Award No. 8722
Docket No. PC-8740

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Carroll R. Daugherty, Referee

PARTIES TO DISPUTE:

THE 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 M. T. Cassidy, Pennsylvania Terminal District, that:

1. Rule 38(c) of the Agreement between the Company and its Conductors was violated by the Company on July 16, 1955, when the Company failed to assign Conductor Cassidy to service on PRR Train No. 113-114, New York to Miami and return.

2. Conductor Cassidy be compensated under applicable rules of the Agreement in the amount he would have earned had he received the assignment to Train No. 113-114 which was due him.

EMPLOYES' STATEMENT OF FACTS:

I.

The first three paragraphs of Rule 38(c), directly involved in this dispute, read as follows:

"A regular signout period shall be established in each district, at which time assignments shall be made for a succeeding 24-hour period. Such 24-hour period shall be designated as a signout day, and the specific signout period of the signout day shall be determined by local conditions. The signout period shall be not less than 30 minutes nor more than 3 hours in length. The local chairman shall be notified in writing by the district representative at least 5 days in advance of any change in the schedule of the signout period or the signout day and bulletin shall be posted for information of the conductors.

"Until credited and assessed hours have been acquired in the current month, extra conductors shall be assigned in accordance with their credited and assessed hours for the preceding month, the conductor with the least number of such hours to be assigned first, con-

first premise is that Conductor Cassidy, who has two telephones and was "waiting" to be called, was not called or at least was not called long enough to respond. In this connection, the testimony of Signout Clerk Lynch clearly shows that Cassidy was called three times, commencing at 9:55 A.M., July 16, and that his telephone was allowed to ring approximately ten times each call. The Organization's second premise is that the notation "too far-Phila," opposite Conductor Cassidy's name, refers to the Miami assignment on PRR trains 113-114; whereas the notation actually refers to an emergency Washington assignment on NH train 169, report time 6:55 A.M., July 16. The Organization's final premise, developed in the hearing, is that the notation "9:50A," which appears opposite Conductor Cullen's name on line 1 of the Daily Posted Record for July 16, refers to the time Cullen was given the Miami assignment; whereas, as explained by Clerk Lynch at the hearing, the notation actually refers to the time Mr. Lynch first tried to fill the assignment by calling Conductor Hammond.

CONCLUSION

The Pullman Company has shown in this ex parte statement that a road service assignment to Miami which remained unfilled at the close of the July 15 conductors' signout period at Pennsylvania Terminal District, New York, was in compliance with Rule 38 held a reasonable time. The Company has shown, further, that at 9:50 A.M., July 16, the signout clerk on duty, in compliance with Rule 38, attempted to contact the extra conductor in town with the least number of credited and assessed hours, Conductor W. C. Hammond, but Conductor Hammond was unavailable. In order, Clerk Lynch then attempted to contact Conductors F. E. O'Brien, M. T. Cassidy and J. F. Cullen, all of whom were unavailable except Conductor Cullen, who accepted and performed the assignment. Finally, the Company has shown that the premises upon which the Organization bases its claim are unsound.

Inasmuch as the claim in behalf of Conductor Cassidy is without merit, the claim should be denied.

All data contained herein 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: Carrier's signout period for the Pennsylvania Terminal District is 10:00 A.M. to 12:00 noon, daily. The signout day to which said signout period normally applies is 3:00 P.M. of the same day to 3:00 P.M. of the next day. During a given signout period Carrier, under Rule 38 of the Agreement and under its own instructions, tries to fill extra assignments in the appropriate signout day with extra conductors by telephoning or otherwise communicating with those of said conductors who are unassigned or available in the District. Under said Rule Carrier is required to distribute said extra assignments among the available extra conductors on the basis of their relative numbers of accredited and assessed hours in the preceding or current month (whichever period is applicable); the extra conductor having the smallest number of such hours is to get the first assignment for which he is available.

On July 15, 1955, a vacancy existed in extra service, Pennsylvania Trains 113-114, New York to Miami and return. The reporting time for said assignment was 2:15 P.M., July 16, and was thus within the signout day beginning

3:00 P.M. July 15 and ending 3:00 P.M. July 16, 1955. Carrier was unable to fill said vacancy during the signout period of July 15, and it remained open over into the next day, July 16.

At 9:50 A.M. on July 16—ten minutes before the beginning of the signout period for that day—Carrier's signout clerk, pursuant to instructions previously issued by Carrier, began calling extra conductors in order to fill the above-mentioned vacancy. Extra Conductors Hammond, Cassidy (the instant Claimant), O'Brien, and Cullen were telephoned in the order named. Only Cullen responded (at about 9:59 A.M.), and he was given the assignment. Claimant Cassidy was called three times, beginning 9:55 A.M. Later, at 10:40 A.M., he was called again, responded, and was assigned to a trip to Toronto.

The Parties agree on these facts. They agree also that the above-named Extra Conductors were called in the proper order under the provisions of Rule 38. The controversy arises over the timing of Carrier's calls to the Extra Conductors. The Employes argue that, although (as the Carrier asserts) Rule 38 (c) is silent as to how Carrier is to handle a case like the instant one, Third Division Award No. 6621 plus the general intent of Rule 38 requires that Carrier call extra conductors for extra assignments at reasonable times; and this should mean, if reporting time permits, the period of their maximum availability, which is the signout period—in the instant case the signout period of July 16. Carrier argues that, because the Rule is silent on how it should proceed in cases like the instant one, Carrier is free to act unilaterally in good faith, as it did here.

A careful reading of Rule 38 reveals that, for the purpose of determining the instant dispute, the relevant provisions are contained in Subsection (a), in the first and second paragraphs of Subsection (c), and in Question and Answer 9. Without regard to exceptions not pertinent here, Subsection (a) says that all the extra work in a given district must be given to the extra conductors in that district when they are "available". And Q.-A. 9 says that an extra conductor is "available" when (1) he can be "contacted and assigned" and (2) "can reach the point where he is required to report by scheduled reporting time". Substituting this definition of "available" for that word where it appears in Subsection (a), the latter can properly be read as follows: "All extra work of a district . . . shall be assigned to the extra conductors of that district when they can be contacted and assigned and when they can reach their required reporting points by their scheduled reporting times."

Consider now the first two paragraphs of Subsection (c) of Rule 38. Relevant here, the first paragraph requires the establishment of a regular signout period during which the assignments mentioned in Subsection (a) are to be made for a succeeding 24-hour period known as the signout day. The provisions of the second paragraph relevant here say that the extra conductor having the smallest number of credited and assessed hours is to be given the first assignment, and so on thereafter, applying the same principle.

From a reading of Rule 38 (a) and (c) plus Q.-A. 9, it is evident that, when the Parties negotiated these provisions, they tried to harmonize two notions of equity or protection so far as the instant case is concerned. They tried to provide equity and protection to extra conductors by (1) setting up the system of signout periods and signout days; and (2) requiring Carrier to distribute the extra work during a given signout period for the succeeding signout day on the basis of the least-hours principle. And they tried to provide equity and protection to the Carrier by permitting Carrier to disregard the least-hours principle in respect to extra conductors who would be unable

to reach their reporting points by the scheduled reporting times set by Carrier. That is, the Parties tried to protect Carrier from loss due to lateness or absence of essential employes.

However, as the Parties agree, Rule 38 (c) does not spell out equity specifically to either Party in respect to a situation like the one here, where an assignment for a time during a given signout day could not be filled during the appropriate or preceding signout period. It is not within the authority of this Board to decide matters of equity. The instant dispute can be resolved only through an interpretation or construction of the relevant portions of the Agreement as written by the Parties; and said construction may not be strained or at variance with the intent of the Parties when they wrote said relevant portions, same to be considered in relation to each other as well as separately.

If the Employes' contention is to be upheld, in whole or in part, it can be only because Subsection (a) Q.-A. 9 of Rule 38 throw illumination in their behalf on the meaning of Subsection (c), particularly the pertinent language of its second paragraph. Otherwise the Carrier's position must prevail.

In the light of the language of Subsection (a), which says in effect that extra work is to be given to extra conductors only when they are available, it seems reasonable to believe that the word "available"—and the definition thereof given in Q.-A. 9—applies also to the second paragraph of Subsection (c) where the word "conductor" appears. Then said Subsection would read in part, "Available extra conductors shall be assigned in accordance with their credited and assessed hours . . ., the available conductor with the least number of such hours to be assigned first . . .". And if the Q.-A. 9 definition of "available" is used, the above language would then read as follows: "When they can be contacted and assigned and can reach their required reporting points by their scheduled reporting times, extra conductors shall be assigned in accordance with their credited and assessed hours . . ., the conductor with the least number of such hours who can be contacted and assigned and who can reach his required reporting point by his scheduled reporting time to be assigned first . . ."

This enlargement of the language of paragraph two of Rule 38(c) is clearly a construction or interpretation of the language as written, based on the "four-corners" principle of contract construction. In no sense can the Board here be said to be adding to the Agreement or writing new language therein.

All this being so, it follows that Claimant in the instant case should have been called at a time that would, so far as possible, have harmonized the two principles of equity underlying the three relevant provisions of the Agreement. He should have been called at a time when he could have been "contacted and assigned", thus giving effect to the least-hours principle of distributing extra work; and he should have been called at a time when he would have been able to report to Carrier in New York at the reporting time scheduled for the New York-Miami run, thus giving effect to the equity principle of protecting Carrier from lateness or absence of an essential employe.

The facts of the case here before the Board establish that, if Claimant had been telephoned at or soon after 10:00 A.M. on July 16, both the above-mentioned equity principles could have been adhered to. Therefore the Board is compelled to rule that, in the light of the contract construction presented above, Claim 1 of the instant petition has merit and must be sustained.

Before Claim 2 is considered, it must be clearly pointed out that the above ruling by no means wholly supports the principle that in all cases like the instant one extra conductors must be called during the signout period that lies within the signout day, i.e., must in such cases be called during the period of "maximum availability". In some cases the scheduled reporting time might be such that to call conductors during such signout period would be to leave Carrier totally unprotected from lateness or absence of the essential employe. For example, suppose that the scheduled reporting time for a given train in the Pennsylvania Terminal District were 11:30 P.M. on a particular day and that the extra conductors who had least hours as of 10:00 A.M. on that day all lived an hour or more away from the reporting point. Obviously the Carrier would be endangering its position if it waited until 10:00 A.M. to begin calling the conductors. Weather might be bad, trains late, etc. The principle laid down in this case is that in all such cases the calling time must be reasonable and equitable for all concerned, including the Carrier.

Furthermore, in the light of the Parties' Agreement, it is the Carrier who in the first instance has the right to decide what is reasonable and equitable for all concerned. Carrier's decision, of course, is always subject to objection by the Employes under the appropriate channels of the grievance procedure.

The Board comes then to Claim 2, which asks reparation to Claimant in the amount he would have earned if he had been assigned to Train No. 113-114 on July 16, 1955. Under the second paragraph of the Parties' Memorandum of Understanding, as re-executed at Chicago on December 20, 1950, this claim must be allowed.

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 Carrier violated the Agreement to the extent set forth in the Opinion.

AWARD

Claims 1 and 2 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 5th day of February, 1959.

DISSENT TO AWARD NO. 8722, DOCKET NO. PC-8740

Award 8722 correctly states—"It is not within the authority of this Board to decide matters of equity." However, Award 8722 disregards this and other limitations upon this Board's authority which have been recognized consistently by our awards. For illustration:

In disposing of a claim involving an alleged violation of Rule 38(c) of the Agreement between the same parties as herein, this Division, in Award 6647, held that it had no right to change words in the Rule, and stated:

> "It may well be that the principle is the same, but we are not to indulge in conjecture as to what the parties had in mind when the rule was written."

In Award 5079 we held:

> "This Board has consistently held by a long line of awards that the function of this Board is limited to the interpretation and application of agreements as agreed to between the parties. Award 1589. We are without authority to add to, take from or write rules for the parties. Awards 871, 1230, 2612, 3407, 4763."

In Award 4439 we held:

> "In determining the rights of the parties it is our duty to interpret the applicable rules of the parties' Agreement as they are written. It is not our privilege or right to add thereto, and when a rule specifically lists the situations to which applicable it thereby excludes all those not included therein."

Award 8722, by speculation and conjecture as to the intent of the parties, creates a complex situation out of a simple issue and sustains the claim on what the majority alleges to be principles of equity in complete disregard for specific provisions of the applicable rule as written by the parties and in complete disregard for its recognition that this Board is without authority to decide matters of equity.

As restricted by the claim itself, the only issue before this Division in the instant case was whether or not Carrier violated Rule 38(c), which Rule provides, in pertinent part, as follows, insofar as that issue is concerned:

> "(c) A regular signout period shall be established in each district, at which time assignments shall be made **for a succeeding 24-hour period. Such 24-hour period shall be designated as a signout day,** and the specific signout period of the signout day shall be determined by local conditions. * * *" (Emphasis added.)

The following holding from our Award 6574 is pertinent:

> "This is plain language; and we find no uncertainty or ambiguity in it. Such being the case, we cannot vary or modify the terms of the Special Letter Agreement by resort to past practices or to the motives that actuated the Organization and the Carrier in entering into it (Award 4386)."

It is significant that, under Rule 38(c), assignments are required to be made during a signout period **only covering the 24-hour period comprising the succeeding signout day.** The 24-hour period designated by the parties as comprising the signout day for the Pennsylvania Terminal District was from 3:00 P.M. to 3:00 P.M. The reporting time for the assignment in dispute was 2:15 P.M. on July 16, 1955. Inasmuch as this starting time was prior to and consequently outside of the 24-hour period comprising the signout day for July 16, 1955, there was no requirement in Rule 38(c) to wait until the start of the

signout period at 10:00 A.M. on July 16, 1955, before filling the assignment. Furthermore, Claimant was not available at 9:55 A.M. that date and there is no evidence in the record that he would have been available at 10:00 A.M. if Carrier, notwithstanding there was no requirement in the Rule to do so, had waited five more minutes before calling him.

The majority in Award 8722 was without authority to assume that the parties performed a useless and vain act by including the emphasized portion in Rule 38(c), or to assume that that portion of the Rule was mere surplusage, and then to enlarge upon the remaining language thereof when the rule as written by the parties in the first place is clear and unambiguous, as in this case, insofar as the issue stated by the claim is concerned.

For the foregoing reasons, among others, Award 8722 is in error and we dissent.

/s/ W. H. Castle

/s/ J. F. Mullen

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ J. E. Kemp