Award No. 7406
Docket No. PC-7502

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor W. R. DuVall, Fort Worth District, that:

1. Rule 38 of the Agreement between The Pullman Company and its Conductors was violated by the Company on September 2, 1954, when the Company assigned Conductor T. E. Talley, Dallas District, to extra road service San Antonio through Fort Worth (a point within 50 miles of Conductor Talley's home station, Dallas) and thence to Cheyenne and deadhead Cheyenne to Denver at a time when Extra Conductor DuVall, Fort Worth District, was available for and entitled to assignment Fort Worth—Cheyenne—Denver.

2. Conductor DuVall be credited and paid under applicable Rules of the Agreement for the time made by Conductor Talley (Fort Worth to Cheyenne in extra road service and Cheyenne to Denver deadhead) as a result of the Company's improper assignment.

EMPLOYES' STATEMENT OF FACTS:

I.

The home station of Conductor Talley is Dallas.

Fort Worth is a point within 50 miles of Dallas.

On September 2, 1954, Conductor Talley was a "foreign district" Conductor at San Antonio, having completed an assignment terminating at San Antonio.

On this date Conductor Talley was given an assignment in extra road service San Antonio through Fort Worth to Cheyenne and thence deadhead to Denver.

At the time this assignment was given to Conductor Talley, Extra Conductor DuVall, Fort Worth District, was available for assignment Fort Worth—Cheyenne—Denver.

CONCLUSION

In this ex parte statement the Company has shown that Rule 38 (a) is the controlling rule in this dispute and that the provisions of paragraph (e) are not applicable to the facts of this case. Also, the Company has shown that Third Division awards, with especial reference to Award 6093, support Management's position that extra Conductor T. E. Talley, Dallas District, was entitled to the trip San Antonio—Cheyenne, which trip represents the assignment an extra conductor of the San Antonio District would have received had an extra conductor of that district been available. The Organization's contention that Conductor Talley's assignment should have terminated at Fort Worth and that extra Conductor DuVall of the Fort Worth District should have been assigned to service Fort Worth—Cheyenne and to a deadhead trip, Cheyenne—Denver, is without merit and should be denied.

All data presented herewith in support of the Company's position have heretofore been submitted in substance to the employe or his representative and made a part of this dispute.

(Exhibits not reproduced).

OPINION OF BOARD: The facts in this case are not in dispute. Claimant Conductor DuVall was employed in Carrier's Fort Worth District. Conductor T. E. Talley was employed in the Dallas District. At the time this dispute arose, there were two extra assignments out of San Antonio with only one extra conductor available. The parties are in dispute as to whether the second extra assignment should have been given to Claimant Duvall or to Conductor Talley, who was assigned. The claim is based upon an alleged violation of Rule 38(e).

Rule 38 governs the operation of extra conductors and provides in part that,

> "(a) All extra work of a district, including work arising at points where no seniority roster is maintained . . ., shall be assigned to the extra conductors of that district when available, except as provided in paragraphs (d) and (e)."

(Paragraph (d) is not involved in the instant case.)

> "(e) This Rule shall not operate to prohibit the use of a foreign district conductor out of a station in service moving in a direct route toward his home station or to a point within a radius of 50 miles of his home station."

The plain meaning of this language is that, even where there are extra conductors available, the Carrier may assign a foreign district conductor, if the assignment will bring him to or near his home station. This language in Paragraph (e) is permissive; it is not mandatory. But the answer to Q-7 under this paragraph makes clear that a foreign district conductor cannot be deadheaded from one district to another to take an assignment where an extra conductor is available, **except where the foreign district conductor would be in a direct route to his home station.**

If no extra conductor of the district is available, as in the instant case, this language does not restrict the use of foreign district conductors. Thus paragraph (e) was not controlling in the assignment of Conductor Talley on the date in question.

In short, Rule 38 deals specifically with the "operation of extra conductors." Here no extra conductors were available and none was involved. We fail to see that there was any violation of the Agreement (Award 6093).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 14th day of September, 1956.

DISSENT TO AWARD NO. 7406, DOCKET NO. PC 7502

The action of the majority herein is ill-advised and incorrect, and completely disregards —

1. The issue involved.

2. The clear intent of Agreement Rule 38(e).

3. The parties' agreed upon interpretation of Rule 38(e).

4. Carrier's own unilateral understanding of intended application.

5. The applicable precedent Awards.

The Employes' Ex Parte Submission sets out in detail and in tabular form the factual background of this dispute and that involved in Award 6617 wherein the Employes were sustained. That record shows both disputes to be as nearly identical as any two disputes possibly can be. The record further shows Award 6617 to be an applicable precedent Award involving the same parties, the same Agreement and the same rule.

The brief submitted on behalf of the Employes directs attention to the principle that applicable precedent Awards must be given notice and support. That is a principle which Carrier Members, in their numerous dissenting opinions, have repeatedly and earnestly demanded be adhered to. Particular attention is directed to Award 2517 wherein we correctly held that:

> "Unless palpably wrong this Board is never warranted in overruling, in a subsequent dispute between the same parties, a previous award construing the identical provisions of their contract. . . ."

That brief further directs attention to other applicable Awards, including Award 6784, one of several which cite and reaffirm the principles enunciated in the Memorandum to Accompany Award 1680.

Subsequently, however, the Referee proposed a denial Award wherein, as here, Award 6617 is completely disregarded. The only authority cited by the Referee is, as here, Award 6093 and Q-A 7 to Rule 38(e) of the Agreement.

The author of this dissent requested and was granted an opportunity to again review the record with the Referee. All of the points hereinbefore referred to were again pointed out. Attention was again called to the Referee's responsibility to set out in his proposed Award wherein, if at all, the instant case was in any respect at variance with that involved in Award 6617. Again attention was called to the fact that Award 6093 was also urged by the Carrier in Award 6617 and overruled. The applicability of the example set out under Q-A 2 of Rule 38(e) was pointed out, as was the obvious inapplicability of Q-A 7, which the Referee cites, and which is inapplicable for the simple reason that no deadheading was involved.

Yet despite all this the Award here in question utterly and unwarrantedly disregards, — (1) — applicable precedent, but instead relies upon one Award which involved an entirely different rule and issue, and — (2) — an agreed upon interpretation which has no application in this dispute.

Because the action of the majority is ill-advised, inept and incorrect, it is necessary and appropriate that this be one of the rare occasions for a dissenting opinion by a Labor Member of this Division. A review of the numerous dissenting opinions written by Carrier Members of the Division, — eighty-eight during the past three years — discloses repeated and earnest demands that this Division recognize precedent Awards. Yet here they find themselves in the untenable position of tacitly admitting that they do not propose to adhere themselves to their own oft-repeated professions.

One of the Carrier dissents here in reference is directed to Award 7370. In that Award the Labor Members also filed a concurring opinion. That concurring opinion includes the full text of a recent arbitration Award which has some reference to Award 6695 of this Division. What the majority held in that arbitration Award has forceful application to the matter of the effect of this Board's Awards, and the following merits quotation here:

> "The carrier urged that Award 6695, as part of an administrative as distinguished from a judicial proceeding is not entitled to the force of res judicata. This, however, by-passes the effect of Section 3 (m) of the Railway Labor Act, which states:
>
> > 'The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.'
>
> "It is true, as the Carrier pointed out, that a number of referees in Adjustment Board cases have overruled prior decisions on the grounds generally that such decisions were unsound in fact or not based on good reasoning. In none of the references to such cases, as submitted in evidence before us, was any mention made of Section 3 (m) of the Act, nor of the fact that Congress as a matter of policy while providing no appeal from Adjustment Board awards nevertheless made such awards final and binding on the parties. By what authority subsequent Adjustment Boards may ignore this clear legislative direction we can not understand, nor can we get any enlightenment from the quoted portions of the opinions accompanying the awards which overrule prior awards in disputes between the same parties on the identical question."

To quote the Carrier Members' own words, in their dissent to Award 6688 —

"The improper and unnecessary confusion which would result if this decision were to be given faith and credit would be harmful and unfortunate."

R. C. Coutts
Labor Member—Third Division

N R A B

Chicago, Illinois
September 20, 1956

CONCURRING OPINION (AWARD 7406): As the majority holds in the instant Award, "Rule 38 deals specifically with the 'operation of extra conductors'." Paragraph (a) thereof protects all extra work of each district to available extra conductors of that district, with certain exceptions. Paragraph (e) is specified as an exception. Admittedly, no extra conductor of the San Antonio District was available in the instant case. Obviously, therefore, paragraph (a) of Rule 38 was not applicable and paragraph (e), which is an exception to paragraph (a), did not apply.

Award 6093, cited by the majority in the instant Award and involving the same parties and agreement, is specific in interpreting paragraph (e) of Rule 38 as not restricting the use of foreign district conductors to the service specified therein if no extra conductors of the district are available. It cites Question and Answer 7 under paragraph (e) as confirming that view.

The Labor Member's dissent to the instant Award (7406) laments that the majority gave no reason therein for not following Award 6617, which latter Award he states overruled Award 6093. There is no requirement so to do. In any event, the dissent to Award 6617 contains sound reasons for its not being followed as a precedent.

No rule places any restriction on the use of foreign district conductors when no extra conductor of the district is available. In many Awards this Division has held that a Carrier may be held accountable in this forum only for that which it has contracted, and that, except insofar as it has restricted itself by agreement, the assignment of work necessary for its operation lies within its discretion. For illustration, in Award 6107 we followed the following principle stated in early Award 2491:

"* * * We can only interpret the contract as it is and treat that as reserved to the Carrier which is not granted to the employes by the Agreement."

For the foregoing reasons, the undersigned concur in Award 7406.

/s/ W. H. Castle
/s/ R. M. Butler
/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ J. F. Mullen