Award No. 14178
Docket No. DC-15467

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES
Local 849

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes Local 849, on the property of the Chicago, Rock Island and Pacific Railroad Company, for and on behalf of Waiter Don O. Sullers, that he be paid the difference between the hours for which he was paid on September 15, 1964, while deadheading on Carrier's Train #9 and eight (8) hours, account of Carrier's failure to compensate claimant for a minimum of eight (8) hours in violation of Rule 4 and 8 of the Agreement between the parties.

EMPLOYES' STATEMENT OF FACTS: On October 12, 1964, Employes instituted the instant claim via the following letter:

"October 12, 1964

"Mr. M. H. Bonesteel, General Superintendent
Dining and Sleeping Cars
Chicago Rock Island and Pacific Railroad Company
164 West 51st Street
Chicago, Illinois 60609

"Dear Sir:

"Accept this as a time and money claim for and in behalf of Mr. Donald O. Sullers, who was given a special assignment September 15, 1964 to report to Train #9, deadhead to Rock Island returning Train #10 September 16, 1964.

"We request that Mr. Sullers be paid an additional six (6) hours, making eight (8) hours for the date of September 15, 1964, in accordance with Rule 4 of the existing agreement, which reads as follows:

> "'EXTRA EMPLOYES. Extra employes performing road service in the place of a regularly assigned employe or on an extra assignment, shall be paid in accordance with their classification and shall receive the same number of hours as regularly assigned employe would have received for the same service. When used for extra service employes will be paid actual time worked with a minimum of eight (8) hours for

at release points, subject to the requirements of the service."

The time between 9 P.M. and 6 A.M., subject to the requirements of the service, is designated as rest period time on all dining car department assignments. The above applies whether or not an employe is deadheading, in extra service, or on a regularly assigned run. In this respect please see Third Division Award 12647, recently rendered, which upheld this practice regarding rest periods.

The Employes' case lacks consideration before your Board because the Employes erroneously filed claim for September 15 and 16, 1964, while the action complained of actually happened on September 30 and October 1, 1964. Therefore, as many past awards proclaim, the claim must fail for lack of a correct date.

Furthermore, the Employes' claim rests on Rule 4 which reads, in pertinent part:

> "When used for extra service employes will be paid **actual time worked** with a minimum of eight (8) hours for each day so used." **(Emphasis ours.)**

Rule 17 is a new rule in the Dining Car Employes' Agreement as it was first written into the agreement effective April 1, 1962. The principle covered by Rule 17 dates back for some time prior to that date.

On March 31, 1947, the Dining Car Employes filed claim with the Third Division alleging violation of Rules 2(b), cited above; 3(b), entitled, Called and Not Used; and/or Rule 8, cited above. The claim was covered by Docket DC 3730 and Award 3663. The claim involved certain regularly assigned dining car employes required to report for a train at approximately 1:00 A.M. and placed on rest period at that time. The case was withdrawn from your Board.

At that time an understanding was reached that such employes would be paid one hour for reporting for such assignment. It was further delineated that the settlement of that claim was made with the understanding that the payment of one hour would be made only in cases where the employes reported for duty and were not compensated from the time of reporting.

The two hour allowance under Rule 17 is not "actual time worked" as that term applies to Rule 4. Your Board is requested to deny this claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was a waiter on the extra board whose home terminal was Chicago. On September 30, 1964, he was assigned to report to Train No. 9 at the La Salle Street Station in Chicago, deadhead to Rock Island, Illinois, and work on Train No. 10 returning to Chicago the following day. He was paid two hours reporting time as provided in Rule 17 of the Agreement, but received no compensation for deadheading.

Employes contend that Claimant is entitled to eight hours pay for deadheading under Rules 4 and 8 of the Agreement, He, therefore, should receive six hours additional pay for deadheading on September 30, 1964.

Carrier argues that since Claimant occupied sleeping quarters on Train No. 9, it was his designated rest period for which no compensation is required.

Rule 17 is controlling. It reads:

> "RULE 17. Employes who are required to report for trains which are scheduled to depart between the hours of 9:00 P.M. and 4:00 A.M. where sleeping accommodations aboard train are provided and available shall be paid at the pro-rata rate for any duties performed or held until sleeping accommodations are available with a minimum of two hours."

Further, since Claimant did not actually perform work, there is no violations of Rule 4.

We had occasion to consider Rules 4 and 8 of this Agreement in Awards 13076 and 13077 involving the same parties. In Award 13076 we said:

> "The word service is used at this point in the Agreement in its most general sense, just as it is used in its general sense at the end of the first sentence of Rule 4 where it includes both road service and service performed on an extra assignment; in such use it applies to both 'regular service' and 'extra service'; it is unaccompanied by any adjectival limiting descriptive word, and none is implied.
>
> "... The last sentence of Rule 4 cannot sensibly be construed, as urged by the Carrier, to require 'actual work' to be performed as a condition precedent to entitlement to the minimum guarantee stated in the rule; ..."

There is nothing palpably wrong with this interpretation. It applies to deadheading to a work assignment as well as deadheading from a work assignment. The mere fact that Claimant occupied sleeping quarters on Train No. 9 does not alter the intent of the Agreement. There is no assumption that the trip to Rock Island was Claimant's rest period. Rule 17 does not abrogate, nor does it limit the obligations in Rules 4 and 8.

Rules 4 and 8 are special rules dealing with compensation for extra employes and for deadheading while Rule 17 is a general rule. The latter contemplates that any employe be paid for only two hours when he is assigned work on the train to which he reports. It does not abrogate the special pay requirement for deadheading.

Awards 13071 and 13072 are not applicable because the Claimants therein were assigned rest periods "while their trains were enroute"; they were not deadheading. Claimant in this case was not assigned to Train No. 9; he was deadheading to an assignment on Train No. 10. In Award 12647 the claim was denied because of failure to prove an allegation of practice. There is no material issue of practice in this case.

For the reasons stated, we conclude that there is merit to 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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION
ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February, 1966.

CARRIER MEMBERS' DISSENT TO AWARD 14178. DOCKET DC-15467

(Referee Dolnick)

Under this award we have the anomalous ruling that time spent by an employe enjoying a properly designated rest period, occupying appropriate sleeping accommodations, is "actual time worked." A more obvious perversion of the plain meaning of words used in a contract would be difficult, if not impossible.

True it is that the award does not purport to be based on such a perversion of the rule. Rather, it is expressly based on a finding that the period of time involved was **not** a rest period of the Claimant. All three of the specific findings in the award turn upon the central finding that the time involved was not a rest period, and this compels us to conclude that the claim would necessarily have been denied except for the erroneous finding that the time involved was not a rest period for this Claimant.

The three specific findings which compel this conclusion are that: (1) the case is controlled by "special pay requirements for deadheading" in Rule 8; (2) "Awards 13071 and 13072 are not applicable because the Claimants therein were assigned rest periods . . ."; and (3) "There is no assumption that the trip . . . was Claimant's rest period." Each of these findings necessarily compels the conclusion that the award is based squarely on the central finding that the time involved was not a properly designated rest period of the Claimant.

The finding that the case is governed by deadheading provisions in Rule 8 compels the conclusion that the sole basis for a sustaining award is the ultimate finding that the time involved was not a rest period for Claimant, for Rule 8 expressly provides that the deadheading rules therein shall not entitle any employe to compensation during a rest period established pursuant to Rule 2. Rule 8 accomplishes this by expressly incorporating therein the provisions of Rule 2 (b). The applicable portions of Rules 8 and 2 read:

> "RULE 8. **DEADHEADING.** Deadhead hours properly authorized will be counted as service hours and upon the same basis, **subject to the provisions of Rule 2 (b) . . . .**" *
>
> "RULE 2 (b) Time allowance will be calculated from time employes are required to report and do report until released at layover, set-out, or terminal point, or **where rest periods are provided under**

> **Rule 2,** except that no deduction in time will be made where interval of release is less than two (2) hours."

It is thus crystal clear that **time spent occupying sleeping accommodations during a rest period provided under Rule 2 is neither service nor deadheading for pay purposes.** Neither the Referee nor the Labor Member has suggested that the provisions in Rule 8 explicitly making that rule subject to the provisions of Rule 2 are not entitled to full force and effect. The conclusion is therefore inescapable that in finding Rule 8 controlling and at the same time sustaining the claim, the Referee is necessarily ruling that the time involved was not a rest period under Rule 2.

*Bold face herein by us unless otherwise indicated.

The finding that "Awards 13071 and 13072 are not applicable because the Claimants therein were assigned rest periods 'while their trains were enroute'; . . ." is logically relevant only if it is first concluded that the time involved here was not a rest period for Claimant. If this was a rest period, the ruling in those awards denying pay for time spent in sleeping quarters enroute during a rest period is certainly applicable and requires denial of the claim. Significantly, the Employes in **Award 13071** admitted that no pay was allowable for a rest period under Rule 2. The nub of their contentions in that case was simply that Carrier did not have the right to start a rest period enroute as it did in that case. In their argument to the Board in both cases they made this frank admission:

> ". . . To state the matter another way, **Carrier must carry an employe's time continuously, except that it may deduct** from the continuity of time, time spent after arrival at release points; i.e., layover, set-out or terminals and **'rest periods' enroute where time spent at layover, set-out or terminal points,** or where the rest period interval **exceeds two (2) hours . . .**" (page 9 of Docket DC-14596, Award 13071)

Under that express admission, Claimant here could properly have been assigned a rest period for the time involved (and no doubt that is the reason the Employes admit he was so assigned). **Awards 13071** and **13072** rejected the Employes' novel interpretation of Rule 2 and categorically held that no pay is allowable for rest time enroute. Thus, by simply distinguishing **Awards 13071** and **13072** on the basis that they involved assigned rest periods, the award again indicates that it is based on a finding that the time involved in this claim was not a rest period for Claimant.

Finally, the award expressly finds that the time here involved was not a rest period for the Claimant. It states:

> ". . . There is no assumption that the trip to Rock Island was Claimant's rest period . . ."

The fact that the time involved in this claim was a duly designated rest period of this Claimant is clearly and conclusively established in the record before us. **Claimant admittedly did not report until 9:00 P.M.,** and after quoting from Rules 8 and 2, Carrier tells us:

> **"The time between 9 P.M. and 6 A.M., subject to the requirements of the service, is designated as rest period time** on all dining car department assignments. The above applies **whether or not an employe is deadheading, in extra service,** or on a regularly assigned run . . ."

The Employes do not deny the truth of this statement, in fact they recognize throughout their arguments that a properly designated rest period is involved in this claim. As an example of the unqualified admission of the Employes that this was a designated rest period for the Claimant, we have this statement by them:

> "... it is technically true that Carrier is not obligated to pay an employe during the hours 9:00 P.M. to 6:00 A.M...."

These are the only words of the Employe that are responsive to Carrier's statement regarding rest period assignments which is quoted above. They conspicuously do not deny that these hours were assigned as Claimant's rest period. This Board has consistently accepted such a failure to deny a material allegation as a binding admission. See **Award 13076,** which the award purports to follow on the point that Rule 8 is controlling, also see **Awards 12241** (Coburn), **12130** (Sempliner), **11398** (Moore), **9261** (Hornbeck), among many others.

In view of the conclusive showing in the record that this was a rest period for Claimant, the Referee's sustaining award based squarely on a finding that it was not his rest period is both arbitrary and palpably wrong.

We dissent.

/s/ G. L. Naylor
G. L. NAYLOR
/s/ R. A. DeRossett
R. A. DeROSSETT
/s/ C. H. Manoogian
C. H. MANOOGIAN
/s/ W. M. Roberts
W. M. ROBERTS