Award No. 6029

Docket No. PC-6147

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: Claim of the Order of Railway Conductors, Pullman System, for and in behalf of Conductors W. M. Hadley, H. P. Odom and A. W. Hyatt, and for and in behalf of certain extra conductors, San Antonio District, that:

1. During the period April 29 to May 31, 1951, inclusive, Conductors W. M. Hadley, H. P. Odom and A. W. Hyatt, San Antonio District, were assigned to the conductor run on T&NO Trains Nos. 8-171 and 172-7, designated as Line 3497, which assignment included relief periods of three hours in each direction. Certain extra conductors were also assigned as relief conductors to this Line in the course of the period named.

2. Conductors W. M. Hadley, H. P. Odom, A. W. Hyatt and each extra conductor employed in this Line be credited and paid under applicable rules for three hours for each trip made in either direction during the period named.

3. During the period April 29 to May 31, 1951, inclusive, both regular and extra conductors assigned to this run were required to perform Station Duty, receive for cars on SP Train No. 6, including local Houston-New Orleans car, Line 3491, beginning at 8:30 P. M. in the Houston depot.

4. Conductors W. M. Hadley, H. P. Odom, A. W. Hyatt and each relief conductor, employed for the receiving service described in paragraph 3 above, be credited and paid for seven hours for each performance of such receiving service in the period named.

5. Rules 6, 10, 12, 13, 22, 25 and 38 have been violated.

Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment. The exercises of such judgment is a prerogative of the management and unless it has been exercised in an arbitrary, capricious or discriminatory manner we should not substitute our judgment for that of the management.

It is the position of the Organization that where an employe has filled a position for more than 30 days, without being disqualified under Rule 2-A-3, he must be deemed to have sufficient fitness and ability therefor. We decline to adopt such a principle in a case where the employe was informed that his services were not satisfactory during his prior occupancy of the position. Such was the case here and no other reason appearing for considering management's judgment to have exercised arbitrarily, capriciously or discriminatively, the claim is without merit.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1952.

31-32. Conductor Smith was frequently required to remain on duty beyond his scheduled release time after arrival of train No. 31 in Pocatello to deliver diagrams and reports to the conductor on UP train No. 11. The Organization contended that Conductor Smith should be paid for such services performed after arrival in Pocatello as station duty under Rule 10 (b). The Third Division, however, rejected the contention of the Organization and under **OPINION OF BOARD,** in Award 3844, stated in part as follows:

> "There can be no doubt that on those occasions when train No. 11 was on time that the mentioned service was treated as incidental to the assignment. When train No. 11 was late that was also of necessity under conditions obtaining at Pocatello and incident of the assignment performed with delay.
>
> It is suggested as against this that after arrival he was required to lift transportation for these cars which were to go forward on train No. 11. This does not alter the conclusion arrived at. Rule 10 (c) provides in part as follows:
>
> > '(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 therefor shall cease when released from receiving service. * * *'
>
> If he engaged in receiving service he was required to do so under this provision. The cars were, from that point on, other than cars to be handled on the road by this conductor. The work performed was within the spread of the assignment."

Thus, the Board held that lifting transportation for cars to be carried out of Pocatello on train No. 11—cars other than those Smith would handle on the road—was work within the spread of Smith's assignment and that Smith was not entitled to additional credit and pay for such work because of the provisions of Rule 10 (c). Yet the work of lifting transportation for the cars of train No. 11 was not performed by Smith while receiving for cars he would handle on the road. It is apparent, therefore, that the representative of the Organization was in error in contending that a conductor can only be required to lift transportation for cars other than those he will handle on the road without additional credit and pay while he is receiving for cars he will handle on the road.

Rule 12. Payments for Hours Credited was also introduced into this dispute for the first time by the Petitioner in its letter of appeal to the Third Division. This Rule provides that all hours credited shall be paid for in accordance with the rules covering basis of payment. Since Management paid conductors operating in Line 3497 for all hours credited to them in that assignment in accordance with the rules covering basis of payment, the Petitioner cannot successfully show that there has been any violation of Rule 12 by Management in this dispute.

Rule 13. Rest Periods En Route permits Management to make a maximum rest deduction of four hours for each night in regular service where the spread of the trip includes the hours from midnight to 6 A. M. and the trip is of at least 12 hours' duration from scheduled reporting time to scheduled release time. The Members of the Board will note from chart appearing on page 2 of this submission that the elapsed time of the trip from San Antonio to Galveston was 13 hours in duration and embraced the hours from midnight to 6 A. M. Likewise, the trip from Galveston to San Antonio embraced the hours from midnight to 6 A. M., and the elapsed time was 16:30 hours. Thus, under the provisions of Rule 13, Management was privileged to make a 4-hour deduction for rest in each direction in Line 3497. The Company, however, made only a 3-hour rest deduction in each direction and, therefore, fully complied with the provisions of Rule 13.

Additional coroboration of the above-stated principle is contained in Award 1397 of the Third Division as follows:

> "The practice complained of is one of long standing. During its continuance there have been revisions of the contract, without correction, if correction be needed, of this practice. That is persuasive that, for eleven years or more, the employes themselves have not regarded it as a violation of their contract."

Consideration should also be given to Third Division Award 2436, in which Award, under **OPINION OF BOARD**, the Board held as follows:

> "Where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforcible to the same extent as the provisions of the contract itself. See Awards Nos. 507, 1257 and 1397."

CONCLUSION

The record in this dispute supports the position of the Company. The Company has shown that none of the rules cited by the Organization supports its position in this dispute. The Company has further shown that the operation in question was in effect for many years without protest from the conductors' Organization. This Board has repeatedly held that the burden of showing a violation of the Agreement rests with the Organization alleging the violation. In this dispute the Organization has failed to meet that burden. This Board in its **OPINION** in Award 4758 made the following statement:

> "The Claimant in coming before this Board assumes the burden of presenting a theory which, when supported by the facts, will entitle him to prevail. The Board cannot accept the burden of finding a reason to grant relief when the Claimant fails to make out a case. See Awards Nos. 4011, 3523, 3477, 2577."

The Organization in this dispute has advanced no theory supported by facts which would entitle it to prevail. The claim is without merit and should be denied.

The Company affirms that all data submitted herewith in support of its position have heretofore been submitted in substance to the employes or their representative and made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants held an assignment involving the handling of a car or cars on Trains 7 and 8 between San Antonio and Houston, and the handling of a different car or cars on Trains 171 and 172 between Houston and Galveston. The position of the Organization that such was not a proper assignment under the rules is based in part upon the proposition that, while conductors of one seniority district may properly be given an assignment to service originating in their own seniority district which carries them into or through other seniority districts, it is only proper where the train or Pullman equipment is operated through between the points involved. We find no rule in the Agreement which supports that proposition and, since this same assignment has been in effect most of the time since 1936, it may not properly be said that past practice supports it.

This position of the Organization is also based in part upon the proposition that the service between Houston and Galveston properly belonged to conductors in the Houston seniority district under the seniority rules and could not properly be assigned to conductors of the San Antonio seniority district. We are not here confronted with a claim by Houston District conductors but by a claim relating to the pay due to the conductors

who accepted the assignment and performed the service. Thus, we decline to pass upon that contention because even if correct it could hardly affect the application of the pay rules to the service performed.

This was not a new assignment so our Award No. 4647, relied upon by the Organization, is not applicable.

Since the elapsed time in each direction on this assignment was more than 12 hours, the three-hour relief for rest enroute was proper under Rule 13 and the claim for pay for such time is without merit.

There is also a claim for pay for station duty at Houston due to these conductors being required to receive for cars on S.P. Train No. 6 until arrival of that train. Since the assignment did not provide a layover period at Houston and since no rule requires the establishment of a layover period at that point, such service was performed within the spread of their assignment and hence under Rule 10 (c) constitutes service which may be required without additional credit or pay.

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 Agreement was not violated.

AWARD

Claim denied.

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