Award No. 9539
Docket No. PC-9026

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductor and Brakemen, Pullman system, claims for and in behalf of Conductors E. E. Lenth, W. J. Kempa, H. G. Thera, S. M. Rowell, J. C. Horgan and M. O. Kyllo, St. Paul District, that:

1. The territorial seniority rights of the above named Conductors established by Rule 64 (a) of the Agreement between The Pullman Company and its Conductors (as interpreted by Appendix A to this Agreement and the Award in National Mediation Board Docket No. 3099) were violated when Canadian employes of the Canadian Pacific Railway were employed to perform conductor work in sleeping car service on Minneapolis-St. Paul & Sault Ste. Marie RR — Canadian Pacific RR Trains 13-14 between St. Paul, Minn., and Moose Jaw, Saskatchewan, between September 11, 1955, and November 16-17, 1955, inclusive.

2. Rule 64 (a) of the Agreement between The Pullman Company and its Conductors (as interpreted by Appendix A to this Agreement and the Award in National Mediation Board Docket No. 3099) was violated by the Company between September 11, 1955, and November 17, 1955, inclusive, when the Company failed to provide employment to the above named Conductors on Soo-CP Trains 13-14 between St. Paul and Moose Jaw, or reciprocal employment on Pullman cars operating in "Canadian Territory", or compensation in lieu of such employment.

3. The above named Conductors be compensated for each day's employment lost by each of them as a result thereof, exclusive of all other earnings.

(a) The employment of Canadian employes of the Canadian Pacific Railway to perform conductor work in sleeping car service on Soo-CP Trains 13-14 between St.

Paul and Moose Jaw, September 11, 1955, to November 16-17, 1955, inclusive, and —

(b) The failure of the Company to provide for these Conductors either employment on Soo-CP Trains 13-14 between St. Paul and Moose Jaw, or reciprocal employment on Pullman cars operating in "Canadian Territory" or compensation in lieu of such employment.

EMPLOYES' STATEMENT OF FACTS:

I.

Since 1893 there has been in existence joint line international sleeping car service in which The Pullman Company and its Conductors have participated and as a result of which passengers have been able to travel between points in the United States and points in Canada without being put to the inconvenience of changing sleeping car accommodations.

Begining in 1893 each such instance of joint line international sleeping car service was based on an agreement between a United States and a Canadian railroad, the United States railroad then further contracting with The Pullman Company to supply its share of the required sleeping car service to the joint line international operation.

Since 1893 there has therefore existed in connection with such joint line international sleeping car operation the problem of how the required equipment, employment and revenues should be apportioned between The Pullman Company and the participating Canadian railroad.

Since 1893 and continuing today, equipment has been supplied by The Pullman Company and by the Canadian railroad in proportion to the trackage involved. That is, if the mileage of the United States railroad was twice that of the Canadian railroad then The Pullman Company contributed twice as many cars to the joint operation.

But in actual operations the cars supplied by one of the parties were frequently used more often than were those of the other party. Consequently at the end of a given period it might be found that (in the instance cited) the mileage accumulated by Pullman cars was more than twice the mileage accumulated by the cars supplied by the Canadian railroad.

Hence the need arose for a "mileage equalization account". In its initial form the party supplying less than its proper share of car mileage paid the other party at an agreed upon rate. But early in this century this was changed and for approximately half a century car mileages have been equalized by one of the participants withdrawing some of its cars while the other party's cars are then substituted in the service until the mileage account has been again approximately equalized.

Since 1893 and continuing today, revenues have been shared on the basis of each participant receiving those revenues derived from travel over the respective trackage.*

*In the case of The Pullman Company, this is the trackage of the United States or Canadian railroad whose share of the joint line international sleeping car service the Company has contracted to supply.

Soo Line Railroads unilaterally exercised their rights under these contracts to discontinue regular Pullman service effective June 1, 1955. Also, the Company has shown that during the period June 1, 1955, through September 10, 1955, Pullman conductors were permitted to operate on railroad sleeping cars on the "Mountaineer" route by virtue of a special arrangement with the railroads and a special agreement between The Pullman Company and its conductors. Additionally, the Company has shown that subsequent to the latter date The Pullman Company no longer participated in the regular sleeping car service on the "Mountaineer" route and that Pullman conductors no longer held rights to regular service along that route.

Further, the Company has shown that the Organization's contention that Rule 64 (a) was violated has no merit in view of the express application of that Rule to **Pullman** cars in service and that Appendix A of the working Agreement, dealing with "frozen" one Pullman car runs, does not support the Organization. Moreover, the Company has shown that the Award of the Special Board of Adjustment in Mediation Board Docket No. 3099, which Award is relied upon by the Organization, does not support the Organization. The Company has also shown that the Organization during the course of hearings which led to the above Award conceded that the Canadian Pacific Railroad had a right to own sleeping cars and to operate them with its own sleeping car conductors and that the Chairman of Board stated during the course of the hearings that where a railroad chooses to operate its own sleeping cars, Pullman conductors have no valid cause for complaint. Finally, the Company has shown that Awards of the National Railroad Adjustment Board support the position of The Pullman Company in this dispute.

The facts of this case require a denial award.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The facts are not in dispute but require presentation in assessing the complex arguments of the parties.

The Facts

Since 1893 there has been joint line sleeping car service between Canada and the United States. Coordination of the operations of Canadian carriers and the Pullman Company has been necessary so as to allocate the revenue from the service and to provide satisfactory service to travelers.

To accomplish the latter purpose, Canadian railroad sleepers and Pullman cars were used for complete trips despite the fact that they crossed the international border. As summarized in the Organization's brief, the basic plan was:

> "The participating Carriers each supplied sleeping car equipment in proportion to trackage involved. Frequently the involved Carriers would find that one or the other would accumulate more mileage over a given period; accordingly, a 'mileage equalization account' was established. Initially, this mileage equalization account was balanced between the parties by payment of an agreed upon rate; later, the excess in mileage was equalized by one of the parties

withdrawing their cars until the mileage account was more or less equal."

In most cases Pullman Conductors operated both Pullman and Canadian railroad sleeping cars within the borders of the United States and Canadian conductors operated both kinds of sleeping cars within Canada. They exchanged places at border "gateway" points.

The instant case involves a different pattern of operation growing out of a special situation.

In 1936 the Canadian Pacific, in order to meet competition, decided to use air-conditioned sleeping cars on the "Mountaineer" joint service it provided with the "Soo" from St. Paul to Vancouver during the summer. Due to depression conditions and the lack of use for air-conditioned cars during the winter, it was not economically feasible for the Canadian Pacific to build or buy the cars for itself. It therefore entered into an agreement, to which the "Soo" was a party, under which the Pullman Company was to provide all of its sleeping car service on the "Mountaineer" line during the summer and the related St. Paul-Moose Jaw, Saskatchewan service during the winter season. As part of this service, the Pullman Company provided Pullman Conductors.

In 1945, the Organization and the Company entered into an agreement Rule 64 (a) of which provided:

> "Pullman conductors shall be operated on all trains while carrying, at the same time, more than one Pullman car, either sleeping or parlor, in service . . ."

It will be seen that the Rule requires Pullman Conductors only where there are two or more Pullman cars on the run. In 1950, a group of one-car runs, including the summer and winter ones here involved, were affirmed as within Rule 64 (a). That agreement (referred to in the claim as "Appendix A") specified that the listed runs "shall continue to be operated in charge of conductors for as long as such runs remain in existence. Should any such run be discontinued and subsequently restored it shall be a conductor operation".

In 1955, the Canadian Pacific and the Soo elected to terminate their agreement with the Pullman Company. The power to terminate was an outgrowth of a 1944 anti-trust case decree which required greater freedom for railroads contracting with the Company. After cancellation the runs were to be operated with Canadian Pacific sleeping cars and Conductors.

During the summer of 1955 the Company and the railroads agreed upon an interim arrangement under which Pullman Conductors were to operate the railroad sleeping cars. The Company and the Organization also entered into an agreement covering this interim arrangement.

That arrangement and the employment of Pullman Conductors ended on September 10, 1955 and the claim covers the lost work from September 11 to November 16-17, 1955.

Contentions of the Parties

The Organization contends that its members were improperly denied the work on the "Mountaineer" runs after cancellation of the Company's contract

by the railroads. The main argument is based upon the "Swacker" Award of the Special Adjustment Board in NMB Docket No. 3099.

The cases giving rise to the Award were based upon the Organization claims that Rule 64 (a) gave Pullman Conductors the right to operate Pullman Cars in Canada because of its language calling for Conductors on "**all** trains while carrying, at the same time, more than one Pullman car . . .".

None of the cases before the Special Board involved a situation like that involved here, but the Special Board had complete information about the inception and operation of Pullman Conductor service on the "Mountaineer" runs.

The Swacker Award did not sustain the Organization's claims or its theory in major part. In the main the Swacker Board held that an implicit element of Rule 64 (a) was that it applied only in "United States territory". The Organization asserts, and with reason, that this meant something more than "within the United States". It also included "territory" served by Pullman personnel under special arrangements with Canadian railroads because of special circumstances, such as a gateway point so near the Canadian terminal as to make it inefficient to substitute Canadian Conductors for Pullman Conductors.

The major ground for the Swacker Award was that Pullman Conductors never had the rights claimed in Canada and Rule 64 (a) gave no evidence of intent to go beyond **past practice.** The Board, in language which is a key to the Organization's case also said:

> "It is a normal, customary and usual operation for there to be interchange of equipment under the conditions here. The Pullman conductors enjoy the operation of Canadian line sleepers in United States territory, which is a reciprocal proposition, and if it does not balance so far as they are concerned that might be a subject matter of separate negotiations, but there is nothing that Rule 64 (a) ever had any application or intention to extend to it."

On this basis the Organization makes these points.

(a) Rule 64 (a) was held to give the Canadian railroads the right to operate Pullman and railroad sleeping cars in Canadian territory (i.e. those parts of Canada in which there was not a special arrangement to use Pullman personnel) **only because** as a "reciprocal proposition" Pullman Conductors had rights to operate both Pullman and Canadian railroad sleeping cars within "United States Territory" (i.e. the United States and those parts of Canada in which arrangements existed for the use of Pullman personnel);

(b) that the abolition of Pullman Conductor operating rights on the "Mountaineer" runs would destroy the "reciprocal proposition"; that unless such rights are honored and continued the whole Swacker Board Award arrangement falls and Pullman Conductors would have operating rights on all multi-Pullman-car runs in Canada;

(c) the Award was based on "practice"; as Pullman Conductors were operating on the Mountaineer runs that practice could not be changed; and

(d) the rights of Pullman Conductors extended to operate **railroad sleeping cars** within United States **territory.**

Further, the Organization argues that it and the Company have agreed that another case is to be controlled by the outcome of this case; that one, not before us, is a "mileage equalization" problem involving conductor assignment; that such action constitutes an admission that this case presents a "mileage equalization" problem. As a "mileage equalization" case, the reciprocal status of Pullman Conductor rights on the "Mountaineer" runs is confirmed, making them immune to abolition. Finally, the Organization argues that the 1950 "one car run" freeze agreement (Appendix A) prevented abolition of Pullman Conductor jobs on this run as one covered by the Agreement.

The main Company contentions are:

(a) this is not a "mileage equalization-reciprocal rights" case;

(b) that the Company can and must provide employment only where it has a contract with a railroad to provide service;

(c) that nothing in Rule 64 (a) provides a greater right to employment or imposes a greater duty to provide it than under (b); and

(d) the freeze agreement depends upon Pullman Company operation of the run under the foregoing principles.

Discussion of Contentions

(1) The relationship between the two cases

The Organization's argument that this is a mileage equalization case because the Company has agreed to be bound by the outcome here in another case which is a mileage equalization case is unconvincing. The Company did not specify its reasons; it only signified its willingness. The record data cited contains only an assertion by the Organization that the cases are the same. For its part the Company could have many reasons for agreeing to be bound in the other case. It could feel that the Organization's case is weaker here than in the other and that if it could not win this, it could not win the other; or that this was a sure winner and hence there was no necessity of trying the other. Or, the liability in the other might be so small as to not warrant the time and effort to present it to the Board. There may be other possibilities. Even if these were both mileage equalization cases the only evidence in the record shows that the Pullman Company provided mileage exceeding that of Canadian carriers. [R117]. If the situations were subject to mileage equalization they would be subject to the substitution of Canadian cars and employes until the excess was cancelled.

Suffice it to say that neither the record nor logic compels or permits the conclusion that the two cases are so alike as to provide the mileage equalization element in this case by borrowing from the one not before us.

(2) The "Reciprocal Proposition" argument

The keystone of the Organization's major argument is contained in the following passage from the Swacker Award:

"The Pullman conductors enjoy the operation of Canadian line sleepers in United States territory, which is a reciprocal proposition, and if it does not balance so far as they are concerned that might be a subject matter of separate negotiations, but there is nothing that Rule 64 (a) ever had any application or intention to extend it."

In our judgment the language will not bear the weight of the argument piled upon it.

The phrase "which is a reciprocal proposition" is descriptive language. It does no more than say that Canadian Conductors operate Pullman and railroad cars in Canada and that Pullman Conductors do the same in the United States. The Pullman Conductor arrangements were not based on mileage equalization; a principle consideration was the requirements of the service to be performed. With this requirement in mind, variations in the basic pattern were made.

The significance claimed for the "reciprocal proposition" language is cancelled by the language which follows it. The Swacker Board said, ". . . and if it [the reciprocal proposition] does not balance so far as they [Pullman Conductors] are concerned that might be a subject matter of separate negotiations . . ."

This language makes it reasonably clear that the arrangement was reciprocal in a general and qualitative but not a specific and quantitative way. We read it as saying that the parties had not bargained and agreed in Rule 64 (a) upon a method for balancing **amounts** of Canadian and Pullman Conductor service.

The Swacker Board was a Special Board of Adjustment interpreting the same Rule now before us. It did not and could not act as an arbitration tribunal imposing new conditions not to be found in pre-existing agreements. That is beyond the power of this Board and the analogous Special Boards of Adjustment.

We therefore hold that nothing in Rule 64 (a) as interpreted by the Swacker Board created any reciprocal rights to provide balance between the **quantity** of Conductor work performed by Pullman Conductors and Canadian Conductors.

It follows that the "Mountaineer" runs were not the exclusive province of Pullman Conductors in the absence of an arrangement with the railroads for the Pullman Company to provide service because of Rule 64 (a) and any "reciprocal proposition" associated with it.

(3) Rule 64 (a) and the one car agreement as guarantees of employment

The Organization's subsidiary argument that Rule 64 (a), as interpreted by the Swacker Board, froze past practice is not persuasive.

The Award did hold that Rule 64 (a) was limited by past practice, i.e. the Pullman Conductors did not have general job rights within Canada on Pullman Cars and nothing in Rule 64 (a) was meant to expand past practice. It does not follow that Rule 64 (a) so freezes past practice as to preserve job rights for work that the employer itself has lost unwillingly. This is not a case of subcontracting away the work or leasing the cars. The Company has lost the work unwillingly every bit as much as the Conductors have.

We agree that the 1950 "one-car run" Agreement as a guarantee of Pullman Conductor employment is plainly contingent upon the existence of the run. The Agreement does no more than say, in effect, the Company will apply Rule 64 (a), otherwise applicable only to multi-car runs, to one-car runs. In no other respect does it go beyond the Rule itself.

It is a well established principle that:

> "Such work as is reserved by the agreement to Respondent Carrier's employes can only be that which is within the Carrier's power to offer."

Award 8417 (Vokoun) citing **Awards 2425, 4353, 4945, 5774, 5778, 8076.**

Also **Awards 7194** (Wyckoff) and **6210** (Shake).

Award 6861 which was to the contrary was overturned in **Boos v Railway Express Agency, Inc.,** (W.D. So. Dak., 195) 153 F. Supp. 14, aff'd (C. A. 8, 195), 253 F2d 896. There the court observed in part:

> "* * * It is evident that this was nothing more than a withdrawing of the work by the Railway from the defendent, which the Railway was privileged to do under its contract with the defendent; and a re-assigning of such work to Roush. The defendent was placed in the situation of no longer having any work available to which the position of plaintiff applied. The fact that defendant maintains terminal offices on the route has no bearing on the abolition of the chauffeur position, and it cannot be contested that the Railway, the party who controls the work, can withdraw a part, or the whole, of the work as it so desires.
>
> "There is no question in this case concerning to whom the work belongs. It is stipulated that at all times the work of carriage of express belonged to the Railway. The work never belonged to the defendant except as it was delegated by the Railway. Therefore, it was impossible for the plaintiff to acquire an ownership interest in the work, which would entitle him to restoration of such work, because he could obtain no better title to, or interest in, the work than the defendant, the party from whom he acquired such title or interest. However, it is the plaintiff's contention that under the bargaining agreement he acquired a right to have his position maintained, or, in lieu thereof, be paid the salary for such position, even though the defendant no longer had the work to offer and the Railway had turned such work over to Roush. We find no validity in this contention.
>
> "Plaintiff apparently concedes the right of the Railway to determine how the express is to be transported, but claims that he has a right to perform the work of handling the express. This is inconsistent with the fact that plaintiff's former position, to which he seeks to be restored, is that of a chauffeur. In any event, when the Railway withdrew the work from the defendant, all of the work, of whatever nature, formerly performed by the plaintiff in his chauffeur position, left the defendant's control and no longer fell within the scope of the bargaining agreement."

Having found no special arrangement binding the Company to provide work or equivalent pay on the Mountaineer run, we believe those precedents are fully applicable here. The Company's duty to provide work, or pay, for unavailable work does not exceed its opportunity to offer the work.

(4) Canadian cars as Pullman cars

In a very ingenious argument the Organization contends that the Swacker Award transformed the "all cars" of Rule 64 (a) into "all cars in United States Territory" and also transformed "more than one Pullman car" into "more than one Pullman or Canadian car in United States Territory". This follows from the right of Pullman Conductors confirmed by the Swacker Award to operate Canadian cars coming into the United States under the "reciprocal" arrangement described.

It is argued that the fact that the "Mountaineer" runs were Pullman Territory under the Swacker Award rationale (no case concerning them was before the Swacker Board for decision) Pullman Conductors have the right to operate them notwithstanding the fact that only Canadian railroad cars were used after September 10, 1955.

The argument has a verbal plausibility that does not take into account the operating realities which gave rise to the practice of having Pullman Conductors operate some Canadian cars.

As described under "The Facts", the operation of Canadian cars by Pullman Conductors within the United States grew out of the desire to provide through service to passengers on international runs. So, both Pullman and Canadian sleeping cars were kept on a train for its full run while Pullman Conductors operated them within the United States to and from "gateway" points.

The inception of Pullman Service on the "Mountaineer" runs grew out of an entirely different set of circumstances, i.e. the railroad's requirements for cars only Pullman could provide on these specific runs. It would be artificial in the extreme to transport a gloss of the language growing out of one kind of situation and apply it mechanically to an entirely different set of circumstances. Moreover, all of the situations involving Pullman Conductor operation of Canadian cars were pursuant to contractual arrangements between the Canadian carriers and the Company. To find such a right in the absence of a contractual arrangement by the Company to supply service would be to introduce an entirely new term and a new practice not found in the Agreement nor the Swacker Award interpreting it. Much as we admire the ingenuity of the argument, we find the Organization's proposition unconvincing.

None of the arguments of the Organization and the Claimants singly or in combination substantiate the claims.

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

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August, 1960.