Award No. 781
Docket No. PC-708

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

ORDER OF SLEEPING CAR CONDUCTORS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: "Conductor W. M. Phillips, Chicago Eastern District, claims that Rule 31, Agreement between The Pullman Company and Conductors in the service of The Pullman Company, has been violated by withdrawal of bulletin of Lines 3342 and 3580, Wabash trains 21 and 24 between Chicago and St. Louis, on or about December 11, 1937, and refusal to assign conductors to this run as required by the rule. He asks immediate assignment to this run in accordance with his bid and pay for all time lost on account of failure to assign him thereto."

EMPLOYES' STATEMENT OF FACTS: "On December 6, 1937, Lines 3342 and 3580, Wabash Railroad, were bulletined for conductors' bids. After bids were made, including that of Phillips, the bulletin was cancelled and porters were substituted for conductors on these lines. The bulletin was posted as required by the rules of the Agreement between the Company and its conductors. At the time this run was posted it was understood that there would be 3 cars in the line—2 parlor cars operating between Chicago and St. Louis and 1 sleeping car operating between Chicago and Hot Springs, Arkansas. It was later decided to remove one of the parlor cars, leaving 1 parlor car and 1 sleeping car on the run. The bulletin was cancelled following this decision. The sleeping car was a new line.

"This grievance has been presented in accordance with the rules of the Agreement between The Pullman Company and Conductors in the service of The Pullman Company. Decision of the highest officer designated for that purpose is shown in Exhibit 'A'. Rules 25 and 31 are involved in this case, Exhibit 'B'."

POSITION OF EMPLOYES: "Line 3342 is a new run coming under the provisions of Rule 31 which requires that it be bulletined for conductors to bid on. This is a mandatory feature of the rule. It was so bulletined on December 6, 1937, and Phillips bid for it. Then the railroad decided to discontinue Line 3576, a parlor car, operating between Chicago and St. Louis, and thereupon The Pullman Company cancelled the bulletin and placed porters in charge of the remaining cars. Mr. Vroman's decision, Exhibit 'A', is so worded as to confuse the situation. He infers that the withdrawal of one of the parlor cars and addition of one sleeping car leaves the run unchanged and therefore the Company was not required to bulletin the run. This is not the case. Line 3342 is a new run operating between different terminals than Lines 3576 and 3580. Furthermore, there is conductors' work to be performed on these lines and conductors are entitled to that work in accordance with their seniority ratings. Mr. Vroman further says that the cancellation of one of the parlor cars left the run with 'no change in the number of cars

"The principles involved in this claim are similar to those involved in the claim of Conductors Rawdon, Kelley, Mosbarger, et al., of the Kansas City District, now before the Third Division, and the members thereof are respectfully referred to our ex parte submission of even date in that claim, as the arguments contained therein apply with equal force to this claim with the exception of the details of the particular runs which have been treated separately in each submission. This claim is also similar to that of Washington District Conductors Fant, Frowert, Slye, et al., concerning which we have today furnished the Division an ex parte submission referring also to the 'key' case—that of Conductors Rawdon, Kelley, Mosbarger, et al.

"For reasons similar to those set forth in the claim of the Kansas City District conductors, we ask that the Division deny the request of Conductor Phillips. Such reasons may be briefly summarized as follows:

1. The existing Agreement between The Pullman Company and conductors in its employ, effective December 1, 1936, governing rates of pay and working conditions of Pullman conductors, does not abrogate the right of The Pullman Company to exercise an accepted practice of long standing wherein and under certain circumstances porters are assigned to run in charge of Pullman cars.

2. The existing agreement with conductors is not in conflict with past practice; therefore, said past practice is still in effect.

3. The existing agreement with conductors does not provide the conditions under which conductors shall be used; it merely prescribes rates of pay and rules applicable when conductors are used.

4. Failure of The Pullman Company to assign a conductor to take charge of the Pullman cars on Wabash Railway trains Nos. 21 and 24, lines 3342 and 3580, has not deprived Conductor Phillips of any seniority rights nor has it caused him to make any less time than he would have made had not the bulletin previously mentioned been posted and later withdrawn. In any event, he stood small chance of being awarded the assignment because his seniority, as compared with other conductors who bid, was insufficient.

5. The agreement between The Pullman Company and its conductors, effective December 1st, 1936, does not sustain the claim of the employes.

6. An award in favor of the petitioner would have the effect of writing a new rule, which is not within the province of the National Railroad Adjustment Board.

7. The precedent established by the Third Division, National Railroad Adjustment Board, in its Award No. 493, dated September 9, 1937.

"We affirm that all data submitted herewith in support of our position have heretofore been presented to the employe's representatives and made a part of the question in dispute, with the exception specified in our submission in the claim of Conductors Rawdon, Kelley, Mosbarger, et al."

OPINION OF BOARD: This opinion covers this (PC-708) and Dockets PC-698 and PC-699, Award Nos. 779 and 780. They all involve the same principle, though some difference in facts, and for that reason they will be considered together.

The question arises from the substitution of porters in charge in place of conductors in the first two cases and the cancellation of a bulletin for a conductor and substitution of a porter in charge in the other case.

The management claims an unlimited right in its managerial judgment to make such changes whenever it sees fit quite without consultation, even

with the organization and that the latter is attempting in these cases to obtain a decision that in substance will require it to discontinue all porter in charge service and substitute conductors therefor, notwithstanding, as it claims, it has pursued a practice for sixty years of assigning work to porters in charge which practice was well known to the conductors at the time of the first agreement with that organization January 1, 1922 and through subsequent agreements to the current one, December 1, 1936 and which therefore, it claims must be deemed to have been adopted in the absence of anything in the Schedule specifically dealing with the matter. It also lays much stress on the absence of a scope rule in that schedule. The Organization disavows any such intentions or claims as those imputed to it and insists it is dealing with the particular cases involved on their respective merits.

It therefore becomes necessary to inquire as to the scope or extent of coverage of the agreement between the parties. This and other boards have held many times that work subject to an agreement cannot be removed therefrom arbitrarily and that principle is too well settled to admit of further questioning.

It is not always easy, however, to ascertain just what work is covered by the agreement. The source and extent of the right was considered at length in First Division Awards Nos. 351, 2171 and this Division Award No. 615; Award No. 636 of this Division presents a contrast to Award No. 615; See also Award No. 757; Award E-333 of Express Board of Adjustment No. 1 presents a strikingly analogous controversy to that here involved. It deals with the substitution of train baggagemen for express messengers.

To summarize briefly these cases hold:

a. That in the absence of limitation the agreement covers all of the work of the kind involved,

b. That the source of the right is by implication of law,

c. That any limitation claimed, not expressed in writing in the scope rule or otherwise, must be definitely proved both as to the fact and extent.

The reason for the implication that the agreement embraces all of the work of the class involved (except such as is specifically excepted) is that any contract must have a definite, ascertainable, subject matter in order to be a contract at all. A contention, therefor, such as that advanced by the management here, that is, that it can, at will, unilaterally, subject to or withhold from the agreement such work as it sees fit, is quite untenable since it would be destructive of the agreement. It would render the agreement a mere option and indeed the carrier in practical effect argues that that is all it is, by its argument that the schedule agreement is only as to the rates and rules that will apply to such work, if any, as it sees fit to accord to the conductors.

But all the circumstances belie the idea that only an option was agreed upon; witness the step rate plan of pay, the seniority rights, the discipline rules all of which would be empty cheats if not affixed to some rights. Likewise why the obligation to be available? Imagination refuses to encompass the possibility that the conductors intended to agree to any such optional arrangement.

On the other hand, as before stated and as held by other cases, unwritten limitations can exist and this case presents such an instance. As claimed by the carrier there has been a practice of sixty years standing of using porters in charge in certain situations which practice under the circumstances involved could not but have been known to the conductors when they contracted, and it is claimed that they must therefore be deemed to have acquiesced in its continuance. But this progresses us but little since the carrier, by reason of the breadth of its claim of right, has not furnished us any adequate

description of the circumstances claimed to be embraced within the practice. It will not do to say that since the actions constituting the alleged practice were the result of the exercise of the will of the management that prerogative must be deemed to be a part of the practice claimed to have been adopted. It would stretch credulity too much to assume anyone agreed to that. Therefore the practice adopted must be spelled out from what had theretofore, customarily, been done, rather than the authority for doing it. This involves the characteristics of the lines involved the reasons for the change and probably many other circumstances usually attending such changing over in the past. The record is utterly barren of information upon which we could attempt to draw a line indicating the bounds of the practice.

The parties ought to get together and agree upon some line of demarcation, rough edged though it may be, rather than burden this Board with the necessity of finding it from evidence in future cases. Otherwise we should be furnished among other things the following criteria; other instances of comparable lines on which substitutions have been made; the history of the contested as well as the compared lines; reasons for the changes; changes in traffic volume.

We know as a matter of general knowledge of the existence of porter in charge service for many years as applied to tail ends of runs, branch lines and perhaps some short runs; we do not understand the conductors' claim here goes so far as to assert these are outlawed by their agreement. What they do assert is that the practice is being extended especially during the depression. The nation-wide depression would not be a proper justification for taking work out of the agreement if it reasonably belonged there any more than it would justify any other violation of the agreement.

There is some evidence to support this contention of the conductors that the practice has been extended to new situations during the depression and as this extension was being protested, it cannot be said to have been acquiesced in so as to have been adopted in the making of the agreement.

It so happens that we can decide two of the instant cases on the meager evidence before us.

In Docket PC-698 the evidence clearly shows that the run in question, at least as far as Billings has, as far back as its history is given, been a conductor run and was such at the time of the agreement. By the latter statement we do not wish to be understood as holding that runs in existence as conductors' at the time of the agreement became frozen as such; we recognize the practice embraced the right to change under change in proper circumstances; we do hold however that as to such runs the burden is on the carrier to justify by more than mere volition. We are not cited any instance of any other runs of anything like the length or importance of this one manned by a porter in charge. It appears rather plainly to be a product of an effort to shift the effect of the depression. We conclude as to it that the men on the extra board entitled to the work should be compensated for a run to Billings during the time this run was manned by a porter in charge.

As to Docket PC-699. This case is in most respects similar to Docket PC-698, although not so long a run. Furthermore by reason of an order of the South Carolina Public Service Commission, porter in charge operation is prohibited in that State. Although the run is technically a new one it is in reality merely a changed run which was a conductor run at the time of the agreement and no evidence has been shown by the carrier to justify the change.

Consequently we conclude the run should have been bulletined as a conductor's run as claimed. It appears however that the run was discontinued altogether as a result of the Public Service Commission Order and since the only relief sought in this case is the bulletining of the run no award can be made in the circumstances.

As to Docket PC-708. The facts here are somewhat different from the two preceding cases. Wabash trains 21 and 24 prior to December 15, 1937 had carried two parlor cars porter in charge, Chicago to St. Louis. Shortly prior to that date the management concluded to add a Hot Springs Sleeper and bulletined a conductor run; before the bulletin was up it decided to drop one of the parlor cars and thereupon cancelled the conductor run bulletin and assigned a porter in charge to the Hot Springs Sleeper. We cannot see very well how dropping the parlor car could change the character of the Sleeper run but as this is a new run and we have no light whatever on what the practice was respecting comparable runs, the case is remanded to the parties in the hope they may be able to adjust it in the light of the indicated principles, failing which it may be brought back with evidence concerning comparable runs.

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 employe involved in this dispute are respectively carrier and employe 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 case is remanded for development of facts indicated by opinion; in case parties are unable to adjust in conformity therewith it may be returned with such information.

AWARD

Case remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of December, 1938.