Award No. 9109
Docket No. PC-8977

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, 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 regular Conductor E. W. Halpin, regular Conductor J. A. Condon and extra Conductor G. H. Beaver and other certain extra Conductors, Chicago Eastern District, that:

1. Rules 36 and 38 of the Agreement between the Company and its Conductors were violated by the Company on November 1, 1955, when regular Conductor Halpin was used on his specified layover in another side of the Conductor run designated as Line 1244 at a time when extra Conductor G. H. Beaver was available and should have been used.

2. Rules 24 (Question and Answer 9) and 9 were violated by the Company on November 3, 1955, when Conductor Halpin, having completed the assignment given him on November 1st, was not held at the home station in order to return him to his assignment (side) of the run and duly compensated.

3. Rules 36 and 38 were again violated by the Company on November 3rd when regular Conductor Halpin was assigned to service at a time when Question and Answer 9 to Rule 24 required that he be held at the home station and at a time when an extra Conductor was available and should have been used. Rule 24 was subsequently violated when Conductor Halpin was not properly compensated for this assignment.

4. Rules 36, 24, 9 and 38 were similarly violated on forty-six subsequent dates prior to February 29, 1956, with reference to Conductor Halpin and certain extra Conductors.

5. Rules 36 and 38 were again violated by the Company on November 2, 1955, when regular Conductor Condon was used on his specified layover in another side of the Conductor run designated

as Line 1244 at a time when an extra Conductor was available and should have been used.

6. Rules 24 (Question and Answer 9) and 9 were violated by the Company on November 4, 1955, when Conductor Condon, having completed the assignment given him on November 2nd, was not held at the home station in order to return him to his assignment (side) of the run and duly compensated.

7. Rules 36 and 38 were again violated by the Company on November 4th when regular Conductor Condon was assigned to service at a time when Question and Answer 9 to Rule 24 required that he be held at the home station and at a time when an extra Conductor was available and should have been used. Rule 24 was subsequently violated when Conductor Condon was not properly compensated for this assignment.

8. Rules 36, 24, 9 and 38 were similarly violated on forty-six subsequent dates prior to February 29, 1956, with reference to Conductor Condon and certain extra Conductors.

9. Conductor Halpin has been compensated in keeping with the requirements of Rule 24 for the "double" which occurred on November 1st. Conductor Beaver has been compensated as required by the Agreement for the assignment to which he was entitled on November 1st. Conductor Condon has been compensated in keeping with the requirements of Rule 24 for the "double" which occurred on November 2nd.

10. Conductor Halpin and Conductor Condon be credited and paid in keeping with the rules of the Agreement for the violations outlined in points 2, 3, 4, 6, 7 and 8 above.

11. Certain extra Conductors be credited and paid in keeping with the rules of the Agreement for the violations outlined in points 2, 3, 4, 5, 6, 7 and 8 above.

EMPLOYES' STATEMENT OF FACTS:

I.

During the period involved in this dispute, Conductor Halpin* was regularly assigned to Line 1244.

Prior to October 30th, Line 1244 was scheduled as a 2 2/3 man operation, that is, Conductor Halpin was scheduled to perform three round trips **and then was scheduled to receive TWO relief days** (48 hours) **at his home station.**

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*It is agreed by the parties that the portion of this claim which relates to Conductor Condon (and certain extra Conductors) will be settled upon the basis of the outcome of that portion of this claim which relates to Conductor Halpin (and certain extra Conductors). Hence in both "Employes' Statement of Facts" and in "Position of Employes" your Petitioner's submission is confined to the consideration of the claim presented on behalf of Conductor Halpin (and certain extra Conductors).

have been provided for them. In the instant case, a sufficient number of conductors were assigned to the Line and every conductor had scheduled relief days. Also, in the case involving the operation of Line 2005, extra conductors who should have been assigned to the regular conductors' relief days were deprived of extra work to which they were entitled. In the instant case, only one extra conductor was deprived of an assignment (extra Conductor Beaver), and the Company compensated him for the trip he did not receive (Exhibit B, pp. 3-4).

Also, the Organization cited Award 6426, rendered by the Third Division, National Railroad Adjustment Board, with Donald F. McMahon sitting as referee (Exhibit A, p. 15). In that dispute a conductor operating in regular assignment was used outside his assignment, as a result of which action the conductor lost one trip in his regular assignment. In the instant case, Conductors Halpin and Condon were not used outside their assignments. Further, no conductor lost a trip in his regular assignment. Additionally, the dispute settled under Award 6426 did raise the question of continuing liability for alleged doubles (Exhibit B, p. 3).

CONCLUSION

In this ex parte submission the Company has shown that Conductors Halpin and Condon have been properly paid for the doubles which they performed on November 1-2 and November 2-3, 1955, respectively. Additionally, the Company has shown that no rule of the Agreement required the Company to hold Conductors Halpin and Condon at home station following the assignments given them on November 1 and November 2. Also, the Company has shown that extra Conductor Beaver has been properly paid for the trip he should have been given on November 1, 1955. Further, the Company has shown that all subsequent assignments given Conductors Halpin and Condon and relief extra conductors in Line 1244 were proper. Finally, the Company has shown that the Awards cited by the Organization do not support the Organization's contentions.

The claim in behalf of Conductors Halpin and Condon and extra Conductor Beaver and certain other extra conductors of the Chicago Eastern District is without merit and should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The formal claim of the Organization is set up in detail and at length (eleven paragraphs) but in the submission it is tersely stated thus:

> "You" (the Carrier) "were working the conductors on their established layover days, and on the days when they should have been working you have them at home."

In refutation of this claim the Carrier says:

> "The only doubles involved in this dispute have been properly paid, including the extra conductor who should have been assigned to the double and that on November 3 and 4 and all dates there-

after, Conductors Halpin and Condon were operating in their proper sides of the run and all extra conductors were correctly assigned. * * * That Answer 9 of Rule 24 is not applicable to the facts of this case, and that Rule 9 is not involved."

Three separate and distinct operations are developed in this submission.

(1) Line 1244, prior to October 30, 1955, a 2-2/3 man, 8 cycle operation with a layover of 48 hours, to which Conductors Halpin and Condon were assigned.

(2) Line 1244, on and after October 30, 1955, a 2½ man, 5-day cycle, with a 24-hour layover to which Conductors Halpin and Condon were assigned. This operation was not bulletined as, it is admitted, it should have been, but it is stated that this failure is not an issue in this submission.

(3) Line 1244, effective February 29, 1956, rebulletined, to which three conductors were assigned with a relief of 24 hours after six consecutive trips.

We have been somewhat concerned by the claims of the Organization that, on or about the time the second operation went into effect, the Carrier was put on notice that it was violating the agreement in its assignments of claimant conductors; that the Carrier conceded the Agreement had been violated by its denial of the claim only "because it was excessive" and by the bulletining of the third operation and the assigning of the claimant conductors as contended for by the Organization.

We consider these claims in the order heretofore stated. We find that, on one date before and one after the second operation went into effect, there was some oral discussion between the parties wherein the Organization asserted the claims here made. The first written notice that the Organization purposed to insist on its claim, as here urged, was in a letter of December 28, 1955, from the local Chairman of the Organization to the Superintendent of the Carrier, Eastern Division. This stated position of the Organization is convincing that it did not acquiesce in the changed assignment but, of course, it is not probative that the Agreement was violated. That remains the issue. The extent of the admission of the Carrier as to proper assignment dates, as contended by the Organization, was that the assignment "could have been handled as outlined by the Organization." Upon the charge that the claim was denied only because of its excessiveness, it appears, that because the Carrier was willing to compensate Conductors Halpin and Condon for doubles and an extra Conductor for Conductor Halpin, it could not consistently deny the whole claim. The form of the denial questions the correctness of the claim in all particulars save that which is admitted by the payments which Carrier made.

The Organization also contends that the Carrier by its rebulletining of the third operation, February 29, 1956, placed Conductor Halpin on the assignment (side) which he had in the first operation, and thereby admits its error. From the meager information concerning the Schedule of the third operation, we cannot say that it had the effect claimed because it is different in material particulars. If it did accomplish that for which the Organization contends it would not prove, although it might have some weight, that Carrier's position was incorrect in its assignments in the second operation.

The claim of the Organization is based on the right of Conductors Halpin and Condon to the continuation of their assignments (side), as existent in

operation 1, prior to 9:00 P. M., October 30, 1955, into and as a part of their assignments in the second operation.

Conductors Halpin and Condon did not have preferred assignments. Rule 31, Question and Answer 2, of the controlling Agreement. If their assignments had been continued into the second operation, as contended for by the Organization, even then there would be a change in days and dates of departure on their runs and of layovers because of the reduction in the number of trips and of rest days from two to one.

If Conductor Condon departed on his run on the 30th of October, before the effective hour of the second operation, then under operation 1, both he and Conductor Halpin were entitled to two days of relief, Halpin on October 31 and November 1 and Condon on November 1 and 2. The Organization insists that Condon's trip on the 30th was under operation 2, which is probably correct, but in the face of that fact it concedes that he was entitled to two rest days carried over into the second operation. However, the Carrier, whether correctly or not, concedes that Conductor Halpin doubled on the run November 1 and Condon on November 2, one of the relief days of each earned upon the basis of operation 1. For these doubles they have been compensated, as was an extra Conductor for Conductor Halpin. This claim for compensation for Conductor Halpin for the run on his relief day is the subject of paragraph 1 of the claim. Thereafter, Conductor Halpin made a second trip departing November 3rd and Conductor Condon another trip, departing November 4th.

If the days of departure assignments (sides), as fixed by the first operation were carried over into the second, Conductor Halpin should have departed on his run on November 2 and Condon on November 3. The variance in these departure dates continued during operation 2, as required by the Carrier and as contended by the Organization, makes the issue.

After Conductors Halpin and Condon observed the assignments as directed by the Carrier, in operation 2, beginning with the November assignments, heretofore stated, they operated regularly and in the same order and relation to each other as in the former assignments, their seniority was not affected, they were denied no trips to which they were entitled, no advantage to either appears in the relief days, as fixed, and in the number of extra Conductors to be given runs is the same although in different order than claimed by the Organization. Nor has any of the conductors affected suffered any loss in compensation unless Rule 24 of the controlling Agreement has been violated.

Although it is stated that Rules 36, 38, 6, 24, 15 and 9 have been violated the claim as to the pecuniary loss must be resolved by interpretation of Rule 24 and particularly by Question and Answer 9 to this rule.

Rule 24 provides:

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

Question 9:

> "A conductor regularly assigned to a run is doubled out on another side of his run. On his return to his home station shall he

be credited and paid held-for-service time, as provided in paragraph (a) Rule 9, after expiration of layover of the side of the run on which he returned in order to return him to the assignment (side) of the run."

Answer:

"Yes."

The rule, insofar as applicable, covers road service performed by conductors **on specified layover or relief days.** (Emphasis ours.) Insofar as we are able to determine, both parties have, in instances, related the assignments to be made under the second operation to be controlled by the assignments effected under the first operation. This, we do not believe was required.

After October 30th at 9:00 P. M., when the second operation became effective, the first no longer had any force or effect. Layover time that had been earned did not necessarily have to be recognized as such in the new operation. Of course, proper recognition should have been given by compensation for relief days not received, but did not have to be carried over as controlling assignments (sides) or fixed layover or relief days in the second operation.

The dates of departure were not carried into operation 2 as in operation 1 and it is difficult to determine just how they were reached. We are certain, however, that it was not obligatory upon the Carrier to fix them according to the former schedule. That is to say, that the former assignments (sides) did not, as a matter of right, have to be carried over into the second operation. The rebulletining of operation 2 would have annulled the assignments in operation 1. Award 621, Third Division, Swacker, Referee. The same thing was accomplished by the execution of operation 2.

It is our opinion that Question and Answer 9 to Rule 24, relates to assignments (sides) and relief days pertaining to a certain run or cycle and not in connection with another and different run where the change, because required to be bulletined, permits of different assignments.

If, as we have held, Rule 24 has application to either operation, what effect can we give it in view of the conduct of the parties and the concession heretofore made that nothing is claimed for the failure to bulletin the change. This concession, in our judgment, has definite and marked effect on the proper award in this submission.

To determine, as a fact, what would have occurred if the proposed change in operation 2 had been bulletined for the required time before it became effective would be pure conjecture. Can we say that the scheduled runs in operation 2 and relief days thereunder could not have been set up as carried out in execution of the operation and that under not circumstances would Conductor Halpin have bid for the runs beginning November 1 and November 3, 1956 with the relief days as designated. In making choice there were many factors to consider. As the operation progressed, departure and relief days and dates would be different than in the first operation. As we look at the matter now there is no choice between the assignments in the first two operations. If there were perceptible advantage a presumption would be indulged that Conductor Halpin, the senior conductor, having the first right to bid on the proposed assignments, would choose the more desirable.

We cannot say, had the second operation been bulletined, that the result as to the assignments as carried out would necessarily have been different.

Had the Organization insisted on its rights because of the failure of rebulletining the change in runs, as proposed in the second operation, we would have a different and even more difficult issue to decide.

We have examined the Awards cited by the parties and do not find that the facts so parallel those found here as to constitute a controlling precedent.

The Agreement has not been violated except in the particulars admitted by the Carrier and for which compensation has been made.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1959.

DISSENT TO AWARD 9109 — DOCKET PC-8977

This Award is grossly erroneous since it clearly indicates the majority is confused.

By reference to Point 1 of the claim it will be noted that Petitioner contends that Rules 36 and 38 of the parties' Agreement have been violated. **Throughout the Award the majority has ignored Rule 36.**

The Carrier admits that Rule 36 of the parties' Agreement was violated when on November 1, 1955, Conductor Halpin was used out on another side of his run twenty-four hours before he was due out, thus placing him on an improper side of the run. This admission is substantiated by the Carrier paying Conductor Beaver, the extra Conductor who was available and willing to go out on the relief side of his run November 1, 1955. Thus, it is clear that the Carrier violated Rule 36 of the Agreement and placed Conductor Halpin on the run in a side other than his own.

Likewise, the Carrier again violated Rule 36 of the Agreement when it used Conductor J. A. Condon, who was on his specified layover November 2, 1955, and placed him on a side of the run which he was not entitled to operate. This too is admitted in the record by the Carrier paying Conductor Condon under the terms of Rule 24. The Carrier declined to pay the extra Conductor who was due out on the relief side in place of Conductor Condon.

Rule 36 clearly provides that a "Conductor operating in regular assignment shall not be used in service outside his assignment except in emergency." The Carrier admits there was no emergency involved, since there were extra Conductors available and willing to perform the work.

Conductor Halpin had earned his layover from the first assignment; therefore, when the Company required him to report for work on November 1, 1955, the Company violated Rule 36; and because it required Conductor Halpin to report on November 1, it automatically put him on another side. This the Carrier admits, and which the record shows; yet, we do not find the majority mentioning violation of Rule 36.

When Carrier violated Rule 36 it then became mandatory that the Conductor be compensated in accordance with Rule 24, and that the Conductor be returned to his side of the assignment in accordance with Question and Answer 9 of Rule 24.

In order for the majority to deny this claim they must, of necessity, write Rule 36 out of the parties' Agreement.

This Board held in Award 5924 —

> "We cannot change or modify the rules as written; that is a matter for negotiation of the parties under Rule 66 and the Railway Labor Act."

Also see Third Division Awards 4439, 389, 383, 794, 1248, 1257, 1568, 1589, 1609, 2029, 3421, 4050, 5636, 5767, 6790, 6907 and 4763.

In Award 5924 we held —

> "It is the function of this Board to interpret, not to write Agreements. * * *"

We held in Award 7296 —

> "* * * We agree also that it is the function of this Board to interpret Agreements, and not to disregard or add to any of their provisions. * * *"

In Award 5994 we said —

> "We are dealing with rules as written. Equity cannot be considered. The Rules here considered are not ambiguous. If Rules are to be changed it must be done under the Railway Labor Act."

Here, the majority has wantonly and wilfully disregarded the principles so established by this Board. In order for the majority to hold that Conductors Halpin and Condon were on the proper sides of their respective runs, Rule 36

in its entirety must be ignored. This is exactly what the majority has done. Award 9109 states:

> "Nor has any of the Conductors affected any loss in compensation unless Rule 24 of the current Agreement has been violated."

The Carrier first violated Rule 36 by using Conductors Halpin and Condon on their specified layovers **when extra Conductors were available.** After they used them on their specified layovers Rule 24 was applicable in regard to compensation, and furthermore, Question and Answer 9 to Rule 24 then became material.

In Award 4648 this Board held —

> "The fact that either or both of these Conductors, Beaupre or the Claimant, earned additional compensation in the alternate runs to which they were assigned is understandable and should not be allowed to warp our judgment with the appropriate application of Rule 10 and 21."

It appears that because Conductors Halpin and Condon did not lose any time, it has warped the judgment of the majority in regard to Rule 36.

In our Award 6465 we stated:

> "Although an employe works full time and Carrier violates the Agreement, the Carrier must pay because of the violations."

It is most significant that the majority carefully avoided all reference to Rule 38 and the compensation due available extra Conductors who were deprived of the extra service obtaining from Carrier's malodorous malpractice. The implication persists that this remarkable distinction became generative because Petitioner failed to identify the extra Conductors due to be compensated. Should this be the case, the majority's attention is directed to this Division's Awards Numbers 8773, 8767, 7943, 6124, 6123, 6109, 5923, 5755, 5700, 5117, 5078, 4821, 3832, 3687, 3738, 3256, 1711, — particularly Award 7943 which states:

> "* * * This Board has consistently sustained claims of this general character in behalf of all the members of a seniority unit where work belonging to that unit was contracted out. Neither Rule 30 nor the Act require the naming of names in cases of this character."

Under the terms of Rule 51 of the Agreement it is not necessary to name the particular Conductor entitled to payment for Carrier violations of the contract between the parties. Neither does the Railway Labor Act require that the employe be named in Rules violations. Furthermore, it will be noted that claims based on a continuing violation is not prohibited.

Under the Agreement between The Pullman Company and its Conductors it would be impossible to name the extra Conductors who would be entitled to the work on any subsequent day, without recourse to Carrier's records.

It is not the responsibility of this Board to go into the mechanics of how a claim is to be paid. The Board is to determine if the Rules of the Agree-

ment have been violated. Pertinent to the above is Second Division Award 2195 wherein that Board stated:

> "Carrier contends the claim should be dismissed because it does not name the individuals for whom the claim is being made although who they are is clearly evidenced by the notices posted by Carrier, copies of which are attached to the Organization's original submission. . . . The claim made on behalf of certain classes of employes who, it is claimed, were improperly laid off in force reduction. The basis of the claim was consistently adhered to in all stages of its handling and Carrier was at all times fully aware thereof. When it was determined whether or not the basis for the claim was sound then, if it is found that it is, the determining of who is entitled to be paid is merely a ministerial duty and can easily be determined from Carrier's records. We think the form of claim, as here made, is neither vague nor indefinite but desirable. It does not clutter up the records, which would be the situation if individual claims were filed. Neither does it unduly burden this record with a list of names that would serve no purpose. Doing so is neither required by the rules of the parties schedule agreement nor by rules covering procedure here."

Dean William H. Spencer in his book on the National Railroad Adjustment Board declared —

> "The Referee plays a most important role in the judicial activities of a Division to which he is attached. His is a delicate and important responsibility.
>
> "Not only must a Referee be able to in some degree maintain an objective and impartial attitude, but he must possess the ability to master quickly the facts of the controversies which come before him; skill in seizing upon the essential issue or issues and sound judgment in rendering awards."

The majority refers to the fact that the run was not bulletined. There is no penalty because the Carrier fails to bulletin a run, but if the Company uses Conductors contrary to the other Rules of the Agreement, then a penalty attaches. In the instant case, Carrier failed to bulletin the run and violated Rule 36 by using Conductors Halpin and Condon on their specified layovers. Accordingly, this violative action required compensation under the terms of Rule 24, and held-for-service time pay under the provisions of Rule 9.

The majority has completely ignored the provision of Rule 36, and as a consequence, wrote it out of the Agreement. **This the majority has no right to do!** It appears that such irresponsible reasoning is a product pure and simple of confusion and lack of objective understanding. For the reasons so stated, this dissent is made.

C. P. Carr
Labor Member
Third Division
National Railroad
Adjustment Board.