Award No. 10510
Docket No. PC-11811

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

David Dolnick, 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. E. Brace, Denver District, that:

1. The Pullman Company violated Rule 38 of the Agreement between The Pullman Company and its Conductors when, on July 1, 1957, Conductor Brace was not given the assignment due him as provided in Rule 38, between July 1 and July 8, 1957.

2. We now ask that Conductor Brace be credited and paid for all work that his credited and assessed hours would entitle him to from July 1, 1957 to July 8, 1957, i.e., assignment given Conductor F. R. Campbell on July 4th, reporting 7:45 A. M., July 5th, and assignment given Conductor J. T. Graven on July 7th, a total of 35:35 hours.

Rule 40 was also violated.

EMPLOYES' STATEMENT OF FACTS:

I.

There is an Agreement between the parties, bearing the effective date of January 1, 1951, and amendments thereto, on file with your Honorable Board, and by this reference is made a part of this submission the same as though fully set out herein.

II.

For easy reference and convenience of the Board the most pertinent parts of Rules 38 and 40, which are directly applicable to this dispute, are quoted as follows:

"RULE 38. Operation of Extra Conductors.

of Railway Conductors and Brakemen, Pullman System, argued that the Company failed properly to transfer a conductor as provided in **Rule 42. Temporary Transfers** because the Company failed to give the conductor being transferred from the Portland District to the Pennsylvania Terminal District (Conductor C. W. Kuenkler) an assignment slip on which notice of his transfer was recorded in strict conformity with the requirements of the Rule and that when he was given an assignment out of the Pennsylvania Terminal District, **Rule 38. Operation of Extra Conductors** was violated. In denying the claim the Board stated in pertinent part as follows:

> " . . . we note and find the record definitely establishes that, even though there was no physical delivery of an Assignment to Duty slip with proper endorsements, Kuenkler and everyone else concerned knew of his transfer to Pennsylvania Terminal; that he arrived at such Terminal, and was taken up on the extra list at that point on the very date of his arrival; that from that date on he was accorded all the rights and privileges of an employe transferred under Rule 42 and was so regarded by both Carrier and Employes; that even though there was a technical defect in the procedural details incident to his transfer, he was actually a defacto transferee under such rule . . . "

The Company submits the Organization has failed to meet the burden of establishing facts sufficient to require the allowance of the case at hand (Third Division Awards 5976, 7362).

CONCLUSION

In this ex parte submission the Company has shown that Conductor Brace was properly furloughed July 1, 1957, as provided in Rule 40 of the Agreement and that Rule 38 was not violated when Conductor Brace was not given assignments during the period July 1 — July 8, 1957, during which period he was on furlough. Also the Company has shown that Awards of the National Railroad Adjustment Board support the Company in this dispute.

The claim filed in behalf of Conductor Brace is without merit and should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant, C. E. Brace, was an Extra Conductor, in the Denver District. Sometime in the morning of July 1, 1957, — the record does not show the exact time of the day — the claimant arrived in Denver from Portland, Oregon. He reported in at the Denver office and received his pay check. The claimant testified that he then telephoned his wife to bring bills due to be paid and to meet him in downtown Denver. He met his wife as arranged and did not return to his home until 12:55 P. M. He also testified that his wife came home about five minutes later.

The Claimant further testified that he telephoned Car Clerk Barber on July 3, 1957 and inquired if his services will be needed on July 4. Barber's statement in the record on this conversation is as follows:

> "On Wednesday afternoon, July 3, Conductor Brace called this office and inquired of me whether or not he would be required July 4. I checked my requirements and informed him that I saw no reason for any recall on this date."

The Claimant does not specifically deny that Barber used the word "recall," but in the record he said that Barber told him that he doubted if the Claimant would be called out, "but there were no sure way of telling . . . He (Barber) said he had the assignment for the day completed."

The Claimant further testified that Albert Balla, another extra conductor called the Claimant on July 4 and told him that Conductor Golden told Balla that the Claimant had been furloughed. The Claimant told Balla that he never had been notified that he had been furloughed.

On the morning of July 8, the Claimant went to the Carrier's office, checked the board and found that he had been furloughed on July 1, 1957, the day he arrived from Portland. He immediately checked and he was told that Car Clerk Barber had notified the Claimant by telephone at 12:30 P. M. on July 1 and had sent him a written notice. It was then discovered that no written notice had been sent or given to the Claimant, but that the copy had been placed in the conductor's mail box in the conductor's room. On July 8, 1957, the Carrier mailed the Claimant by Special Delivery mail a copy of the furlough notice dated July 1, 1957.

Rule 40 of the Agreement then in effect read:

> "Rule 40. Reducing and Increasing Forces. In reducing forces, seniority shall prevail in selecting those to be retained in the service. When forces are increased, those who were laid off or furloughed shall be returned to service in the order of their seniority, provided they have filed their names and addresses with the designated official for that purpose. Failure to report for duty within 7 days from the date of notification shall terminate this privilege unless an explanation satisfactory to Management is given.
>
> "Conductors who are to be furloughed or recalled from furlough shall be notified in writing with copy to the local chairman at the time of furlough or recall."

It is agreed that the copy of the furlough notice dated July 1, 1957, was never mailed or delivered to the Claimant prior to July 8, 1957. The Carrier contends that the placing of the furlough notice in the Conductor's box on July 1, 1957, complies with the requirement that the Claimant "be notified in writing" under Rule 40. While it is true that Rule 40 does not require the Carrier to mail such notice, it is certainly reasonable to assume that a furloughed conductor should be given a copy of such notice by handing it to him at the Carrier's office, by delivery to him by messenger, or by delivery through U. S. mail. The Carrier cannot expect that a conductor, having signed out, and having left the Carrier's office, be required to check his mail box at the Carrier's office while he is awaiting at home for an assignment call. Carrier is required under Rule 38(c) of the Agreement, when making assignments, "to notify the extra conductors by telephone or wire." Placing the furlough notice in the Claimant's mail box in the conductor's room in the Carrier's office does not meet the requirement of Rule 40 that a conductor who is furloughed "shall be notified in writing."

The Carrier also contends that the Claimant had notice of his furlough because Car Clerk Barber telephoned him of the fact at 12:30 P. M. on July 1, that Barber advised him on the telephone on July 3 that he "saw no reason for any recall on this (4th) date," and that Conductor Balla advised the Claimant on July 4 that he had heard that the Claimant was furloughed. The evidence on these facts are not entirely clear and convincing. There are sufficient facts in the record to question the efficacy of these conclusions. But even if all of it was true, it still does not relieve the Carrier of the specific obligation to

notify the Claimant in writing. There is no merit to Carrier's statement that a telephone conversation is "a better notice than a written notice;" not when the Agreement requires a written notice.

Most of the Awards cited by the Carrier are not directly in point. They deal primarily with the subject of burden of proof and with the necessity that the Claimant prove his case beyond speculation and conjecture. There is no question here that the Claimant was not notified in writing under Rule 40. This is not speculation nor conjecture. The fact is proved beyond any doubt.

The Carrier also cites Award 6747 (Parker) to support its claim that placing the furlough notice in the mail box is sufficient under Rule 40. In that case the Organization filed a claim contending that there was no physical delivery of an "Assignment of Duty" to another conductor, not the Claimant. The Board held that "Kuenkler (not the claimant) and everyone else knew of his transfer . . . that he arrived at such terminal and was taken up on the extra list at that point on the very date of his arrival; that from that date on he was accorded all the rights and privileges of an employe transferred under Rule 42 and was so regarded by both Carrier and Employes . . ." The Board in that case continues:

> ". . . and last but not least, that the first portion of the very rule on which Claimant relies to sustain his position expressly provides that a conductor temporarily transferring to another district shall be considered a conductor of such district on the date of his arrival."

In other words, the Board held that the transfer was an accomplished fact and so the delivery of an "Assignment of Duty" slip was not necessary. The facts in the case now before the Board are entirely different. There was no accomplished fact.

In Award 3845 (Yeager) the Board held that the Carrier could have used greater diligence in notifying the conductor. The record in this case is devoid of any diligence by the Carrier.

It is a well established rule adopted by this Board in many Awards that a party to an Agreement cannot circumvent a specific written obligation contained in an Agreement. The Carrier in this case did not notify the conductor in writing within the meaning and intent of Rule 40.

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

That the parties waived oral hearing;

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 Carrier violated the Agreement as stated in the Opinion.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1962.