

Award No. 6036

Docket No. 5901

2-DM&IR-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 71, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. — C. I. O. (Carmen)

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement the members of the wrecking crew were improperly compensated for service rendered during the period of August 1, through August 30, 1968.

2. That accordingly, the carrier be ordered to additionally compensate the hereinafter named wrecking crew members for five and one-half (5½) hours at pro rata rate for service rendered on the following dates:

Claimants	Dates of Service	Total Hrs. Claimed
R. Kolden, Carman	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 —	106
D. E. McDonald, Carman	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 —	106
H. Donahue Wrecking Engineer	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 —	106
E. Ellefson, Carman	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 —	106
P. M. McGovern, Welder	1, 2, 3, 5, 6, 7, 8, 9, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 —	100.5
F. G. Jugasek, Carman	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 — — —	95

Claimants	Dates of Service	Total Hrs. Claimed
R. D. Brazerol, Carman	5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27 — — —	93.5
V. R. Ophus, Carman	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 — — —	89.5
L. W. Ruhnke, Carman	1, 2, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 — — —	89.5
D. E. Wagner, Asst. Wrecking Engr.	3, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 — — —	84
H. W. Osse, Asst. Wrecking Foreman	5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 — — —	82.5
T. Leland, Carman	1, 5, 12, 19, 26 — — — — —	27.5
B. McKagen, Carman	1, 5, 12, 19, 26 — — — — —	27.5
R. D. Powell, Asst. Wrecking Foreman	1, 2, 3 — — — — —	12.5

EMPLOYEES' STATEMENT OF FACTS: On July 31, 1968, the Duluth, Missabe and Iron Range Railway Company, hereinafter referred to as the Carrier, notified and instructed the wrecking crew members to be ready to depart from Proctor, Minnesota at 6:00 A. M., August 1, 1968, for wrecking service at the scene of a derailment at Mountain Iron, Minnesota. The wrecking outfit remained in wrecking service through August 30, 1968, when it was returned to its home terminal at Proctor, Minnesota.

Carmen R. Kolden, D. E. McDonald, E. Ellefson, F. G. Jugasek, R. D. Brazerol, V. R. Ophus, L. W. Ruhnke, T. Leland, Wrecking Engineer H. Donahue, Assistant Wrecking Engineer, D. E. Wagner, Assistant Wrecking Foreman A. Osse and R. D. Powell, Welder P. M. McGovern, and Carman Helper B. McKagan, hereinafter referred to as the claimants, are regularly employed by carrier. The claimants are regularly assigned employees on carrier's Missabe Division and the headquarters point is located at Proctor, Minn. Their regular working shift is from 7:00 A. M. to 3:00 P. M. daily with rest days of Saturday and Sunday.

The carrier called the wrecking crew members at 5:00 A. M. each morning at Rainy Junction at which point the bunk and dining cars of the wrecking outfit tied up every evening after completion of the day's work at the scene of the derailment. After the crew members were daily awakened at 5:00 A. M., they waited until 6:00 A. M. when they departed by automobile from Rainy Junction for the scene of the derailment at Mountain Iron. The bunk and dining outfit cars also left for the scene of the derailment at 6:00 A. M. each morning and were brought back to Rainy Junction in the evening. The crew members were again returned to Rainy Junction

2. The claimants, while on the road, were awakened one hour before leaving time in accordance with the provisions of Rule 11(b).
3. There is nothing in Rule 11 which provides for payment for the time between the time called and the time required to report for duty. On the contrary, the rule clearly provides that employees will be paid for all time working, waiting or traveling from the time ordered to report for duty at their home station until their return, unless relieved from duty and permitted to go to bed for five or more hours, in which case the continuity of service for pay purposes is broken and such time is not paid for.
4. Numerous awards of the Second Division have supported the position of the carrier in similar cases.
5. The employees have relied solely on the argument that past practice supports their claims. Carrier records and statements of the responsible supervisory employees involved indicate that such past practice has not existed.
6. Notwithstanding Item No. 5 above, the employees' arguments with respect to past practice have no relevance in the face of the applicable rules which are clear and unambiguous.
7. Without prejudice to the carrier's position that the claims in this case have no merit, the claims for continuous overtime pay (4 additional hours in addition to one hour at the time and one-half rate), apparently on the basis of Rule 6 of the effective agreement, are improper since Rule 6 with the exception of paragraph (f) does not apply to employees in wrecking service.

In conclusion, the carrier has shown, without question, that the claims in this case are without merit, and respectfully requests that they be denied by your Honorable Board.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimants as members of a wrecking crew were notified by the Carrier to depart from Proctor, Minnesota at 6:00 A. M., August 1, 1968 for wrecking service at the scene of a derailment at Mountain Iron, Minnesota. The wrecking outfit remained in wrecking service through August 30, 1968, when it was returned to its home terminal at Proctor, Minnesota.

Claimants are regularly assigned with hours of 7:00 A. M. to 3:00 P. M. daily rest days Saturday and Sunday. Carrier called all claimants at 5:00 A. M. each morning at Rainy Junction where the bunk and dining cars of the wrecking outfit tied up every evening after completion of the day's work at the scene of the derailment. After the Claimants were awakened each morning at 5:00 A. M. they washed, dressed, had breakfast and departed by automobile for the scene of the derailment. The bunk and dining cars also left for the scene of the derailment and returned to Rainy Junction in the evening. Carrier decided to compensate claimants as follows:

6:00 A.M. — 7:00 A.M. — 1 hour @ time and one-half
7:00 A.M. — 3:00 P.M. — 8 hours @ straight time rate
3:00 P.M. — 8:00 P.M. — 5 hours @ time and one-half

It is the contention of the Claimants that they are entitled to additional daily compensation of one and one-half hours for being called at 5:00 A. M. each morning which starting time also entitled them to another four hours compensation during their regular assigned shift of 7:00 A. M. to 3:00 P. M. They further contend that in accordance with past practice wrecking crew members have always been given compensation beginning from the time they were called for wrecking service; that they were paid from the time crew members are awakened in the morning by the wrecking Foreman when out on overnight wrecking service, and further that they were paid at time and one half on a continuous basis for all time worked until relieved from wrecking service assigned if called prior to one hour before regular starting time.

The employees maintain that Rules 5, 6, and 11 of the Current Agreement sustain their position. Rule 5(a) entitled "Starting Time, Shifts, and Meal Periods" reads in pertinent part as follows:

"(a) Where one shift is employed, the starting time shall not be earlier than 7:00 A.M. nor later than 8:00 A.M. The time and length of the meal period shall not be less than thirty minutes nor more than sixty minutes."

They allege that Carrier could not change the starting time for each day's work since only one shift was employed at the scene of the derailment.

Rule 6 captioned "Overtime and Calls" reads in pertinent part as follows:

"(d) Except as otherwise provided in this rule, employees called or required to report for service outside their regular assigned hours and reporting will be paid on the basis of time and one-half until relieved, with a minimum of four hours for two hours and forty minutes or less, and will be required to do only such work as called for or other emergency work which may have developed after they were called and cannot be performed by the regular forces in time to avoid delay to train movements. Where employees have been relieved and they desire to work their regular work period, or part thereof, such time, if worked, will be paid for at the straight time rate.

(e) Employees will be paid time and one-half on the minute basis for service performed continuously in advance of the regular

working period, with a minimum of one hour's pay at the straight time rate for forty minutes or less. The advance period shall not be more than one hour. **For service performed more than one hour in advance of the regular starting time, paragraph (d) of this rule will apply.**"

They state categorically that Rule 6 provides for payment at time and one half with a minimum of four hours when employees are called outside of the regular assigned hours, and since claimants were called at 5:00 A. M. and their regular assigned starting time was 7:00 A. M., they are entitled to the additional minimum four hours pay provided in Rule 6. The Claimants were required to continue in service through their regular tour of duty as they were called to perform emergency service and were not relieved until 8:00 P. M.

Since the facts are that all Claimants were called at 5:00 A. M. and departed for the derailment at 6:00 A. M., they allege that they are entitled to compensation during this period in accordance with the provisions of Rule 11 "Road and Wrecking Service", reading in pertinent part as follows:

"(a) Except as provided in Rule 6(f), an employe regularly assigned to work at a shop, engine house, repair track, or inspection point **when called for road or wrecking service away from such point will be paid for all time working, waiting, or traveling** from the time ordered to report for duty at home station until his return. Straight time rates to be paid for home station straight time hours and **overtime rates for home station overtime hours whether working, waiting or traveling.**"

(b) If, during the time on the road a man is relieved from duty and permitted to go to bed for five or more hours, such relief time will break the continuity of service for pay purposes and will not be paid for; provided that in no case shall he be paid for a total of less than eight hours for each calendar day when such irregular service prevents the employe from making his regular daily hours at the home station. Where meals and lodging are not provided by the Carrier, actual necessary expenses will be allowed when such service makes it necessary for employes to purchase meals and/or lodging. **Employes will be called as nearly as possible one hour before leaving time, and on their return will deliver tools at points designated.**"

Claimants assert that under the factual situation in this case of being called to report for service at 5:00 A. M. and since their regular starting time was 7:00 A. M., they are entitled to the 4 hours pay provided in Rule 6.

Because of the one hour waiting time, they also claim an entitlement to one hours' additional pay at overtime rate for the home station overtime hour per the provisions of Rule 11(a). They also point out that Carrier, in accord with 11(b) is required to call employes one hour before leaving time.

Carrier, during the handling of this dispute on the property and in its submission and rebuttal has steadfastly maintained that Rule 11 provides for compensation from the time employes are ordered to report for duty until

their return; that awakening the crew at 5:00 A. M. was not a call even though claimant's regular tour of duty began at 7:00 A. M., and that they were not entitled to waiting time even though they were required to wait until 6:00 A. M. They further allege past practice as a defense, a defense denied by the Claimants as evidenced by many statements of fellow employees alleging the contrary to be true. Carrier contends that Rule 81 and 11 are controlling in this case. Rule 81 provides that wrecking crews will be paid for such service under Rule 11, and Rule 11 provides that crews will be paid straight time rates for home station straight time hours and overtime rates for home station overtime hours.

We agree with Carrier in this case that Claimants have already been properly compensated for their work. The reliance on past practice by the employees has been considered but when confronted with the clear, concise and unambiguous wording of the controlling rules, 81 and 11, past practice is not a valid defense. There is nothing in the rules which provides for payment for the 5:00 A. M. to 6:00 A. M. period. The rule does provide for payment for all time working, waiting or traveling from the time ordered to report at their home station until their return, unless relieved from duty and permitted to go to bed for 5 hours or more in which case the pay period is broken. We further agree with Carrier that the claim for continuous overtime pay four additional hours plus one hour at time and a half on the basis of rule 6, are improper since rule 6 with the exception of 6 (f) does not apply to employees in the wrecking service. We will deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November, 1970.