Award No. 1883
Docket No. PC-1774

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

ORDER OF SLEEPING CAR CONDUCTORS

THE PULLMAN COMPANY

STATEMENT OF CLAIM: Conductors T. F. Campbell, J. J. Doherty, L. B. Kreis, W. E. Putnam and C. Gran, St. Paul District, claim violation of the Agreement between The Pullman Company and its Conductors as interpreted by Adjustment Board Awards, by removal of conductors from Line 717 between St. Paul and Moose Jaw, on October 1, 1940, and ask reinstatement of conductors immediately with pay for all time lost.

EMPLOYES' STATEMENT OF FACTS: This case has been progressed in the usual manner under the rules of the Agreement between The Pullman Company and Conductors in the service of The Pullman Company. The decision of the highest ranking officer designated for that purpose is shown in Exhibit "A." That exhibit contains the admission that the conductors were removed from their line without any change having occurred in its operation. This involves Rule 33, which is shown in Exhibit "B." Indirectly, Rule 31 is also involved and therefore it is made a part of Exhibit "B." An explanation of the conditions under which this claim arose is contained in a letter from M. S. Warfield, President, Order of Sleeping Car Conductors, to B. H. Vroman, Assistant to Vice-President, The Pullman Company, dated December 2, 1940, Exhibit "C." Details of the complaint of the conductors are shown in Exhibit "D."

POSITION OF EMPLOYES: This claim involves the operation of a transcontinental train. The run covers the territory between St. Paul, Minnesota, and Vancouver, B. C., over the Soo Line and Canadian Pacific Railroads. The assignment of conductors to this run up to October 1, 1940, is proof that conductors' work existed thereon and as there was no change on or after that date, conductors' work is still present. October 1, 1940, does not mark any change except the removal of conductors from their run and for that reason their removal establishes the fact that the Agreement between The Pullman Company and its Conductors has been violated and the conductors' rights invaded. All this is proved further by the fact that conductors still operate on these trains west of Moose Jaw. The conditions are the same throughout so far as service is concerned. The employes believe that the operation of conductors on one half of the line confirms their right to work on the other.

Reviewing this practice of operating porters in place of conductors it will be observed that the carrier began by using porters on insignificant lines and tag-ends. With the passing of time the carrier became bolder until now we find it attempting to operate porters on parts of transcontinental trains.

The employes believe that all the facts sustain their claims and that they are entitled to return to the run with pay for all time lost.

flected the constantly varying circumstances of the various lines. For example, as pointed out in our submissions in the previous cases, more than 200 such changes were made between January 1, 1922 and the end of 1923. In 1924 through 1927 over 500 changes were made. In 1928 and 1929 approximately 200 such changes were made, and similarly the practice has involved changes both before and since these years. The history of this very Line 717 illustrates the number of changes to and from porter-in-charge operation that have been made in adjusting the service to seasonal or other changes in conditions.

As shown in detail in our submissions in the previous case, both the total number of porter-in-charge lines, and the number of porter-in-charge car trips has decreased since the mid-1920s. Moreover, it is there shown in detail that since the present agreement in 1936, there has been a substantial decrease in the car mileage operated by porters-in-charge, and a corresponding increase in the car mileage operated by conductors. It was shown that in 1938, for example, porters in charge operated only 6.5% of the total Pullman sleeping car miles and conductors operated 93.5%. In other words, despite the frequency of changes to or from porter-in-charge operations, such operations constitute only a minor fraction of the total business.

The decrease in porter-in-charge lines has continued since the last date available at the time of our submissions in the recent cases. As of December, 1941, the total number of porter-in-charge lines was less than at any of the previous dates for which figures are available, namely 1925, 1928, 1935, 1938 and 1939.

Today, as always, the porter-in-charge practice is associated with marginal operations. When practicable to do so, it is in the interest of the public, the Company and the employes, that these marginal lines be continued. If they are to be maintained, two considerations made it necessary that they be operated with porters in charge. The first is that a line from which the traffic has virtually disappeared, as the traffic disappears on this run during the winter season, simply cannot support a conductor. The second is that the service needs are so light that it would be indefensible waste to employ both a porter and a Pullman conductor to provide care for an average of five passengers, in addition to the care given by the regular train conductor and train crew.

Never in the history of this line has such an operation been carried on as that which the conductors' organization now asks this Board to force upon the Pullman Company. The conductors' work on Line 717 has always been only a part of their total assignment; they have never been employed to work on only one car. When the assignment was reduced to a single car, as it has been reduced many times, a porter in charge has invariably been assigned.

We submit that the claim should be denied, first, because there is no rule in the agreement, express or inferential, restricting the employment of porters in charge, and, second, because under the principles laid down by the Board the reasons heretofore stated fully sustain the assignment of porters in charge to Line 717.

OPINION OF BOARD: At the outset, for the purposes of this award, the claim will be segregated into (1) Reinstatement of conductors and (2) Pay for all time lost, reasons therefor appearing in the Opinion.

This is another "porters in charge" case and, as appears, the Carrier makes the same protestations that it has made in at least ten such cases that have been decided by this Board, viz., that it has never agreed to waive, modify or in any way change its inherent right to substitute "porters in charge" for conductors on its cars whenever in its judgment it saw fit to do so.

The Supreme Court of the United States in a unanimous decision has given a final and complete answer to that contention in the following language: "Moreover, the resources of the Railway Labor Act are not exhausted if nego-

tiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules or working conditions, are 'not adjusted by the parties in conference,' either party may invoke the mediation services of the Mediation Board, Sec. 5, First, or the parties may agree to seek the arbitration provision of Sec. 7." Virginian Ry. Co. vs. System Federation No. 40. 300 U.S. 515, 81 L. Ed. 789.

Carrier admits that the employes' organization has tried time after time to have a specific provision inserted in their agreement to limit the claimed power of the Carrier to substitute porters for conductors whenever it thinks it is to its best interest to do so. It seems the time has come to say, as the previous awards of this division have indicated but not specifically said, that today the Carrier has no such unlimited power or authority. Referee Swacker in Award 779 said, "Imagination refuses to encompass the possibility that the conductors intended to agree to any such optional arrangement," as contended by the Carrier in that case, and every similar case since, including the instant one. Or as Referee Mitchell put it in Award No. 1461, "Under the Carrier's interpretation of this contract, it has the right to destroy it."

It must be taken that the rule announced in Award No. 779, viz., "* * * 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." and the burden of furnishing this information is on the Carrier is the established rule of this division.

These criteria are matters which should be common knowledge to the Carrier, and in most cases to the employes. In any event they are matters that could be and should be discussed in conference, and would serve as a comparatively simple guide to both sides in determining whether a substitution or change should be made.

Carrier contends that the Board has no right or power to impose any such burden upon it. "* * * when such a collective agreement has been made the policy of the Act (Railway Labor Act) forbids the making of other and different contracts with individuals subject to the collective contract who have designated representatives, except after negotiation with such representatives. Indeed, it is not an **onerous** requirement of the employer and presumably where changes in business conditions, etc., arise at particular locations, such as appears to be true in the present instances involved in this case, there would be no difficulty in reaching a satisfactory adjustment of the general contract applicable to the particular situation." Order of Railroad Telegraphers vs. Railway Express Agency, Civil Action 2223 U.S. District Court, Northern District of Georgia, June 26th, 1942. Involves Awards 298 and 548 of this Division.

For a much stronger reason should this language apply where a carrier seeks to deal with individuals of another craft or class, not covered by the agreement.

Contention is made that Virginian Railway Case 300 U.S. 515, 81 L. Ed. 789, and this Georgia case, supra, involved the 1926 Railway Labor Act, while the dispute in the instant case arises under the 1934 Act as amended, but the Court in the Georgia case says, "Thus, it embodied at least from the standpoint of the claim of the O. R. T. a dispute which in part arose after the effective date as amended, 1934."

But, says the Carrier, Section 6 of the 1934 Act as amended says that the thirty day notice of conference has reference only to "an intended change in **agreements** affecting rates of pay, rules, or working conditions." and, since "porters in charge" service is not covered by the **agreement** in the case at hand, Section 6 of the 1934 Railway Labor Act as amended has no application. There are at least two good answers to that contention here; (1) By the successive awards of this Board, the criteria or working formula to be

used in these cases has been written into this and all similar agreements. So it is in there. (2) Rule 55 says "all disputes between the Company and the conductors" will be conferred on "in accordance with the requirements of the Railway Labor Act."

Finally the Carrier says, we did not change any "rates of pay, rules, or working conditions" covered by the "agreement." The preamble to the agreement says it covers "rates of pay and working conditions of **all** Pullman conductors employed by the Pullman Company." This surely includes these five men on the St. Paul District. It would seem, without being facetious, that the rates of pay and working conditions of these men were rather violently changed, and they and their representatives were entitled to be heard on these matters in accordance with Rules 55 and 56 which were subscribed to in their behalf.

Since it is admitted that these conductors are now working on the run, no order for their reinstatement is necessary. If such information should happen to be incorrect, the order is that they be immediately reinstated.

(2) However, it does not follow that they are entitled "to pay for all time lost." Until this award was announced, the Carrier was not aware that any rules had been violated, as no previous award had held specifically that conferences were necessary in these cases, although Referee DeVane said, "They (Rules 55 and 56) will govern should it be determined that the work in question belongs to the conductors." That the work in this case belonged to the conductors is best shown by the fact that it had been performed **exclusively** by them for five years prior to the change on Oct. 1, 1940.

Coming then to the question whether these conductors should be allowed pay for all time lost because of the substitution of porters on line 717: It does not necessarily follow that, because we reached the conclusion above in regard to the violation of the rules that they should. Another principle that must be considered as established is that conductors' runs as such were not frozen by the agreement. There still remains some discretion with the management in using porters when the conditions laid down by this Board have been met, and this is particularly true in regard to one-car operations necessitated by substantial decrease in traffic. No good purpose would be served by a repetition of the criteria above mentioned. We do not say that the Carrier can avoid the agreement by entering into contracts with other carriers, such as was done with the Canadian Pacific in this case but such a contract having been in force for years without objection by the employes is one of the conditions, together with the others that we may well consider in determining whether the Carrier's conduct in making the change was justified. We think it only fair to say that the changed conditions here did justify the use of the porters, and, since the agreement does not provide for any "liquidated damages" in case of violation, this Board will not impose them when it concludes that there was no showing of bad faith. The Employes' contention that this was an attempt on the part of the Carrier to drive an entering wedge for use of porters on transcontinental runs is not borne out by the record. Under the circumstances, we think claim for all pay lost must be denied.

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 (1) Carrier violated the agreement and (2) Pay for all time lost is denied.

AWARD

Claim sustained as to violation of the agreement but denied as to pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1942.

DISSENT TO AWARD NO. 1883, DOCKET NO. PC-1774

Notwithstanding the holding "* * * that the changed conditions here did justify the use of the porters * * *" the Referee has found it possible to reach the conclusion that the carrier "violated the agreement." The agreement was violated, it is said, because "the conductors were entitled to be heard on these matters in accordance with Rules 55 and 56," and that the procedure set up by those rules had not been followed.

Not so much as a single word is to be found in the written agreement to support the view that it contains any limitation upon the so-called porter-in-charge practice. The evidence of a contrary intent is overwhelming. We shall not review the record on that issue. It is unnecessary to go beyond the language of the award itself to discredit it. The Opinion proceeds from the false premise that a limitation upon the practice has been written into the contract, and for the purpose of this discussion we shall deal with it on that assumption.

The Opinion holds:

(Paragraph 14) "* * * Another principle that must be considered as established is that conductors' runs as such were not frozen by the agreement.* * *"

(Paragraph 5) "* * * the rule announced in Award No. 779, * * *, is the established rule of this division." and under that rule the carrier must furnish the criteria by which the right to use porters-in-charge is determined.

(Paragraph 10) "* * * the criteria or working formula to be used in these cases has been written into this and all similar agreements. * * *"

(Paragraph 14) "* * * We think it only fair to say that the changed conditions here did justify the use of the porters, * * *"

The sum of these specific holdings is that the conditions under which the Company used porters-in-charge on this line satisfied "the criteria or working formula" which has been "written into this agreement." The holding that "the changed conditions did justify the use of the porters," is a holding that their use was simply the exercise of a right under the agreement. But the right which is thus clearly recognized is immediately nullified. The finding that the Carrier violated the agreement, and the sustainment of the claim to that extent, is naught but a declaration that the Company could exercise its right to make this change which it had "justified" as within the formula of the agreement, only with the approval of the conductors' organization, or, failing such an agreement, by resort to the National Mediation Board, as stipulated by the agreement itself—Rules 55 and 56.

In short, the result of the holdings and the finding in conflict therewith is that in order to exercise an acknowledged right under the agreement the Company must secure a change in the agreement; also, that an operation of porters-in-charge which changed conditions "did justify" as within the criteria written into the contract, could actually only be effected by following the procedure set up by Rule 56. That Rule prescribes the method for changing the agreement. It provides that "in the event no agreement can be reached the questions at issue shall be submitted to the National Mediation Board." Under that Rule by this Opinion the conductors whose runs are "not frozen by the agreement" could and would accomplish the freezing of all runs simply by refusing to agree to the use of porters, whether "justified" or not.

The Opinion declares that "There still remains some discretion with the management in using porters when the conditions laid down by this Board have been met, and this is particularly true in regard to one-car operations necessitated by a substantial decrease in traffic." Here is a one-car operation, and a showing of a "substantial decrease in traffic" was not disputed. The management therefore had discretion to operate porters-in-charge, and the operation of porters-in-charge under these changed conditions was specifically found by the Opinion to be justified. It was justified, it is declared, because it was within the formula which is said to have been written into the contract. Notwithstanding all this, the stated principle that conductors' runs are not frozen, that there is discretion to use porters within the formula of the agreement, that in this instance the use of porters is justified,—the evident conclusion of this Opinion is that the agreement was violated because the use of porters constituted a change in the agreement not effectuated in accordance with Rule 56. This is confusion and contradiction confounded.

The fundamental fallacy of the Opinion lies in its utter disregard of the necessary effect of its own findings respecting the use of porters-in-charge on this particular run. In Award No. 779, on which the Opinion purports to rely, as in every other award in this series of cases, it was held that the porter-in-charge practice, as it had existed from the very beginning, was recognized by the agreement. The sole purpose of the previous awards in requiring the carrier to furnish certain designated data respecting the disputed operation was to permit a determination of whether the operation was within, or outside, the scope of the historic practice. If it was within the practice, then the previous awards held that it was within the agreement. If it was not within the prior practice, it was a violation of the agreement. Here the Opinion purports to accept the rule which they announce, but while holding that the necessary criteria must be shown and that here they justify the disputed operation, this Opinion nevertheless holds that the porters can be used only by a change in the agreement pursuant to Rule 56. Thus would the Opinion in effect nullify the precedents which it pretends to follow.

While apparently recognizing that in resting the Opinion solely upon a failure to comply with Rule 56, its conclusion is contrary to that of all the previous awards, the Opinion seeks to throw some doubt on that score through misapprehension respecting the Opinion of Referee DeVane. What that Referee said (Award 909) about Rule 56 is as follows:

> "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 Opinion here does not quote or refer to this unequivocable statement by Referee DeVane that reliance upon Rule 56 "is untenable." Referee DeVane continued as follows:

> "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."

Quoting only the next to the last sentence above, the Opinion states the antecedent of the word "they," underlined above, to be "(Rules 55 and 56)." This is obvious error. It is perfectly clear that the reference of Referee DeVane was to "the many decisions of this Board, etc."

In conclusion we merely note, without discussion, that the Opinion makes certain misleading and confusing comments upon two decisions of the courts which, as will be found upon reading, do not have the slightest bearing on the question here in issue.

We dissent from the finding that the agreement was violated. As we have shown, the process by which this conclusion was reached is an amazing one.

/s/ R. H. Allison
/s/ C. C. Cook
/s/ A. H. Jones
/s/ C. P. Dugan
/s/ R. F. Ray