Award No. 11065
Docket No. PC-12759

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Preston J. Moore, 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 H. N. Chancey, Penn Terminal District, that the Agreement between The Pullman Company and its Conductors, dated September 21, 1957, was violated when:

1. On December 15, 1960, during the established signout period in Penn Terminal District, from 11:00 A. M. to 1:00 P. M., Conductor Chancey was given an assignment to report in the Penn Terminal Station at 10:10 A. M., December 16th, for a deadhead trip to Miami, Fla., on trains 107-87, for service out of Miami on December 17th, on FEC train 88.

Conductor Chancey's assignment was cancelled in violation of Rule 38 (b).

2. Because of this violation we now ask that Conductor Chancey be credited and paid just as though he had been permitted to perform the trip to which he had been assigned.

EMPLOYES' STATEMENT OF FACTS:

I.

During the signout period in the Penn Terminal District, on December 15, 1960, Conductor H. N. Chancey was given an assignment to report in New York on December 16th, at 10:10 A. M., depart at 10:30 A. M., to deadhead on PRR train 107 — Florida Special — to Miami, Fla. The Florida Special was scheduled to arrive in Miami at 11:45 A. M., December 17th. Conductor Chancey was being sent to Miami to return on FEC train 88, which was scheduled to depart from Miami at 4:45 P. M., December 17th.

Conductor Chancey reported for the assignment given him as per instructions. After he reported, however, the Company cancelled his assignment.

The Company submits that when the Organization presents a claim it assumes the obligation of presenting a clear and logical account of the facts and of citing rules which support its claim. In the instant case the Organization has not assumed this responsibility. In Third Division Award 4011 (Parker), the Board stated, under **OPINION OF BOARD:**

> "The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance. . . ."

Also, see Awards 5418, 5758, 3523, 3477 and 2577.

CONCLUSION

In this submission The Pullman Company has shown that Conductor Chancey's deadhead assignment properly was canceled on December 16, 1960, since the assignment was not a right given to him by rule. Also, the Company has shown that the Organization's arguments in the instant case are unsound and are not supported by the rules of the Agreement. Finally, the Company has shown that Awards of the National Railroad Adjustment Board support the Company in this dispute. The claim is without merit and should be denied.

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

(Exhibits not reproduced.)

OPINION OF BOARD: This is a dispute between The Order of Railway Conductors and Brakemen and The Pullman Company.

On December 14, 1960, the Miami District advised the Penn Terminal District of their desire to borrow a conductor for service at Miami on December 17, 1960. The Miami District cancelled the request on December 15. Claimant had been ordered to make the trip but when he reported to the station was advised that the request had been cancelled. He was paid 3:25 hours for reporting and not used. Claimant contends Rule 38 (b) was violated and requests payment as if he had made the trip.

At the outset, we concur with the opinion expressed in Award 5588 wherein it was held "That Rule 38 and the Memorandum of Understanding relate to the handling of extra work arising in a given district and the manner of its assignment to conductors in the district."

It is apparent from the record that Claimant could not have been given the road service assignment, even if he had reported to Miami. The Penn Terminal District could not make that assignment. That leaves the deadhead assigment. We do not believe that the Agreement intended that the Company should be required to do a senseless act.

Rule 38 (a) grants the right of certain work to the extra conductors of that district, 38 (b) then states the manner in which extra conductors will receive assignments and when the assignments may be cancelled.

"RULE 38. Operation of Extra Conductors.

"(a) 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 (a) and (e).

"(b) * * * * *

"It is understood that Management has the right to annul an extra conductor's assignment under the following conditions:

"(1) When assigned in lieu of a regularly-assigned conductor who had been laying off and the regularly-assigned conductor reports for his assignment before scheduled reporting time.

"(2) When the cars in his charge are consolidated with cars of another train, or trains, that are in charge of a Pullman conductor, or Pullman conductors, except an extra conductor's assignment shall not be annulled when the cars in his charge are consolidated with the cars of another train that are in charge of a Pullman conductor and by such consolidation, the need for an additional conductor is created.

"(4) When he is filling a regular assignment at an outlying point under the jurisdictions of his home station and he is awarded a regular assignment under the provisions of Rule 31; when a reduction of force is necessary under the provisions of Rule 40; or when he is to be transferred under the provisions of Rule 41 or 42.

"(5) When an assignment does not materialize after the assignment has been made because a railroad annuls the operation of a train or cancels extra cars to the number that a conductor is not required as provided in the rules.

"It is understood the Management has the right to change an extra conductor's assignment when the destination of his train is changed en route, in which event the conductor will continue to the new destination."

Therefore Rule 38 is not pertinent to this dispute.

For the foregoing reasons, we find no violation of the Agreement.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1963.

LABOR MEMBER'S DISSENT TO AWARD 11065, DOCKET PC-12759

This Award is completely erroneous and indicative of the Majority's penchant for giving little credence to obvious FACTS, and is predicated upon either a lack of knowledge of the collective agreement involved or else an utter disregard for the provisions thereof.

Despite the reproduction in the Award of Rule 38(a) and that part of (b) pertaining to the manner in which assignments may be cancelled, Carrier's inconsistent and incorrect contentions obviously influenced the Majority to summarily and incorrectly hold that:

"Therefore Rule 38 is not pertinent to this dispute."

This reasoning is patently untenable for the simple reason that assignments to all extra work are made and controlled by no rule of the Agreement except Rule 38 which also enumerates how and when such assignments may be cancelled.

There is **no other manner** of assigning extra work under the Agreement except by the application of Rule 38. Nor is there **any other manner** of cancelling such assignment except by the provisions of the same rule. (See Award 9991)

The aforementioned FACT should be obvious to all and yet in order to confuse and confound and to have the Majority hold Rule 38 to be not applicable (which unfortunately has been done), the following incorrect or at least fallacious arguments were included in Carrier's panel presentation as follows:

> "The Company's position is that Rule 38 did not give the Claimant the right to the assignment and therefore it could cancel it at will."

> "The employes have made much of the fact that Claimant was assigned according to the provisions of Rule 38(c), and it is

expected that they will argue that since Carrier assigned Claimant in accordance with Rule 38 (c) it must have known Rule 38 applied. We submit that Carrier had no reason to give an assignment in any way other than the usual procedure it had set up to give assignments, but that this is not an admission that the rule applied to this situation. On the contrary is mere administrative use of existing procedures. It had no reason to assign the work to Claimant by use of a different administrative procedure. The Company's administrative procedures must necessarily conform to the rules. The vast majority of its assignments no doubt are subject to Rule 38 but when an assignment is required to be made which is not subject to Rule 38, we submit, that the Company, by use of its administrative procedures previously set up does not admit, by use of those procedures, that the rule covers its action."

"The employes rely on the Company's position in the docket in **Award 9968** (Weston). It must be realized that inconsistent and alternative arguments are used everywhere without the fear of admission. They are mere attempts to persuade. An Agreement can only be set out in words and the words have no meaning until interpreted. Certainly an attempt to persuade is not an admission but a hypothetical proposition for the instant purpose. Such argument as the employes present is not realistic and is not a convincing argument. We submit that the Company's position in a docket for a prior Award is immaterial. However we will discuss Carrier's contentions on that docket. The Company contends (P. 67), that their position was not contrary but that in that case the conductors were transferred under Rule 23. In any event all that award decided was that Claimants had not proved they were available under Rule 38 (a). The Company did not choose to make the contention that it is now making, preferring instead to argue within the framework of Rule 38. It certainly cannot lose its right to make an argument when it has another defense which was successful. The Carrier merely contended that under Rule 38 the Claimants were not available.

The fallaciousness of the second-quoted paragraph is clearly apparent when we examine the Agreement because when an assignment is required to be made, Rule 38 is the only Rule governing the assignment to extra work.

The first sentence admits that assignment was made under Rule 38(c) thus making this rule **fully** applicable.

Assignments of **ANY** nature are made through the application of the Agreement rules and NOT by "administrative procedure."

From a casual reading of the aforequoted flummery and mishmash, even the uninitiated can readily see that the accusation of inconsistency leveled at Carrier by this Organization (and heartily concurred in by the author of this dissent) is certainly true.

Unfortunately more weight was apparently given this inconsistent and contradictory material than the facts of record in the submissions of the parties.

The Majority completely ignored Award 9968 and the testimony from Emergency Board No. 89, both in the record, which clearly bring Rule 38 into application and particularly where the question of deadheading is involved.

Award 11065 is manifestly incorrect and should be considered as having no value and dissent thereto is hereby registered.

R. H. Hack
Labor Member