Award No. 2452
Docket No. PC-2254

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

O. R. C.—PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: Conductors J. A. Bryant, C. R. Alfring, R. J. La Fontaine and C. H. Heck, Los Angeles District, claim they are not being paid the rates of wages to which they are entitled under Rule 1 of the Agreement between The Pullman Company and its Conductors and ask immediate adjustment of their wages in accordance therewith.

EMPLOYES' STATEMENT OF FACTS: This dispute has been handled in accordance with the Agreement between The Pullman Company and Conductors in the Service of The Pullman Company. Decision of the highest ranking officer designated for that purpose is shown in Exhibit "A." Rules 1 and 3 of the Agreement are involved and are shown in Exhibit "B."

POSITION OF EMPLOYES: R. J. La Fontaine has been in the service over 19 years. J. A. Bryant has been in the service over 15 years. C. H. Heck has been in the service over 17 years. All three of these men are still on the 5-to-10-year rate of pay. C. R. Alfring has been in the service over 13 years and is still on the 2-to-5-year rate of pay. All four of these men, when not working on the road, have been performing necessary stand-by service. That is to say, they would be furloughed during times when there was not sufficient extra work to insure enough wages to enable them to get along—they are paid only when used—and then called back to extra board work as needed to fill extra assignments. These periods of furlough and recall to extra board work were so frequent as to make it impossible for the men to get any outside work with which to eke out an existence. They were tied to the job and yet not paid except when given extra work. This gave the Company a constant supply of skilled workers without having to pay for inactive service or hire and train new men. The picture of this condition of service is shown in the record of furloughs and recalls, Exhibit "C."

From the foregoing brief history it will be understood that there never was any idea in the minds of the conductors' representatives that the rules would be construed in such manner as to deprive the men of their rights to the increases in pay under the step-rates in Rule 1 when due on the pretext that they were not in active service during periods on furlough. More to the point, however, the rules do not sustain such an interpretation. The reasons given by Mr. Vroman in his decision, Exhibit "A," are contrary to the rules. "Previous practices" do not constitute a reason for ignoring rules. Neither does the excuse embodied in the last paragraph of Mr. Vroman's decision correctly state the intent of the rule. He says: "This rule clearly shows the intent of the parties to the Agreement as confining non-active service, applicable to step-rates of pay, to periods of sickness and leaves of absence of thirty days or less." There is nothing even remotely resembling that alleged

of sickness as active service in computing progressive rates of pay. This claim, being merely an attempt on the part of the Organization to gain by interpretation what it failed to secure by negotiation, is without merit and should be denied.

OPINION OF BOARD: The claim is that under the rules the Claimants, who have not left and later reentered the Carrier's service, should receive longevity pay on the basis of the time which has elapsed since their original employment, rather than on the basis of the portion of that time spent in actual or active service, which latter basis has been followed and acquiesced in for some forty years. The rules cited by the parties, with the subject headings under which they appear in the Agreement are as follows:

"RATES OF PAY

(Effective August 1, 1937)

RULE 1. **Rates of Pay.** The following rates of pay shall be applicable to all conductors employed by The Pullman Company:

Service Period	Rates Per Month	Rates Per Hour
First Year	$172.00	71.67¢
Over 1 to 2 Years	182.00	75.83
Over 2 to 5 Years	189.50	78.96
Over 5 to 10 Years	197.00	82.08
Over 10 to 15 Years	200.00	83.33
Over 15 Years	205.00	85.42

RULE 2. **Conductors Re-entering Service.** Conductors with more than one year's cumulative experience as sleeping or parlor car conductors in Pullman service at the time of re-entry into that service shall receive as a starting rate the compensation of conductors with over one to two years' service; progressive rates dating from last time employed shall be applied thereafter.

RULE 3. **Computing Service Periods.** Authorized leaves of absence of thirty (30) days or less and time lost on account of sickness shall be counted the same as active service in applying progressive rates of pay."

"SENIORITY RIGHTS AND ROSTERS

RULE 25. **Basic Seniority Date.** The seniority of a conductor, which is understood in this agreement to mean his years of continuous service from the date last employed, shall be confined to the district where his name appears on the seniortiy roster."

"MISCELLANEOUS RULES

RULE 52. **Leaves of Absence.** Leaves of absence for periods of ninety (90) days or less shall be authorized on application of conductors when service conditions permit. No deductions shall be made from the seniority of conductors for time spent on authorized leaves of absence, furloughs or sickness."

It will be noted that this controversy is over rates of pay and that the rules to be applied are those primarily relating to that subject, with such modification or explanation as may be supplied by the other rules. The primary question here is the meaning of the heading, "Service Period," under which appear the six pay classifications in Rule 1. Obviously the term, "service period," means "period of service," and our problem is to determine whether it means the entire period since the employe entered the service, or the actual amount of time during which service was actively performed. Since either is a possible meaning, the expression is clearly ambiguous and therefore open to interpretation in the light of the other rules and of past practice.

With reference to the subject, Rule 1 speaks of "service," Rule 2 of "cumulative experience" and Rule 3 of "active service." We must presume that there is a reason for the use of the various terms, but not necessarily that the intent was directly to contrast them, for the obvious purpose of Rule 1 was to provide for the longevity periods and the pay rates applicable thereto, while the purposes of Rules 2 and 3 were to provide for the special circumstances therein designated. In view of the lack of any explanation or qualification of the word "service" in Rule 1, we must consider the purpose of the three rules, and the reasons for the words used with reference to the subject in Rules 2 and 3.

Since normally the pay should match the value of the service performed, and since there is usually no reason why longevity pay should be on any other basis, it is to be expected that normally the amount of active service should be understood to control, rather than the entire time which has elapsed since the service first began, including periods in which there was no actual service. For certainly one who entered the service ten years ago and has worked continuously ever since should normally be of greater value than one who entered the service fifteen years ago but has worked intermittently a total of only nine years during that period. Yet on the basis contended for, the employe with nine years of service extending over fifteen years would be entitled to higher pay than the employe of ten years' unbroken service. It may, of course, have been the intent of the Employes and the Carrier to bring about that result in order to encourage employes to remain on the rolls although furloughed for lack of work; but in view of the usual purpose of pay to compensate service in proportion to its value, and of longevity pay to measure the value of service actually performed and to compensate it accordingly, actual service would seem the more logical basis of interpretation.

That the latter interpretation was accepted by both parties is shown by the fact that for more than forty years before this claim was filed, the Carrier had computed the periods by including only the active service of the employes and not the entire elapsed time since their entry into the Carrier's service including furloughs, and that the employes and the Organization had accepted that interpretation without question.

The record shows that prior to May 7, 1932, this was also the accepted practice in regard to seniority but that on that date a Mediation Agreement was made, effective as of May 1st, which provided that deductions should not be made from seniority for "periods of furlough caused by reduction in force." This now appears as Rule 52, which provides that "no deductions shall be made from the seniority of conductors for time spent on authorized leaves of absence, furloughs or sickness," and which therefore prevents the exclusion of time out because of sickness or leave as well as furlough. It must be noted, however, that by its express terms Rule 52 refers only to seniority and not to longevity pay.

Rule 3 applies to the latter and provides that "in applying progressive rates of pay" authorized leaves of absence of thirty days or less and time lost on account of sickness "shall be counted the same as active service." As distinguished from Rule 52, which is applicable only to seniority, Rule 3 eliminates from the computation all furloughs, and all leaves of absence of more than 30 days. The well-established rule, exclusio unius, clearly applies, especially since the parties are presumed to have intended the differences indicated by the wording of the two rules. The wording of Rule 3 is significant also in its reference to **active** service. The fact that the leaves and sick absences are to be counted **the same** as active service involves the necessary conclusion that the parties do not regard them as active service, but have nevertheless agreed that they shall be counted **the same** as active service is counted. Indeed, if they were classified as active service, no such provision would be necessary; for they would automatically be within the rules

relating to active service. The reference to their being counted the same as **active** service clearly indicates also a recognition of the fact that **active** service is what is counted for longevity pay purposes, thus excluding all inactive service not within Rule 3, namely, furloughs and leaves of more than thirty days.

That these differences were recognized and followed in practice is shown by the further fact that during the negotiation of the present Agreement in 1936, the Organization sought to have the rules amended to provide that "authorized leaves of absence, furloughs, or time lost on account of sickness, will be counted the same as active service in applying progressive rates of pay," which would have made the rule the same as for seniority. It should be noted also that the reference to **active** service in the proposed new rule indicated again the idea that active service was the fundamental consideration. However, the change was not made, and leaves of more than thirty days and all furloughs are still not "counted the same as active service" for longevity pay purposes, although they are for seniority purposes under Rule 52.

The wording of Rule 2 does not indicate any different understanding of the matter. It applies only to conductors who after more than one year's **cumulative experience** withdraw from and later reenter the Carrier's service. This clearly means that a conductor who has more than a year's cumulative experience on the job shall, upon reentering the service, receive the second period pay rate, even though he might during his original employment have attained the sixth period rate. It says further that "progressive rates dating from last time employed shall be applied thereafter." But it does not say that the service periods shall run continuously from that date without regard to active service performed after the reemployment.

The clear purpose of Rule 2 is to differentiate between those whose service is interrupted by furloughs, leaves of absence and illness, and those whose service is terminated by complete detachment from the Carrier's employ and thereafter restored by reentry into the service; in other words, it penalizes the employes for dropping out entirely by limiting him on reentry to the second pay rate, whatever rate he may have attained during his prior employment; but it encourages his return and recognizes his greater value to the Carrier than a new recruit, by starting him at the second period rate, rather than requiring him to start at the bottom again.

But Rule 2 gives the employe that benefit only after he has attained more than one year's **cumulative experience** as a conductor. It uses the latter expression in preference to the term "active service" used in Rule 3, and in exclusion of the leave and sick absence periods which under Rule 3 are ordinarily to be applied for longevity pay purposes "the same as active service." The purpose was clearly to provide that the extra allowances of Rule 3 were not to be applied under Rule 2 in determining whether the employe reentering the service was entitled to second period pay. If, instead of the expression "cumulative experience" in Rule 2, the expression "active service" had been used, as in Rule 3, it could properly be contended that the provisions of Rule 3 were applicable to Rule 2, and that in determining whether the returning employe was entitled to the second period pay, everything should be counted which Rule 3 says "shall be counted the same as active service in applying progressive rates of pay." That fact clearly explains the use of the different terms in Rules 2 and 3, and excludes any inference that the term "active service" is intended to include anything other than actual experience on the job.

The Organization relies on Award 696, while the Carrier relies on Award 905. It is not necessary to state whether this Division agrees with the reasoning of the earlier award; for the distinction made between it and Award 905 by Referee Garrison in denying the latter claim is equally applicable

to this claim, in view of the long-established and recognized usage with which the Organization as well as the Employes have been acquainted.

The claim must therefore 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 there has been 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 4th day of February, 1944.