

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

Edward A. Lynch, Referee

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**PARTIES TO DISPUTE:**

**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 R. E. Garman, formerly on the roster of the Salt Lake City District, that:

1. Rule 38(e) of the Agreement between The Pullman Company and its Conductors was violated on October 10, 1953, when the Company issued an assignment to Conductor L. F. Halper, Chicago Western District and on that date a foreign district Conductor in the Seattle District, which properly directed him to perform extra road service Seattle-Portland-Pocatello but further and improperly directed this Conductor to proceed Pocatello-Salt Lake City-Colorado Springs-Kansas City-Chicago.

2. Rule 38(a) of this same Agreement was violated by the Company on October 11, 1953, when the Company failed to assign Conductor R. E. Garman, Salt Lake City, as follows: Deadhead Salt Lake City-Pocatello and extra road service Pocatello-Salt Lake City-Colorado Springs-Kansas City-Chicago.

3. Conductor R. E. Garman be credited and paid in the amount which he would have earned had the assignment to which he was entitled under the Agreement been given him, namely: Deadhead Salt Lake City to Pocatello, extra road service Pocatello-Salt Lake City-Colorado Springs-Kansas City-Chicago and deadhead Chicago to Salt Lake City.

**EMPLOYEES' STATEMENT OF FACTS:**

**I.**

On October 10, 1953, an assignment in extra service arose in the Seattle District requiring the services of a Pullman Conductor on the following route: Seattle-Portland-Pocatello-Salt Lake City-Colorado Springs-Kansas City-Chicago.

of that district been available. The Organization's contention that Conductor Halper's assignment should have terminated at Pocatello and that extra Conductor Garman of the Salt Lake District, which district has jurisdiction over Pocatello, should have been assigned to operate deadhead, Salt Lake-Pocatello, in service Pocatello-Chicago, and deadhead Chicago-Salt Lake, is without merit and should be denied.

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

(Exhibits not reproduced.)

**OPINION OF BOARD:** Confronting us at the outset is argument offered in behalf of the Company that this claim must be barred because of a delay of 20 months in perfecting the appeal, which, it is argued, violates Rule 51.

The question of timeliness was never cited by the Company as a fact or an issue at any time during the handling on the property. It cannot now be raised. We shall proceed to the merits.

It is argued by and in behalf of the Organization that "The precise issue here before us has been previously passed upon and the Employees' position sustained" in Awards 6375, 6617 and 6649.

It is the Company's position here, that

"We want you to understand that the Company is not contending that Conductor Halper's assignment was on a direct route to his home station. However, we do contend that since there were no Seattle extra conductors available for duty at Seattle on October 10, when this assignment arose, the Company had no other alternative but to make use of his services. Under the prevailing circumstances at Seattle on October 10, we contend we were privileged to use Conductor Halper in any assignment which arose at Seattle and for which no Seattle conductor was available."

It is Organization's position the question of an "emergency" existing is of no consequence here. Reference is made to this portion of Company's oral submission:

"\* \* \* It is the Company's position that the question of whether or not an 'emergency' existed in Seattle is relatively unimportant.  
\* \* \*"

We are here concerned with paragraphs (a) and (e) of Rule 38. We note Company contention that

"Paragraphs (d) and (e) set forth specific conditions under which the Company is permitted to use a regular or extra conductor out of regular order or use a foreign district conductor 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. Both paragraphs (d) and (e) constitute exceptions to paragraph (a) of Rule 38. \* \* \*"

Company position continues:

"\* \* \* Paragraphs (d) and (e) apply only when local extra conductors are available and permit Management, when local conductors are available, to make assignments which could not otherwise be made under the provisions of paragraph (a) of Rule 38. However, in the instant case, no local extra conductors were available in Seattle. Therefore, neither paragraph (d) nor (e) is applicable to this dispute. \* \* \*"

We will agree that Paragraphs (d) and (e) of Rule 38 modify, to the extent indicated, paragraph (a). The latter so stipulated. Paragraph (d) is not involved here.

Paragraph (e) says, clearly, that

"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."

The exception provided by paragraph (e) is that the Company may use 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, whether local extra conductors are available or not available.

This case must turn, then, on Conductor Halper's assignment. Was it on a direct route toward his home station, or to a point within a radius of 50 miles of his home station?

Company admits the assignment was not on a direct route in this statement, previously referred to:

"We want you to understand that the Company is not contending that Conductor Halper's assignment was on a direct route to his home station."

We have, however, this argument offered in Company's behalf;

"In the instant dispute, the Organization states in its ex parte submission:

'The Organization is in agreement with the Company on the company's first contention, namely, that no Seattle District extra Conductors were available at the time when the assignment arose.'

"Therefore, we can only conclude that, since paragraph (a) of Rule 38 was not applicable to the situation, paragraph (e), which is an exception to (a), likewise could not be applicable and the Organization's contentions regarding a deviation from the direct route are irrelevant."

We must, therefore, consider Rule 38 as a whole. It is very long, contains many sections, paragraphs and examples. It does deal with "Operation of Extra Conductors."

If Rule 38(e) conferred upon the Company the affirmative right to "the use of a foreign district conductor" in the manner therein described, then, we could agree with the Company that in the absence of extra conductors, paragraph (a) would not apply, and consequently paragraph (e)—which modifies (a)—would have no application.

Paragraph (e) however, does not confer such a right directly upon the Company. It does say that nothing in the entirety of the Rule itself shall

"\* \* \* 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."

It is, therefore, inescapable that Company has the right to the use of a foreign conductor in the manner described, and paragraph (e) protects that right by stating that no paragraph of the Rule governing "operation of extra conductors" shall "operate to prohibit" such use of foreign district conductors, so long as Company uses such conductor in a direct route to his home station or within a radius of 50 miles thereof.

The parties here are not in dispute concerning the Seattle-Pocatello portion of the assignment.

Argument in Organization's behalf notes that Pocatello is

"\* \* \* an intermediate point on the direct route between Seattle and Chicago, and is also within the jurisdiction of the Salt Lake City District. Instead of assigning a Salt Lake City District Extra Conductor for the extra service in question at Pocatello, the intermediate point, as required by Rule 38 (a), the foreign district conductor was assigned to and permitted to fulfill extra service through to Chicago via the indirect route specified.

"The employees assert claim for compensation on the ground that Carrier's action was violative of both Rules 38 (a) and 38 (e), contending that Claimant Garman should have been assigned to deadhead service Salt Lake City to Pocatello, thence in extra road service for the remainder of the assignment."

It is evident that it was at Pocatello that Conductor Halper's assignment deviated from the "direct route toward his home station."

It is also evident that had Halper's assignment followed the direct route to his home station, Company would not have been subject to the prohibitions of Rule 38. It was at Pocatello, then, that Company became subject to the prohibitions of Rule 38 by reason of such deviation.

The Labor Member arguing this case before the Referee, cited the following excerpts from Company's own operating rules, under the heading "Assignment of Extra Foreign District Conductors":

"If the requirement is special or extra service, such service must be on a direct rail route to his home station. The termination of the service must be within a radius of 50 miles (railroad miles) of his home station. It is permissible to assign a conductor to an intermediate station on a direct rail route to his home station. Refer to Rule 38, paragraph (e), question No. 1 of Current Conductors' Agreement for definition of 'direct route.' \* \* \*

"In the event the service is in a direct route to the conductor's home district and the terminal point is not within a 50-mile radius, the conductor may be assigned to an intermediate station, and the intermediate station wired with request to have the Conductor relieved at that station. \* \* \*

Company relies mainly on three prior Awards of this Board: 5588 (Robertson), 6093 (Whiting) and 7406 (Larkin).

Award 5588 involved paragraph (c) of Rule 38 and is not in point here.

Award 6093 involved Company's right to change an extra conductor's assignment when the destination of his train is changed enroute. It is not in point here.

Award 7406 involves facts not here present. There the Conductor was given an assignment in extra road service through a point within 50 miles of his home station.

We should like to comment on citation in Company's behalf of Labor Member's dissent from Award 6093, quoting therefrom:

"The purpose of the exception provided in paragraph (e) is to permit Management to return a Conductor to his home terminal in service in a direct route when extra local Conductors are available, or in an indirect route when no extra local conductors are available, and the Carrier has so recognized and paid identical claims."

The Labor Member arguing this case before the Referee does not agree. The Labor Member who dissented in Award 6093 is not now a member of this Board. Dissents to Awards of this Board enjoy no recognition or status in fact or in law. The Railway Labor Acts recognize only Awards of this Board.

We will here hold, as we did in Award 6375 (Ferguson), that in this instance there is an admitted 'deviation from a direct route' and, therefore, "a violation of the rule."

We do so for the reasons herein set forth, and Question and Answer 2, and example, under Rule 38 (e):

"Q-2. Shall it be permissible to use a foreign district conductor in service to \* \* \* an intermediate point which is on a direct rail route toward his home station?

"A-2. Yes.

"Example: A San Francisco District conductor available in Chicago may be used in a Chicago-Los Angeles movement and relieved at Salt Lake City, where either a Los Angeles or a Salt Lake City District conductor would be assigned. Likewise, a Salt Lake City District conductor available in Chicago may be assigned to such a movement as far as Salt Lake City.

**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 16th day of January, 1959.

#### DISSENT TO AWARD NO. 8685, DOCKET NO. PC-8482

Award 8685 is based upon the majority's confusion concerning the question at issue before this Division. At the outset of its discussion of the merits under Opinion of Board, the majority quotes the following excerpt from the Company's position:

"We want you to understand that the Company is not contending that Conductor Halper's assignment was on a direct route to his home station. \* \* \*"

Accordingly, in discussing Conductor Halper's assignment the majority committed error in concluding that the question at issue was as follows:

"\* \* \* Was it on a direct route toward his home station, or to a point within a radius of 50 miles of his home station?"

The majority's holding, as follows, obviously was the result of its confusion concerning the question at issue before this Division:

"We will here hold, as we did in Award 6375 (Ferguson), that in this instance there is an admitted 'deviation from a direct route' and, therefore, 'a violation of the rule.'"

The record shows that the Organization stated the issue in its Ex Parte Submission as follows:

"Hence the issue between the parties is as to whether the conditions which existed at the time of Conductor Halper's assignment brought this assignment into keeping with the requirements of the Agreement."

The record shows that the Company stated the issue in its Ex Parte Submission as follows:

"The issue in this dispute is whether under the rules of the Agreement the assignment of a foreign district extra conductor to a point not on a direct route to or within 50 miles of his home station, which assignment originates in a district where no local extra conductors are available, is proper."

The claim was based upon an alleged violation of paragraphs (a) and (e) of Rule 38, which provide as follows:

"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."

There was no dispute between the parties concerning the following points:

1. That Rule 38 (a) protects extra work to extra conductors holding seniority within the district where the work arises.
2. That the work involved in the instant dispute arose in the Seattle District.
3. That no Seattle District extra conductors were available at the time the assignment was given to Conductor Halper of the Chicago District.
4. That paragraph (e) of Rule 38 is an exception to paragraph (a) thereof.

In Award 6375, which the majority herein elected to follow, extra conductors of the district where the work arose were available; consequently, that Award was not in point here because therein there was no question but that Rule 38 was applicable. The issue therein was whether or not the longer of two alternative routes was also a direct route.

Inasmuch as admittedly no Seattle District extra conductor was available where the work arose in the instant case, paragraph (a) of Rule 38 was not applicable, and it followed that paragraph (e), which admittedly is an exception to paragraph (a), did not apply. Accordingly, Question and Answer 2, and Example, under Rule 38 (e), also was not applicable.

No rule places any restriction on the use of foreign district conductors when no extra conductor of the district is available. In many Awards this Division has held that a Carrier may be held accountable in this forum only for that which it has contracted, and that, except insofar as it has restricted

itself by agreement, the assignment of work necessary for its operation lies within its discretion. For illustration, in Award 6107 we followed the following principle stated in early Award 2491:

"\* \* \* We can only interpret the contract as it is and treat that as reserved to the Carrier which is not granted to the employees by the Agreement."

The present Referee recognized this principle in Award 7786.

In the instant case, if Foreign District Conductor Halper had not been available in Seattle for this assignment in extra road service and there had been no other foreign district conductor available and as no extra conductor of the local district was available at the time, the Carrier could have used a station agent or anybody else for the extra road service trip and the Salt Lake District would have had no claim to any part of the work.

In Award 3918, involving the same parties as the instant case, this Division denied a claim when the Carrier appointed a station agent as Pullman conductor in an emergency when no extra Pullman conductors were available.

In Award 3973, involving the same parties as in the instant case, this Division recognized that the provisions of Rule 38 "Are silent as to the length of the assignment of an extra man".

In Award 5588, involving the same parties as in the instant case, this Division recognized that it is permissible to use a foreign district extra conductor in service not on a direct route to his home station when there are no extra conductors of the local district available.

In Awards 6093 and 7406, also involving the same parties as in the instant case, this Division first quoted paragraphs (a) and (e) of Rule 38, and then held respectively as follows:

#### Award 6093

"It is obvious that paragraph (e) permits the company to use foreign district conductors for the service specified even though extra conductors of the district are available, but it does not restrict the use of foreign district conductors to the service specified if no extra conductors of the district are available. Question and Answer 7 under that paragraph confirms that view.

Thus paragraph (e) was not applicable to the assignment of Conductor Carr to service in Miami. \* \* \*

#### Award 7406

"The plain meaning of this language is that, even where there are extra conductors available, the Carrier **may** assign a foreign district conductor, if the assignment will bring him to or near his home station. \* \* \*

If no extra conductor of the district is available, as in the instant case, this language does not restrict the use of foreign district conductors. Thus paragraph (e) was not controlling in the assignment of Conductor Talley on the date in question.

In short, Rule 38 deals specifically with the 'operation of extra conductors.' Here no extra conductors were available and none was involved. We fail to see that there was any violation of the Agreement (Award 6093)."

Awards 6093 and 7406, supra, are specific in interpreting paragraph (e) of Rule 38 as not restricting the use of foreign district conductors if no extra conductors are available in the district where service originates, like in the instant case at Seattle. They cite Question and Answer 7 under paragraph (e) as confirming that view.

Applying our holdings in those cases to the facts in the instant case, inasmuch as admittedly no extra conductors of the Seattle District were available, paragraph (e) was not applicable to the assignment of Conductor Halper to service arising at Seattle.

It is significant that the Labor Member who handled the case covered by Award 6093 agreed in his dissent with the Carrier Members therein to the following extent insofar as the sole issue involved in the instant case is concerned:

"The purpose of the exception provided in paragraph (e) is to permit Management to return a Conductor to his home terminal in service \* \* \* in an indirect route when no extra local conductors are available, \* \* \*."

While the majority in Award 8685 alleges that Awards 5588, 6093 and 7406, supra, are not in point here, this allegation emphasizes the majority's confusion regarding the issue here because those Awards irrefragably hold that nothing in Rule 38 restricts the use of foreign district conductors if no extra conductor of the district is available, which was the sole issue involved in the instant case.

The majority commits further error in stating that Dissents to Awards of this Board enjoy no recognition or status in fact or in law. The Courts of this land and referees before this Board, have taken cognizance of strong and carefully reasoned dissents on issues of importance. For example, in Dissent to Award 6861, the Carrier Members pointed out how that majority had committed grievous error in its finding and conclusions. On August 14, 1957 the District Court of the United States for the District of South Dakota, Western District, in B. P. Boos vs. Railway Express Agency, Civil Action No. 626 W.D., dismissed the Plaintiff's action to enforce Award 6861 on the very grounds cited in the Dissent thereto, and stated:

"It is noteworthy that this misunderstanding was assailed by the five dissenting members of the Adjustment Board in Award No. 6861."

Federal Courts have recognized the strong stand taken by the Carrier Members relative to the necessity for due notice to all parties involved in disputes as required by Section 3, First (j) of the Railway Labor Act. See Seaboard Air Line Railroad Company v. Third Division N.R.A.B., et al, Civil Action No. 50C 1448, wherein the United States District Court for the Northern District of Illinois, Eastern Division, refused to dismiss an action restraining the enforcement of Award 7816, and mentioned the fact that the Carrier Members had dissented to the sustaining of the claim therein.

Eminent jurists such as Holmes and Brandeis are famous for their forceful and logical dissents which have been adopted as the majority opinion in subsequent cases. In *United States v. Darby*, 312 U. S. 1pp, 85 L.Ed. 609; 61 Sup. Ct. 451, rendered in 1947, the court overruled the decision in *Hammer v. Dagenhart*, 247 U.S. 251, to which Justice Holmes had dissented. In referring to the *Hammer* decision, which had been rendered twenty-two years earlier, the Court stated:

"In that case (the *Hammer* case) it was held by a bare majority of the Court over the powerful and now classic dissent by Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce.

\* \* \*

\* \* \* It should be and now is overruled."

Similarly, in many instances, dissents have served as guideposts in subsequent Awards for correcting the majority's original error. For example:

In Awards 8502 and 8503, the Referee therein took advantage of the opportunity and clarified the subject of a dissent by Carrier Members to Award 8431 in which he previously had been Referee.

In Award 8327, this Division took cognizance of the many dissents made by Carrier Members to a long line of Awards and held that the Awards were contrary to principle and wrongly decided.

In Award 7013, the majority cited the Labor Members' Dissent to Award 6839 as a precedent for sustaining the claim made therein. The same Labor Member dissented to Award 6093 who dissented to Award 6839. Yet, when the shoe is on the other foot, and the same Labor Member's Dissent to Award 6093 commanded the denial of the instant claim—we find the majority stating herein that dissents enjoy no recognition or status in fact or in law.

For the foregoing reasons, among others, Award 8685 is in error and we dissent.

/s/ W. H. Castle

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp

#### REPLY TO DISSENT TO AWARD 8685—DOCKET NO. PC-8482

It is well known and understood that the numerous dissents which have been filed by the Carrier Members of this Division are NOT a part of our Awards and have no standing, as the Division has noted on several occasions. It is, therefore, only upon extremely rare occasions that a dissenting opinion warrants any response. This is one of those rare instances, for the reason that the dissent here in reference is not only specious but palpably erroneous in its contentions.

The minority in its dissent to Award 8685 alleges that the majority's conclusion was reached because they were confused concerning the question at issue before this Board.

A thorough review of the facts involved in Award 8685 will show that the minority in its dissent were confused, rather than the majority.

The Pullman Company in its ex parte submission stated that the issue was as follows:

"The issue in this dispute is whether the assignment of a foreign district extra conductor to a point not on a direct route to or within 50 miles of his home station, which assignment originates in a district where no local extra conductors are available, is proper."

A careful analysis of Rule 38 (e) clearly demonstrates that it grants the Company the right to use a foreign district Conductor out of a station, in service, moving toward his home station to a point within a radius of 50 miles of his home station.

Under Rule 38 (e) is shown Example 3, which states:

"A San Francisco District conductor available in Chicago may be used in a Chicago-Los Angeles movement and relieved at Salt Lake City, where either a Los Angeles or a Salt Lake City District conductor would be assigned. Likewise, a Salt Lake City District conductor available in Chicago may be assigned to such a movement as far as Salt Lake City."

From the minority's dissent it is clear that they are attempting to write language into Rule 38 (e) and Example 3 that is not contained in that Rule.

The minority urges that Rule 38 (e) provides that when no local extra Conductors are available then Management has the right to assign a foreign district Conductor in any manner it desires.

If Rule 38 (e) and Example 3 thereto had provided that when no local extra Conductors were available Management could assign a foreign district Conductor in any manner it desired, the Rule would have so stated.

The majority's conclusion in Award 8685 is correct. As the Board has stated in Award 4439:

"In determining the rights of the parties it is our duty to interpret the applicable rules of the parties' agreement as they are written. It is not our privilege or right to add thereto and when a rule specifically lists the situations to which applicable it thereby excludes all those not included therein."

Also, as stated in Award 5934:

"We cannot change or modify the rules as written; that is a matter for negotiation of the parties under Rule 66 and the Railway Labor Act."

Thus it is clear that the minority, in dissenting to Award 8685, are attempting to write language into the Rule.

/s/ R. C. Coutts

**ANSWER TO "REPLY TO DISSENT TO AWARD 8685—DOCKET  
NO. PC-8482"**

*In his reply to Carriers Members' Dissent to Award 8685, the Labor Member representing Petitioner has lost sight of undisputed facts of record, viz., that paragraph (e) of Rule 38 is an exception to paragraph (a) thereof, and that paragraph (a) was not applicable because no extra conductors of the Seattle District were available at the time the assignment arose in that district. Under these circumstances, Carrier contended that neither paragraph (e) of Rule 38 nor any other rule of the agreement between the parties was violated because no rule prohibited the assignment made. Our Awards 6093 and 7406 confirm Carrier's position in this respect as does the following dissent to Award 6093 made by the Labor Member representing this same Petitioner at the time:*

*"The purpose of the exception provided in paragraph (e) is to permit Management to return a Conductor to his home terminal in service \* \* \* in an indirect route when no extra local conductors are available, \* \* \*."*

/s/ W. H. Castle

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp