Award No. 13658
Docket No. DC-15014

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 370

THE DELAWARE AND HUDSON RAILROAD CORP.

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees, Local 370 on the property of the Delaware and Hudson Railroad Corporation, for and on behalf of Waiters-in-Charge Leroy Smith, D. Keats, F. Tippett, William Mann, Edward McAdoo, and all other employes similarly situated and adversely affected, that they be compensated for all hours worked in dining service by New York Central Railroad Company employes over the lines of the Delaware and Hudson Railroad Corporation.

EMPLOYES' STATEMENT OF FACTS: Prior to April 28, 1963, Claimants were assigned to dining cars in the consist of Trains 9-10, New York, N. Y. to Montreal, Canada and return. Also, in the consist of the trains was a New York bedroom lounge car manned by sleeping car porters between the same points. This lounge car rendered snack and liquor service to **Pullman or sleeping car passengers only.** The diner of Carrier to which claimants were assigned rendered dining service to all coach passengers and to Pullman or sleeping car passengers who desired same.

Effective April 28, 1963, Carrier discontinued dining service on the trains in question and claimants were advised that all such positions were abolished. Effective the same date, the New York Central Railroad buffet car or lounge car began rendering dining and beverage service to all passengers. This included a breakfast into Montreal on Train No. 9, which service had heretofore been performed exclusively by employes of Carrier.

Employes protested the proposed new operation in letter dated April 18, 1963 and under date of May 18, 1963 filed a time claim on behalf of claimants, alleging a violation of the scope rule in the Agreement between the parties. (Employes' Exhibit A.) Under date of May 28, 1963, Carrier denied the claim. (Employes' Exhibit B.)

Employes appealed this decision from the Superintendent Dining Car Service to the General Superintendent, and further appealed to Carrier's Manager of Personnel, who under date January 2, 1964 also denied the claim. (Employes' Exhibit C.)

Article 5 — Seniority

Article 6 — Miscellaneous Allowances

Article 7 — Handling of Employes

The entire Agreement between the parties as made effective on January 1, 1939, and revised September 1, 1949 is on file with the Third Division, National Railroad Adjustment Board and carrier does not feel that this record should be prolonged by setting forth here the entire provisions of seven articles of a ten-article agreement. Suffice to say that the only article of the agreement which can possibly be remotely connected to this dispute is the Scope Rule, Article 1 of the current agreement, which reads as follows:

"ARTICLE 1. SCOPE

The following rules will govern the hours of service and working conditions of Chefs, Porters in charge, Second Cooks, Third Cooks and Waiters."

It will be noted that this article is the type of scope rule which merely sets forth the titles of positions and does not reserve to the employes any specific or exclusive duties. Therefore, custom and practice on the property must determine the work, if any, which may be properly said to accrue exclusively to the employes covered thereby.

The complainant Organization cannot deny that since at least 1939, the effective date of the agreement covering Dining Car employes, a Pullman or New York Central bedroom-lounge car has been operated in trains Nos. 9 and 10 between New York City and Montreal and that this car has served food and beverages. Neither can the Organization deny that for many years prior to and since 1939, New York Central dining cars have been operated on the Delaware and Hudson Railroad. Under the long established practice, acquiesced in by the employes without claim or protest, it is clear that New York Central employes not only have the right to operate bedroom-lounge cars but also have the right to operate dining cars over the Delaware and Hudson Railroad.

A dispute involving a claim by the Joint Council of Dining Car Employees, Local 351, against the Grand Trunk Western Railroad Company was denied by your Board in Docket No. DC-8971, Award No. 9269. The attention of the Board is also respectfully referred to Awards 2325, Referee Swain and 11206, Referee McMillen, which further support the decision rendered in Award No. 9269.

This rule is not supported by any rule or practice under the Agreement and Carrier respectfully requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to April 28, 1963, Claimants were assigned to dining cars in the consist of Trains 9-10, New York, N. Y. to Montreal, Canada and return. In the consist of the trains was a New York Central Railroad bedroom-lounge car equipped to serve light breakfasts on northward trips and refreshments on the southward trip. This bedroom-lounge car has been so operated by the New York Central since July 1, 1958 and prior to that time by the Pullman Company. The diner of the Carrier, to which Claimants were assigned, rendered dining service to passengers who desired

same. Effective April 28, 1963, Carrier discontinued dining service on Trains 9-10 and all such positions were abolished.

The Employes contend that Carrier violated Rule 1 — Scope of the Agreement as service of food and beverages to Carrier's passengers on Carrier's trains is work coming within the scope of the Agreement; that Carrier contracted with the New York Central allowing that Railroad, with its employes to perform work belonging to the Claimants under the Scope Rule of the Parties; that though the dining car was removed from the train the work still remains.

Carrier alleges that proper notice was posted on April 18, 1963 to the effect that the dining car operated on Trains 9-10 would be discontinued effective April 28, 1963 and all regular and assigned relief positions would be abolished; that the New York Central is not now performing at the request of the Delaware and Hudson Railroad, the work of serving to coach and Pullman passengers, all food and beverage service on Trains 9-10, as the bedroom lounge car and the service was already available and been so provided since July 1, 1958 by them and before that by the Pullman Company; that based upon improved arrival and departure schedules to better accommodate patrons, the necessity of clearing patrons through Customs, there no longer existed a need for the dining car which had incurred substantial losses on Trains 9-10.

The Article of the Agreement, pertinent to this dispute, is the Scope Rule which reads:

"ARTICLE I. SCOPE

> The following Rules will govern the hours of service and working conditions of Chefs, Porters in charge, Second Cooks, Third Cooks and Waiters."

The Article is the type of scope rule which is general in terms, only setting forth the titles of positions and does not reserve to the Employes any specific or exclusive duties. When general in terms, the Employes have the burden of proving that such work performed by them accrues by reason of custom and practice on the property and must be exclusively performed by them.

The Board finds that since 1935 the consist of Trains 9-10 had included a lounge-type car staffed by either Pullman Company or New York Central employes and a Delaware and Hudson Dining Car, staffed by Delaware and Hudson Dining Car employes. The lounge-car employes are not employed by the Carrier nor covered by the Agreement between the Delaware and Hudson Railroad and the Dining Car Employes Union. It is apparent from the record, that this service and practice were known by the Organization when it negotiated with the Carrier and has not been abrogated by subsequent Agreements. We further find that the Carrier does have the prerogative to abolish positions and terminate the dining car on Trains 9-10, and that dining and beverage service has been provided on the lounge-car for many years, available to all passengers without restrictions and not performed exclusively by the Delaware and Hudson Dining Car Employes. See prior Division Awards 2325, 9269, 10099 and 11206.

The Scope Rule has not been violated and Petitioner having failed to sustain the burden of proving that the work in the instant dispute was the Claimants' exclusively by past practice and custom, the Claim must be denied.

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

That the parties waived oral hearing;

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 15th day of June 1965.