Award No. 4442

Docket No. PC-4544

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors, Pullman System, claims for and on behalf of Sleeping and Parlor Car conductors in the employ of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and governed by Schedule of Rules Governing Rates of Pay, Hours of Service and Working Conditions of Sleeping and Parlor Car Conductors, Effective August 1, 1943:

1. That Rules 22, 25, and 35 of the above Agreement were violated when on July 2, 1948, and subsequent dates, three parlor cars in service were operated out of Chicago on Train No. 21, and individuals who hold no seniority as Sleeping and Parlor Car Conductors were used to perform Sleeping and Parlor Car Conductor work on those cars, and

2. We now ask that Extra Conductor W. T. McGuire, entitled to perform this work on July 2, 1948, and the extra conductor entitled to perform this work on each date subsequent to July 2, 1948, be compensated for any work of which they were deprived.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the Milwaukee) and the Sleeping and Parlor Car Conductors in its service, bearing effective date of August 1, 1943. This dispute has been progressed up to and including the highest officer of the Carrier designated for that purpose, whose letter denying the claim is attached as Exhibit No. 1.

The essential facts in this case are as follows:

On July 2, 4, 8, 15, 16, and subsequent dates, Train No. 21 was operated out of Chicago with three parlor cars in service destined to Channing, Michigan, or Minocqua, Wisconsin. Each of these parlor cars were operated on the dates involved with a Milwaukee porter in charge. No Milwaukee parlor car conductor was assigned in this service.

Rule 22 of the Agreement reads in part:

"Extra Service. Conductors shall be paid at their respective established hourly rates for all hours credited each month for extra road service * * *."

Rule 25 of the Agreement reads in part:

The information given immediately above will show that the use of the sleeping and parlor car conductor on Train No. 21 from Chicago was irregular and that this practice has been in existence since July 1943 or prior thereto considering which and the fact that the schedule did not, until November 16th, 1948, contain a requirement for the use of a sleeping and parlor car conductor under the circumstances which existed on July 2nd, 1948, the claim has no support.

Without in any way waiving the contention of the Carrier as to the merits of the claim from the standpoint of the schedule rules, the Carrier desires to point out that should the claim be sustained, there would arise a question as to the payment to be allowed for the reason that Conductor McGuire, in whose behalf the claim of July 2nd, 1948 has been filed, performed service as a sleeping and parlor car conductor on Train No. 11 from Chicago at 6:00 P. M. July 2nd, 1948. He returned to Chicago and was released from service at 9:05 A. M. July 6th, 1948. For that trip his earnings amounted to $51.84. Had Conductor McGuire been used on No. 21 from Chicago at 12:30 P. M. July 2nd, 1948, as he would not have returned to Chicago until 7:30 P. M. July 3d, 1948, he would not have been available for the service which he actually performed during the period July 2nd to 6th. We wish also to point out that had he been used on No. 21 from Chicago July 2nd, 1948, the earnings on that trip, plus other earnings he would have had as a conductor up to July 6th would have amounted to $35.88, which would have been $15.96 less than he actually earned during that period. The circumstances outlined above in connection with the claim of July 2nd, 1948 are typical of the circumstances which prevailed in connection with claims for subsequent dates.

The schedule of rules, inclusive of those upon which this claim is based, would apply to a sleeping and parlor car conductor in service but it does not apply where there would be no sleeping and parlor car conductor assigned or used on these trains.

The Organization has not set forth any rule which required the assignment or use of a sleeping and parlor car conductor on Train No. 21 on July 2nd, 1948 and we respectfully ask that the claim be declined.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is based on the fact that on July 2, 1948 and on subsequent dates, as set out in the submission, three parlor cars were operated in service in Train No. 21 out of Chicago, destined for Milwaukee and points beyond, with Porters-in-charge but no conductors assigned thereto.

The record discloses that Train No. 21, known as the Chippewa, scheduled to operate between Chicago and Ontonagon, Michigan, was placed in operation on May 28, 1937 and its regular equipment included one parlor car handled by a Porter-in-charge. Beginning in 1938, when, in summer months and holiday periods, heavy passenger traffic made it necessary, it became the practice of the Carrier to add one or two additional parlor cars to this train. On some of these occasions a Conductor has been used, but such use is irregular as Porters-in-charge are regularly assigned thereto.

It is the Organization's contention that Conductors have a right to perform all Conductor's work involved in the conduct of Carrier's sleeping and parlor car business and that Milwaukee extra Conductors were entitled to be assigned on Train No. 21 whenever three or more parlor cars were operated in service.

It is of course true that work subject to an agreement cannot arbitrarily be removed therefrom but when, as here, it is not defined it is not always easy to ascertain just what work is covered by the agreement.

It should be said that such an agreement has been entered into by the parties but it was not effective until November 16th, 1948. That provision not being retroactive we must decide this matter by the provisions of the

parties' Agreement effective August 1, 1943 as they apply to the facts before us.

In the absence of limitations the Agreement covers all of the work of the kind involved. Limitations, except when specifically set forth in an Agreement, must be proved both as to the fact and extent. In this respect unwritten limitations can exist by practices existing at the time the Agreement was adopted, when these practices were known to the parties and not specifically abrogated by the provisions of the Agreement. However, such practices must be spelled out from what had theretofore customarily been done. See Awards 779 and 2743 of this Division.

This record discloses that Porters-in-charge have always been regularly assigned to and used on this run with intermittent and occasional use of conductors. This fact must have been known to the Organization when they contracted. There is no provision in the Agreement which specifically abrogates such practice and, it appears no objection was made thereto for some years after the effective date of the Agreement.

In view of this situation we find the practice that existed with reference to the use of Porters-in-charge on Train No. 21 as of August 1, 1943 was not abrogated by the Agreement but continued as a limitation on the work covered by the Sleeping and Parlor Car Conductors' Agreement with the Carrier. In view therefore we find the claim to be without merit.

Reference has been made to Award 3991 of this Division. Although language used therein might seem to support this claim, however the facts therein are entirely different and therefore the holding therein is not applicable here.

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 Carrier did not violate 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 30th day of June, 1949.