Award No. 1461
Docket No. PC-854

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

THE ORDER OF SLEEPING CAR CONDUCTORS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: "Conductors W. H. Smith and M. S. Strevell of Albany District, who were removed from their regular assignment on Line 1200-1553 and 5511, by putting porters in their places, effective August 28, 1938, ask immediate reinstatement to their assignment and pay for all time lost on account of removal therefrom."

STATEMENT: This is a re-submission of the case covered by Award No. 909 in which the Board remanded the matter for the development of further evidence. The facts and arguments set forth in Award No. 909, as well as in the re-submission of the case, will not be restated.

OPINION OF BOARD: This is the second time this Board has been confronted with this case. See Award 909. Prior to August 28, 1938, lines 1200, 1553, and 5511 were operated by conductors as indicated below:

On that date the conductors' positions between Albany, N. Y. and Montreal were abolished and porters-in-charge were assigned to do the work formerly done by conductors. Line 1200 consists of one pullman car operated between Albany, N. Y. and Montreal, which is a distance of 234 miles. Line 1553 consists of one pullman car operated between New York City and Plattsburg, N. Y. via Albany, northbound, and via Troy, N. Y., southbound. Line 5511 consists of one pullman car operated between New York City and Fort Edward, N. Y. via Albany, N. Y., northbound, and via Troy, N. Y., southbound. Lines 1553 and 5511 were and still are in charge of pullman conductors from New York City to Albany, N. Y., northbound, and from Troy, N. Y. to New York City, southbound. Line 5511 from New York City to Fort Edward, N. Y. was operated by a porter-in-charge from Albany to Fort Edward prior to abolition of conductor's position.

It is the contention of the Pullman Company that it has the right to substitute porters-in-charge in place of conductors on these lines from Albany, northbound, and to Troy and Albany, southbound, to and from their several termini.

All of the questions that confront us in this claim have been decided by this Division in Awards 779, 780, 781, and 909. However, it is the contention of the carrier that, in the submissions of the above referred to awards, what is referred to as the "historical background" of the negotiations that took place between the Pullman Company and the conductors was not presented to this Board and was therefore not considered. So, the only question for this Board to decide in the present case, if it does not desire to overrule its former awards, is to determine whether or not the "historical background" would justify this Board in changing the rules laid down in Awards 779 and

909. The Referee had the advantage of listening to the oral arguments made at the time of the submission of this case. Both the carrier and the employes were represented by special counsel who ably and elaborately set forth their respective positions. It has been the contention, and is now the contention of the Pullman Company, that it can at any time, of its own volition, without any reason or cause, change a line from that of a conductor operated to a porter-in-charge operated line. We have been furnished with memoranda on both sides showing the various negotiations that have taken place between the parties. We have carefully reviewed all of these records, many of which were extremely lengthy. There can be no question but what the employes, during this period of time, attempted to re-write the Agreement so that no question could be raised as to its exact meaning and interpretation; and, at the same time and during the same negotiations, the Pullman Company has attempted to insert into the Agreement provisions which would more definitely state the rule they desired to have adopted. In the construction of this contract both parties are desirous of interpreting it from their own viewpoint. It is the carrier's claim that the practice of operating porters-in-charge is as old as the Company itself and that this has always been known to the conductors and that they accepted it in all negotiations, writing of rules and signing of Agreement. It is quite true that the employes were aware that porters-in-charge were used when they negotiated the present Agreement, but it is also true that the conductors were contending that the previous rules were being violated in that respect.

Because the employes were seeking a more definite statement in the Agreement is not in itself an admission by them that the carrier's interpretation of an existing rule is correct. It is but a desire on their part to eliminate any question as to what the rules mean. This record shows that, through the whole stormy period of negotiation and mediation, the conductors have steadfastly contended that their employment is not subject to be arbitrarily terminated by the carrier. The exact limits of the employment in question have been continuously in dispute. Many suggestions have been made and brought forth by the employes to fix definitely this limit but at no time have the conductors conceded that the field of service available to them has no limit, save what the carrier in its own judgment decides it to be.

In the oral argument the Referee asked special counsel for the Pullman Company if, under the interpretation the carrier placed upon the contract, the Pullman Company could discharge all of the conductors employed without cause or reason at any time. The admission was made on the part of the carrier that it had that right but that it would not exercise it because it could not do so and operate successfully. In other words, under the carrier's interpretation of this contract, it has the right to destroy it. The mere fact that it may not exercise that right does not in any way alter or change its power to destroy the contract. It is inconceivable that the employes would enter into an agreement with the Pullman Company giving to the carrier the right at any time without cause or reason to destroy the contract. We can come to no other conclusion than that the "historical background" of the contract does not justify the position taken by the Pullman Company. This Board reaffirms the findings set out in Awards 779, 780, 781, and we quote with approval from Award 909:

> "The Board reaffirms, without repeating here, what is said in Awards 779, 780, and 781 as to these contentions of the parties. The management does not have the unlimited right to make such changes whenever it sees fit to do so. Any change from conductor to porter-in-charge operation must find support in the practice in effect when the agreement was executed. As the practice has been in effect for many years and porter-in-charge operation has always been the exception and not the rule, enough accumulated experience should be known to both parties to make the problem a simple one for them if they would get together and in good faith attempt to agree upon some yardstick for the determination of the conditions under which porter-in-charge

operations are permissible. Such an undertaking would also greatly simplify the cases brought to this Board for adjudication.

"The contention of Petitioner that, as the lines in question were in charge of conductors when the prevailing agreement was executed, the runs were frozen as conductor runs and porters-in-charge cannot be substituted except by agreement between the parties or after notice and conference as provided in Rule 56 of the agreement is untenable, for the reasons stated in the awards heretofore referred to. The many decisions of this Board holding that work cannot be removed from an agreement and given to employes not covered by the agreement (cited and relied upon by petitioner) are not applicable to the precise question presented by this dispute. They will govern should it be determined that the work in question belongs to conductors. The question before the Board, however, is whether the work belongs to the conductors or whether conditions had so changed as to authorize the substitution of porters-in-charge."

In Award 779, this Board, commenting upon the showing that should be made, said: "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."

With this rule in mind we turn to the record in this case to ascertain the showing that was made for the substitution of porters-in-charge in the place of conductors, remembering that the burden of proof is on the carrier. The record shows the lines as now operated have only one pullman car on them; that at previous times they have been operated with porters-in-charge; that there are comparable lines being operated with porters-in-charge; that the traffic has declined; that the carrier has met the burden by showing the necessary elements that justify the change.

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 there was no violation of Agreement.

AWARD

Claim disposed of as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of June, 1941.