Award No. 11275

Docket No. PM-12885

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF SLEEPING CAR PORTERS

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: * * * for and in behalf of G. R. Tillman, who is now, and for some time past has been employed by the Chicago, Rock Island and Pacific Railroad Company as a sleeping car porter operating out of Chicago, Illinois.

Because the Chicago, Rock Island and Pacific Railroad Company did, through General Superintendent M. Bonesteel and Vice President—Personnel G. E. Mallery, deny the claim filed for and in behalf of Mr. Tillman under date of June 27, 1961, in which it was contended that Management did not pay Mr. Tillman the full amount of money he had earned for service performed by him during the month of May 1961, said shortage being due to the fact that Management did not allow the hours of service performed by Mr. Tillman in deadheading to be considered in computing the punitive overtime rate of pay for services performed during said month, which action, the Organization contends, is in violation of the rules of the Agrement between the Chicago, Rock Island and Pacific Railroad Company and its sleeping car employes, represented by the Brotherhood of Sleeping Car Porters.

And further, for the Chicago, Rock Island and Pacific Railroad Company to be directed to pay the sums of money contended for in the original claim, to Mr. Tillman.

EMPLOYES' STATEMENT OF FACTS: Your petitioner, the Brotherhood of Sleeping Car Porters, respectfully submits that it is duly authorized to represent all employes of the Chicago, Rock Island and Pacific Railroad Company, classified as sleeping car porters. And in such capacity, it is duly authorized to represent G. R. Tillman who is now, and for some time past, has been employed by the Chicago, Rock Island and Pacific Railroad Company as a sleeping car porter operating out of the Chicago District.

Your petitioner further sets forth that under date of June 27, 1961, a claim was filed under the provisions of Rule 24 of the Agreement presently in effect governing wages and working conditions of Rock Island sleeping car porters, setting forth that Mr. Tillman had been shortpaid the sum of $24.69 in connection with services performed by him during the month of May, 1961.

Paragraph (a) of Rule 4 of the Agreement denies the claim of the employes in the instant case because, in clear and unequivocal language, the Agreement states:

> "All time **worked** in excess of two hundred and five (205) hours to and including two hundred and forty (240) hours per month shall be paid for as overtime on a minute basis on the pro-rata hourly rate as provided in Rule 2. All time **worked** in excess of two hundred and forty (240) hours per month shall be paid for at the rate of time and one-half." (Emphasis ours.)

To reinforce this principle the Agreement went further in Paragraph (b) by providing:

> "Under this rule, time paid for in the nature of arbitraries, extra or special allowances, **including but not limited to the following,** will not be used for purpose of calculating punitive overtime pay: (Emphasis ours.)
>
> (1) Time held at away-from-home terminal.
>
> (2) Called or held and not used.
>
> (3) Witness service (excluding time so held from regular assignment)."

During the handling of this claim on the property the Organization was advised that it was the Carrier's position that while deadheading was not specifically mentioned as being one of the items not used for the purpose of calculating overtime, it has been understood by practice that deadheading was so defined and that it is included as an item that would not be used for the purpose of calculating overtime. The Organization's attention was also called to Third Division Award 9803, rendered on February 2, 1961. In that Award, your Board held:

> "This Division has held in many cases that claims covering payment for deadheading time is for services rendered. **Where no work is performed during this period involved, the proper rate is at the pro rata rate,** such as the situation before us. Rule 8 was revised, effective November 1, 1945. Sections (a) and b(1) of the revised rule are applicable." (Emphasis ours.)

For these reasons we respectfully request your Honorable Board to deny the claim of the employes.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The question in this case is whether deadheading time, under the Agreement, should be counted for the purpose of calculating punitive overtime pay. In May 1961, Sleeping Car Porter G. R. Tillman was credited with 24 hours' deadheading time for which he was paid at the pro rata rate. Since his total service that month (excluding deadheading time) was 284 hours and 5 minutes, the Organization believes he should have re-

ceived punitive pay which, under Rule 4(a), is granted for all time worked in excess of 240 hours per month.

Rule 7, Deadheading provides:

"Deadheading, when properly authorized, will be credited as actual time up to eight (8) hours for each 24 hour period at the porter rate indicated in Rule 2."

Rule 4, Overtime Allowance, provides:

"(a) All time worked in excess of Two Hundred and Five (205) hours to and including Two Hundred and Forty (240) hours per month shall be paid for as overtime on a minute basis on the pro-rata hourly rate as provided in Rule 2. All time worked in excess of Two Hundred and Forty (240) hours per month shall be paid for at rate of time and one-half.

(b) Under this rule, time paid for in the nature of arbitraries, extra or special allowances, incuding but not limited to the following, will not be used for purpose of calculating punitive overtime pay:

(1) Time held at away-from-home terminal.

(2) Called or held and not used.

(3) Witness service (excluding time so held from regular assignment).

(c) The Carrier shall have the right to rearrange assignments at any time to avoid overtime payments."

Carrier affirms that deadheading time should not be counted when calculating punitive overtime pay since (1) Paragraph (a) of Rule 4 applies only to time worked and deadheading is not work; (2) Deadheading is the type of activity which, under Paragraph (b) of Rule 4, is not to be used in calculating punitive overtime; (3) It has been the practice and understanding on this Carrier to exclude deadheading time from overtime calculations; (4) in **Award 9803,** concerning a rule similar to Rule 4 in an Agreement between this Carrier and Dining Car Employes, the Board denied the same type of claim on the ground that "where no work is performed during this period involved, the proper rate is at the pro rata rate . . ."

The Organization, on the other hand, contends: (1) Deadheading is not included in the list of exclusions in Paragraph (b) of Rule 4 and, had the parties intended it to be, they would have so provided; (2) Since deadheading is recognized and credited as "actual time" under Rule 7, it should be counted in calculating punitive overtime as is time spent in other types of service; (3) Deadheading is just as much a part of the work that Management requires as any other service for which the employes are paid; it is performed at the Carrier's behest, and for no other reason; (4) **Award 9803** is not relevant since it applied to a different Organization (Dining Car Employes) and a different Agreement; (5) The alleged practice of excluding deadhead time from overtime compensations is too short lived to warrant consideration; this Carrier has operated sleeping cars only for a short time; (6) Under industry practice (Pullman Company) deadhead time has always been included in calculating punitive overtime.

A careful analysis of Rule 4 reveals that the parties had in mind two types of situations; under one, punitive pay is to be earned, under the other it is

not. Paragraph (a) declares that "all time worked in excess of" 240 hours shall be paid for at time and one-half. Paragraph (b), in contradistinction, provides that certain kinds of "time paid for" shall not be used for purposes of calculating punitive overtime. The question in case at hand is whether deadheading falls in the first group or the second.

The answer to this question lies in Paragraph (b) which describes "time paid for" in terms of "arbitraries, extra or special allowances" and which specifies three types of service which are to be excluded from punitive pay considerations. The Organization contends, in effect that this is an all-inclusive list, i.e. it contains the only types of service the parties intended to exclude. However, this argument ignores the phrase "including but not limited to the following . . ." (emphasis ours). The three cited circumstances, therefore, are only examples used to illustrate the general principle.

Is deadheading, then, more "in the nature of arbitraries, extra or special allowances" than it is akin to "time worked"? We think it is.

Deadheading, normally, is considered time spent, at the employer's request, in travel to or from an assignment, during which the employe may do as he pleases (within the confines of his accommodations). Tasks associated with the assignment itself are usually not performed. (Our decision here is based, in part at least, on the assumption that no Sleeping Car Porter tasks were performed by Claimant Tillman. While the Organization asserted, at the Referee Hearing, that it is common for Porters to prepare cars for service during deadhead trips, there is no evidence whatsoever in the record that (1) this is normal procedure on this Carrier, or (2) any chores were performed by the Claimant. Had such been the case we would have a different issue to decide.

Were deadheading really the same as "work", as that term is usually defined, it is unlikely that straight-time pay for deadheading time would be credited only up to eight hours within 24, as provided in Rule 7. (Tillman, for example, was credited with eight hours for a deadhead trip from Colorado Springs to Chicago which actually required about twice as long.)

Deadheading is not dissimilar to witness service in the sense that both require an employe's presence, at the Carrier's request, at a place away from home. Interestingly, Rule 9 (Witness Service) provides that a porter be "credited full time for time lost"—even more credit than is granted for deadheading.

In a like vein, a porter who is held at an away-from-home terminal beyond the layover of the assignment is given hourly credit up to 6 hours, 50 minutes, although denied the benefit of overtime (Rule 10). Yet he is away from home, at the Carrier's behest, just like the deadheading employe.

Rule 7, in itself, does not dispose of the case, as the Organization contends, since the principal function of this Rule is to permit crediting of a limited amount of deadheading time, when properly authorized, for purposes of straight-time wage payments. Overtime payments, on the other hand, are determined by the provisions of Rule 4, as noted above.

The contention on "Practice", in our judgment, cannot be considered decisive in this case. No specific instances were cited where, prior to the instant dispute, overtime credit for deadheading time was either granted or denied under this Agreement. True, **Award 9803** sustained Management's position with respect to application of a similar clause which exempted from over-

time calculation "time paid for in the nature of arbitraries, extra or special allowances" and which listed as examples (1) time held in other than home terminals, (2) called but not used, (3) attending court or inquest, (4) attending investigations, (5) telephoning commissaries. Yet **Award 9803** was rendered under another Agreement with a different Organization. By a similar token, the practice under Pullman Company contracts, cited by the Organization, was developed under other Agreements with a different Carrier. More significantly on this score, there is nothing in the record which would reveal whether Pullman Company contract provisions are the same as those on the Chicago, Rock Island and Pacific, whether Pullman porters normally perform service during deadheading trips, or other information which would help to evaluate the relevance of Pullman Company practices.

Under all these circumstances the grievance will be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1963.