

Award No. 10511

Docket No. PC-11782

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, 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 extra Conductor W. H. Muller, Tampa, District, in which we claim that The Pullman Company violated Rules 36 and 38 of the Agreement between The Pullman Company and its Conductors when:

1. On April 1, 1958 it failed to assign Conductor Muller to an extra assignment to report in Tampa, Fla. at 9:45 P. M. to deadhead from Tampa to Naples, Fla., to protect extra service on Atlantic Coast Line train 2/92 with a reporting time in Naples of 9:15 A. M., April 2.

2. We now ask that because of this violation Conductor Muller be credited and paid not less than a minimum day of 6:50 hours for the deadhead trip Tampa to Naples, for an extra service trip Naples to Lakeland, Fla., and for a deadhead trip Lakeland to Tampa of not less than 6:50 hours.

I.

EMPLOYEES' STATEMENT OF FACTS:

There is an Agreement between the parties, bearing the effective date of January 1, 1951, and amendments thereto, on file with your Honorable Board, and by this reference is made a part of this submission the same as though fully set out herein.

For ready reference and convenience of the Board the relevant parts of the Rules which are directly applicable to this dispute are quoted as follows:

"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."

"RULE 38. Operation of Extra Conductors. (a) All extra work of a district, including work arising at points where no seniority

"In view of the record we must concur with argument presented on behalf of Carrier that 'no prerogative of management should be more self-evident than Carrier's sole right to decide what work it (is) to be performed and Carrier's right to determine its time of performance, except where it has restricted itself by Agreement.'

We conclude, therefore, that Organization has failed to prove that the Agreement was violated. A denial award is in order."

Third Division denial Award 7307 (John Day Larkin, Referee), rendered in a dispute in which the issue as set forth by the Board was whether the Company was required "to accept the employee's decision as to what is his 'best interest' in the matter of work assignments; or whether the management still retains the primary responsibility for making work assignments, while giving consideration to the employees' best interest." In denying the claim of the Organization in connection with work assignments, the Board stated as follows:

"We sympathize with the employees' wish to have two consecutive rest days. Wherever practicable for the operation of the Carrier's business, work weeks with two consecutive rest days are desirable. And such may be generally considered to be to the best interest of the employees. But the management has primary responsibility for making work assignments and it must consider what is best for the efficient operation of its business. The language of the parties' present Agreement does not specifically require that assignments be made with five consecutive work days following by two consecutive rest days. And since it does not we cannot sustain this claim."

Also see Third Division Awards 8222, 6168, 6022, 5897, 5768 and 3993.

CONCLUSION: In this ex parte submission the Company has shown that no extra conductor was available for the emergency assignment to deadhead Tampa-Naples for extra service Naples-Lakeland and return deadhead service Lakeland-Tampa, reporting time in Tampa 12:45 P. M., April 1, 1956. Also the Company has shown that Management properly assigned regular Conductor Dotson to the assignment in question. Finally, the Company has shown that awards of the National Railroad Adjustment Board support Management in this dispute.

The claim that extra Conductor Muller is entitled to an adjustment of 13:40 hours is without merit and should be denied.

All data submitted 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: On March 31, 1956, the signout period in the Tampa District was from 9:00 A. M. to 10:00 A. M. At the close of the signout period on that day the Carrier had two unfilled assignments which the Carrier was required to make to become effective between 1:00 P. M. on March 31 and 1:00 P. M. on April 1. Extra Conductor, W. E. Sharp, who arrived in Tampa on March 31 and was released at 3:25 P. M., was given one assignment and instructed to report at 12:15 P. M. on April 1.

The second assignment required the Conductor "to report at 12:45 P.M. on April 1, 1956, to deadhead to Naples, Florida, on ACL train 92 and to return in service to Lakeland, Florida, reporting time in Naples 9:15 A.M. April 2, thence deadhead Lakeland — Tampa." No extra conductors arrived in Tampa from 3:25 P.M., on March 31 (Conductor Sharp) until the beginning of the signout period on April 1 (9:00 A.M. — 10:00 A.M.). This second assignment was given to Conductor, H. A. Dotson, a regularly assigned conductor in the Tampa District at 8:30 A.M. on April 1, with instructions to report at 12:45 P.M. on that day.

Pursuant to the assignment, Dotson reported at 12:45 P.M., on April 1 and departed by train for Naples, Florida, at 1 P.M. Extra Conductor Muller arrived in Tampa at 2:55 P.M., on April 1 and was released at 3:10 P.M. He was given an emergency assignment on ACL train 2/92 Tampa-New York, reporting time 12:15 P.M., April 2, 1956.

Conductor Dotson was paid 6 hours and 50 minutes for the deadhead trip from Tampa to Naples, one hour and 50 minutes for hold-for-service in Naples, 6 hours and 50 minutes for service trip from Naples to Lakeland, Florida and 6 hours and 50 minutes for deadhead trip from Lakeland to Tampa or a total of 22 hours and 20 minutes. Extra Conductor Muller was paid 21 hours for a service trip from Tampa to New York and 10 hours and 15 minutes deadhead trip from New York to Tampa or a total of 31 hours and 15 minutes.

The Organization contends that the Carrier violated Rules 36 and 38 the applicable parts of which read as follows:

"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."

"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).

* * * * *

"(c) A regular signout period shall be established in each district, as which time assignments shall be made for a succeeding 24-hour period. Such 24-hour period shall be designated as a signout day, and the specific signout period of the signout day shall be determined by local conditions. The signout period shall be not less than 30 minutes nor more than 3 hours in length. The local chairman shall be notified in writing by the district representative at least 5 days in advance of any change in the schedule of the signout period or the signout day and bulletin shall be posted for information of the conductors.

"Until credited and assessed hours have been acquired in the current month, extra conductors shall be assigned in accordance with their credited and assessed hours for the preceding month, the conductor with the least number of such hours to be assigned first, continuing until all conductors in this group have been assigned, after which the conductor with the least number of hours accumulated in the current month shall next be assigned."

Paragraph (d) of Rule 38 does not pertain to this dispute.

"Q-9. What is meant by "available" as used in paragraph (a) of this Rule?

"A-9. "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. However, an extra conductor who reports at his home terminal after the assignments have been made for the signout day shall not be privileged to displace any of the local extra conductors already assigned, but may displace a regularly assigned conductor or a foreign district conductor assigned to a movement not on a direct route towards his home station (regularly-assigned conductor to be displaced first)."

It is the Organization's position that the Carrier knew that Extra Conductor Muller would return to Tampa at 3:25 P.M. on April 1, 1956, and that he was available for the assignment which was given to Conductor Dotson who in turn was not required to leave on his service run from Naples, Florida to Lakeland, Florida, until 9:15 A.M. on April 2, 1956.

It is the Organization's further position that no emergency existed on March 31, 1956, under Rule 36, until signout time on April 1, 1956. The Organization also argues that the Carrier frequently transported conductors from Tampa to the place of origin by bus and that there was a bus leaving Tampa at 10:45 P.M. on April 1, 1956 which Extra Conductor Muller could have taken to Naples where he would have arrived at 2:50 A.M. on April 2, in ample time to report for the service run at 9:15 A.M.

There is no question that had the Carrier listed the assignment on April 1, 1956, instead of March 31, 1956, and had the Carrier assigned Conductor Dotson to that run on April 1, 1956, Extra Conductor Muller could have bumped Conductor Dotson when he returned to Tampa at 3:25 P.M. on April 1. He would then have been "available" under Rule 38 as defined in question and answer No. 9.

Although the Organization claims that there was an established practice to deadhead conductors from Tampa by bus, the record in this case does not support that contention. In the hearing on July 11, 1956, Mr. T. R. Edwards, the Local Chairman of the Organization said:

"In the past the Company has deadheaded men to Forst Myers for service by bus, leaving at 4:00 A.M. of a morning on the day of operation and they also deadheaded conductors by bus to St. Petersburg for service and all of a sudden Management decides to deadhead a conductor by train and necessarily assign him 47 hours and 45 minutes before necessarily needed in Naples, which is an undue hardship on the extra conductors, to lose all of that time waiting to perform an extra service when they could leave their home terminal at 10:00 P.M. the night before the service is performed. If Management persists in deadheading conductors by train, there is no reason why other conductors if they have assignments in St. Petersburg can not be deadheaded by train, leaving on the day before the assignment.

"It seems unnecessary at this time to change the policy of deadheading conductors to outlying points. . . ."

This is the only evidence in the record of any significance on this subject. The Carrier does not deny that conductors have been deadhead from Tampa by bus, as the needs and the requirements of the Carrier required. This evidence, however, does not establish a past practice which requires the Carrier to transport or deadhead a conductor by bus in order to comply with Rule 36 and 38 of the Agreement.

The train Conductor Dotson took from Tampa to Naples, Florida at 12:45 P. M. on April 1, 1956, was the only train between those two points which left Tampa in time to get a conductor in Naples to take over the run that started at 9:15 A. M. on April 2, 1956.

Undoubtedly, the Carrier is required under the Rules of the Agreement to give every consideration to extra conductors where emergencies exist. This is significantly agreed to by the Carrier in a letter dated September 20, 1946 in which J. P. Leach, Assistant Vice President of the Carrier System wrote in part:

"I agree with your position that the conductor having a regular assignment should not be given extra assignments until the emergency actually requires that this action be taken in order to protect the service. I am instructing our district representatives that in the future extra assignments should not be given to regular conductors at the signout period and that these assignments should be held until fairly certain that an extra conductor will not be available; further, a regularly assigned conductor should be called only in sufficient time to protect the assignment."

This letter continues to say that in the event an extra conductor becomes available after a regular conductor has been assigned, the extra conductor shall be allowed to take the assignment and the regular conductor paid for 'called and not used'.

What constitutes available under Rule 38 must be judged by the facts in each particular case. There can be no hard and fast rule on the subject. If the Carrier, in making assignments, is arbitrary and discriminatory, the Rules must be applied one way. On the other hand, if the Carrier acts in good faith, consistent with normal business practice, it must be construed another way. There is no evidence in the record of bad faith by the Carrier in making the assignment to Conductor Dotson; there is no evidence of discrimination to show that the Carrier deliberately set the reporting time for 12:45 P. M. on April 1, 1956. In view of these circumstances it is the opinion of the Board that Extra Conductor Muller was not "available" for the run scheduled by the Carrier to commence at 12:45 P. M. from Tampa on April 1, 1956.

There is another ancillary point which should be discussed. The claim filed on behalf of Conductor Muller is for an amount not less than a minimum day of 6 hours and 50 minutes for the deadhead trip Tampa to Naples, for 6 hours and 50 minutes for the extra service trip from Naples to Lakeland, Florida, and for a deadhead trip Lakeland to Tampa of not less than 6 hours and 50 minutes. The total time is for 20 hours and 30 minutes, although the Local Chairman originally requested only 13 hours and 40 minutes. Dotson was paid 22 hours and 20 minutes which included 1 hour and 50 minutes held-for-service in Naples. The fact remains, however, that Extra Conductor Muller was assigned to report for the trip from Tampa to New York at 12:15 P. M. on April 2, 1956. This is exactly 3 hours after Dotson reported in Naples on the same day for the run to Lakeland, Florida. Muller was away from Tampa

on the run to New York for a total of 31 hours and 15 minutes. He could not possibly have taken the run to New York and at the same time fulfilled the obligation as conductor on the run from Naples to Lakeland, Florida.

There is also no evidence in the record that any other extra conductor was available either on April 1 or on April 2, 1956 who could have been assigned to the Tampa — New York run. In other words, there is no individual employe who has suffered any damages by reason of the alleged wrongful assignment made by the Carrier to Conductor Dotson.

It is true that this Board has held in numerous cases that a Carrier is liable for punitive damages if there is a violation of the Agreement and this Board has sustained claims even though the Claimants did not themselves suffer damages by reason of such contract violation. Few of such awards, however, apply to situations where no employe at all suffered damages by reason of the contract violation. It may very well be that it is justifiable to assess punitive damages where the Carrier deliberately, willfully or maliciously violated the terms of the contract. In such a case, an employe not directly damaged may file a claim and collect for such contract violation. But this is not the case here. The assignment was made in good faith. Whether the Carrier was diligent or not is a matter of judgment and discretion. If Muller had not been assigned to the Tampa — New York run, or to any other similar or equal assignment there would be no question but that his claim was properly filed before this Board and this Board would then have to determine whether or not the Carrier violated the provisions of Rules 36 and 38. It is not the function of the Board, however, to indiscriminately assess punitive damages where no fraud, no discrimination or no malice is shown in the record and where no employe, whether it be the proper Claimant or not, had suffered or may have suffered any damages by reason of such alleged violation.

It is a fundamental principle of law that damages for a breach of contract is the amount which the Claimant actually suffered by reason of such a breach. Consequently an employe wrongfully discharged is entitled to the amount he would have earned if he had not been so wrongfully discharged. See Award No. 1638 (Carter) Second Division. In Award No. 8673 (Vokoun) this Board said:

" . . . In the assessment of penalties the usual penalties are based on losses to individuals who are caused monetary loss because of a contractual violation, in order to make one 'whole'. Punitive damages are not ordinarily approved by the Board."

Also see Awards 3651 (Miller), 5186 (Boyd), 7309 (Rader) and 8674 (Vokoun).

We cannot see how it will benefit the relationship between the Organization and the Carrier and effectuate the purpose of the Agreement to assess punitive damages on the evidence contained in the record.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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, and that, in any event, the Claimant suffered no damages.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1962.

DISSENT TO AWARD 10511, DOCKET PC 11782

In this case the majority has held, incorrectly it is submitted, that the individual claimant was "not available", thus denying the claim. The Agreement rule specifies the manner and time for making assignments which, it is submitted, was not complied with by the Carrier.

This dissent, however, is not directed to that point.

Having stated the basis for denying the claim, the majority proceeds with a discussion of what is referred to as "ancillary" or subordinate points, and expresses the view that no reparations are in order when no loss is sustained, citing several Awards in respect to the well-known principle of making employees "whole".

Such dicta is inappropriate as well as gratuitous and irrelevant and does not represent the weight of precedent. See Awards 685, 2277, 2282, 2838, 7816 and Carrier Member's Dissent in Award 6630, to cite but a few.

More importantly, such discussion directs itself to a consideration which is not raised in the record and was never an issue between the parties.

It is well established that neither the parties, nor the members of this Board can raise issues other than those set out in the record of a dispute. See Awards 10180, 70171 and 10102 in respect to parties raising new issues. See also Award 9578 in respect to members of this Board injecting new issues.

Any view that there is any burden upon the employees to establish that a carrier has "deliberately, wilfully or viciously violated the terms of the contract" is not only palpably specious but contrary to the Awards of this Board which have consistently held that it is the Carrier's responsibility to correctly apply the terms of its covenants and it must be presumed to know what it can and cannot do. The wholly improper dicta here in reference, not only directs itself to a non-existent issue in this dispute but impliedly strays into the field of equities in which field this Board has many times held it cannot and will not indulge.

For the reasons stated above, I dissent.

R. H. HACK