 19, Portland to Oakland, on February 16 and 17. No extra board was maintained at Portland. **Nelson was also used on February 17-18, Oakland to Portland, Train 20.**

The Claimant stood first out on extra board at Oakland but did not work on February 17 and 18. The Carrier allowed Claimant 18 hours, 30 minutes, for February 17 and 18, representing compensation he would have received had he been properly used on said date in lieu of Nelson on the Oakland-Portland trip. Claim is made for additional time of fifteen hours, forty minutes, representing time allowance Claimant would have received for the return deadhead to his home terminal on February 19 and 20, had he been

assigned on Train 20, Oakland-Portland, in the first instance. Claimant performed other service on February 19 and 20 and was paid nineteen hours therefor. Because this compensation exceeded that which he would have earned if properly used on said dates, Carrier denied the claim.

Claimant was entitled to be made whole for the rule violation and this has been done in this case. No express penalty is provided for under the Agreement, but, despite that fact, an employe wrongfully deprived of work is entitled to be made whole. Carrier recognized this obligation and discharged it and nothing further is payable.

This Organization relies on Award 5123 but the claim there was for "the first out extra steward and in the absence of an extra steward for the first out regularly assigned steward," which claim does not raise the same question as we have before us here.

The Division, without referee in Award 550, involving these same parties, laid down the guiding rule when remanding that case to the property for further negotiation in line with Opinion expressed therein.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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 facts do not call for an affirmative award.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of June, 1954