

Award No. 4331

Docket No. 3892

2-C&S-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 140, RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

THE COLORADO AND SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. The Colorado and Southern Railway Company violated the provisions of the controlling Agreement, particularly par. (d) of Rule 12, when during the month of November, 1959, they deducted pay in the amount of ten hours and thirty minutes, at the rate of time and one-half, from the pay checks of the following members of the wrecking crew at Denver, Colorado: A. L. Monaco, J. Smith, E. L. Brack, J. C. Dodaro, A. Monaco, A. P. Petschauer and L. B. Vechazone, and five hours and thirty minutes, at the rate of time and one-half, from the pay check of J. Caputo, who is also a member of the wrecking crew.

2. That accordingly the Colorado and Southern Railway Company be ordered to restore pay, in the amount deducted from their November pay checks, to each of the employes, as shown above.

EMPLOYEES' STATEMENT OF FACTS: The Colorado and Southern Railway Company, hereinafter referred to as the carrier, maintains a wrecking derrick and outfit at Denver, Colorado.

The claimants in this dispute are all members of this wrecking crew and are regularly assigned carmen at Denver with hours of service of 7:30 A. M. to 12:00 Noon — 12:30 P. M. to 4:00 P. M., Monday through Friday, except J. Caputo, whose hours of service are 3:00 P. M. to 11:00 P. M., Monday through Friday.

On September 9, 1959, this Denver, Colorado wrecking crew was called to go to Brush, Colorado, a distance of approximately eighty-five (85) miles east of Denver, to pick up cars that had been derailed at that point. They completed picking up this wreck on September 15, 1959, and with the wrecking outfit departed from Brush, Colorado toward their home station (Denver, Colorado) at 1:00 P. M. on that date (September 15). However, after having proceeded about forty-five (45) miles the wrecker train, on which the crew was riding, was tied up at Roggen, Colorado at 6:00 P. M. September 15. This

Actual expenses for meals and lodging were paid by the carrier while the claimants were away from their home point. Claimants contend they should be paid from 6:00 P. M. on October 22, 1951, to 8:00 A. M. on October 23, 1951, as waiting time under Rule 11 * * *.

We quite agree that if an employe is held over after the work is completed that it will be construed as waiting time. Awards 1028 874. But where rest of five hours or more can be had after leaving and before returning to his home point, outside of assigned hours and waiting and traveling time, the exception applies and the employes are not entitled to pay for such time under the rule. Awards 1429, 1557. The terminal points of the road emergency service covered by the rule are the time of leaving and the time of returning to the home point. The fact that pieces of emergency work may be done on different pieces of equipment at different times is not a factor in determining the meaning of the rule. Claimants were correctly paid." (Emphasis ours).

Referee Carter made clear the distinction which petitioner in this docket fails to make. Time off duty cannot be construed as waiting time when more work remains to be done the next day. In such cases, it is a rest period which need not be paid for under the rule.

In conclusion, the carrier reasserts the principal points of its defense to this completely unjustified claim which effectively bar a sustaining award:

1. Rule 12, Paragraph (b), expressly allows deductions from pay for periods of relief, except when relief period is less than five hours or the employes are not permitted to go to bed. No other exceptions should be engrafted upon this rule by the Board.

2. The awards which have made another exception are based on a situation where the road service was completed and the employes were required to wait for a train to bring them home. This was not the case here for additional service remained to be performed during the trip from Roggen to Denver on September 16, 1959.

3. Awards 1429, 1557, 1635 and 1637 recognize that deductions in pay for rest periods can be made when the employes have more work to do after their rest is up.

For these reasons, the Board must find for the carrier and deny this claim in its entirety.

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.

Parties to said dispute were given due notice of hearing thereon.

The Claimants E. L. Brack, J. Caputo, J. C. Dodaro, A. Monaco, A. L. Monaco, A. P. Petschauer, J. Smith, and L. B. Vechazone have been employed

by the Carrier as carmen at Denver, Colorado. They were also regularly assigned members of the Denver wrecking crew.

On September 9, 1959, twenty-seven cars of a freight train were derailed at Brush, Colorado, a distance of about 88 miles from Denver. The Claimants were called to clear up the wreck and left Denver in a special wrecking train. They performed wrecking service at Brush for several days. They departed from Brush in a "hospital train" at 1:05 P. M., September 15th. That train consisted of nine cars of the wrecking train and fifteen damaged cars from the freight train. The "hospital train" proceeded at slow speed and made several stops for inspection purposes. It arrived at Roggen, Colorado, at approximately 6:00 P. M. and the Carrier decided not to operate it during night time hours. The Claimants were tied up at Roggen and went to bed in the bunk cars of the wrecking train. They left Roggen in the early morning hours of the following day (September 16th). After having made again several stops, the "hospital train" arrived at Denver at about 12:00 Noon and the Claimants were relieved from duty. They claimed and received compensation at the rate of time and one-half for the hours during which they were tied up at Roggen. However, the Carrier deducted the compensation from their pay in November, 1959, on the ground that payment was made by mistake.

The Claimants filed the instant grievance in which they sought to recover said compensation, namely, 10:30 hours' pay at the rate of time and one-half, except the Claimant Caputo whose claim amounts to 5:30 hours' pay at the premium rate. The Carrier denied the grievance.

This case poses the question whether the Carrier was entitled to recover the compensation here in dispute in accordance with Rule 12(b) of the applicable labor agreement or whether the Claimants were entitled to such compensation under Rule 12(d) of the agreement. Said Rules read, as far as pertinent, as follows:

Rule 12(b): "If, during the time on the road, the employe is relieved from performing any work at a place or point where there is an opportunity for him to go to bed for five (5) hours or more, such relief period will not be paid for; * * *

Rule 12(d): "Wrecking service employes will be paid under this rule, except that * * * all time working, waiting or traveling on week days after the recognized straight-time hours at home station will * * * be paid for at rate of time and one-half."

We have repeatedly been called upon to construe contractual provisions identical with or substantially similar to the above quoted Rules. We have held that Rules comparable to Rule 12(b) generally permit a carrier to relieve wrecking crew employes on the road prior to completion of wrecking service without pay for the relief period, provided they are afforded an opportunity to go to bed for five hours or more. See: Awards 1429 and 1637 of the Second Division.

In passing upon factual situations similar to the one here involved, we have construed Rules, like Rule 12(d), to mean that time spent by wrecking crew employes outside of regular hours at their home station and after completion of work at a wreck must generally be regarded as waiting time and thus be compensated under said Rules. See: Awards 154, 790, 1028, 1048, 1078 and 1971 of the Second Division.

Applying the above principles to this case, we have reached the following conclusions:

It is beyond dispute that the time for which the Claimants request compensation was spent on a week day outside of their regular hours at home station. It is also undisputed that they submitted time cards in the usual manner for said time and that the Carrier honored their time claims. The payment of those claims by the Carrier created a presumption that it recognized such time as waiting time compensable under Rule 12(d). The burden of proof to refute such presumption squarely rests upon the Carrier. The evidence on the record considered as a whole inadequately supports the Carrier's assertion that the time in question was, in fact, relief and not waiting time. Specifically, the available evidence does not demonstrate beyond a reasonable doubt that the Claimants performed any wrecking service after their departure from Brush. It is significant that the Claimants were tied up at Roggen, because of the Carrier's decision to run the "hospital train" during day light time hours for safety reasons and not because of any work still to be performed by them in connection with the wreck. Under these circumstances, we are unable to find that they had not completed the wrecking service under consideration when they left Brush. The most that can be said in favor of the Carrier's position is that it may be doubtful whether the Claimants completed such service at Brush or at Denver. However, any doubt as to the essential facts underlying this case must be resolved against the Carrier since the burden of proof rests upon it and not upon the Claimants as pointed out hereinbefore.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of November 1963.