

Award No. 1799

Docket No. 1643

2-PULL-CM-'54

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Carmen)**

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYEES: (1) That under the current agreement the Carrier improperly assigned other than Pullman Carmen Painters to paint trucks on 30 Pullman cars at Pittsburgh, Pennsylvania on June 13, 1952.

(2) That accordingly the Carrier be ordered to additionally compensate Pullman Carmen Painters T. J. Ricotti, C. A. Willig, K. Szarnach, O. N. Conti, P. J. Broderick, G. Gehe and J. F. Berkey in the amount of eighty (80) hours' pay at the time and one-half rate equally divided among them.

EMPLOYEES' STATEMENT OF FACTS: The carrier maintains at Pittsburgh, Pennsylvania District Yards painting facilities and a force of seven (7) painters who are assigned to painting of the interior and exterior of Pullman cars including trucks.

Painters T. J. Ricotti, C. A. Willig, K. Szarnach, P. J. Broderick, G. Gehe and J. F. Berkey, hereinafter referred to as claimants, are regularly employed as such by the Pullman Company at the Pennsylvania Railroad Pullman District Yards, Pittsburgh, Pennsylvania, regular assigned hours 8:30 A.M. to 5:00 P.M., Monday through Friday, with Saturday and Sunday as rest days. Painter O. N. Conti, hereinafter referred to as a claimant, is regularly employed as a painter by the Pullman Company at the P. & L. E. and Baltimore & Ohio Railroad Pullman District Yards, Pittsburgh, Pennsylvania, regular assigned hours 7:30 A.M. to 4:00 P.M., Monday through Friday, with Saturday and Sunday as rest days.

The Baltimore & Ohio Railroad Pullman District Yard is considered as part of the P. & L. E. Yard, as the Baltimore & Ohio Railroad regular trains arrive and depart from the P. & L. E. Station.

During the week of June 9, 1952, thirty-two (32) Pullman cars were held over in the Pittsburgh, Pennsylvania Pullman District Yards to be used

as proof in support thereof. The company has also shown that there has been no violation of Rule 81 of the agreement since the rule contemplates that painting of trucks on Pullman cars shall be performed by Pullman carmen painters only when the cars are placed in the Company's repair shops and further, that Rule 81 was not intended to cover such work as was never performed by Pullman Company employees prior to the consummation of the present agreement.

The company has shown, further, that it is a well-established principle that where a contract is negotiated and existing policy and practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself. The company has also shown that in order to sustain this claim, the Board would be compelled to ignore numerous decisions of the National Railroad Adjustment Board as to the force and effect of past practice. Finally, the company has pointed out that the claim of the organization is excessive and further, that penalty payment for work not performed is at the straight time rate of pay. The claim should, therefore, be denied.

The summation of the principle here involved is set forth in the language of Award 217 of the Fourth Division, National Railroad Adjustment Board, Docket No. 215, which Award states as follows:

"We agree with the parties that the matter in dispute is not within the current agreement. It is not within the jurisdiction of this Board to either make, or amend, or nullify, agreements duly executed by a carrier and its associated employees. This limitation of the Board is bottomed upon the right of freedom of contract, sound principles of jurisprudence, and common sense. The Board has no authority to read into a contract that which its makers have not put there expressly, or by clear implication. The Board has said so many times. As noted in Award No. 5288, page 3 (1st Division, Hon. Edward F. Carter, Referee), the Board has no power to rewrite the contract or to relegate to itself the powers and duties of the parties. And in Award No. 5396, page 8, (1st Division, Hon. Robert G. Simmons, Referee): 'In the absence of rules clearly establishing the right it will not be held that the carriers and employees contracted to pay and to be paid two days' pay for one day's work. In the instant case, the established practice followed, without objection, by both carriers and employees over a long period of time supports the position taken by the carrier in the construction of the cited rules.' Of course, repeated breaches do not abrogate a clearly expressed contract provision, but where the contract is silent, or the meaning of a provision is not clear, the long-continued practice of the parties is most persuasive proof that the practice was within the purview of the contract, and the intention of the parties. Such practical construction of a contract should not be brushed aside by any tribunal. This tribunal may only determine the question of where the parties have placed themselves by their own agreement."

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

On June 12, 1952, thirty-two Pullman cars were assembled in the Pittsburgh and Lake Erie Railroad yard in Pittsburgh for use on Baltimore and Ohio special trains to leave Pittsburgh on June 14, 1952 en route to Miami,

course, is part of the exterior cleaning, which is a responsibility of the railroad company."

"... this matter has been taken up with our people and they advise that trucks of our cars are not re-painted between shopping periods, and as these cars have only been outshopped lately, it would appear to be a question of exterior cleaning, and that it is a case of cleaning instead of painting the trucks."

It is our opinion these quotes clearly indicate that painting trucks was not considered a part of exterior cleaning of the cars, the work reserved by the Baltimore and Ohio.

We come then to the question, was it reserved to the Baltimore and Ohio by practice under the classification of "Exterior car cleaning", particularly at the Pittsburgh and Lake Erie yards in the Company's Pittsburgh District? There is considerable dispute in the record as to just how this work has been handled but we do not think the showing made establishes a past practice so as to reserve this work to the Baltimore and Ohio. It may be that under other Uniform Service or Operating Contracts with other carriers that this work is specifically reserved or it may be that it is reserved on other carriers under language used by reason of past practices. We do not decide these questions here. All we determine here is that under the facts disclosed by this record the Company's painters were entitled to perform this work when it was performed at the Pittsburgh and Lake Erie yards in the Company's Pittsburgh District on Pullman cars that were to be put in service on Baltimore and Ohio trains.

We come then to the question of the extent to which the claim should be allowed. Whatever the amount of time for which the claim is eventually allowed it should only be at the pro rata rate for that is, under the circumstances here disclosed, the proper penalty for work lost. See Award 1530 of this Division.

The Company says the work did not actually take over thirty (30) hours whereas the organization says it took ninety-eight (98) hours and offers proof to that effect. The claim is for eighty (80) hours. The proof offered by the organization shows sixty-three (63) hours spent by Baltimore and Ohio employees in cleaning, scraping and repairing the trucks for painting and the painting thereof. That is the work for which claim is here made. It also shows Baltimore and Ohio employees doing thirty-five (35) hours of work on the Shriners' Special. Whether this latter was done in connection with painting the trucks is not shown by the statements of the employees who did the work. To hold it would only be conjecture on our part.

We therefore come to the conclusion that the claim should be allowed for sixty-three (63) hours at straight time rate.

AWARD

Claim sustained for sixty-three (63) hours at straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1954.