Award No. 2706
Docket No. 2497
2-NYNH&H-CM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Thomas C. Begley when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 17, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the carrier improperly paid the members of the Maybrook, New York, Tool Train, who were put on rest, while in wrecking service at Mill Plains, Conn., from May 3 to May 5, 1955.

2. That the carrier be ordered to additionally compensate the following named members of the Maybrook Wrecking Crew:

H. Brown, Der. Engineer	W. E. McVey, Carman
R. Tremper, Der. Fireman	R. Amodio, Carman
T. S. Blake, Carman	L. Salisbury, Carman
G. Crist, Carman	A. Palazzo, Carman
R. H. Brown, Carman	G. Palazzo, Carman
T. V. Decker, Carman	E. R. Brown, Carman
V. Mangione, Carman	W. Fellows, Box Packer

each in the amount of twelve and one-half (12½) hours' at the difference between the time and one-half (1½) rate paid and the double time rate of pay.

EMPLOYES' STATEMENT OF FACTS: On May 3, 1955, the Maybrook, New York, tool train was called at 10:10 P. M. for wrecking service, because of a serious derailment at Mill Plains, Conn. They preceded to the scene of the derailment and worked until 5:00 P. M. on May 4, when they were put on rest. They remained on rest until 5:30 A. M. May 5, a period of 12½ hours, when they returned to work. They returned to Maybrook, New York, their home station, and were relieved of duties at 8:45 P. M. on May 5, 1955.

The first reason advanced is, we submit, patently without merit. No decision by any officer of the company is cited. Indeed no evidence can be found of the alleged payment in the files. Assuming without conceding some timekeeper passed one or two times slips claiming double time, this cannot properly be suggested as an agreed-upon interpretation of the rule.

One, two or a few instances do not make a custom or practice, even if that could be considered as changing the rule, even if proved. And the burden of such proof is placed with the organization. Third Division Award 5421. It is also clear a timekeeper's interpretation would not be binding. Third Division Award 2089, First Division Award 16159.

The second argument advanced is equally without merit. At the time Award 1131 was entered the second paragraph of Rule 8 read:

> "All time actually worked continuously beyond sixteen (16) hours will be paid for at double time."

In 1947 a change was negotiated so that the second paragraph now reads:

> "All service performed in excess of sixteen (16) hours will be paid for at double time."

The purposes of this change were twofold:

> (a) To remove the requirement that double time was interrupted by lack of continuity of work service;
>
> (b) To extend double time payment to travel time when beyond sixteen hours.

The rule, to the best of carrier's knowledge, has been applied in accord with these purposes.

The contention of the organization now made would require that "service performed," as used in the second paragraph of Rule 8, be interpreted to time on rest. Resting or sleeping is neither "service" nor is it "performed." The decisions of this and other divisions have been searched without trace of any case so holding. "Service performed" by definition requires some activity undertaken by an employe in furtherance of his duties. Such activity is entirely lacking in a rest period (already paid at the time and one-half rate away from home station when outside regularly assigned hours, otherwise at straight time rate).

Carrier submits the claim should be denied.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The employes state that the language in Rule 8 was changed in 1947, therefore, the decision in Award 1131 is no longer controlling.

The language in Rule 8 formerly read:

"All time actually worked continuously beyond sixteen (16) hours will be paid for at double time."

The language of Rule 8 now reads:

"All service in excess of sixteen (16) hours will be paid for at double time."

Rule 8 still contains no provision for a deduction of pay during a rest period while on such duty and we do not believe that the change in the wording in Rule 8, as it now stands, was intended to apply if there was a reasonable interruption for rest. We, therefore, hold that Award 1131 is still controlling and that time and one-half is the correct payment for the rest period. Therefore, this claim is denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of December, 1957.

DISSENT OF LABOR MEMBERS TO AWARD No. 2706

We are constrained to dissent from the findings and award of the majority for the reason that time and one-half is not the correct payment. The only compensation provided in Rule 8 of the controlling agreement for wrecking service is double time for hours in excess of sixteen; therefore, employes in wrecking service in excess of sixteen hours are entitled to compensation at that rate.

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner

James B. Zink