Award No. 7146
Docket No. PM-7248

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of Robert N. Nelson, who is now, and for some time has been, employed by The Pullman Company as a porter operating out of St. Louis, Missouri.

Because The Pullman Company did, under date of April 2, 1954, deny the claim filed by the Brotherhood of Sleeping Car Porters for and in behalf of Porter Nelson, in which the Organization claimed that The Pullman Company should have paid Porter Nelson the equivalent of wages earned by Porter Johnnie B. Gilbert, St. Louis, while working on temporary transfer out of the Cleveland District since November 27, 1953, because of a violation of Rule 48 of the existing Agreement between The Pullman Company and the Brotherhood of Sleeping Car Porters in returning Porter Gilbert to service ahead of Porter Nelson who was the senior employe.

And further, for Porter Nelson to be paid the sum of money as contended for by the Organization in said claim.

EMPLOYES' STATEMENT OF FACTS: Your Petitioner, the Brotherhood of Sleeping Car Porters, respectfully submits that it is duly authorized to represent all Porters, Maids, Attendants and Bus Boys employed by The Pullman Company as it is provided for under the Railway Labor Act.

Your Petitioner further sets forth that in such capacity it is duly authorized to represent Robert N. Nelson, who is now, and for some time past has been, employed by The Pullman Company as a porter operating out of the District of St. Louis, Missouri.

Your Petitioner further sets forth that under date of February 19, 1954, a claim was filed for and in behalf of Robert N. Nelson through District Superintendent T. C. Birch based upon the following facts: Robert N. Nelson has a seniority date in the St. Louis District of March 2, 1944, and he appears on the St. Louis District Seniority roster as No. 413. Robert Nelson, along with other porters in the St. Louis District, particularly Porter Johnnie B. Gilbert, was placed on furlough as a result of the reduction of forces during the month of September, 1953. During the latter part of November, 1953, the St. Louis District was called on by The Pullman Company to furnish a number of porters from its seniority roster to operate temporarily out of Cleveland, Ohio. Notice of the above-mentioned work was posted for the benefit of the active porters on November 23, 1953,

changed by its terms, such practices are as enforceable as the provisions of the contract itself. Finally, the Company has 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.

The summation of the principles 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 employes. 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 employes 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 employes 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 Company submits that the instant claim should be denied for the following reasons:

1. No rule of the working Agreement contains any provisions that precludes the Company from proceeding in the manner found here.

2. Third Division Award 408, cited by the Organization in support of its contentions in this dispute, is not applicable to the facts of this case.

3. Awards of the National Railroad Adjustment Board clearly establish that where a contract has been negotiated and existing practices are not abrogated or changed by its terms, such practices are as valid and enforceable as the written provisions of the contract itself. The claim should be denied.

The Company affirms that all data submitted herewith in support of its position has heretofore been presented in substance to the employe or his representative and made a part of the question in dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The question presented in this case is whether, when recalling furloughed employes in one district for work in another district on a voluntary basis, the Carrier is required to recall them in order of their seniority.

Claimant contends that under Rule 48, in any case when furloughed employes are called back to work, whether the work is to be performed in their own district or in another, there is an increase in forces, and therefore they must be recalled in the order of their seniority.

Carrier contends that Rule 48 applies only where furloughed employes are recalled to work in their own district, and that Rule 34, which applies specifically to temporary transfers, is silent as to the order in which employes shall be transferred.

The precise question raised here was considered by this Division in Award 408. In that case, the factual situation was similar to the one before us, and while the agreement was between The Pullman Company and the Order of Sleeping Car Conductors, rather than the Brotherhood of Sleeping Car Porters, the language of the rule involved was identical to Rule 48 in every material respect. The Division held, upon reasoning which we still consider sound, that under the rule the furloughed employes must be called back in order of seniority, and it sustained the claim of a furloughed conductor who was not offered the opportunity to work in another district before such work was awarded to a furloughed conductor junior to him. There have been no contrary awards by the Division, and unless there are new facts or arguments raised by the Carrier which compel otherwise the decision in Award 408 should be followed here.

Carrier claims that Award 408 is not applicable. It asserts that the practice, both before and since Award 408, has been to transfer porters on a temporary basis without regard to seniority. It points out that after Award 408, it negotiated a new rule with the Conductors providing specifically that temporary transfers should be in accordance with seniority; but that in Rule 34—Temporary Transfers of several Agreements with the Porters negotiated since Award 408, no mention is made of the order of transfer. Carrier further states that in negotiations preceding the present agreement, the Union agreed that the practice of temporarily transferring porters without regard to seniority was acceptable to it.

However, the Claimant denies that any such agreement was ever made or contemplated and disputes the practice asserted by the Carrier. The Carrier submits no evidence beyond its bare assertions to support the existence of the alleged practice and agreement. On this state of the record, the Division cannot find as a fact the existence of such a practice and agreement.

The fact that there is no provision as to order of transfer in Rule 34, negotiated subsequent to Award 408, does not lessen the effect of that Award. Rule 34 does not deal with the recalling of furloughed employes, which is the primary issue here. In Award 408, language identical to that in Rule 48 was interpreted to mean that furloughed employes called back on a voluntary basis for work in another district must be called back in order of seniority. Since the language of Rule 48 has not been changed, that interpretation is still applicable.

The same arguments were raised by Carrier in Award 408 as are raised here, with the exception of the effect of Rule 34, which is dealt with above. There is not sufficient proof in the record to sustain Carrier's assertions of a contrary practice or agreement subsequent to Award 408. Nor have any awards been cited which have placed a different interpretation on Rule 48 or similar rules. Since Award 408 is squarely on point and is the only prior decision of the Division which has interpreted the rule under similar circumstances, it should be followed in this case.

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 21st day of October, 1955.