

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductor, Pullman System, claims that The Pullman Company violated rules of the Agreement between The Pullman Company and Conductors in the service of The Pullman Company:

- (1) when, on November 6, 1945, and subsequent dates, the Pullman Company furnished Western Union Rate Books to conductors of the Chicago Eastern District who operate on Santa Fe Trains Nos. 17 and 18 between Chicago and Los Angeles, requiring them to carry these Rate Books and act as an agent of the Western Union Telegraph Company; and
- (2) when, on November 6, 1945, and subsequent dates, The Pullman company instructed conductors of the Chicago Eastern District who operate on Santa Fe Trains Nos. 3 and 4 between Chicago and Los Angeles to receive and deliver messages and otherwise act as an Agent of the Western Union Telegraph Company.

We now ask that because of this violation conductors who operate on the above trains be paid as Agents of the Western Union Telegraph Company in addition to their earnings as Pullman conductors.

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. 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 attached as Exhibit No. 1.

There is published by The Pullman Company a pamphlet designated on cover as "Instructions to Conductors." One of the title pages refers to the publication as a "Book of Instructions," and advises the reader that it is "in Two Parts." That, "The second part contains instructions to all car employes." The term "car employes" includes conductors. On page 30 of this second part there appears the following:

"Telegrams. Employes will receipt to passengers for telegrams entrusted to them for forwarding and must exercise utmost care to see that messages are promptly delivered to operator and correct change returned to passenger. Receipt of operator should be obtained on coupon attached to special Western Union telegraph blank, and turned in to district office. All telegrams sent in the interest of passengers must be paid for by them.

summation of the principles here involved is completely expressed in the language of Award 217, Fourth Division, National Railroad Adjustment Board Docket No. 215, which language 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 days' 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."

The Pullman conductor has lost no rights as an employe by performing the small time-consuming task of handling telegrams for Pullman passengers, which service, however, is one of considerable convenience and benefit to the patrons of the Company. The service complements the work of a Pullman conductor and cannot be construed as detracting either from the importance of a Pullman conductor's work or from his efficiency as a conductor.

The Company submits that the instant claim should be denied: first, because there is no rule in the current Agreement, effective September 1, 1945, or in any prior Agreement, restricting the right of The Pullman Company to require its conductors to act as agents of Pullman passengers riding in cars under their supervision by handling the telegrams for those passengers and, second, because the reasons herein stated under points 1 to 4, inclusive, sustain the right of Management to request Pullman conductors in Lines 4015 and 45 to perform the work complained of.

(Exhibits not Reproduced.)

OPINION OF BOARD: While the claim in this case was initially filed under Rule 49 of the current Agreement as a grievance complaint, it was later amended and the original contention in effect abandoned. In any event, the issue now is whether the Pullman Company violated any of the rules of the applicable working Agreement, effective September 1, 1945, in requiring Pullman conductors assigned to Santa Fe trains No. 17 and No. 18, commonly known as the Super Chief, to carry Western Union Telegraph Company rate books and in requiring such conductors on trains No. 3 and No. 4, ordinarily referred to as The Californian, to receive and deliver telegraph messages. In addition, the Employees ask that conductors operating on such trains be paid as agents of the Western Union in addition to being compensated as Pullman conductors.

The essential facts are not in dispute and their substance can be briefly summarized.

Perhaps for a couple of years prior thereto, but definitely on or about April 27, 1938, the Company commenced the practice of furnishing conductors operating on the Super Chief with Western Union rate books and required them to not only accept and receive telegrams from and for Pullman passengers but, in addition, required that they rate and collect proper payment for messages which passengers desired to send from that train. This particular practice came into existence largely because the Super Chief is a fast train, making short stops, and generally there is not time at stations where stops are made for the conductor to get off the train, go to the telegraph office, ascertain the rate, make change for each telegram, and do all other things necessary during the short space of time available.

Long prior to April 1938 conductors on the Californian had been required by the Company to receive and deliver telegraph messages on that train as a part of the duties of their position and on all dates in question were doing so. For that matter, this practice was no different than that which had been followed by the Company for years, on its Pullman cars, throughout the entire nation.

Nothing is to be gained by attempting to relate the long and detailed explanation of the parties as set forth in the record with respect to conditions and circumstances under which telegrams are rated on the Super Chief and received and delivered by Pullman conductors on both the Californian and the Super Chief. It suffices to say that all parties concede the practice of handling telegrams enroute for passengers in Pullman cars, both with respect to sending and receiving of messages, is a special Pullman service feature supplied by the Company and performed by Pullman conductors over a long period of years. It can also be stated that the record conclusively establishes that Western Union rate books had been furnished conductors operating on the Super Chief for at least seven years prior to the effective date of the execution of the working Agreement in force and effect on the date of the filing of the instant claim. Likewise, added, that except for possible increase in the work, due to changing traffic conditions, the record does not reveal there has been any expansion of, or material change in, the practices followed by the Company with respect to the handling of telegrams on either of such trains since April 1938.

The sum and substance of the Employees' position, in fact, the very gist of their claim, is that when Pullman conductors handle telegrams under the conditions and in the manner heretofore related, the rules of the current Agreement are violated, the conductors are acting as agents of the Western Union, and they should be compensated for their service in the capacity of telegraph agents in addition to the rate paid them for their services as conductors.

After carefully reviewing the record we are convinced the claim must be denied for several reasons which will be stated as briefly as possible:

(1) The Employees cite no rule, and we fail to find any in the Agreement, which even by inference prohibits the Company from following the practices heretofore described with respect to the rating or receiving and delivering of telegrams. Before this Division would be justified in granting an affirmative Award it must be able to say some rule of the Agreement precludes the Carrier's action. We cannot either make, amend or nullify a contract. Neither do we have power to read anything into it that is not expressly there or clearly to be implied from its terms.

(2) When the current Agreement was negotiated the practice of receiving and of delivering telegrams by Pullman conductors had been followed for many years. The practice of rating telegrams on the Super Chief had been in existence for at least seven years. We assume the Organization, acting as the Employees' representative, knew of the existence of such practices. But whether it did or not is immaterial. It is charged with knowledge of the working conditions existing at the time the Agreement was executed. If it desired to have the practices abolished they should have been made subjects for negotiations and agreement. When a contract is negotiated and

long existing practices are not abrogated or changed by its terms, such practices are deemed to have been within the contemplation of the parties and approved. Indeed, there is sound precedent for giving them the same force and effect as if they had been incorporated within the terms of the contract itself. See Awards 2436, 1397, 1252, 507. What has just been stated is all the more true when—as here—in addition to long continued acquiescence prior to the filing of a claim the parties have since revised the working Agreement, then in force and effect, without abrogating or doing away with the practices of which they then and now complain.

(3) When the claim and arguments in its support are boiled down and stripped of all surplus verbiage it is apparent the Employees are simply claiming that the compensation received by Pullman conductors on the date of the filing of the claim was not adequate pay for the amount of work they were required to do by the Company and they are asking this Division to fix new rates of pay for their positions on that account. That, as has repeatedly been held, is not a proper function of any Division of the National Railroad Adjustment Board but is a matter which must be left to collective bargaining between the parties.

Each and all of the foregoing grounds justify a conclusion the practices of which the Employees complain are not in violation of the Agreement and that they may be indulged in by the Company until such time as they are curtailed, or eliminated entirely, through the medium of negotiation.

We find nothing in the record to warrant the sustaining of the Employees' contentions that Pullman conductors in performing the services required by the Company were acting as agents of the Western Union or were performing work outside the scope of their employment.

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 Employees involved in this dispute are respectively carrier and employees 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 none of the practices complained of violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of August, 1948.