Award No. 1781
Docket No. PM-1704

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: For and in behalf of the attendants employed by The Pullman Company operating out of the Chicago District Commissary. Because The Pullman Company did, on or about October 1, 1940, assign an employe classified as a Barber to perform the work of an attendant on a Lounge car operation between Chicago, Illinois and Seattle, Washington on the Chicago, Burlington and Quincy and Great Northern Railroads train known as the "Empire Builder," such assignment being made in violation of the agreement between The Pullman Company and porters, attendants and maids in the service of The Pullman Company in the United States of America and Canada, effective October 1, 1937. And further, because in making such assignment The Pullman Company removed the attendant's work on said Lounge car from the scope of the above mentioned agreement. And further, for attendants of the Chicago District Commissary to be placed in operation on said Lounge car run and for such attendants who lost pay by virtue of having been deprived of this work to be reimbursed for the pay lost.

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

Your petitioner further states that in such capacity it is duly authorized to represent all attendants operating out of the Chicago District Commissary.

Your petitioner further represents that there has operated for the past several years a lounge car on a train known as the Empire Builder, between Chicago, Illinois and Seattle, Washington; said lounge car being a regular Pullman lounge car on which the service generally rendered on Pullman lounge cars is performed, such as serving drinks, food, cigars, cigarettes and the like.

Your petitioner further represents that the Management of The Pullman Company operated an attendant on this line to do the attendant's work, such as serving drinks, cigars, cigarettes and food and etc.; and that it did on or about October 1, 1940 remove the attendant who had been operating and doing the attendant's work on this particular car on the Empire Builder, between Chicago, Illinois and Seattle, Washington, and, thereafter had this work performed by another employe taken from the barbers' seniority roster and that this employe taken from the barbers' seniority roster has continued to operate on the above mentioned lounge car, performing the work that, under the agreement between The Pullman Company and its porters, attendants and maids, should be performed by an attendant from the attendants' seniority roster of the Chicago District Commissary.

of each year since 1934, as borne out by the history of the line; that there has not been an attendant assigned to this line from 1931 through 1940, except during the summer months since 1934; and that the attendants ab initio, and their representatives since 1937, concurred in and acquiesced in such operation until December, 1940.

(2) That the initial reason for the removal of one of the two employes from each of these cars in 1931 was one of sound business judgment, and that in the ensuing job consolidation the new position was given to that class of employes who possessed the necessary qualifications to perform all phases of the work. Pertinent awards of this Board in support of this position have been cited.

(3) That the railroads were paying directly for the services of the employes operating on these lounge cars and that The Pullman Company furnished the number and type of employes the railroad required. Had The Pullman Company refused to furnish the barber-attendants, the railroad of necessity would have placed it own employes on the cars. But rather than refuse to furnish the employes The Pullman Company salvaged one job on each car for its employes.

(4) That this question is now moot. That the railroad purchased these cars February 5, 1941, and began using Great Northern employes April 1, 1941, which fact the petitioner knew before it brought this claim to the Board.

The Pullman Company submits that this claim is without merit and should be denied.

OPINION OF BOARD: The real question presented by this record is whether the work involved is within the scope rule of the agreement between the parties. It is the contention of the claimants that under the scope rule of this agreement all attendant's work belongs to employes covered by the agreement. It is the carrier's contention, in substance, that the scope rule of the agreement does not assure to employes covered thereby attendant's work which is of such small quantity that it may reasonably be performed by a barber employed on the car, and whom the carrier has designated a barber-attendant.

It is well established by holdings of this Board that agreements such as here involved embrace all of the work of the class covered by the agreement except that expressly excepted in the agreement, and that which can be definitely shown was not intended to be covered. There is no express exception contained in this agreement, so the question is, do the facts of record show an exception was intended.

The record discloses that the agreement between the parties was executed in 1937. At that time the work was being performed by a barber-attendant to the same extent and in the same manner that it was when claimants objected. From May 1931 to May 1934, the barber-attendant had performed the work the entire year. In 1934 the regular attendant was assigned during the summer, and this practice continued until October 1940, without protest or complaint. It appears, therefore, that for several years antedating the agreement and for three years thereafter this work in dispute was being performed by the barber-attendant to the same extent and in the same manner as it was at the time objection was made. Never has the carrier recognized the right of claimant to perform the work at a time when the quantity of the work was such that it could be performed by the barber-attendant. This distinguishes this Docket from Docket CL-1781, wherein the carrier had recognized prior to 1935 that the work in dispute came within the scope rule of the Clerks' agreement. Not only has the carrier never considered this work performed by the barber-attendant within the scope of the agreement, but for three years after the execution of the agreement the claimant made no claim to the work. As said in Award 1435, "Conduct may be, frequently is, just as expressive of intention and settled conviction as are words either spoken

or written." Certainly it would seem that if claimant intended this work to come within the scope of the agreement some objection to it being performed by others would have been made at the time the agreement was being negotiated. No objection being made it seems clear that the carrier was justified in its conclusion that claimant made no claim to the work. This conclusion is further justified by claimant's failure for three years to complain or protest. While delay in asserting a claim does not bar a claim for a continuing violation of an agreement, nevertheless, such delay may be considered as evidence of the fact that there was no violation. Award 1397.

We are of the opinion, therefore, that under the peculiar facts of this record it cannot be said that carrier violated the scope rule of the agreement by permitting a barber attendant to perform the work at the times and in the manner disclosed by the record.

The work being performed by barber-attendants at the time the agreement was executed, and claimants having failed to protest the performance of this work by barber-attendants for three years after the execution of the agreement it must be held that the agreement was made in the light of this condition which is a clear exception to the right of attendants to perform all of that class of work.

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 the record discloses no violation of the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 22nd day of April, 1942.