Award No. 3453

Docket No. PC-3457

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors, Pullman System, claims for and in behalf of Conductor G. G. Cornett, San Francisco District, that he should have been assigned to a vacancy in Line 144, bulletined under date of November 21, 1945, Bulletin No. 165. He was the senior conductor who bid for the vacancy and when the bids closed on December 1, 1945, as shown by Bulletin No. 169, he was not assigned to this vacancy as provided in Rules 25 and 31. Instead, Conductor A. R. Byrd was assigned. We now ask, by reason of the violation of Rules 25 and 31, that Conductor Cornett be compensated for each trip he was not permitted to operate in the vacancy for which he bid and was entitled to, up to March 4, 1946, on which date he was placed in the vacancy.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between The Pullman Company and conductors in its service, bearing effective date of September 1, 1945. Also, a Memorandum of Understanding captioned "Subject: Compensation for Wage Loss," bearing date of August 8, 1945. (This Memorandum of Understanding is quoted on Pages 4 and 5 of Exhibit No. 2.)

This dispute has been progressed in accordance with the Agreement up to and including the highest officer designated for that purpose, whose letter denying the claim is submitted as Exhibit No. 1.

The minutes of the initial hearing held before District Superintendent H. C. Lincoln, San Francisco, are submitted as Exhibit No. 2.

The essential facts in this case are as follows:

Conductor G. G. Cornett, San Francisco District, was operating in a side of Line 144 on Western Pacific and Denver & Rio Grande Western Trains Nos. 40-6 and 5-39 between Oakland, Calif., and Denver, Colo. Under date of November 21, 1945, Bulletin No. 165 was posted in the San Francisco District for conductors' bids for a period of 10 days, as provided in Rule 31, advertising a vacancy in Line 144. Conductor Cornett filed his application with the designated official, as provided in Rule 31, for this vacancy. Under date of December 1, 1945, the bids closed and Conductor A. R. Byrd, who was junior to Conductor Cornett, was assigned to this vacancy in violation of Rules 25 and 31. This matter was called to the attention of the District Representatives prior to the date Conductor Cornett would have gone out in this vacancy had he been assigned to it (See Exhibit No. 2, bottom of page 6, top of page 7).

POSITION OF EMPLOYES: The Grievance Committee representing Conductor Cornett in this case has presented the claim clearly and con-

move from side to side in order to satisfy a whim at the expense of the senior extra men, for we no longer have hold-downs to take care of them, and if it is felt that such action will result in the greatest good for the greatest number, the Management will probably go along. You must remember that an incident of this kind will delay the oldest extra man who happens to bid on the assignment ten days before he can get into the regular run, and if some other conductor in the run elects to move in the same manner as Mr. Cornett moved, the senior extra conductor will be delayed twenty days before he can get into the regular run. Whether or not this is fair to the extra man seems to be highly problematical. I have always held that the extra man should be protected as well as the man with plenty of seniority. On the first of September the Management agreed to recognize preferred sides on certain specified runs, thereby increasing the opportunity for selection by the senior conductors. The interpretation under discussion is clearly not what was in the minds of the parties when the rule was written, and it certainly doesn't take into consideration the rights of the senior extra man. However, as stated, if the Organization wants this interpretation, we having admitted violation, there is nothing we can do about it * * *."

Since the Organization has rejected the Company's offer of compromise settlement in this dispute, the Company can do no other at this time than to delegate to the Third Division, National Railroad Adjustment Board, the responsibility of ascertaining the degree of liability, if any, that has accrued to the Company as a consequence of the manner in which it has handled this claim. The Company does not believe that it has forfeited its chances of a favorable decision from the Board by reason of its offer of a compromise settlement to the Organization in behalf of its member. That the Third Division looks with favor upon efforts by Management to arrive at compromise settlements with its classes of employes, and without prejudice to Management in so attempting compromise settlements, is borne out by various awards of the Third Division. In Award 274, Docket No. TE-278, the following language should be noted:

"Cases are likely to arise under Labor Agreements which can only be handled on their individual merits and when so handled should not be regarded as creating precedents for subsequent cases or as changing the Agreement in question. The Referee finds that the case before the Board is a case of this sort. In the absence of a specific rule an equitable compromise adjustment is in order."

Also, in Award 1395, Docket CL-1441, the following language, under **OPINION OF BOARD**, should be noted:

"A settlement (not a decision) of another claim has been cited as authority. Apparently the result was reached by compromise. Such settlements should be encouraged. The Referee questions the propriety of citing them as to a claim which is contested to decision here. If the parties may not compromise such a claim without subjecting themselves to the danger of later having their action construed as an admission against them, a long and objectionable step will have been taken to discourage amicable adjustments on the property. That observation has some, but not as much, application to the results of arbitration."

Further, in Award 2331, Docket No. CL-2377, the Board ruled on a dispute somewhat similar to the instant one as follows:

"**OPINION OF BOARD:** This case involves the rate of pay of cashier at Mason City, Iowa. The Carrier offered to increase the rate of pay 25 cents per day. It is the opinion of this Division that based upon all the facts and circumstances of this particular case, this offer represented a fair disposition of the claim, and as the record does not indicate there has been any material change in

the situation, the offer of the Carrier still represents a fair adjustment of the dispute upon which the parties should continue their negotiations to a settlement as of the date the claim was presented, November 18, 1940."

Finally, in Award 2612, Docket No. TE-2572, language in point is contained under **OPINION OF BOARD**, as follows:

"The petitioner calls attention to Docket No. TE-1527 which involved a claim like this, namely, that the carrier had filled an asterisk (*) position by the appointment of an employe not under the Agreement. It is asserted that pending a hearing of that claim by this Board, the parties held a conference at which it was agreed that the position would be vacated and filled from among the Agents or Assistant Agents carried on an Agents' roster, but that the carrier should not be confined to the seniority district wherein the vacancy occurred; that this was accordingly done; and that the case was thereupon withdrawn from the consideration of this Board. It further appears, however, that in entering into said agreement, the carrier made the following express reservation: 'It is understood that the settlement in this case shall not constitute a precedent.' The public has an interest in the amicable adjustment of disputes by the parties and it is, and ought to be, the policy of governmental agencies to encourage such disposition of controversies. For that reason this Board is always reluctant to regard such settlements as establishing binding precedents with respect to future differences. In Award 1395 it was appropriately said: 'If the parties may not compromise such a claim without subjecting themselves to the danger of later having their action construed as an admission against them, a long and objectionable step will have been taken to discourage amicable adjustments on the property.' In view of the prior holdings of this Board and the further fact that this carrier expressly indicated that its action in settling Docket TE-1527 was not to be understood as establishing a precedent, we are constrained to hold that the settlement of that case has no force here.

* * * * * *

The problem with which we are here dealing is peculiarly a matter of contract between the organization and the carrier. We do not find the terms of the contract indefinite, uncertain or ambiguous; on the contrary, these are clear and positive. It follows that any change of policy must be brought about by negotiation. It is not within our jurisdiction to make contracts for the parties."

We submit that the claim herein presented should be denied: first, because this claim by the Organization in behalf of Conductor Cornett for his alleged right to operate in another position in an assignment not having preferred sides constitutes a departure from "past practice" and relates to an operating condition not specifically covered by any rule of the working Agreement; second, in proposing a compromise settlement which was rejected by the Organization, the Company demonstrated complete good faith by agreeing to recognize as a regular operating practice the right of conductors to move about from position to position within an assignment; third, because there is no equity in the claim since Conductor Cornett lost no time in the major assignment of his choice, Line 144, nor, under the Company's compromise offer which still holds, in his eventual transfer from one position to another position of the same Line, number 144; and fourth, because The Pullman Company has not violated any of the rules of the working Agreement, effective September 1, 1945, there is no proper basis upon which this claim can be sustained.

The sole purpose and effect of Conductor Cornett's claim is to collect double pay for performing a single chore. Although somewhat belatedly getting into a selected position of an operation to which he was already

assigned, Conductor Cornett suffered no damage. On the contrary, under the Company's compromise offer, he stands to gain pay for eight days. Any money grant beyond that would constitute "feather bedding" at its worst. The claim is completely outside of the clear intent of the Memorandum of Understanding, dated August 8, 1946, which sets up a penalty payment where the Company clearly violates a rule of the working Agreement through failure properly to assign a conductor. No rule of the working Agreement was violated in the Cornett case.

OPINION OF BOARD: On November 21, 1945, the Carrier bulletined a vacancy for conductor in Line 144. Claimant Cornett, who was then assigned to that line, applied for the vacancy but a conductor junior in seniority was assigned to the vacancy December 1, 1945.

On February 23, 1946, the Carrier's Superintendent advised Cornett, that being the senior bidder, he should have been assigned to the vacancy and arranged to so place him March 4, 1946.

Claim for compensation for each trip he was not permitted to operate in the vacancy is based on Memorandum of Understanding dated August 8, 1945.

While the Statement of Claim covers the period December 1, 1945, to March 4, 1946, the record shows Cornett was not available for the vacancy until December 14, 1945, and also that he laid off for his own convenience on January 5 and 25, 1946.

The claim should be sustained, under the Memo of Understanding dated August 8, 1945, for compensation for such trips as claimant was available between December 14, 1945, and March 4, 1946. This Award does not contemplate pay for time while claimant was laying off for his own convenience.

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 claim will be sustained in accordance with the Opinion.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of March, 1947.