Award No. 2743
Docket No. PC-2723

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS—PULLMAN SYSTEM

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Protest and claim of the Grievance Committee, Local Division No. 715, Chicago, Illinois, Order of Railway Conductors, Pullman System, because of non-compliance with the rules governing sleeping and parlor car conductors of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in not using employes who hold seniority as sleeping and parlor car conductors to perform sleeping and parlor car conductors' work in Line 100, Train No. 5, departing from Milwaukee on December 11, 1943, and subsequent dates. Line 100 was allowed to depart from Milwaukee on December 11, 1943, and subsequent dates in charge of a porter, an employe not covered by the sleeping and parlor car conductors' agreement, who performed all of the sleeping and parlor car conductor's work on the line in question.

The committee contend that under the rules of the agreement, the sleeping and parlor car conductors holding seniority on the C. M. St. P. & P. Railroad should have been assigned to Line 100 on December 11, 1943, and subsequent dates, and now ask that the conductors entitled to this work be compensated for all time lost by reason of this violation of the sleeping and parlor car conductors' agreement—and that like settlement be made for each date this line is allowed to depart without a sleeping and parlor car conductor in charge.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, its Trustees, and Sleeping and Parlor Car Conductors in its service, bearing effective date, August 1, 1943. This dispute has been progressed in accordance with the Agreement up to and including the highest officer designated for that purpose, whose letter, denying the claim, is shown as Exhibit No. 1.

Two parlor cars are operated daily on Trains Nos. 5 and 6 between Chicago and Minneapolis. Conductors are assigned to operate on Trains Nos. 5 and 6 between Chicago and Milwaukee only. Porters are operated in charge on these trains between Milwaukee and Minneapolis, performing all the duties and work of conductors covered by the conductors' Agreement. Porters are not carried on the Conductors' Seniority Roster.

When, on December 11, 1943, and all subsequent dates, the Carrier allowed Line 100 on Train No. 5 (two cars) to depart from Milwaukee in charge of porters, employes not covered by the Sleeping and Parlor Car Conductors' Agreement, it constituted violation of Rule 25, the seniority rule, and Rule 29, the bulletining rule, of the Agreement, which violation is the subject of this claim.

Rules 1, 20, 26, 46 and 49 are also directly involved in this case.

It is the position of the management that there is no rule in our schedule with the Order of Railway Conductors which requires the assignment of parlor car conductors and that the assignment or non-assignment of parlor car conductors is something within the judgment of the management.

The organization has included in support of this claim Rules, 1, 20, 25, 26, 29, 46 and 49.

Rule 1 deals only with rates of pay, therefore, would not in any way support this claim.

Rule 20 deals only with regularly assigned conductors being paid their established monthly wage on completion of their monthly assignment of 240 hours or less and would not support this claim.

Rule 25 deals with seniority date insofar as employes entering or leaving the service would be concerned and would not support this claim in any way.

Rule 26 deals with the posting of seniority rosters and would not support this claim in any way.

Rule 29 deals with bulletining of runs, providing how such runs shall be bulletined but there is nothing in this rule which requires the assignment of parlor car conductors. In the event a parlor car conductor was assigned then Rule 29 would become effective, but it would not be effective until such time as it was decided by the management that a parlor car conductor should be assigned.

Rule 46 deals with granting conferences and handling disputes. The committee was granted a conference in connection with this dispute but the rules do not in any way support the claim.

Rule 49 provides the agreement shall become effective August 1, 1943, and shall continue in force and effect until it is changed as provided for in the Railway Labor Act as amended but certainly this rule does not support the claim in question.

As above indicated the schedule of rules, inclusive of those upon which this claim is based would apply to a parlor car conductor in service, but does not apply where there would be no parlor car conductors assigned to these trains.

The organization has not set forth any rule which requires the assignment of a parlor car conductor to the trains in question and certainly the claim should be declined.

OPINION OF BOARD: On January 21, 1939, the Carrier began operating streamlined equipment on the train known as the "Morning Hiawatha" between Chicago, Illinois, and Minneapolis, Minnesota. This train took the place of the "Daylight Express" and was known as Trains 5 and 6. Parlor car Conductors were assigned on the "Morning Hiawatha" until January 7, 1941, when Porters-in-Charge were used from Milwaukee to Minneapolis and the Conductor was used only from Chicago to Milwaukee. The first contract between the Organization and this Carrier was entered into August 1, 1943. At that time Porters-in-Charge were used between Milwaukee and Minneapolis on the "Morning Hiawatha," The Carrier also had a streamlined train known as the "Afternoon Hiawatha" operating between Chicago and Minneapolis where Parlor car Conductors were used for the entire run.

The Organization contends that this work is covered by the Agreement and it is a violation of the Agreement to use Porters-in-Charge on the "Morning Hiawatha." On the other hand, the Carrier contends that it has the right to use Porters-in-Charge when the Management thinks it desirable and moreover, if the Organization intended this work was to come within the Conductors' Agreement, some objection to the use of Porters-in-Charge on this train would have been made at the time the Agreement was being negotiated, which was not made.

The Agreement here involved is identical in all respects to the Pullman Conductors' Agreements that have been before this Board. See Awards Nos. 779, 780, 781, 909, 1461, 1462, 1463, 1464, 1465 and 1883. Those awards are the converse on the facts to this claim and the principles announced in those awards govern this claim. In other words, in the above-named awards Pullman Conductors were in charge of the Parlor and Sleeping cars at the time the agreements were negotiated, and later the Carrier attempted to assign Porters-in-Charge, while in this claim Porters were in charge on this train when the agreement was negotiated, and the Organization is attempting to have Conductors put in charge. The leading award in this question is Award No. 779, which was followed in the other above-named awards.

The Organization contends the "Preamble" governs all Conductors' work. That is true. But, the question arises, what is Parlor and Sleeping Cars Conductors' work? If it is what the Organization contends, then there can be no Porter-in-Charge work.

In Award No. 779, it was said that the scope or extent of coverage of the Agreement should be ascertained by certain principles stated in certain named awards of this and other Boards.

It summarized the holdings in those awards as follows:

"a. That in the absence of limitation the agreement covers all of the work of the kind involved.

b. That the source of the right is by implication of law.

c. That any limitation claimed, not expressed in writing in the scope rule or otherwise, must be definitely proved both as to the fact and extent."

The opinion in that Award then said:

"On the other hand, as before stated and as held by other cases, unwritten limitations can exist and this case presents such an instance. As claimed by the carrier there has been a practice of sixty years standing of using porters in charge in certain situations which practice under the circumstances involved could not but have been known to the conductors when they contracted, and it is claimed that they must therefore be deemed to have acquiesced in its continuance. But this progresses us but little since the carrier, by reason of the breadth of its claim of right, has not furnished us any adequate description of the circumstances claimed to be embraced within the practice. It will not do to say that since the actions constituting the alleged practice were the result of the exercise of the will of the management that prerogative must be deemed to be a part of the practice claimed to have been adopted. It would stretch credulity too much to assume anyone agreed to that. Therefore the practice adopted must be spelled out from what had theretofore, customarily, been done, rather than the authority for doing it. This involves the characteristics of the lines involved. the reasons for the change and probably many other circumstances usually attending such changing over in the past. The record is utterly barren of information upon which we could attempt to draw a line indicating the bounds of the practice.

"The parties ought to get together and agree upon some line of damarcation, rough edged though it may be, rather than burden this board with the necessity of finding it from evidence in future cases. **Otherwise 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;** changes in traffic volume." (Emphasis ours.)

This record shows that Porters-in-Charge of Parlor and Sleeping cars have been used intermittently for over thirty-five years, and this fact must

have been known to the Organization when they contracted, and therefore they must be deemed to have acquiesced in its continuance. Moreover, this Organization knew of the interpretation placed upon the identical Agreement by this Board in Award 779 to Award 1883 involving this question and is presumed to have entered into this Agreement with the knowledge of that interpretation. It follows that the Carrier has the right to use Porters-in-Charge on this train unless conditions have changed in accordance with the criteria above quoted from Award No. 779.

We do not mean to say that because Porters were in charge of the Parlor Cars on this train at the time of the Agreement it became frozen as such. But since the Organization is seeking to make the change, it should show such a state of facts as are set forth in the criteria in Award No. 779. The Organization does make a comparison with the "Afternoon Hiawatha," but it is presumed from the record that the "Afternoon Hiawatha" was in operation when the Agreement was executed. There is no showing that there was any change on the "Afternoon Hiawatha" after the Agreement was executed. Nor do we think that the occupational classification of the I. C. C. for Reports in response to Public Resolution No. 13, Seventy-second Congress, approved March 15, 1932, govern because the Response definitely states that the Classifications are not made for the purpose of determining jurisdictional questions. It is a reporting regulation.

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 claimants have failed to show a 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 13th day of December, 1944.