Award No. 9959

Docket No. PC-9743

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Raymond E. LaDriere, Referee

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 L. E. Gettig, Tampa, District, that:

1. Rule 13 of the Agreement was violated when on April 6, 1956 the Company failed to observe the uniform reporting and release time of Conductor T. R. Edwards and used Conductor Edwards improperly.

2. Because of this violation, we now ask that Conductor L. E. Gettig be credited and paid not less than 6:50 hours for a deadhead trip Tampa to Naples, and not less than 6:50 hours for a service trip Naples to Lakeland and for a deadhead trip Lakeland to Tampa.

EMPLOYES' STATEMENT OF FACTS:

I.

On April 5, 1956, Conductor Edwards was given an assignment to duty slip instructing him to deadhead from Tampa, Florida to Naples, Florida via Atlantic Coast Line trains Nos. 92-291, reporting Tampa at 12:45 P. M. and departing at 1:00 P. M. Naples is an outlying point under the jurisdiction of Tampa District, therefore Conductor Edwards also was given another assignment to duty slip instructing him to protect regular car of Line 6818 and an extra car operating in extra Line 6818 from Naples to Lakeland on Atlantic Coast Line train No. 292 on April 6th, thence to deadhead Lakeland to Tampa via ACL train No. 91, same date.

On the morning of April 6th there was a requirement for a Conductor to perform an identical assignment, i.e., deadhead from Tampa to Naples via ACL trains Nos. 92-291 and to protect regular car of line 6818 and an extra car operating in extra Line 6818 Naples to Lakeland on ACL train No. 292 on April 7, 1956, thence deadhead Lakeland to Tampa, same date via ACL train No. 91.

In denying the claim that a technical defect in connection with Kuenkler's transfer invalidated the transfer and that a Pennsylvania Terminal District conductor was entitled to the assignment given Kuenkler on January 19, 1953, the Board stated as follows:

> "Boiled down, the gist of all arguments advanced by Claimant is that failure to give Kuenkler a copy of an Assignment to Duty slip on which notice of his transfer was endorsed in strict conformity with the requirements of Rule 42 completely nullified his transfer to Pennsylvania Terminal with the result his use out of that district against available Pennsylvania Terminal conductors was in violation of Rule 38.
>
> *The issue thus raised seems to be one of first impression on this* Board. At least the parties present no Awards dealing with similar claims or situations. Turning directly to its consideration we note and find the record definitely establishes that, even though there was no physical delivery of an Assignment to Duty slip with proper endorsements, Kuenkler and everyone else concerned knew of his transfer to Pennsylvania Terminal; that he arrived at such Terminal, and was taken up on the extra list at that point on the very date of his arrival; that from that date on he was accorded all the rights and privileges of an employe transferred under Rule 42 and was so regarded by both Carrier and Employes; that even though there was a technical defect in the procedural details incident to his transfer, he was actually a defacto transferee under such rule . . ."

CONCLUSION

In this ex parte submission the Company has shown that the assignment *given Conductor Edwards on April 6, 1956, was in accordance with the* provisions of Rule 38. Also, the Company has shown that the assignment given Edwards properly contemplated the reporting and release time as provided in Rule 13. Finally, the Company has shown that Third Division Award 6747 supports the Company in this dispute.

The Organization's claim in behalf of Conductor Gettig is without merit and should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: There is no dispute between the parties concerning the facts, which are as follows:

A—That on April 6, 1956 an extra conductor assignment arose in line 6818, involving a service trip on April 7, from Naples to Lakeland on ACL train 292.

B—That Naples is an outlying point under the jurisdiction of the Tampa District.

C—That no extra conductors were available in Tampa for this assignment.

D—That the assignment of Tampa District extra conductor Edwards who finished a service trip at Lakeland at 2:40 P. M. April 6, and who was then scheduled to deadhead from Lakeland back to Tampa, was cancelled or annulled, and he immediately reported to deadhead from Lakeland to Naples, leaving from Lakeland at 2:45 P. M. on April 6, to protect the extra service trip from Naples to Lakeland on April 7.

E—That it was because extra Conductor Edwards' train arrived late at Lakeland that he was not given the usual ten minute advance reporting time at Lakeland for the deadhead trip to Naples on April 6.

F—That there was no "Emergency" involved in the circumstances.

Employes assert (1) that Rule 13 was violated in that Conductor Edwards had only five minutes instead of ten minutes advance reporting time and (2) that Carrier had no authority to cancel or annul the assignment of Conductor Edwards under the circumstances.

Carrier states that Rule 38 provides that all extra work of a district "shall be assigned to the extra conductors of that district when available and that under Answer 9 the word "available" means "That the conductor entitled to an assignment can be contacted and assigned and can reach the point where he is required to report by scheduled reporting time".

Employes counter by saying that in the definition the words "entitled to" an assignment, would exclude a conductor already on assignment.

Rule 38 (b) provides "that management has the right to annul an extra conductor's assignment under the following conditions * * *" none of which apply to the present situation.

Award 5492 (Donaldson) involved strikingly similar facts except that the conductor was on a service run whereas the one here was "Deadhead" when the assignment was cancelled. This Board made a sustaining award in that case and decided adversely to Carrier points that are raised here.

In the record an attempt has been made to distinguish between "service" assignments and what is referred to as "tag-end deadhead trips", which is defined as "trips which merely return the conductor to his homestation", but no authority for such distinction is cited.

Under the circumstances we find the Rules were violated in annulling the assignment of Conductor Edwards and also in failing to provide ten minutes advance reporting time.

However, Carrier refers to Rule 36 as a bar to any recovery by the Claimant Gettig, a regular conductor. The Rule reads:

> "A conductor operating in regular assignment shall not be used in service * * * except in emergency * * *."

As it is agreed herein that no emergency existed, the objection should be upheld, because if Conductor Gettig could not be given or receive the assignment he has suffered no loss to be reimbursed.

However, as said above, the Agreement was violated, and it has been held that under such circumstances a monetary award should be made in vindication. Award 9544 and others cited therein.

The violation was of a minimal nature; the Carrier had to make a choice (Hobson's choice it used to be called) between Extra Conductor Edwards and violate the Agreement as we held here, or Regular Conductor Gettig and violate the Agreement because there was no emergency. (Award 5646, Wenke.)

The Board should not put itself in the position of requiring the Carrier, in effect, to violate the Agreement or pay the Claimant if it didn't do so, even though such sum is designated as a penalty. Claimant Gettig being disqualified from receiving any payment, his claim cannot be used as a basis to fix the penalty, nor is the Agreement between the parties of any greater help. Therefore, in view of all the circumstances, no penalty will be assessed.

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 Rules 13 and 38 (b) of the Agreement were violated, in accordance with Opinion and Findings herein.

AWARD

Claim denied in part and sustained in part in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 26th day of May, 1961.

DISSENT TO AWARD 9959 DOCKET PC 9743

The majority, including the Referee and Carrier Members, properly held that the rules were violated in annulling the assignment of Conductor Edwards; also in failing to provide ten minutes advance reporting time. However, they commit grevious error in holding that the parties were not in dispute, that there was no "emergency" involved in the circumstances, and consequently Claimant Gettig "suffered no loss to be reimbursed."

The allegation that there was no dispute between the parties concerning the facts "that there was no 'emergency' involved in the circumstances" is not supported by the record. Nowhere therein did the Carrier claim that no "emergency" existed and therefore Rule 36 acted as a "bar to any recovery

by Claimant Gettig, a regular Conductor." This allegation was first made by a Carrier Member in panel argument before the Referee. That he was quite impressed by the introductions of this new issue—which should not have been considered—(Awards 3950, 5457, 5469, 8324) is clearly evidenced by quoting Items A-B-C-D from Carrier Member's Memorandum contending there was no dispute between the parties on the property.

Carrier's entire defense was based on the proposition that it had the right to annul the assignment of Extra Conductor Edwards and transfer him to the assignment in dispute, under Rules 38(a) and 13. The substances of its contentions was that as long as Conductors could be made available, Claimant Gettig had no right to the assignment in dispute. These contentions were rejected by the majority by holding that Carrier violated Rules 13 and 38(b) by annulling Edwards' assignment and failing to allow the uniform reporting time of ten minutes. It would therefore follow that an emergency existed because there were no available Extra Conductors, and as a consequence, Claimant Gettig was entitled to be used. This is supported by the following from Carrier's brief:

> "* * * The instant dispute involves the assignment of Extra Conductor Edwards on April 6, 1956 * * *. Each assignment slip **designated the assignment as an 'emergency' which indicated that no Extra Conductors were available in Tampa for the assignment * * *.**"
> (Emphasis ours).

> "* * * We can use a regular man in extra service in an emergency * * * certainly there was no emergency in this case inasmuch as Conductor Edwards was on the ground and available."

> "* * * Management, however, does have the right to use the regular Conductor to do extra work in emergency, but only when there are no Extra Conductors available * * *."

> "* * * it is Management's contention that Conductor Gettig has no right to any extra work **unless it is the result of an emergency** or **in a case when no one is available to protect the service**; then we have a right to use a regular man."

It should be remembered that the Award holds that Extra Conductor Edwards was not available and it is undisputed that there was no other Extra Conductor available for the service in dispute. It would therefore follow that an emergency did exist in fact, regardless of the contentions of the majority here, and as a consequence, Claimant Gettig was entitled to be used. This conclusion is fully supported by a previous claim that was allowed by Carrier under similar circumstances involving the same Claimant. The Carrier attempts to differentiate between the two disputes because a regular Conductor was used there instead of an Extra Conductor here.

The Carrier states:

> "* * * Since it was known in advance that the scheduled operation of the trains involved did not permit giving Conductor White the uniform release time for his previous deadhead trip and **no Extra Conductors were available,** the Company paid regular Conductor Gettig, who was on layover, **1½ days for the work he should have been permitted to perform in Line 6901 * * *.**
> (Emphasis ours).

"* * * In the instant case, the scheduled operation of the trains involved, permitted giving Conductor Edwards the uniform release and reporting time. Additionally, the fact should be noted that in the instant case Edwards was properly released from his initial assignment in that he received the uniform release time in Lakeland as provided in Rule 13 of the Agreement, a condition not present in the prior dispute."

After rejecting Carrier's argument, as quoted above, it is hard to understand how the majority reached the conclusion that Claimant was not entitled to subject service, while Carrier paid for service not performed in a situation almost identical to the situation confronting us here. Carrier admitted that where no Extra Conductors were available, regular Conductor Gettig was entitled to compensation for "1½ days for the work he should have been permitted to perform" during his layover period. Apparently, the majority deliberately overlooked the controlling principle for no other reason than to relieve the Carrier of its obligation to make reparation for an admitted violation of the Agreement.

Award 5646 (Wenke) is cited in support of the absurd contention that—

"The violation was of a minimal nature; the Carrier had to make a choice (Hobson's choice it used to be called) between Extra Conductor Edwards and violation the Agreement as we held here, or Regular Conductor Gettig and violate the Agreement because there was no emergency."

I am sure that the employe who loses wages—approximately two days' pay—does not consider it minimal; furthermore, it is difficult to see how Award 5646 supports this erroneous conclusion. In that Award claim was made by an Extra Conductor who was available for extra work that was assigned to a regular Conductor. Referee Wenke did not hold that no emergency existed when there were no Extra Conductors available. He did hold, however, that—

"It is the responsibility of the Company to comply with the rules of the Agreement and if it fails to do so it becomes obligated under the provisions thereof."

"As to the form of the claim made, the parties 'Memorandum of Understanding Concerning Compensation for Wage Loss' reexecuted on 12-20-50, insofar as it relates to the question before us, provides 'he shall be paid for the trip lost in addition to all other earnings of the month'. That is the nature of the claim as made."

Award 9959 properly holds that Carrier violated the Agreement. However, the conclusion that Claimant was not entitled to compensation for wage loss is palpably erroneous and from that I dissent.

H. C. Kohler

REPLY TO DISSENT TO AWARD NO. 9959, DOCKET NO. PC-9743

Considering that the Agreement between the parties contains no penalty provision covering service claimed but to which we found the claimant not entitled, Award 9959 properly denied any penalty.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ J. F. Mullen