Award No. 2575
Docket No. PC-2247

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS—
PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: Conductors E. H. Castle and A. O. Booth, Chicago Southern District, claim violation of the Agreement between The Pullman Company and Conductors in the Service of The Pullman Company, resulting from reduction in the number of men operated in regular line 509, Illinois Central Railroad, Trains 3-4 from 5½ to 5, thus compelling conductors to work in excess of the monthly requirements as established in Rule 4. Said conductors request the return of the half man removed from the line.

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. The decision of the highest ranking officer of the carrier designated for that purpose is shown in Exhibit "A." Rule 4, involved in this dispute, is shown in Exhibit "B."

On August 17, 1941, the number of conductors regularly assigned to the line in dispute was reduced from 5½ to 5. This reduction caused the remaining 5 men to work each month in excess of the 240 hours established as a month's work in Rule 4.

POSITION OF EMPLOYES: This dispute brings to light a startling situation. We learn that the carrier entertains the idea that the agreement with conductors does not prevent the establishment of a regular run on an overtime basis. The fallacy of that idea is apparent the moment we uncover the facts. Rule 4 permits of 240 hours regular work per month. There is no agreement in existence in railroad service which sets a higher limit on monthly hours of work. In addition, there is another rule in the conductors' Agreement which permits of deductions from the credits of working hours for alleged rest periods en route, a device carried forward from the old autocratic control of labor by management in the pre-organization era. These deductions range from 4 to 6 hours a night, the average deductions per month being about 60 hours. Add those 60 hours to 240 and you have a permitted maximum of 300 hours per month work on the road. That means over 41% of the total hours in a month. Still another rule permits operating conductors in regular assignment with a minimum of time at home stations of 96 hours a month in 24 consecutive hours or multiples thereof. That means the possibility of keeping conductors on the move or laying over at stations away from home to the extent of 624 hours a month. Not content with these unheard of con-

48 hour basic week. On every hand in industry as a whole examples can be found where regularly scheduled work periods exceed the basic hours work constituting a day's service, a week's service or a month's service. Of course, hours worked in excess of the basic hours are paid for as overtime. Why the conductors' Organization should suddenly at this late date take the stand it has in this particular dispute is beyond comprehension.

Although the Company is perfectly willing to let the case rest on its merits, consideration must be given the fact that it is impossible to grant the specific relief requested. According to the "Statement of Claim," the relief requested by the conductors in this dispute is "the return of the half man removed from the line." Obviously, since the conductors' operation, Chicago to New Orleans, on Illinois Central trains Nos. 3 and 4 is no longer in existence—the Chicago cars on the train now going only to Memphis—the "half man" cannot be restored to the run. Indeed, because the run in dispute no longer exists, the whole question is moot.

The Organization is seeking to have the Board set aside an interpretation and application of the rules in which it has concurred for over 22 years. Its claim is stale, is without merit, and should be denied.

OPINION OF BOARD: This dispute involves a Pullman conductor operation, line 509, between Chicago and New Orleans on the Illinois Central Railroad. The number of conductors regularly assigned to this line was reduced from 5½ to 5, resulting in the remaining five being required to work regularly 247 hours per month. The claimants asserted that this violated Rule 4 of the Agreement of December 1, 1936, which provides that, "Two hundred forty (240) hours' work . . . shall constitute a basic month's service." The demand was that the half-man be restored to the operation. After the grievance was presented to the Carrier, but before notice of filing with this Board, the half-man was restored and, subsequently, the line was discontinued. When this occurred, the claimants' organization representative advised the Carrier as follows:

> "As this question of the right of the Company under the Agreement to establish a regular line operation in excess of the monthly requirement of 240 hours is a very live issue . . . it is my desire to carry this case forward as a matter of interpretation of the rules involved."

Promptly thereafter the claim was filed here.

On this state of the record we cannot say that this is a moot case. The Railway Labor Act of June 21, 1934, Sec. 3 (i), confers upon this Division jurisdiction of "disputes . . . growing out of . . . the interpretation or application of agreements concerning . . . working conditions." In Award 697 it was held that a petitioner, in its representative capacity, may, upon proper application, have this Board pass upon a dispute involving the interpretation of rules applicable to a group of employes, even after the particular claimant has ceased to have any interest in the controversy. Awards 619, 658 and 780 are not applicable, since no claim of group interest in the subject matter was asserted in those proceedings. We shall, therefore, consider this case as one calling for the interpretation of rules.

The substantial question is whether Rule 4 of the Agreement permits the regular assignment of a Pullman conductor to more than 240 hours per month. It is the position of the Carrier that said rule has no application, and that there is no limitation upon the number of hours that may be regularly assigned, so long as the wages paid for overtime are in accordance with Rule 20 and the worker is allowed 96 hours off duty each month at his designated home terminal, as is required by Rule 17.

The Agreement contains no specific declaration of scope, such as is frequently found in contracts of this character. Its principle objective must, therefore, be gathered from the four corners of the instrument. The preamble declares that the rules cover "rates of pay and working conditions." The body of the Agreement is divided into ten separate titles. Rule 4 appears

in the sub-division entitled, "BASIC MONTH." Wages are dealt with under other appropriate headings. The subject of Rule 4 is the number of hours work that "shall constitute a basic month's service." It is well known that the word "service" is frequently used interchangeably with "work." There is no reference to wages or pay in Rule 4 or in the title under which it appears. Two hundred and forty hours work must, therefore, be considered the basis of a month for all purposes of the Agreement. This includes working conditions as well as the basis upon which the normal monthly wage shall be calculated.

Section 2 of the Adamson Law, enacted in 1916, provides that:

> "Eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard for the purpose of reckoning the compensation for services of all employes who are now or may hereafter be employed by any common carrier by railroad (with certain exceptions not here pertinent) who are now or may hereafter be actually engaged in the operation of trains used for the transportation of persons or property on railroads. . . ." U. S. C. A., Title 45, Sec. 65.

It is most significant that the above statute covers what shall constitute "a day's work **and** the measure or standard for the purpose of reckoning the compensation." This statute has been held applicable to a railroad employe whose contract calls for a stipulated compensation per month and contains no provision as to hours of service. Nelson v. St. Joseph & G. I. Ry. Co. (1918), 199 Mo. App. 635, 205 S.W. 870. Two hundred and forty hours' service during a 30 day month is on the same basis as an 8 hour day. The Carrier has no right to insist that the employes have bound themselves by a contract which would be illegal. This confirms our conclusion that the rule was intended to cover the subject of a normal month's work.

We have not overlooked the Carrier's showing that on June 1, 1943, it had in operation 65 regularly assigned overtime runs, constituting 18.3% of all its conductor operations. This is indicative of the importance of the subject with which we are dealing, but it cannot persuade us from declaring what we believe to be the clear intent of the rule. Acquiescence cannot change the meaning of a rule, though it may sometimes create a waiver or estoppel as to claimed past violations. Award 2346.

We hold that Rule 4 of the Agreement of December 1, 1936, forbids the establishment of a regularly assigned conductor's run in excess of 240 hours per month.

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 Carrier misapplied Rule 4, as claimed.

AWARD

The claim is sustained as an interpretation of Rule 4.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of May, 1944.

DISSENT TO AWARD NO. 2575, DOCKET PC-2247

The award is based upon an interpretation of Rule 4 of the agreement between The Pullman Company and its conductors. The line involved was discontinued in 1942, the question originally presented thus became moot and the award is not determinative of any claim now before the board. Nevertheless, the majority holds that Rule 4 forbids the establishment of a regularly assigned conductor's run in excess of 240 hours per month. To that conclusion we dissent.

THE BOARD'S CONCLUSION IS CONTRARY TO THE CLEAR LANGUAGE OF THE AGREEMENT

Rule 4 provides, in substance, "Two hundred forty (240) hours work * * * shall constitute a basic month's service." The majority states that 240 hours must be considered the basis of a month for all purposes of the agreement and that these purposes include working conditions as well as rates of pay. It has concluded from that premise that the Agreement forbids the establishment of a regularly assigned conductor's run in excess of 240 hours per month. It would have been easy to express such a positive limitation but none was made.

The agreement here, which states the number of hours that shall constitute a basic month does not foreclose the Pullman Company from requiring longer service, so long as it agrees to pay for work in excess of the basic period.

The purpose of Rule 4 is clearly to define the number of hours which may be required of a conductor in return for his normal monthly wage. The majority opinion states that there is no reference to wages or pay in Rule 4 or in the Title under which it appears but makes no comment on Rule 5. Two rules, numbers 4 and 5, constitute the subdivision of the agreement entitled "Basic Month." Rule 5 provides:

> "Where a regular assignment is less than Two hundred forty (240) hours' work per month, deductions shall not be made from the respective established monthly wage in consequence thereof." (Underlining supplied.)

Neither rule under this title expressly prohibits nor authorizes regular assignments in excess of 240 hours, but both in their very nature contemplate variations from the basic standard. Even standing alone Rule 4 would impeach the Board's conclusion. It is, moreover, an elementary rule that "a contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole." (17 C.J.S. Sec. 299, p. 707.) Ignoring this principle, the majority has made no effort to construe the agreement as a whole. Rule 20 provides for the payment for overtime. Taking Rules 4, 5, and 20 together, the agreement provides:

4. "Two hundred forty (240) hours' work, credited as hereinafter provided, shall constitute a basic month's service."

5. "Where a regular assignment is less than two hundred forty (240) hours' work per month, deduction shall not be made from the respective established monthly wage in consequence thereof."

20. "* * * and overtime at pro-rata hourly rates for all time in excess of two hundred forty (240) hours to two hundred seventy (270) hours; time in excess of two hundred seventy (270) hours shall be paid for at the rate of time and one-half. * * *"

It seems quite impossible that if these three provisions stood side by side anyone would seriously contend that assignments in excess of 240 hours are prohibited by the agreement. They lose nothing of their compelling force from the fact that they are not written on the same page.

Rule 21 gives further proof that assignments in excess of 240 hours were in the minds of the parties. That Rule deals with the payment of conductors who work part time on regular assignments. It provides in part that as to such men, time in excess of an average of 8 hours a day performed on regular assignments shall be paid at the hourly rate. The 240 hour basic month is built up as the Opinion states, of 30 units of 8 hours each. If the daily average in a regular assignment is more than 8 hours, it must follow that the monthly assignment is more than 240 hours. "Example No. 2" under Rule 21 is also explicit in its reference to a regular overtime assignment. This is an example of a conductor who works part time in two regular assignments, one of which exceeds an average of 8 hours a day. It is obvious from a study of the entire agreement that it contemplates assignments in excess of 240 hours.

THE BOARD'S CONCLUSION IS CONTRARY TO THE PRACTICAL CONSTRUCTION OF THE AGREEMENT BY THE PARTIES

The agreement is clear and unambiguous. But if any doubt could be read into its plain language it would be resolved by the practical construction which the parties have placed upon it from the beginning. This elementary rule is stated at 17 C.J.S. Sec. 325, p. 755:

> "Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction may be considered by the Court in construing the contract, determining its meaning, and ascertaining the mutual intention of the parties at the time of contracting; it is entitled to great, if not controlling, weight in determining the proper interpretation of the contract; and it will generally be adopted by the Court."

Also see Third Division Awards 726, 1178, 1246, 1850, and 2278.

The agreement here being considered became effective December 1, 1936. But more than 24 years ago, on September 3, 1919, the first basic month of 240 hours or less was put into effect by the Director General of Railroads (Amendment 1. Supp. 17 to General Order 27). Since 1919 there have been regular assignments in excess of 240 hours per month almost without number. Indeed, the Opinion calls attention to the fact that on June 1, 1943, 18.3% of all conductor operations of The Pullman Company were in regular assignments of more than 240 hours. The record shows that even assignments which average less than 240 hours often result in some of the conductors in the line being assigned to more than 240 hours in a month due to their starting near the first of the month and making more than the average number of round trips. It is recognized, therefore, that assignments in excess of 240 hours have been common practice for almost 25 years, and that throughout that long period the conductors have not disputed the right of the Pullman Company to make such assignments under the governing agreements. For more than 6 years under the present agreement, both parties have recognized that it does not limit the assignments to 240 hours. This practical interpretation of the parties themselves must be accepted as controlling unless, as the Board holds, there is some statute which would make such an agreement **"illegal."**

Before leaving the subject of practical interpretation another factor should be considered. The fact that overtime assignments were common during a long period before the present agreement was made at times when the parties were operating under various agreements and orders containing provisions identical with Rule 4, throws light on their intent when they made this agreement in 1936. It was stated in the Opinion of Third Division Award 1609:

> "When the present agreement was negotiated, the 'tonnage rate' had been in effect at the Reading Transfer platform for fifteen years. Whether the Organization knew about it is immaterial. It is chargeable with knowledge of the working conditions and rates of pay existing at the time the agreement was negotiated. If it wanted the practice

abolished the matter should have been made the subject of negotiation and agreement; and that is the only recourse the Organization now has. The Board cannot reform or alter the terms of the agreement. To read Rules 17, 24, and 63 as the Organization would have us read them would be to inject into the agreement a meaning that is not expressed and cannot be inferred by any fair—much less, necessary—implication."

Also see Third Division Awards 1397, 1689, and 2436.

One of such practices existing in 1936, as shown by the record, was that The Pullman Company had for 17 years been regularly assigning conductors to runs requiring service in excess of 240 hours. Throughout that period there had at all times been a provision in the governing agreement or order, that

"Two hundred forty (240) hours work shall constitute a basic month's service."

Had consideration been given to this circumstance, it would seem that the Board could not have failed to conclude that the provision was not changed in the 1936 agreement because the parties intended no change as to this feature of their relationship. It is unnecessary to labor the obvious fact that if a party to a contract finds that one of its provisions is being interpreted in a manner contrary to his intention he will see to it that that provision is so worded in subsequent agreements that misinterpretation is impossible. His failure to alter the provision is conclusive evidence that the precedent interpretation was correct. It must be said, therefore, that rather than prohibiting overtime assignments, the agreement clearly recognizes that such assignments may properly be made.

THE BOARD IS IN ERROR IN THE VIEW THAT THE PLAIN WORDS OF THE AGREEMENT AND ITS PRACTICAL CONSTRUCTION BY THE PARTIES MUST BE DISREGARDED AS PRODUCING A RESULT CONTRARY TO THE ADAMSON LAW AND THEREFORE "ILLEGAL"

The Board disposes very summarily both of the clear language of the agreement, and of its long practical construction of the parties, by citing the Adamson law, and declaring:

"The Carrier has no right to insist that the employes have bound themselves by a contract which would be **illegal.**"

The section of the so-called Adamson law thus relied upon provides, in substance, that 8 hours shall in contracts for labor and services be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of the employes affected. Throughout its history, it has been recognized that this law does not limit the number of hours which may be required.

In 1916, the four Unions of employes engaged in operating interstate trains, failing in an effort to obtain increased wages, called a nation-wide strike to begin September 4th. President Wilson then called upon Congress to enact a law to avert what he believed would be a calamitous strike. The result was the Adamson Act, enacted September 3, 1916. At the hearing on the legislation before the Senate Committee on Interstate Commerce it was recognized that the so-called "8-hour day law" would not limit the hours of labor. Mr. W. G. Lee, who was president of the Brotherhood of Railroad Trainmen, said at this hearing:

"* * * the 8 hour day, as we considered it, is practically useless so far as shorter hours is concerned unless the company is penalized in some way for working men after the expiration of 8 hours or the expiration of the time necessary to form the basic day. * * *" (Hearing before the Committee on Interstate Commerce, p. 60.)

At another point in the proceeding one of the Committee members asked Mr. Lee, who was testifying on behalf of men engaged in the operation of trains, "In order that it may be made plain, you do not understand that this in any way limits the hours of labor of an operator, do you?" And Mr. Lee replied, "Oh, it can not." (pp. 64-65, id.)

The Act provided for a Commission to study the effect of the so-called 8 hour standard workday and on December 29, 1917, this Commission made its report to the President. On page 22 of this report appears the following statement:

> "Although the distinction is elsewhere noted in this report, it is well to emphasize the fact that while the law requires eight hours to be the measure or standard of a day's work for the purpose of reckoning the compensation for services of train employes, it does not limit the actual working time to eight hours."

It is readily demonstrable that the Adamson law which is part of the Hours of Service Act does not limit the hours of labor to the basic day. The Hours of Service Act also embraces the so-called "16-hour law" which limits the hours of work of the same type of employes who are affected by the Adamson law, to 16 hours in any 24. It would, of course, be utterly ridiculous to limit men to 16 hours work if another section of the same law imposed a limitation of 8 hours. The 8 hours limitation would simply write the 16 hour limitation out of the law. It did not do so. The 16 hour law is an effective and subsisting section of the Act and was not amended or repealed by the Adamson Law. This is established by the fact that since the passage of the Adamson Law the Supreme Court has decided at least four cases under the 16 hour law and the lower federal courts a great many more.

The case of **Nelson** v. **St. Joseph & G. I. Ry. Co.** (1918) 199 Mo. App. 635, 205 S.W. 870, cited in the Opinion, holds that the Adamson Act may properly be applied to a contract providing for monthly rather than daily pay. That case concerned a contract made after the passage of the Adamson Act, which contemplated more than eight hours work per day, and the importance of the case so far as this proceeding is concerned is not that it applied the Adamson Act to a contract for monthly services, but that it recognized the right of an employer to require more than eight hours work per day provided the employes received compensation for overtime work.

The case of **Plummer** v. **Pa. R. R. Co.** (Circuit Court of Appeals, Seventh Circuit, 1929), 37 F. (2) 874, disposes of the Board's contention that the Adamson Act limits the number of hours of employment. Considering the effect of the section of the Adamson Act which we are here considering, the Court held:

> "It thus remained within the right of employers and employes to agree between themselves upon the hours to be served and the wages to be paid therefor."

Even if the Adamson law limited hours of labor, which it does not, it still would have no application here because it does not apply to The Pullman Company or to its employes. The Adamson Act by its terms applies to certain types of employes who are "employed by any common carrier by railroad." The Pullman Company is not a common carrier by railroad. The rule on this subject is commonly stated:

> "A sleeping-car company operating sleeping cars in connection with railway trains is not regarded as a common carrier, except where a statute so declares." (13 C.J.S. Carriers Sec. 904, pages 1739, 1740.)

The Federal Statutes which are intended to apply to sleeping-car companies, explicitly define the term "carrier" to include such companies for the purpose of the particular legislation. Among the statutes so written are the

Interstate Commerce Act and the Railway Labor Act. Since The Pullman Company is not a common carrier by railroad within the meaning of the Adamson Act, that Act can have no application to its employes. Further, it has been held (**Coke** v. **I.C.R.R. Co.**, 255 Fed. 190) that the Adamson Act must be limited to those actually engaged in operating trains as trainmen, and Pullman conductors would not come within this classification, even were The Pullman Company a carrier by railroad under the Act.

The majority opinion shows in unmistakable terms that it rests upon the erroneous belief that the Pullman conductors and the Company were prevented by law from contracting for regular assignments in excess of 240 hours per month and that such assignments would be illegal. This consideration was permitted to override the terms of the contract itself and the practical construction placed upon it by the parties. The majority was mistaken in its belief that the Adamson Law prohibits regular assignments in excess of 240 hours. Under the law The Pullman Company may regularly assign conductors to service totalling more than 240 hours per month and the agreement itself recognizes this right.

CONCLUSION

The agreement standing by itself, the practical interpretation given it by the parties over a period of many years, and a careful analysis of the Adamson Law, all show that the agreement does not prevent regular assignments in excess of 240 hours, and that the Opinion and Award are clearly in error.

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