Award No. 10098
Docket No. DC-9787

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 370

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes Local 370 on the property of New York, New Haven and Hartford Railroad Company that John McGrath and other employes similarly situated, bar attendants, be paid the monthly guarantee less whatever amount actually paid retroactively for each month said employes worked in regular assignment as bar attendants without guarantee in violation of Rule 1 of the effective agreement.

EMPLOYES' STATEMENT OF FACTS: Under date of February 9, 1955 the instant claim was initiated on the property (Employes' Exhibit A). On March 17, 1955 Carrier's Assistant Superintendent Dining Service denied the claim (Employes' Exhibit B). This action of denial was appealed to Carrier's Manager of Dining Service on March 25, 1955 (Employes' Exhibit C), and the original decision was upheld by that official under date of March 29, 1955 (Employes' Exhibit D). On April 5, 1955 Organization appealed that decision to Carrier's Vice President Personnel, the highest operating officer designated to consider such appeals on the property (Employes' Exhibit E). The original decision in the claim was reaffirmed by this official.

The runs involved in the instant claim are those on commuter lounge cars operated by Carrier on a five-day basis, Monday through Friday. The positions of bar attendant in these lounge cars were originally established as positions in regular assignment pursuant to Rule 1 of the effective agreement. As is apparent from Employes' Exhibit B, the Carrier unilaterally removed these runs from posting for bid on its own determination that these assignments are not subject to the guarantee rule contained in Rule 1 of the agreement. Furthermore, it is apparent from Employes' Exhibit B that the Carrier has unilaterally assumed the position that the subject positions are not subject to guarantee and has so instructed the incumbents of those positions.

In October, 1954 Carrier had only bar attendants assigned to commuter lounge car on Train 532. Carrier suggested that a waiter be placed in this car on a trial basis to determine whether this additional employe assigned to the car would increase sales sufficient to warrant a regular waiter assignment. Organization agreed that Waiter E. T. Washington should displace on this temporary position and that while the trial position remained as a trial position, the claim for monthly guarantee would be waived (Employes'

POSITION OF THE CARRIER: The contention of the organization is that the Bar Attendants' assignments in question should be advertised under Rule 12 and paid the monthly guarantee under Rule 1.

Neither rule defines the circumstances under which work must be advertised. In the normal operation of the schedule the Dining Car Department lays out the runs to provide as many assignments as may be scheduled for 205 hours a month or more. The balance of the work is filled from the extra list.

The operation in the present instance was not different. Certain of the commuter bar car work was combined with other work on Saturday or Sunday, or both, and advertised, the periods during which so advertised varying as cars were added or taken off not only the commuter trains themselves but Saturday and Sunday operations. The balance of the work was not advertised.

The Agreement contains no rule which would require bulletining these cars. Absent schedule requirement, Carrier respectfully submits the claim should be denied.

All of the facts and arguments used in this case have been affirmatively presented to Employes' representatives.

OPINION OF BOARD: The record discloses that this claim rests on the view that the guarantee contained in Rule 1 of the Agreement between the parties is applicable to service as bar attendant on commuter lounge cars.

It is the position of the Carrier that the Agreement, by its terms, limits its application to "Dining and Grill Car Employes." In answer thereto, the Employes argue that the Carrier cannot assert such a position on this appeal because it is a new issue which was not raised on the property. Numerous awards are cited by the Employes in support of this argument. However, those awards involved procedural matters, new evidence or time limitations which were held procedural. None of them involved the question now raised.

The Supreme Court has made clear that under the Railway Labor Act the substantive authority of this Board to decide a dispute depends on the existence of a collective bargaining agreement which is applicable to it. In **Slocum v. Delaware, L.&W. Railroad Company**, 339U.S.239, 242-243, the Court said:

> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employes, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of various Adjustments Boards by voluntary agreements between carriers and workers. 44 Stat.578. But this voluntary machinery proved unsatisfactory, and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employe disputes growing out of the interpretation of existing agreements."

Since our statutory right to determine the validity of the claim under the Agreement depends on whether the claim is within the coverage of the Agreement, and because in the absence of such coverage that right does not exist, a question in this regard is jurisdictional. In Award 9393 this Division said:

> "It is recognized that certain jurisdictional requisites, such as authority over a party or the right to decide the subject matter of a dispute, may be raised at any stage of the proceedings."

With respect to whether service as bar attendant on commuter lounge cars is covered by the Agreement, we are confronted by our Award 9808 which involved the same parties and the same Agreement presented here. In that case, the claim was predicated on the basis that the "Carrier assigned employes to work such new equipment (commuter lounge cars) from the roster of soda men and bar attendants, under Grill Car classification as per Rule 3 of the Agreement, in preference to the rights of senior qualified employes holding rights under the Waiters' roster." In concluding that the claim should be dismissed because the Agreement did not cover such positions on commuter lounge cars, this Division held:

> "The Agreement before us makes no mention of a classification covering such positions as we have involved here, in reference to commuter lounge car equipment. There is nothing in the record here, to justify the claims as properly being positions belonging to waiters in the Dining Car classification, and not positions to be performed by Soda Men and Bar Attendants as employes holding positions within the Grill Car classification. The Agreement before us contains no classification as Commuter lounge car positions.
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> " . . . We are of the opinion that the Organization should have, by proper procedure, taken steps to negotiate the matter pending here, but not having done so, cannot ask this Board to write a rule for them in support of the claims. This matter should have properly been negotiated between the parties, since we can find nothing in the rules to support the claims in reference to commuter lounge car positions. See Award No. 5079"

We find no basis for disregarding this holding and our prior award.

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 claim should be dismissed in accordance with the Opinion.

AWARD

Claim dismissed in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Scretary

Dated at Chicago, Illinois, this 6th day of October 1961.

Dissent to Award 10098, Docket DC-9787

This award is not only erroneous but also unfortunate in that the majority, composed of the Referee and the Carrier Members, knowingly went completely outside the record to find something on which to dismiss the claim rather than decide the issue as clearly presented by the parties.

The assertion that: "It is the position of the Carrier that the Agreement, by its terms, limits its application to 'Dining and Grill Car Employes'." is not supported by the record. The fact of the matter is that Carrier's Assistant Director of Labor Relations and Personnel, in complete defiance of instructions from the Chair, injected the issue at hearing before the Referee. The Carrier never so much as hinted that the Agreement does not apply to Claimants. The Carrier's whole argument was that the bulletining and guarantee provisions of the Agreement do not apply to employes working on "5-day a week commuter trains."

Obviously, the Slocum case has no application here. Nevertheless, this award places the Employes in the helpless and hopeless position of having duly handled and presented their dispute to the proper tribunal, viz., the Third Division, National Railroad Adjustment Board, for decision as contemplated by the Supreme Court in the Slocum case only to find the Slocum case seized upon as a means of denying them the benefit of a decision.

Neither Award 9393 nor Award 9808 dealt with either a comparable issue or involved like facts and circumstances. Therefore, those awards had no precedent value in the case covered by Award 10098.

In dismissing this case the majority has frustrated the intent of Congress in setting up machinery for the settlement of disputes between carriers and their employes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . " Therefore, I dissent.

/s/ G. Orndorff

G. Orndorff
Labor Member

Answer to Labor Member's Dissent to Award No. 10098, Docket No. DC-9787

Award 10098 involved service performed by bar attendants on commuter lounge cars. Carrier's position was as follows:

"The Agreement contains no rule which would require bulletining these cars. Absent schedule requirement, Carrier respectfully submits the claim should be denied."

Award 9808 also involved service performed by bar attendants on commuter lounge cars, and this Division correctly held therein as follows:

"The Agreement before us makes no mention of a classification covering such positions as we have involved here, in reference to commuter lounge car equipment. * * *"

Accordingly, Award 10098 correctly followed Award 9808.

Award 9393 correctly recognized that jurisdictional questions may be raised at any time.

/s/ W. H. Castle

/s/ P. C. Carter

/s/ R. A. Carroll

/s/ D. S. Dugan

/s/ J. F. Mullen