

Award No. 7919

Docket No. PC-7791

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

**THE ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,
PULLMAN SYSTEM**

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor A. W. DeWolfe, Boston District, that:

1. Rule 38 of the Agreement between the Pullman Company and its Conductors was violated by the Company on July 5, 1954, when the Company failed to assign extra Conductor DeWolfe to deadhead service Boston, Mass., to Ellsworth, Me., and to extra road service on MeC-B&M No. 84—NYNH&H No. 185—PRR No. 201, Ellsworth, Me., to Philadelphia, Pa., which extra work was under the jurisdiction of the Boston District. Rule 36 of the Agreement and the Memorandum of Understanding Concerning Annulment of Runs is also involved.

2. Conductor DeWolfe be credited and paid under the applicable rules of the Agreement for a deadhead trip Boston to Ellsworth and a trip in extra road service Ellsworth to Philadelphia.

EMPLOYES' STATEMENT OF FACTS:

I.

The following "Memorandum of Understanding Concerning Annulment of Runs" is binding upon the parties:

**"MEMORANDUM OF UNDERSTANDING CONCERNING ANNUL-
MENT OF RUNS**

"It is hereby understood and agreed by and between The Pullman Company and its Conductors represented by the Order of Railway Conductors, Pullman System, that Management shall not annul a run which is discontinued for any reason for only one day (24 hours).

has shown that numerous awards of the National Railroad Adjustment Board support the Company in this dispute.

In view of the foregoing, a denial award is in order.

All data presented herewith in support of the Company's position have heretofore been submitted in substance to the employee or his representative and made a part of this dispute.

(Exhibits not reproduced)

OPINION OF BOARD: The train involved in this dispute, "Bar Harbor Express" operates from Philadelphia on Mondays, Wednesdays and Fridays and from Ellsworth, Maine, on Tuesdays, Thursdays and Sundays. Trains arriving Ellsworth on Tuesdays and Thursdays double out same day of arrival, whereas train arriving on Saturdays fills the Sunday departures, thus establishing an additional 24 hour layover at Ellsworth as compared to the Monday and Wednesday departure from Philadelphia.

Because there is no departure from Philadelphia on Sundays, the Conductor arriving Philadelphia will have an additional 24 hour home layover. To assure equal distribution of the additional layovers two conductors are operated in each two weeks' time providing for one complete cycle on each departure from Philadelphia; a Monday and a Friday in one week and a Wednesday in the second week.

The "Operation of Conductors" form governing the regularly assigned conductor, and upon which he bid for this seasonal run, carried this statement:

"Reg. Season Operation—Mon. Wed. Fri. (Eastbound) 6/28 to 9/3 incl. except 7/5. Tues. Thur. Sun. (Westbound) 6/29 to 9/5 incl. except 7/4 & 6 will also operate 7/5."

The above details contained on this form were set forth by the Company in compliance with Rules 15 and 31 which call for a statement showing specific layovers, service hours and train numbers when regular assignments are first set up.

Conductor Deckard, one of the two regularly assigned conductors, departed Philadelphia July 2 and arrived at Ellsworth on July 3. On July 4 the "Bar Harbor Express," in keeping with the "Operation of Conductors" form, did not operate and Conductor Deckard was directed to remain in Ellsworth, was paid held-for-service time for the 24 hour period, pursuant to Rule 9 (c), and performed service Ellsworth to Philadelphia on the "Bar Harbor Express" departing July 5.

The Railroad Companies with whom the Pullman Company does business, and not the Pullman Company, establish the schedules upon which Pullman equipment must operate. In April 1954 the railroads which jointly operate the "Bar Harbor Express" notified the Pullman Company of its operating schedule and the Pullman Company established a conductor run to operate accordingly.

The employees contend that a Memorandum of Understanding Concerning Annulment of Runs was violated by the Company when it issued its "Operation of Conductors" form establishing the assignment in question and attempted to annul the assignment for the one day, July 4, 1954. By reason thereof it is alleged that Conductor Deckard was required to perform service outside of his assignment. This action it is maintained violated Rule 36 giving rise to the instant claim by Conductor DeWolfe, Boston District, for being improperly denied extra work to which he was entitled pursuant to Rule 38 of the Agreement.

The Memorandum of Understanding and the two Rules referred to read as follows:

"MEMORANDUM OF UNDERSTANDING CONCERNING
ANNULMENT OF RUNS.

"It is hereby understood and agreed by and between The Pullman Company and its Conductors represented by the Order of Railway Conductors, Pullman System, that Management shall not annul a run which is discontinued for any reason for only one day (24 hours).

"If an assignment in a run or a run does not operate for any reason for only one day, the conductor shall be credited and paid held-for service time as provided in Rule 9."

"RULE 36. Continuance in Regular Assignment. A conductor operating in regular assignment shall not be used in service outside his assignment except in emergency and as provided in paragraph (d) of Rule 38.

"Q-1. May a conductor who is operating in regular assignment who has missed his return trip at his opposite terminal, be used in service toward his home terminal as provided in Rule 38? A-1. Yes, provided the uniform release time has expired. However, he shall not be used in a regular assignment operated by the away-from-home district."

"RULE 38. Operation of Extra Conductors.

"(a) All extra work of a district, including work arising at points where no seniority roster is maintained but which points are under the jurisdiction of that district, shall be assigned to the extra conductors of that district when available, except as provided in paragraphs (d) and (e).

"(e) This rule shall not operate to prohibit the use of a foreign district conductor out of a station in service moving in a direct route toward his home station or to a point within a radius of 50 miles of his home station."

Employees also call attention to the so called Sonntag claim which was adjusted by the Pullman Company. In that case violation of Rule 38 was charged and the claim stated that Rule 36 and the Memorandum of Understanding were also involved. There the train involved, the 20th Century Limited Chicago to New York, did not operate on May 30th (Memorial Day). The Company held the Conductor over, paid him held-for-service time and he performed service on the same train on May 31. Since the conductor assigned to this train departing Chicago May 31st was not available this operation became extra work for an extra conductor under the provisions of Rule 38 (a). The Company paid the claim agreeing that under the provisions of Rule 36, especially Question and Answer 1 it was improper to use the regular conductor in service on May 31st. The only difference in that claim was that the "Operation of Conductors" form contemplated operation of the train on May 30th and it was discontinued for that day only and the regular conductor was used outside his regular assignment on May 31st contrary to the "Operation of Conductors" form for his assignment.

There is no dispute that an "Operation of Conductors" form governs an assignment so long as it does not violate the Agreement.

The Company maintains that the Memorandum of Understanding places no restrictions on the Company in scheduling conductors assignments initially to meet the requirements of train service, but that it only applies after regular assignments are made in order to protect regular conductors from annulment thereof for one day only. In other words, Company contends, the intent of the Memorandum is to continue conductors on their scheduled trips even tho on one day the train is not operated and to provide the manner in

which the conductors who lose a trip shall be compensated. The Company also contends that the Memorandum has no application here because the conductor schedule as set forth in the "Operation of Conductors" form was not disrupted.

We agree with employes when they point out that regular assignments provide (1) full time employment, and (2) the possibility of planning daily life in advance since they know the schedule on which they will operate. However here the company in its "Operation of Conductors" form, as required by Rules 15 and 31, set forth the specific known details of the run and the regular conductor knew that his train would not depart Ellsworth on July 4th.

The employes contend, when this situation occurs, the regularly assigned conductor should be deadheaded home as expediently as possible and paid held-for-service time at both terminals.

The question before us is whether the Company could, by the device of indicating on its "Operation of Conductors" form the July 4th exception to the regular assignments, evade the operation of the clear terms of the Memorandum of Understanding which expressly provides "that Management shall not annul a run which is discontinued for any reason for any one day (24 hours)."

It will be helpful, in answering the above question, to examine into the reasons which led to the negotiation and execution of the Memorandum.

In the Company's brief comment dated November 9, 1955, on Petitioner's ex parte statement we find the following discussion:

"Analysis of the Organization's position and supporting arguments leads inescapably to the conclusion that the Organization fails to recognize the proper application of the Memorandum of Understanding Concerning Annulment of Runs. Prior to adoption of the Memorandum, as the Organization points out on page 6 of its submission, situations arose whereby because of the non-operation of a train on a legal holiday, the regular conductor due to depart the foreign terminal that day was unable to depart as scheduled and was returned home in service the following day on a train assigned to another conductor. This practice destroyed the regularity of the run in that it caused the regular conductors to deviate from the schedule posted on the Operation of Conductors form. The Memorandum was executed to change this practice and to provide for the manner in which conductors affected by the non-operation of a train on a legal holiday (or any 24 hour period) would be operated and paid. It provides, as the Organization states, that under such circumstances the regular conductor, unable to return home per schedule on the holiday, shall be deadheaded home as expediently as possible and paid held-for-service time at both terminals. Meanwhile, those portions of the regular operation for which the assigned regular conductors are not available shall be operated with extra conductors. Significantly, the Memorandum was executed to correct the inequities which result when the scheduled assignments of regular men are disrupted by the non-operation of a train for one day and one man used in another's assignment.

"It is evident, however, that when a conductor run as scheduled is not affected by a temporary discontinuance of train service, no inequities are present. The conductors assigned in the run operate on their regular schedule as set forth on the operating form. No conductor is used on another's trip. The operating schedule is not disrupted. Moreover, the conductors have the two advantages cited by the Organization (p. 5) as accruing to regular men; that of having 'full time employment,' and that of being able to 'plan'

in advance. These conditions prevail when, as in the instant case, the non-operation of a train on a particular day is anticipated by the Company and provided for on the operating form. When this is done, the Memorandum is not violated; the conditions necessary for its application do not prevail."

The Company thus advises as to situations where inequities previously resulted and which inequities the Memorandum was intended to correct.

We cannot agree with the Company that it can anticipate non-operation of a train on a particular day and provide for its annulment on the operating form. This is doing indirectly what it may not do directly and violates the purpose of the Memorandum by attempting to annul a run which is discontinued for any reason for any one day. (See Award 7361 involving the same parties.) To support the Company's contention would leave the inequitable situations which the Memorandum was intended to correct existing to the same degree as if the Memorandum were never executed. We cannot presume that the parties intend to do a useless act.

Here the regular conductor was held at the away-from-home station beyond the specified layover of the assignment and paid held-for-service time, pursuant to Rule 9 (c), which admitted using the conductor outside of his regular assignment. His regular assignment was as stated on the operating form without regard for the non-operation for one day indicated as an exception. This constitutes a violation of Rule 36 and brings into operation Rule 38 "Operation of Extra Conductors", for the return trip on July 5th became extra work.

The Company now contends that even if the work on July 5th were extra work subject to Rule 38, which it has of course denied, that the claimant extra conductor would have no right to the work over the regular conductor who was used, because the latter was a foreign district conductor at Ellsworth on July 5th and had the right to the run over the extra conductor pursuant to paragraph (e) of Rule 38, inasmuch as paragraph (e) is an exception to paragraph (a) thereof.

Company also refers to Question and Answer 1 to Rule 36 to show that the work did not belong to an extra employee.

Question and Answer 1 is an agreed interpretation of Rule 36 in the situation posed in the question.

We have already found that Rule 36 was violated by holding over the regular conductor beyond his specified layover and Rule 36 provides in unambiguous language that he shall not be used in service outside his assignment except in emergency and as provided in paragraph (d) of Rule 38, neither of which situations are here present.

We cannot agree that the Company can violate a Rule and by that action take advantage of an exception to another rule in an effort to defeat a claim where the exception was executed for a different and proper purpose. As we see it the foreign district conductor referred to in paragraph (e) of Rule 38 and in Question and Answer 1 to Rule 36 would be the one who through circumstances other than by the Company's violative action was at his opposite terminal having missed his return trip. The purpose then of the action permitted the Company under paragraph (e) and confirmed in the Question and Answer referred to, would be to use in service toward his home terminal that foreign service conductor so that he might resume his regular assignment, as against the necessity of deadheading him home and losing to the Carrier that particular service.

In the instant case the regular conductor should have been deadheaded home. He did not miss his trip in the sense meant in Question 1; by Company's unilateral action the run did not operate.

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 the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1957.