Award No. 9544

Docket No. PC-9333

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 Conductors and Brakemen, Pullman System, claims for and in behalf of Conductor C. J. Schroeder, Cleveland District, that:

1. Rule 38 (c) of the Agreement between the Company and its Conductors was violated by the Company on September 27, 1955, when the Company issued an improper assignment to Conductor A. E. Henley: "NYC 421 Cinti and S. D."

2. Under the circumstances existing on September 27th, Conductor C. J. Schroeder was available for and entitled to perform the station duty assignment portion of the above double assignment.

3. Conductor Schroeder be credited and paid under appropriate rules of the Agreement in the amount he would have earned had he been given the station duty assignment to which he was entitled.

EMPLOYES' STATEMENT OF FACTS:

I.

During the signout period in the Cleveland District on September 27, 1955, there were four known assignments and three available extra Conductors.

The third listed requirement was an assignment to road service, New York Central Train #421, Cleveland to Cincinnati, with a reporting time of 6:00 A. M., September 28th.

The third listed available extra Conductor was Conductor A. E. Henley.

The above assignment (NYC 421, Cleveland-Cincinnati) was properly given to extra Conductor Henley during the signout period.

The fourth listed requirement was an assignment to station duty, reporting time 7:15 P. M., September 27th.

CONCLUSION

The Pullman Company has shown in this ex parte submission that a technical violation of the working Agreement occurred on September 27, 1955, in that extra Conductor A. E. Henley improperly was given a double assignment during the signout period. Also, the Company has shown that if the assignments on September 27, 1955, had been handled properly in accordance with Rule 38 (c), as interpreted in Third Division Award 6621, the assignment in question (station duty) would have been given to Conductor Henley since he was the only extra conductor available subsequent to the signout period. Additionally, the Company has shown that the claimant, regular Conductor C. J. Schroeder, was not entitled to the station duty assignment on September 27 and, consequently, was deprived of no rights as a result of not receiving the assignment. Finally, the Company has shown that awards of the National Railroad Adjustment Board have established the principle that unless penalty payments are stipulated in the working Agreement none is required.

The Organization's claim is without merit and should be denied.

All data submitted 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. On September 27, 1955, four extra Conductor assignments existed at Cleveland but only three extra Conductors were present and no other was expected before the following morning. The three extra Conductors were assigned to three openings in the proper manner during the signout period, noon to 1:00 P. M. Among the assignments was one for road service given to extra Conductor Henley to begin the following morning at 6:00 A. M.

After this set of assignments was made and still during the signout period, Conductor Henley was assigned to station duty for the period 7:15 P. M. September 27 to 2:20 A. M. September 28.

The double assignment violated that part of Rule 38 (c) which provides:

> "An extra conductor assigned to station duty shall not be given another station duty, road service or deadhead assignment (i.e., a double assignment) during the signout period. * * *"

The Rule literally prohibits "a double assignment" of an extra Conductor assigned to station duty. What took place here was "a double assignment" of a Conductor who first received a road service assignment.

Nonetheless, the Company conceded on the property and before the Board that such a double assignment during the signout period was meant to be within the ban of Rule 38 (c) and conceded that there had been a violation.

Positions of the Parties

However, the Company contends that the violation was a "technical" one only, that no Conductor suffered monetary loss because the same assignment would have been made at any time between the signout period and the beginning of the station duty assignment as Conductor Henley was the only extra

Conductor at Cleveland and hence entitled to the assignment under Rule 38 (a). It provides:

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

The exceptions are concededly not relevant here.

The Claimant and Organization contend that the violation was palpable and that Conductor Henley's station duty assignment was not proper under Rule 38 (a) because he was not "available" within the meaning of the Rule.

There is a definition of "available" in the Agreement. Q-9 and A-9 appended to Rule 38 read:

> "Q-9. What is meant by 'available' as used in paragraph (a) of this Rule?
>
> "A-9. 'Available' means that the conductor entitled to an assignment can be contacted and assigned and can reach the point where he is required to report by scheduled reporting time. * * *"

The Claimant contends that Extra Conductor Henley was not "available" because while on station duty he was subject to an assignment which could make him unavailable for the already assigned road service as a consequence of that part of Rule 38 (c) which provides:

> "* * * An extra conductor assigned to station duty shall be given a road service or deadhead assignment which occurs and which has a reporting time within his tour of station duty."

Claimant further argues that under these circumstances the extra conductor was not "available" because not "released from his prior assignment."

In sum, Claimant and the Organization contend: (1) that an extra Conductor once assigned cannot receive a double assignment either during a signout period or after until the completion of the first assignment; and (2) in the absence of a completely unassigned extra Conductor, any remaining extra assignment should go to a regular Conductor on lay over Rule 36 (which, however, limits "service outside his assignment" to an "emergency").

Quite clearly, the double assignment prohibition of Rule 38 (c) literally read does not prohibit all double assignments and is not by its terms applicable to any time after the signout period. The Company's concession of violation raises the problem of how far the policy of the Rule does go in determining whether or not monetary loss was or was not suffered—the remaining issue between the parties.

The line of reasoning of the Claimant and the Organization is complex and formalistic in the extreme. We cannot be sure on this record how far Rule 38 (c) goes in banning double assignments. The reasoning that the extra Conductor's second assignment which did not itself conflict with an assignment already made was improper and hence should have been given to a regular Conductor is quite artificial. It does not overcome the clear mandates of the

Agreement in two other respects. Rule 38 (a) is unequivocal that extra work is to go to extra Conductors. Rule 36 is explicit that a regular Conductor is not available for assignment "outside his assignment except in emergency". If anything, the impediments in the Agreement to a second assignment to a regular Conductor are greater than those argued to prevent such an assignment to an extra Conductor. The Organization's contentions are not persuasive.

Under the circumstances we find that no monetary loss was suffered.

The Remedy

The Company has conceded the violation of the Agreement. Despite the fact that it has demonstrated that no Conductor suffered a loss thereby it is not freed from all monetary liability.

The assignment was made "during the signout period" in contravention of the Agreement. The prohibition apparently had some purpose important enough to the parties to be included in the Agreement although we cannot tell from this record precisely what that reason was. It may have been to protect the rights of other extra Conductors who might appear between the end of the signout period and a reasonable time before the beginning of the assignment subject to the Rule. But cf. Award 8777 (McMahon).

It is well established that a monetary award is to be made in vindication of the Agreement regardless of whether the violation resulted in actual loss. Awards 685 (Spencer), 2282 (Fox, 2838 (Youngdahl), and 5893 (Daugherty). In such a case the identify of the Claimant is immaterial. Award 4550 (Wenke). Therefore, we sustain claim 1 and the monetary part of claim 3 with the understanding that the Claimant was not actually entitled to the assignment in dispute; therefore claim 2 must be denied.

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 violated.

AWARD

Claim 1 sustained; claim 2 denied; claim 3 sustained in part and denied in part as indicated in the Opinion.

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.

DISSENT TO AWARD NO. 9544, DOCKET NO. PC-9333

Award 9544 correctly holds as follows:

That "Quite clearly, the double assignment prohibition of Rule 38 (c) literally read does not prohibit all double assignments and is not by its terms applicable to any time after the signout period."

That "The line of reasoning of the Claimant and the Organization is complex and formalistic in the extreme"; it "is quite artificial", and "The Organization's contentions are not persuasive".

That "Under the circumstances we find that no monetary loss was suffered" and "no Conductor suffered a loss."

That "the Claimant was not actually entitled to the assignment in dispute; therefore claim 2 must be denied."

Award 9544 is in error in sustaining claim 3. The theory "that a monetary award is to be made in vindication of the Agreement regardless of whether the violation resulted in actual loss" is pernicious error and should not be perpetuated; no rule of the applicable agreement provides for penalty payments, and this Board is without authority to write rules for the parties. For this reason we dissent.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen

ANSWER TO CARRIER MEMBERS' DISSENT IN AWARD 9544 — DOCKET PC 9333

Award 9544 correctly holds that:

"The Company has conceded the violation of the Agreement."

"The assignment was made 'during the signout period' in contravention of the Agreement."

"It is well established that a monetary Award is to be made in vindication of the Agreement, regardless of whether the violation resulted in actual loss."

The Award is not in error. The Carrier Members in their usual manner, pick a few phrases out of context for the sole purpose of confusing the simple issue of whether or not the Agreement was violated.

Carrier Member states: "No rule of the applicable Agreement provides for penalty payments, and this Board is without authority to write rules for the parties."

Since 1951 the Agreement has contained a "Memorandum of Understanding Concerning Compensation for Wage Loss" reexecuted on December 20, 1950 and again on September 21, 1957 which reads:

> "* * * It is understood that if a Pullman Conductor presents a claim that he was not given an assignment to which he was entitled under the applicable rules of the Agreement, effective January 1, 1951, and that claim is sustained, he shall be paid for the trip he lost in addition to all other earnings for the month."

Thus it is crystal clear that the Agreement provides for penalty payments. Even if this were not so, numerous Awards of this and other Divisions of the National Railroad Adjustment Board have held that a penalty payment is necessary in order to preserve the integrity of the Agreement and to discourage violations thereof. We concur with the majority.

/s/ H. C. KOHLER
Labor Member

Chicago, Illinois

August 22, 1960