# Award No. 3832
# Docket No. PC-3718

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Adolph E. Wenke, Referee**

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## PARTIES TO DISPUTE:

## ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

## THE PULLMAN COMPANY

**STATEMENT OF CLAIM:** The Order of Railway Conductors, Pullman System, claims for and in behalf of the conductors assigned to Line 2005, Atlantic Coast Line Trains Nos. 76-75-76, Tampa-Jacksonville-Sarasota, that the Operation of Conductors Form 93.126 effective Dec. 7, 1945, concerning Line 2005, was made out in violation of Rule 10 (c) of the Agreement of September 1, 1945. We contend (1) that by this violation the regularly assigned conductors in Line 2005 as of Dec. 7, 1945, were deprived of relief as shown in the Operation of Conductors Form for the line effective May 12, 1946, and the request that each of these conductors be compensated for each additional trip that they were required to make by reason of this violation; and (2) that the extra conductors of the Tampa District be compensated for the relief trips as shown in the Operation of Conductors Form effective May 12, 1946, which they were not permitted to work by reason of this violation, between Dec. 7, 1945 and May 12, 1946.

**EMPLOYES' STATEMENT OF FACTS:** There is in evidence an Agreement between The Pullman Company and conductors in its service bearing effective date of Sept. 1, 1945. There is attached copy of "Memorandum of Understanding"—Subject—"Compensation for Wage Loss," dated August 8, 1945, as Exhibit No. 1. This dispute has been progressed up to and including the highest officer designated for that purpose, whose letter denying the claim is attached as Exhibit No. 2.

Rule 10 (c) of this Agreement reads:

> " (c) Conductors, within the spread of their assignment, may be required to lift transportation for cars other than those they will handle on the road without additional credit or pay, but their responsibility therefore shall cease when released from receiving serivce. When conductors are available, they shall receive for the cars they will handle on the road." (Underscoring ours.)

Between Dec. 7, 1945, and May 12, 1946, the car in Line 2005 was open for occupancy by passengers at 9:15 P.M., but passengers for that car were received and their transportation lifted up until 9:50 P.M., by the station duty conductor, from Dec. 7, 1945, to March 1, 1946, and by the conductor in Line 6700 from March 1 to May 12, 1946. Each conductor in Line 2005 was scheduled to report for duty effective Dec. 7, 1945, at 9:35 P.M., commence receiving passengers at 9:50 P.M., and depart at 10:00 P.M.

The Operation of Conductors form effective May 12, 1946, provided that the Pullman conductor in Line 2005 would report for duty at 9:00 P.M., receive passengers 9:15 P.M., depart 10:00 P.M.

December 7, 1945, to May 12, 1946, was in violation of Rule 10 (c). Further evidence of bad faith on the part of the conductors' Organization is found in their request that not only the conductors regularly assigned to Line 2005 as of December 7, 1945, be compensated for the relief trips to which it claimed these conductors were entitled, but also that the extra conductors of the Tampa District be paid for these identical trips. Thus, the Petitioner claims additional payment not only for the conductors regularly assigned to Line 2005, who have already been credited and paid for all work performed in that operation, but for the extra conductors of the Tampa District as well.

The Company submits that neither the regularly-assigned conductors nor the extra conductors of the Tampa District are entitled to any additional compensation. First, neither the regularly-assigned conductors nor the extra conductors of the Tampa District were deprived of any work. As previously pointed out, the change which the Company made following Conductor Wood's protest of May 3, 1946, was to provide the conductors with an operation which would be satisfactory to them. The Company, however, could very well have reverted to the operation in effect prior to December 7, 1945. Had the Company done so the operation would have been continued as a 3-man assignment and the conductors could hardly contend that anyone was deprived of work. The change which the Company elected to make was clearly favorable to the conductors and certainly should not be used as a basis for penalizing the Company.

Additionally, the Organization did not present its claim until June 10, 1946, a period of approximately seven months after the operation complained of was placed in effect and approximately one month after the condition complained of had been corrected. This fact together with the fact that the operation complained of was instituted at the request of the conductors of the Tampa District with the knowledge and consent of the conductors and the conductors' Organization, the Company submits, precludes an award favorable to the conductors. Numerous awards of the Third Division of the National Railroad Adjustment Board supports this position of the Company. Among these are Awards Nos. 116, 1289, 2137 and 2576.

In Award 116 involving the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Indianapolis Union Railway Company, the Board held, under **OPINION OF BOARD** as follows:

> "Furthermore, if employe Tompkins was of the opinion that the position of General Foreman was not an official position at the time it was created in 1930, he or his representatives should have immediately insisted that the positions be bulletined and thus brought the question to an issue at the proper time and in an orderly manner. While it is true that Mr. Tompkins was not compelled to demand that he displace General Foreman Hess in 1930, yet it was his duty as an employe who now seeks protection under the Railway Labor Act and under the Agreement between the carrier and employes, to have protested the irregularity of any action taken by the carrier. Briefly this Division is of the opinion that employe Tompkins has slept on his rights."

Consideration should be given by the members of the Board to Award No. 1289, Third Division Docket No. CL-1202, in which Award, under **OPINION OF BOARD**, the Board held as follows:

> ". . . We do not hold that mere delay will preclude this Board from considering the merits of a claim, but what we do hold is, where there has been no protest of the carrier's acts and the delay has been so extended that the carrier is justified in believing the employes have concurred in its acts, and in this belief the carrier at the demand of the employes increases rates of pay, it is too late thereafter for the employes to demand of this Board that positions, long out of existence at the time the increase in pay was granted, or the work of these positions, should be restored under the increased rates of pay.

"While all the elements of a technical estoppel are perhaps not present, nevertheless, we are of the opinion that the doctrine of laches should preclude the claimant from now obtaining from this Board the rights it asserts."

Further, Award 2137, Third Division Docket No. CL-2141, in the dispute between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Chesapeake and Ohio Railway Company bears out the position of the Company in this dispute. In Award 2137, under **OPINION OF BOARD**, the Board held as follows:

"It is true that repeated violations of a rule do not change it. But repeated violations acquiesced in by employes may bring into operation the doctrine of estoppel. This is particularly true where the controversy concerns simply rates of pay. Wages are not accepted over a long period of time without protest if an employe believes that he is not receiving what is due him. Employes should not permit an employer to continue in the belief that the agreement has been complied with and then after a long lapse of time enter a claim for accumulations of pay. Awards 1289, 1806, 1811."

Also pertinent to this dispute is Award 2576, Third Division Docket No. CL-2556, involving a dispute between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes and the Chicago, Rock Island and Pacific Railway Company. In that Award, under **OPINION OF BOARD**, the Board held:

". . . From the awards of this Board in which this subject has been considered we think the following conclusions may be deduced. Where one party, with actual or constructive knowledge of his rights, stands by and offers no protest with respect to the conduct of the other, thereby reasonably inducing the latter to believe that his conduct is fully concurred in and, as a consequence, he acts on that belief over a long period of time, this Board will treat the matter as closed, insofar as it relates to **past transactions.** But repeated violations of an express rule by one party or acquiescence on the part of the other will not affect the interpretation or application of a rule with respect to its **future operation.** Awards 1806 and 2137."

In this dispute the conductors not only failed to protest immediately the change of December 7, 1945, in Line 2005, but in fact instigated that change. It is likewise true that the employes permitted the Company to continue in the belief that the operation effective December 7, 1945, was a proper operation. In fact, the record indicates that the conductors and their Organization considered it a proper operation. Further, on May 3, 1946, when one of the conductors of the Tampa District first indicated to Management that the conductors felt that the conductor operation designated as Line 2005 was in violation of Rule 10 (c), Management promptly changed that operation in such manner as to avoid further controversy and to provide an operation highly satisfactory to the conductors. Not until approximately one month after the condition complained of had been changed did the Organization present its claim. Conclusively, these circumstances preclude an award favorable to the Petitioner.

## CONCLUSION.

The facts as hereinabove set forth clearly support the Company's position in this dispute; namely, that neither the conductors regularly assigned to Line 2005 as of December 7, 1945, nor the Tampa District extra conductors are entitled to any additional compensation for the period December 7, 1945, the date Line 2005 was changed in accordance with the wishes of the Tampa District conductors, to May 12, 1946, the date the Company changed that operation following the protest of Conductor Wood. We have shown that the operation complained of was placed in effect in accordance with the request of the Tampa District conductors with the knowledge and consent of the conductors' Organization. Neither the conductors' Organization nor any

conductor of the Tampa District protested that operation for a period of approximately six months, or until May 3, 1946, at which time Conductor L. J. Wood of the Tampa District, one of the conductors who petitioned the Company to make the change of December 7, 1945, informed District Superintendent Wallace that it was the opinion of the conductors that they should be permitted to receive all of the time at Tampa for the car of Line 2005 which they would handle on the road. The question of whether or not the operation of Line 2005, effective December 7, 1945, violated Rule 10 (c) was not in controversy. Effective May 12, 1946, the Company changed the operation to permit the conductors to receive all of the time, an additional 20 minutes, for the car they would handle on the road and added relief in order to comply with the provisions of Rule 16.

We have shown that the Organization did not present its claim to correct what it believed to be a rule violation since at the time the claim was presented the operation complained of had been corrected for approximately one month. The claim presented by the conductors' Organization clearly is an attempt to assess a penalty against the Company for a situation for which the conductors' Organization and the conductors in whose behalf the claim is made share the responsibility with the Company. The conductors' Organization has a responsibility to its Agreement. To request a change in operation, slyly then to allow this operation to continue for a period in excess of six months without one word of protest as to the validity of the operation under the rules and then maliciously to charge the Company with a violation of the rules and to demand double pay for work not performed is in complete disregard of all things ethical and equitable. On the basis of the facts herein presented and numerous awards of the Third Division which clearly support Management's position it is indeed surprising that the General Chairman of the Order of Railway Conductors, Pullman System, has progressed this claim on appeal to the Board. We believe the facts in the case show the claim to be without merit and require its denial.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The Order of Railway Conductors claims the Carrier violated Rule 10 (c) of their Agreement in its operation of Line 2005, Atlantic Coast Line trains Nos. 75 and 76, by its assignment of conductors therein. It asks that the conductors regularly assigned in Line 2005 be compensated for additional trips they were required to make by reason of being deprived of relief days and that the extra conductors, who were available and entitled thereto, be compensated for the relief trips of which they were deprived by reason thereof.

**Rule 10 (c)** of the Agreement provides:

> "Conductors, within the spread of their assignment may be required to lift transportation for cars other than those they will handle on the road without additional credit or pay, but their responsibility therefor shall cease when released from receiving service. When conductors are available, they shall receive for the cars they will handle on the road."

**Rule 15** provides:

> "Specific layovers shall be prescribed in operating schedules for regular assignments."

**Rule 16** provides:

> "Not less than 96 hours off duty each month in 24-consecutive-hour periods, or multiples thereof, shall be allowed at designated home terminal, which shall be the point where conductor's name appears on roster, except where, for convenience of conductors, the management designates the opposite terminal."

**Rule 24** provides:

> "Road service performed by conductors on specified layover or relief days shall be paid for in addition to all other earnings for

the month. When excess hours are included in payment on day's service basis they shall not be paid for as overtime."

The record establishes that sometime prior to December 7, 1945, a conductor suggested to the Company that they could save considerable overtime if Atlantic Coast Line trains Nos. 75 and 76 were rerouted to run Tampa-Jacksonville-Sarasota-Tampa instead of Tampa-Sarasota-Jacksonville-Tampa and leave Tampa in the evening instead of in the morning. Following this suggestion the change was made and, effective December 7, 1945, the conductor assignments in Line 2005, which operates in said trains, were as follows:

| | ACL Train | Time | Day | Elapsed Time | Sleep | Time on Duty | Layover |
|---|---|---|---|---|---|---|---|
| Report Tampa | 76 | 9:35 PM | 1 | | | | |
| Released Jacksonville | " | 7:15 AM | 2 | 9:40 | *** | 9:40 | 13:30 |
| Report " | 75 | 8:45 PM | 2 | | | | |
| Released Sarasota | " | 10:15 AM. | 3 | 13:30 | 3:00 | 10:30 | 8:00 |
| Report " | 76 | 6:15 PM | 3 | | | | |
| Released Tampa | " | 9:30 PM | 3 | 3:15 | *** | 3:15 | 24:05 |
| | | | | 26:25 | 3:00 | 23:25 | 45:35 |

Between December 7, 1945, and May 12, 1946, the cars in Line 2005 were opened for occupancy by passengers at 9:15 P. M. During the period from December 7, 1945, to March 1, 1946, the passengers for these cars were received and their transportation lifted, up to 9:50 P. M., by the Station Conductor and from March 1, 1946, to May 12, 1946, by the conductor in Line 6700. Since the conductors in Line 2005 were available, this was contrary to that part of Rule 10 (c) which provides: "When conductors are available, they shall receive for the cars they will handle on the road."

To correct this condition the Company, effective as of May 12, 1946, changed the assignments in Line 2005 to the following schedule:

| | ACL Train | Time | Day | Elapsed Time | Sleep | Time on Duty | Layover |
|---|---|---|---|---|---|---|---|
| Report Tampa | 76 | 9:00 PM | 1 | | | | |
| Released Jacksonville | " | 7:45 AM | 2 | 10:45 | *** | 10:45 | 13:00 |
| Report " | 75 | 8:45 PM | 2 | | | | |
| Released Sarasota | " | 9:45 AM | 3 | 13:00 | 3:00 | 10:00 | 8:55 |
| Report " | 76 | 6:40 PM | 3 | | | | |
| Released Tampa | " | 9:30 PM | 3 | 2:50 | *** | 2:50 | 23:30 |
| | | | | 26:35 | 3:00 | 23:35 | 45:25 |

This change permitted the conductors in Line 2005 to receive passengers and lift their transportation for the cars they handled on the road. It will be observed, however, that the change cut the layover in Tampa below 24 hours. This necessitated making it a three and one-half instead of a three conductor assignment in order to provide the conductors thereof with the four relief periods as provided by Rule 16.

It thus becomes clear that the Company's violation of Rule 10 (c), during the period from December 7, 1945, to May 12, 1946, deprived the regularly assigned conductors in Line 2005 of their relief periods, as provided by Rule 16. They were required to work on the relief days that should have been provided for them and for which, under Rule 24, they should have been compensated. Likewise, extra conductors who were available and entitled to this work under Rule 38 (a), and who were deprived thereof because it was performed by regularly assigned men in the run, have been adversely affected thereby. They are likewise entitled to be compensated therefor. This does not constitute a double penalty as the Company, in any event, should have paid the conductors who performed the work. This award only requires it to do so plus a penalty by requiring it to pay the extra available conductors entitled thereto for its failure to give them the work.

While the record shows that the conductors assigned to Line 2005, Atlantic Coast Line trains Nos. 75 and 76, desired and urged the change in its operation so they might have an evening instead of a morning reporting time and that the General Chairman of the Order, who was familiar with the line, was informed of the change and made no objection thereto, nevertheless, the actual changes in the operation of Line 2005 and in the assignments therein were completely under the control of the Company whose duty it was to comply with the rules of the Agreement. It was the Company's responsibility to fix the schedule of work and reporting times so that they would not violate the rules of the Agreement. Since it failed to do so it must be held responsible therefor.

The Company contends the claim was made out of time. It was made on June 10, 1946. As has already been said it is the responsibility of the Company to comply with the rules of the Agreement and if it fails to do so, then it becomes obligated under the provisions thereof. No great lapse of time is here involved. As a matter of fact the record indicates the claim was made shortly after the violation was discovered and corrected. See Award 2611. Nor is the question as to the claimant's right to compensation moot. We find the claim should be sustained.

**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 this 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 Company violated the Agreement.

AWARD

Claim sustained as to both (1) and (2).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 26th day of March, 1948.