Award No. 1603
Docket No. PM-1571

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS
THE PULLMAN COMPANY

STATEMENT OF CLAIM: ". . . for and in behalf of E. Crawley who is now and for a number of years past has been employed by The Pullman Company as a porter, operating out of the district of Chicago, Illinois. Because The Pullman Company did, under date of October 25, 1940, deny the claim instituted by the Brotherhood of Sleeping Car Porters for and in behalf of porter Crawley for the establishment of his wage status as being in the 'over-fifteen-year' class as of April 16, 1938 and for the adjustment of his compensation on that basis in accordance with Rule 2 of the agreement between The Pullman Company and its porters, attendants and maids in the service of The Pullman Company of the United States of America and Canada, effective October 1, 1937. And further, for porter Cawley to be paid for the wages lost by him by reason of not having been given the 'over-fifteen year' rate as of April 16, 1938."

EMPLOYES STATEMENT OF FACTS: "Your petitioner, the Brotherhood of Sleeping Car Porters, respectfully submits that it is the duly designated and authorized representative of all porters, attendants and maids in the service of the Pullman Company as is provided for under the provisions of the Railway Labor Act.

"Your petitioner further sets forth that in such capacity it is duly authorized to represent porter E. Crawley, who is now and for a number of years past has been employed by the Pullman Company as a porter, operating out of the Chicago Western District at Chicago, Illinois.

"Your petitioner further sets forth that under date of July 31st, 1940, it did initiate a claim for and in behalf of porter Crawley for the purpose of establishing his wage status as being in 'the Over-Fifteen-Years' class as of April 16th, 1938.

"Your petitioner further sets forth that the claim submitted for and in behalf of porter Crawley was denied by District Superintendent Jones of the Western District under date of October 25th, 1940.

"Your petitioner further states that appeals in the matter were taken from the decision of District Superintendent Jones through the regular channels up to and including Mr. B. H. Vroman, Assistant to Vice President of the Pullman Company, who did, under date of January 23, 1941, sustain the decision of District Superintendent Jones in denying the claim filed by the Organization for and in behalf of porter E. Crawley.

"Your petitioner further sets forth that it did, under date of February 6, 1941, file notice with the National Railroad Adjustment Board, Third Division, of its intention to file with your honorable Board an ex parte sub-

already taken place, some language of retroactivity would be necessary. None is to be found in the wording of this rule. On the contrary, the language of the rule clearly shows the intent that it have application only to future furloughs. It provides:

> '* * * when an employe is furloughed for a period of more than ninety (90) days, the time in excess of ninety (90) days shall be deducted. * * *' (Underscoring inserted).

"Prior to the adoption of Rule 2 (f) there was no rule covering the effect of furlough time upon computing progressive rates of pay. The Third Division of the National Railroad Adjustment Board in its awards has held to the generally recognized principle that, in the absence of specific covering by rule, past practice obtains. Its award No. 663 is a case in point. From June 1, 1913, when differential rates of pay based upon length of service were first established for Pullman porters, attendants and maids, to October 1, 1937, the effective date of the current Agreement, it was the practice in computing progressive rates of pay for such employes to deduct from their service time all time furloughed. The records show innumerable cases of progressive rates of pay having been applied upon actual cumulative years of service. A few cases from the employes' records have been chosen at random. These cases are herewith presented as Exhibit D. Employes have at times questioned the time progressive rates of pay have been applied to them. We show in Exhibit E, hereto attached, copies of several such inquiries and replies made thereto. These replies clearly prove that all furlough time was deducted in determining when progressive rates of pay were to be applied. In none of these cases, including that of Porter Joseph Lowe, San Francisco District, initiated by the Brotherhood of Sleeping Car Porters, was an appeal taken.

"An inconsistency exists in the Brotherhood's position in its reliance on Rule 2 (f), while at the same time asserting that seniority alone governs the application of step rates of pay. Rule 2 (f), in itself, recognizes deductions of time in computing step rates of pay, whereas the seniority date posted as of January 1, 1938, must remain intact and is subject to no deductions.

CONCLUSION

"This Company has shown that prior to October 1, 1937, no rule existed specifically covering the computation of time on furlough as applicable to determining when progressive rates of pay were to become effective. The established practice of deducting the total time has been clearly demonstrated. It has further been shown that seniority rights and service rights are entirely separate and distinct, and, therefore, furlough deductions made on the corrected seniority roster of January 1, 1938, as provided for under Item No. 4 of the Mediation Agreement, have no bearing on the issue in this case. Rule 2 (f) of the October 1, 1937, Agreement has also been shown to have no application since the furloughs involved in this claim both occurred prior to 1937. Rule 2 (f) is furthermore not retroactive by the express stipulation of Item No. 6 of the Mediation Agreement of August 25, 1937, and by the intent of the contracting parties as evidenced by the language and nature of its provisions.

"The Brotherhood, in support of its claim in this dispute, has relied on both the seniority date accorded Porter Crawley under Item No. 4 of the Mediation Agreement, and also on Rule 2 (f) of the Porters' Agreement which dual reliance has been shown to be inconsistent. Since neither of these provisions has proper application to this case, this Company respectfully submits that its action in deducting the full period of three months and seven days in accordance with the then existing established practice was entirely proper, and, therefore, the present claim should be denied."

OPINION OF BOARD: E. Crawley was employed as porter by the Pullman Company on April 16, 1923. The Organization claims that he

should have received "over 15 years'" rate of pay as of April 16, 1938. The Pullman Company contends that he was not entitled to that rate of pay until he had accumulated 15 years' actual service and that since he was off on furlough from November 21, 1932 to December 21, 1932 and from March 17, 1933 to May 24, 1933, a total of three months and seven days, the 15 years' actual service would not be up until July 23, 1938, on which date, according to the Company, he would be entitled to "over 15 years'" rate of pay.

The sole question is whether a porter's seniority date or the amount of his actual service controls in computing the date at which he would be entitled to pay accorded porters with "over 15 years'" service.

The Organization contends that the seniority date governs. The Pullman Company contends that actual service controls. Item 4 of the Mediation Agreement of August 25, 1937, was the final adjustment of seniority dates, and there is no dispute in this case but that porter Crawley's seniority date was established on the seniority roster as of April 16, 1923. The Pullman Company contends that, regardless of the logic of the interpretation requested by the Employes, the established practice of deducting the total time of furloughs to October 1, 1937 was the interpretation placed upon the contract by the parties and that it is binding. In Award 696 this Board in a very similar case said:

> ". . . Practice under the prior agreement is not a safe guide for the interpretation of the agreement although the language of Rule 1 in dispute here is precisely the same as the langauge of Rule 1 of the earlier agreement."

However, the Pullman Company argues that it is not Award 696 but rather Award 905 of this Board that is controlling. In Award 905 the writer of that Opinion points out that it is distinguishable from Award 696. We quote:

> "This case is distinguishable from Award 696, for in that case the Brotherhood had represented the employes for only about five months before the agreement was made with the carrier, and there was no such showing there as here of facts surrounding the negotiations upon which an estoppel could be raised. In Award 697 there was nothing in the record to show that the Brotherhood had any knowledge whatever of the prior interpretation."

Past practices can only be considered as an interpretation of what the contract means when both parties to the agreement are in a position to present their views and also to object to the interpretation placed upon it by either party. Under such circumstances the employes are not bound by past practices that they were not in a position to dispute.

It is the opinion of this Board that Award 1081 is controlling and that the seniority date fixed under the Mediation Agreement of August 25, 1937 is the date from which the "over 15 years'" rate of pay applies. Since in this case Crawley's furlough of three months and seven days did not fall within the deductions specified in Rule 2 (f), he was entitled to the "over 15 years'" rate of pay as of April 16, 1938.

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 jurisidiction over the dispute involved herein; and

That the carrier misapplied the rule of the agreement between the parties in the payment of the claimant herein.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1941.