Award No. 13828

Docket No. PC-15328

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

John H. Dorsey, 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, New York Division 709, claims for and in behalf of Conductors P. Hok, W. J. Stillwagon, E. J. Cleary, and certain extra conductors (record to be checked) of the Penn Terminal District, in which we contend that the Agreement between The Pullman Company and its Conductors was violated, with especial reference to Rules 25, 47, 33 and 38, when:

1. On April 26, 1964, without conference and agreement with the General Chairman, as required, the conductor run between New York, Penn Terminal District and Pittsburgh, Pa., on PRR train 32, was reallocated to the Philadelphia District for conductor operation.

2. We now ask that the conductor run on PRR train 32 between New York and Pittsburgh be rebulletined in the Penn Terminal District in accordance with Rule 33 of the Agreement, and that Conductors Hok, Stillwagon and Cleary be credited and paid under the terms of Rules 6 and 20 for each trip that has been denied them, New York to Pittsburgh and return, since April 26, 1964 and subsequent dates, and that the extra conductors entitled to the trip be credited and paid for each trip denied them under the terms of the rules of the Agreement.

Rule 21 is also involved.

EMPLOYES' STATEMENT OF FACTS: There is an Agreement between the parties, and amendments thereto, bearing the effective date of September 21, 1957, revised January 1, 1964, 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.

I.

For many, many years, the Penn Terminal District conductors operated the conductor run between New York City, N. Y., and St. Louis, Mo. on PRR trains 33 outbound and 32 inbound. For accounting purposes, the run was designated as Line 6346.

The Operation of Conductors Form that was issued in accordance with Rule 15 of the Agreement, and posted in a place accessible to the Penn Ter-

(Gray). In the Award 10444 dispute which involved the shortening of a conductor run between Detroit and Richmond, Va. to a run with terminals Charlottesville, Va.-Detroit, the conductors' Organization took the position that the shortened portion of the run was not new service; but was the same service that had been in operation. The Organization argued that under the provisions of Point 1 of Rule 33, it was necessary for the Company to re-bulletin the run in the Richmond District and that the Richmond conductors should have been permitted to continue to operate the run.

Under **OPINION OF BOARD** of Award 10444 the following language is significant:

> "Therefore, there could be little or no question that this was a new run and is not a 're-allocated;' and since it is a new run we must apply an entirely different rule than we would if it were 're-allocated' and we so hold."
>
> * * * *
>
> ". . . Thus, we do not find the awards cited by the Petitioner applicable in this case. On the other hand, Award 8682 supports the Respondent's position that the shortened run was new service and that the run was properly assigned under Rule 46.
>
> We conclude that the Charlottesville-Detroit run was properly assigned by the Respondent to the Columbus Agency conductors in accordance with the provisions of Rule 46."

Thus, the awards of the National Railroad Adjustment Board emphatically hold that a shortened run is new service and properly may be assigned under Rule 46, as in the case at hand.

4. The Claim in Behalf of Penn. Terminal District Conductors Hok, Stillwagon, Cleary, and Certain Extra Conductors Is Unspecific and Excessive.

The Organization claims that Conductors Hok, Stillwagon and Cleary, who are named as claimants in this case, should be paid for all trips lost by them just as though they had performed the trips on and after April 26, 1964, on the theory that they would have applied for and would have been awarded the so-called Penn. Terminal District conductor run on PRR train No. 32 between New York and Pittsburgh. However, these conductors were regularly assigned conductors and operated in other runs before and after April 26, 1964.

The Organization's claim is improper on the basis that the amount claimed is excessive because obviously as regular conductors the Claimants would be entitled only to the earnings they would have received over and above what they were paid in other regular service during the period in question. This position is supported by the decision handed down by Judge James M. Meredith in the United States District Court of the Eastern District of Missouri, Eastern Division, under date of February 14, 1964.

In that case, the Court concluded that when on June 26, 1958, The Pullman Company discontinued the assignment of a conductor to the Pullman car of the St. Louis-Moberly segment of the St. Louis-Omaha run, it properly exercised its option to man this single car with porters in charge and that the claim in behalf of conductors was without merit and should be denied. The

Court further held that if it were otherwise to rule, the plaintiffs' claims with respect to the amount of damages would not be sustained by application of the rules Agreement to the facts but by the application principles of Contract Law, which hold that the measure of damages for one injured by breach of an employment contract is the amount he would have earned under the contract less such sums that he in fact earned. On this point, Management's position is further supported by Third Division Awards 8565 (Weston), 11057 (Moore) and 11293 (Moore).

The claim is found unspecific in that it does not identify the extra conductors who allegedly are claimants in this case. Also, the claim is unspecific in that it does not represent a round trip operation for the regular conductors who allegedly were entitled to operate in a run of which train No. 32 is only a Pittsburgh-New York segment. In the hearing accorded the Organization on its claim the local chairman attempted to correct this deficiency by amending its claims as indicated by the following colloquy:

"MR. CHANCEY: No, it is not my contention that the conductors should have been assigned to train 29. We are not claiming train 29.

MR. GARDNER: What train is it?

MR. CHANCEY: Train 31. Train 29 is properly a Philadelphia operation.

MR. GARDNER: Then it is your position that the Agreement was violated when conductors were not assigned to train 31 out of New York, and on train 32 out of Pittsburgh?

MR. CHANCEY: That is correct; that is my contention.

MR. GARDNER: I have nothing further.

MR. CHANCEY: Now, to further clarify our position: We did not specify train 31 in our original letter of claim. We have cleared this up, however, while still on the property. The Organization has no objection as to whether the man is in a deadhead service or working service.

That is all I have.

MR. GARDNER: Well, what you are saying is that you cannot contend violation of a rule because a conductor was not assigned to either train out of New York, is that correct?

MR. CHANCEY: I am contending a violation of the rule when the train conductor was removed from train 32.

MR. GARDNER: But there was no violation when a conductor was not assigned to 31?

MR. CHANCEY: It follows that, if a conductor is going to operate train 32, he is going to have to be gotten to Pittsburgh some way at all costs."

On the basis of the local chairman's logic as expressed in his quoted statements, the conclusion is inescapable that the Organization's claim is confined to a one-way trip on PRR train No. 32, Pittsburgh- New York.

CONCLUSION

In this submission, the Company has shown that effective April 26, 1964, a conductor run between New York and St. Louis was discontinued as a result of curtailment in Pullman service into and out of St. Louis. The Company has also shown that a new conductor run was inaugurated between Pittsburgh and New York City on PRR train No. 32 and between New York City and Pittsburgh on PRR train No. 29, which was awarded to Philadelphia District conductors in accordance with the provisions of Rule 46, the controlling rule in this dispute. The Company has shown additionally that the Organization's argument to the effect that Rule 46 was improperly applied to the Pittsburgh-New York run and that the Company's action constituted an improper re-allocation of a Penn. Terminal run to the Philadelphia District without conference and agreement with the Organization as required by Rule 47 is without basis. Further, the Company has shown that neither Rule 47 nor any rule cited by the Organization was violated. Finally, the Company has shown that awards of the National Railroad Adjustment Board, with especial reference to Awards 8682, 6476 and 10444 resolve in favor of the Company the question of whether a shortened run is new service under the Agreement.

The claim in behalf of the Claimant Penn. Terminal District conductors is unspecific, excessive, without merit and should be denied.

(Exhibits not reproduced)

OPINION OF BOARD: Immediately preceding April 26, 1964, there was a conductor run from New York to St. Louis (Train 31) and St. Louis to New York (Train 32). The home terminal was New York. Penn Terminal District conductors operated the run. On April 26, 1964, Carrier issued an Operation of Conductors Form that stated, with reference to the run, "Line discontinued;" and a like Form was issued prescribing a run on Train 32 Pittsburgh to Philadelphia to New York and Train 29 New York to Philadelphia to Pittsburgh with Philadelphia as home terminal. The run was labelled "NEW OPERATION" and was assigned to Philadelphia District conductors.

In the so-called "NEW OPERATION" Train 32 carrying less than two pullman cars operated between St. Louis and Pittsburgh without a pullman conductor. At Pittsburgh a pullman car or cars from a Chicago train were coupled on Train 32 and a conductor assignment became a contractual requirement Pittsburgh to Philadelphia to New York. This conductor requirement was consolidated with a second conductor assignment on Train 29 from New York to Philadelphia to Pittsburgh as a conductor run. Thus, the run was from Philadelphia, the designated home terminal, to New York to Pittsburgh to Philadelphia.

The Organization contends that assignment of the run to Philadelphia District conductors was a reallocation of an existing run which Carrier unilaterally effected in violation of Rule 47 of the Agreement.

Carrier contends that the "New Operation" was "new service" within the contemplation of the words as used in Rule 46; and, therefore, by operation of the Agreement, Carrier was contractually required to assign the run to Philadelphia District conductors. The Organization admits that if the run was in fact "new service" the assignment to the Philadelphia District conductors would have been proper.

Comparing the contentions of the parties the issue presented is whether the run was "new service."

PERTINENT RULES

The pertinent rules of the Agreement are:

"**RULE 46. Assignment of Runs to Districts.** In the establishment of new service, the seniority of the extra conductors in the districts involved shall determine which district shall furnish conductors for this service.

* * * * *

"**RULE 47. Reallocation of Runs.** Except as provided in Rule 44, runs assigned to a district or agency shall not be reallocated to another district or agency without conference and agreement between Management and the General Chairman."

RESOLUTION

A. Lack of Definition

The parties agree that the intent of the parties as to the meaning of the words "new service" is not set forth in the Agreement by definition.

We would have no difficulty in holding that the inauguration of an entirely new run would be "new service." But, where previously existing runs are extended, shortened, consolidated in part, or otherwise altered, the intent of the parties is not apparent. Under such circumstances the parties have been in disagreement since 1945. See, Report to the President by Emergency Board No. 89.

Before Emergency Board No. 89, each party sought to have that Board write a definition of "new service" to its liking. The Board rejected both pleas and left the Rule to be interpreted and applied by the Adjustment Board.

In support of its contention that the facts in the instant case do not come within the contemplation of "new service," the Organization cites our Awards 3830, 4647, 6472, 6476, 6331, 6653 and 8565. In support of its position Carrier cites our Awards 6476, 8682 and 10444. None of the Awards purport to define "new service". A reading of the Awards disclose that conclusions as to whether a conductor run was "new service" were arrived at on the basis of "our judgment," "logic" or arbitrary reaction.

B. Contract Principles

In interpreting an agreement, it must be construed so as to give effect to the intent of the parties. The words in a contract, if unambiguous, are given their common meaning unless the words have a peculiar meaning in the industry. The words "new service" have no commonly accepted meaning, either standing alone or in the industry, as is evidenced by continuation of the dispute since 1945. Such being the case we must look to recognized aids to find the intent of the parties such as: (1) history of collective bargaining; and (2) history of applying the Rule by the parties on the property.

C. Powers of the Board

Notwithstanding that Emergency Board No. 89, left to this Board the interpretation and application of "new service," this does not add to our powers which are prescribed and limited in the statute. That we cannot add to, sub-

tract from, or supply what cannot be found in an agreement is uncontrovertible. We do not have the breadth of power that the parties could vest in an arbitrator. Ours is a quasi-judicial function of interpreting and applying agreements in accord with principles of contract law in the light of the record before us.

D. Conclusions

The parties have not seen fit to include in the record either the collective bargaining history leading to the use of the words "new service" nor how the Rule in which the words are used has been applied by the parties on the property since 1945. Therefore, we have no way of determining the intent of the parties. In our consideration of the case we cannot conjure what the parties intended; to do so would be arbitrary and beyond the powers vested in us.

On the record before us we cannot accept or reject the meaning which either party would give to "new service." Therefore, we are compelled to dismiss the Claim.

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 on the record we must dismiss the Claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1965.

DISSENT TO AWARD NUMBER 13828, DOCKET NUMBER PC-15328

Award 13828 is completely in error in failing to adjudicate a dispute properly before the Board and based upon the record here present and previous Awards and precedent in regard to the issue here involved.

This Award, in effect, rejects the arguments of both parties and settles nothing.

Such action does not conform to the Railway Labor Act and the purposes

for which the National Railroad Adjustment Board was created: the resolution of disputes and interpretations of Agreements.

The excuse for not settling this dispute is stated as being:

> "On the record before us we cannot accept or reject the meaning which either party would give to 'new service.' Therefore, we are compelled to dismiss the Claim."

On November 3, 1950, Emergency Board No. 89 (NMB No. A-3300) specifically addressed itself in Item 33 to New Conductor Runs. Both Organization and Carrier in these proceedings suggested definition of the term "new service" which they felt would be advantageous to their respective positions.

The Board, however, rejected the requests for definition and changes and stated in pertinent part that:

> "The existing provisions were negotiated by the parties in 1945 and **they have proved to be reasonably workable** despite the fact that neither 'new service' nor 'districts involved' is expressly defined by them." **(Emphasis ours.)**

Thus it is clear that while the term "new service" is undefined in the Agreement, the Emergency Board felt that no definition was needed to make determination of its meaning, and that in line with the previous Awards of the Board, each instance would be adjudicated on a case by case basis in accordance with the **facts there present.** The instant case should, likewise, have been so determined and an adjudication made as to whether the service here in question was "new service" or not, based upon the facts contained in the record.

Prior to Emergency Board No. 89, only two Awards concerned themselves with this issue. Both Awards 3830 and 4647 were sustained in their entirety in favor of the Employes.

The testimony and exhibits of Carrier Representative Boeckleman before Emergency Board No. 89 clearly indicate that in both Awards 3830 and 4647, this Board had made a determination in each instance whether "new service" was or was not there involved. Both of these Awards being in favor of the Employes, the Carrier recognized that the interpretations of this Board are as binding as though specifically spelled out in the contract and that in order to **change** or **modify** these interpretations of "new service" as defined by this Board, a change would have to be made in Rule 46 in order to overcome the effect of these Awards.

No such change having been made in the Rule, the interpretation placed thereon is binding as was appropriately pointed out by Referee Coffey in Award 5133 which states:

> " * * * Aside from the fact that evidence of past negotiations is of questionable value, except in cases where the intent of the parties is clouded in doubt, such evidence must always give way to clear and unambiguous language, or **later rules interpretations by this Board.** It does not admit of dispute that the **Board's interpretation of rules becomes a part of the Agreement** to all intents and purposes as though written into the rule book. * * * " **(Emphasis ours.)**