Award No. 13562
Docket No. DC-14632

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Ross Hutchins, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 849

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes Local 849 on the property of the Chicago, Rock Island and Pacific Railroad Company, for and on behalf of Wilbur S. Rogan, Otis Floyd and all other employes similarly situated, that they be paid for all hours worked by Marshall Gent, an employe not covered by the Agreement, on Trains 17 and 18 July 16, 17 and 18, 1963, account carrier assigning this employe to the above trains on the above dates in violation of the Agreement between the parties.

EMPLOYES' STATEMENT OF FACTS: Under date of September 13, 1963, the following time claim was filed with Carrier's General Superintendent, Dining and Sleeping Cars:

"Dining Car Employes Local No. 849
743 East 75th Street
Chicago 19, Illinois

"September 13, 1963

"Mr. M. H. Bonesteel, General Superintendent
Dining and Sleeping Cars
Chicago, Rock Island and Pacific Railroad Company
164 West 51st Street
Chicago 9, Illinois

"Dear Sir:

"Accept this as a time claim in behalf of Wilbur S. Rogan, Otis Floyd and other extra employes assigned to the Extra Board at Minneapolis, Minn.

"This claim is filed in behalf of the forenamed employes, due to the violation of their seniority rights by the Carrier.

"On July 16th, 17th and 18th, 1963, the Carrier allowed Waiter Marshall Ghent to work on Trains #17 and #18. This employe Marshall Ghent, did not have seniority on our roster or the B.R.I. roster. To allow him to work violated our rights under the Interline Agreement that exists between this organization, Local 351 and the Car-

able to protect the assignment, leaving Fort Worth on July 16, 1963.

(Exhibits not reproduced).

OPINION OF BOARD: On July 16, 17 and 18 of 1963, the Carrier allowed Waiter Marshall Gent to work on Trains No. 17 and No. 18. Gent did not have seniority on the Chicago, Rock Island and Pacific or the B.R.I. Roster.

Rule C (6) provides:

> "Extra, irregular or casual employment on Trains 507-508 to fill the place of a Joint Texas Division man during voluntary lay-off, vacation, or because of no Joint Texas Division man available, will be filled temporarily by Rock Island men from the Rock Island seniority roster."

The Carrier asserted this defense on the property and before this Board.

> "However, this assignment was made on an emergency basis account the regularly assigned Waiter Garfield W. Thompson was called to California due to illness in his family, making it necessary to assign Gent as no Joint Texas Division men were available and there was no sufficient time to obtain a man from the Rock Island Extra Board at Minneapolis."

No other defense is made by the Carrier and the fact that there was not sufficient time to obtain a man from Minneapolis is not disputed by the employes. The employes contend that the defense asserted by the Carrier is not a defense under Rule C (6) as no exception is expressly provided in the rule.

The Carrier cites many awards to support its position. Award 4948 (Carter), Award 5425 (Donaldson), Award 5766 (Smith), Award 5944 (Douglass), Award 7041 (Whiting), Award 9394 (Hornbeck), Award 11241 (Moore), Award 12938 (Yagoda), and Award 13085 (Ables).

Award 12938 holds in part:

> "Although the Agreement does not expressly provide for deviations from the applicable Rules when emergencies are present, we have held that under unavoidable exigencies requiring the speedy presence of an employe as an alternative to prolonged impairment of operations, that employe, even though enjoying priority of assignment under the Agreement, who clearly cannot get to the assignment in the needed time, may be regarded as not being truly 'available' in realistic terms . . ."

But we do not think that the allowance of an exception in case of an emergency is the real basis of this case. The real basis is the impossibility of performance by reason of the unavailability of the employe resulting from a circumstance created by an employe. The employes cannot enforce a contract they could not have performed.

Maybe the Claimants could have performed the service. We cannot say from the evidence that he could not. But the Carrier says the employes could not have performed the service (see quote above) and the employes do not deny the statement of the Carrier. We hold that it is, therefore, admitted that the employe was unavailable and for that reason cannot recover for what they

could not have done.

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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1965.