NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21125
THIRD DIVISION Docket Number MW-21031

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

Because of the Injuries sustained on January 4, 1972, the Carrier should pay to Messrs. R. G. Almaguer and S. C. Artiaga the benefits set forth in Article V B(3) of "Appendix H" (System File 17-3/MW-46 5/17/72).

OPINION OF BOARD: At about 12:15 a.m., on January 4, 1972, the Galesburg Roadmaster, Jacobs, called Foreman Almaguer and advised him to report to work for overtime service in the Galesburg Terminal. Almaguer contacted Sectionmen Artiaga and VanSkike. All three men were proceeding to work in Artiaga's automobile when it was involved in an accident which resulted in injury to Almaguer and Artiaga, and the death of VanSkike.

This docket concerns the claim of Almaguer and Artiaga. The claim on behalf of VanSkike is before this Board in Docket MW-21026, Award No. 21126.

Rule 30.C specifies that:

> ". ..the time of an employe who is called after release from duty to report for work will begin at the time called..."

There is no question, based upon the above-cited rule, that Claimants were on the Carrier's payroll at the time of the accident. Article V A of the so-called "off-track vehicle agreement" between the parties provides that:

> "This Article is intended to cover accident8 involving employes covered by this Agreement while such employer are riding in, boarding, or alighting from off track vehicles authorized by the Carrier and are
>
> (1) deadheading under orders or
>
> (2) being transported at Carrier expense."

The "Exclusions" of Paragraph D include:

> "(6) While an employe is commuting to and/or from his residence or place of business."

Carrier has attached to its Submission various documents which relate to civil litigation in this matter. The Organization objects to the inclusion of those documents because they do not constitute a part of the handling of the matter on the property. While the documents are background information and of interest to a better understanding of the circumstances which led to the claim, it is questionable that, in the strict sense, they constitute a part of the precise handling on the property, as that concept has developed before this Board. However, a consideration of the Court related documentation does not alter our final disposition of the dispute, and accordingly, for our purposes in this particular case, we have considered all of the documents in the docket.

As Carrier properly notes, we may not limit our review of the dispute solely to the question of "exclusions", but rather, we must assure that Claimants have presented evidence to support their conclusion that all basic elements for liability under the rule are established.

In this regard, Carrier concedes that there was an accident which involved employes covered by the Agreement, and that the employes were riding in an off-track vehicle. But, the Carrier disputes that the use of a private automobile was "authorized" or that Claimants were deadheading under orders or being transported at *Carrier expense.* Accordingly, Carrier concludes that Claimants were merely "commuting" from their residence, and that coverage is consequently excluded under the Agreement.

The record is rather clear that the employes were never reimbursed for travel expense when using their private vehicles in circumstances such as presented here. Although the Organization suggests that, nonetheless, under this record the Board could conclude that there was a transportation at Carrier expense, we do not find it necessary to explore that concept. Under the rule, it is not necessary to find a "deadheading under orders" and a transportation at Carrier expense. Our disposition of the "deadheading" question renders further exploration of the "transportation at Carrier expense" argument unnecessary.

At Page 30 of its Submission to this Board, Carrier concedes that the rule:

> ". . .creates a certain degree of ambiguity as to precisely what must be 'authorized by the *Carrier'...*"

Moreover, the Carrier concedes that the rule does not mandate a specific, direct statement of precise authority to operate a certain designated vehicle. Rather, it is recognized that "authority" can reasonably be inferred

from statements and actions. We agree with Carrier that the record does not show that its agents had specifically authorized the use of Artiaga's 1969 Volkswagen Squareback on the day in question. But that omission is not fatal to the Claimants' case.

Whatever may have been the Claimants' normal mode of transportation concerning regular duty hours is not particularly relevant to this dispute. However, based upon the "under pay" concept5 of Rule 30.C, we feel that knowledge on the part of the Carrier of Claimants' normal practices when called for the type of overtime here in issue is quite important to the question of "authority." The record is singularly clear that the two Claimants here, and the individual involved in Award No. 21126, when called for overtime, always used a personal vehicle of one of the three to journey the 15 or 16 wiles from their residences to the Galesburg Terminal. There was no Carrier passenger or freight train service reasonably available at the times of the calls-and no indication of reasonable availability of other types of public transportation at hours such as involved here. If the Claimants had not employed the means of private vehicles, it is questionable that they would have been able to respond to overtime calls in normal circumstances, and rather obvious that they could not have responded on the night in question.

Of equal significance is the Carrier's knowledge of these factors. The rather extensive records before us fails to include any statements from Roadmaster Jacobs - who called the crew on January 4, 1972- or from other Carrier Officials who might customarily perform similar functions. Thus, we must draw all inferences reasonably concluded from the evidence, and find that Carrier knew, or reasonably should have known, that there was an absence of Carrier (or public) transportation and that the employes would drive private vehicle5 to report for overtime work. Armed with that knowledge, Carrier placed Rule 30.C into operation - and thus, placed the men under pay. It is reasonable to conclude that not only did the Carrier "authorize" the employes to utilize private transportation, but, in fact, under all of the circumstances, they "encouraged" it - as the only reasonably available means to facilitate the reporting to perform productive work, and to minimize undue expenditures of money for the "unproductive" time consumed in reporting to the work sites.

Carrier denies that the employee were "deadheading under orders." While it is questionable that said defense was raised, in those terms, while this matter was the subject of specific handling on the property, it was raised in Award No.-21126. In addition, that argument is directly related to the properly raised defense of "commuting" so es to be properly before us. The Carrier freely concedes that there have bean very few Awards which have dealt with a definition of the term "deadheading." We have considered the few that were cited, but find that they are of little assistance. It may be that certain

of the Awards used the term in a restrictive sense and spoke in terms of "points on the railroad." But, as we have considered those Awards, they did not focus upon an issue such-es this, and we feel that their conclusions are rather neutral to our consideration.

We have noted Carrier's statement, at Page 37 of its Submission, that the word "deadheading" "... is not used anywhere in the BN-BMWE Agreement, except in the Off-Track Vehicle Article." We obviously cannot subscribe, however, to its newt stated conclusion that such a concept /deadheading/ "... manifestly does not exist in this contract or in this context." In point of fact, because the term is not modified elsewhere in the Agreement, we would appear to have a wider latitude in applying it to a given set of circumstances.

In defining the term, it is important to recognize the purpose of the Article in question. It is to cover accidents to employes riding in "off-track vehicles." Obviously then, the parties did not intend a limited definition dealing solely with transportation via rail. The existence of Rule 30.C leads us to conclude that the Claimants fell within the contemplation of the rule. Sad they not been under pay, then other considerations - such as the exclusionary language - would be of paramount importance. But, as of the time of the calls, the employes were on the active payroll of Carrier - at premium rates - and were traveling at the authority of Carrier. Surely, various concepts of agency were in existence as a result of the call-in, and agency concepts may not be limited solely to Carrier-owned property. Not only do we fin that they were deadheading, but, based upon our discussion of "authority", discussed above, we feel that they were "under orders."

Carrier suggests that the application of Rule 30.C is not material to 5 resolution of this dispute, and notes that an employe may be under pay concerning all of the exclusions. We do not read the rule as being so easily defined. It may be that an employe is under pay while riding in an.off-track vehicle, authorized by Carrier, but be excluded from coverage because of Paragraph D(4). At the same time, an employe might not be under pay, but still be covered because he is being transported at Carrier expense. In short, we do not feel that we reach the exclusion of Paragraph D(6) because the asserted exclusion concerning "commuting" has been disposed of by our findings regarding "deadheading." As noted, but for Rule 30.C, we might be inclined to agree that the employes were not entitled to recovery. But, simply stated, when an hourly rated employe is "on the payroll", we do not feel that he is "commuting" in the accepted sense of the word. Nor do we feel that we are in conflict with. the cited IRS considerations. Rule 30.C converts this dispute into quite another matter than a personal choice of location of private residence.

The claim seeks benefits set forth in Article V B(3) of "Appendix H." We read the claim as seeking only benefits to which they are entitled under their individual circumstances.

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 Rmployes 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 inwlved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.