Award Number 259
Docket Number PC–105

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

ORDER OF SLEEPING CAR CONDUCTORS

THE PULLMAN COMPANY

DISPUTE.—

"Conductor L. D. Buckley, Chicago Western District, while working extra in the last half of October 1932 performed the following services:

"Left Chicago deadhead on pass 4:00 P. M., Oct. 26, arrived Lafayette, Ind., 10:00 A. M., Oct. 27. Held for service at Lafayette from 10:00 A. M. to 12:30 P. M., Oct. 27. Left Lafayette 12:30 P. M., Oct. 27 in special service, arriving New York 8:30 A. M., Oct. 28. Held for service in New York from 8:30 A. M. to 12:00 noon, Oct. 28. Left New York deadhead on pass 12:00 noon, Oct. 28, arrived Chicago 8:00 A. M., Oct. 29.

"For this service he was paid:

1 day deadhead on pass, Chicago to Lafayette.
1 day special service, Lafayette to New York.
1 day deadhead on pass, New York to Chicago.

"He should have been paid as follows:

8 hours deadhead on pass 4 P. M. to midnight, Oct. 26.
8 hours deadhead on pass midnight to 10:00 A. M., Oct. 27.
2 hrs. 30 mins. held for service 10 A. M. to 12:30 P. M., Oct. 27.
1 day special service 12:30 P. M., Oct. 27 to 8:45 A. M., Oct. 28.
3 hrs. 30 mins. held for service 8:30 A. M. to 1 noon, Oct. 28.
8 hours deadhead on pass 12 noon to midnight, Oct. 28.
8 hours deadhead on pass 12 midnight to 8 A. M., Oct. 29.

"Under the decision of the Assistant to General Manager, under date of February 7, 1933, Conductor Buckley received an additional 1½ day's pay, making a total of 4½ days' pay for the services tabulated above. As his claim totals 1 day at the daily rate and 38 hours at the hourly rate, there is still a difference due the conductor ½ day at the daily rate and 6 hours at the hourly rate."

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

The carrier and the employe 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 case being deadlocked, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

There is in evidence The Pullman Company Rules Governing Working Conditions for Conductors, effective December 16, 1923, and Mediation Agreement of March 1, 1928.

The service performed was as follows:

	Carrier		Employes claim pay	
	Paid	Credited		
	Days	*Hours*	*Hours*	*Days*
10-26-32 Left Chicago 4 P. M. deadhead on pass			8	
10-27-32 Arrived Lafayette 10 A. M. deadhead on pass	[1] 1	16	8	
Held for service 10 A. M. to 12:30 P. M.		2½	2½	
Left Lafayette special trip 12:30 P. M.	[2] 2½	17¼		1
10-28-32 Arrived New York 8:30 A. M, special trip N. Y. held for service 8:30 A. M. to noon		3½	3½	
10-28-32 Left New York Noon deadhead on pass	1		8	
10-29-32 Arrived Chicago 8 A. M.		16	8	
Total	4½	55¼	6	5

[1] 1 day for side trip Ft. Wayne to Lafayette and return.
[2] ½ of regular allowance Chicago-New York Line.

Elapsed time 64 hrs. (4 P. M. 10-26 to 8 A. M. 10-29.)

The question presented in this case is how an extra conductor should be compensated for such items as deadheading on a pass and held for service when his total hourage credit for the month is less than two hundred and forty hours. The same question is presented in eight other cases now before the Board—Dockets PC-100, PC-104, PC-106, PC-101, PC-102, PC-99, PC-98, and PC-103. All of these cases involve claims against the Pullman Company presented by the Order of Sleeping Car Conductors and in all of them the arguments are the same and are very largely repetitious. The most extended treatment of the question at issue is in PC-105, and therefore this case will be first decided and the others will be decided in the order given above, on the basis of the principles arrived at in PC-105. For the sake of convenience, a separate opinion will be given in each case and a separate award will be made in each case, but all nine cases should be considered as a part of a single issue and, in the opinion which we are about to render, we shall draw upon occasion from statements and arguments appearing not only in PC-105 but in the records of some of the other cases.

The rules which are pertinent to the question before us are as follows:

RULE 1.—(a) Two hundred forty (240) hours' work shall constitute a basic month's service; deadhead hours properly authorized to be counted as service hours. Where a regular assignment is less than 240 hours' work per month, deduction will not be made from the respective established monthly wage in consequence thereof.

(b) Service time shall be computed as continuous for each trip from the time required to report for duty until released, subject to the following deduction:

> (b-1) Actual continuous time authorized for rest at night when sleeping space is reserved, with a maximum of 4 hours for the first night and a maximum of 6 hours for each night thereafter.

(c) When release from duty is less than one hour, no deductions will be made from the continuity of time.

RULE 2.—(a) Conductors will be credited with all hours worked each month, except hours of service on "extended special tours," and will be paid overtime at pro-rata hourly rates for all time worked each month in excess of 240 hours; time in excess of 270 hours shall be paid for at the rate of time and one-half.

(b) Conductors assigned to service on extended special tours will be paid for the number of calendar days in such service, compensation determined by dividing the monthly rate for this class of service by the number of days in the month in which the service is performed.

(c) Road service performed by conductors on specified layovers or relief days will be credited as provided in Rule 1 and paid for in addition to all other earnings for the month.

(d) When required to perform station duty, load trains, or any extra service other than road service, such service will be credited on the hourly basis and

paid for in addition to all other earnings for the month, with a minimum credit of three (3) hours for each call.

RULE 3.—Extra conductors performing road service in the place of regularly assigned conductors or on extra assignments will be paid in accordance with their years of service the compensation a regularly assigned conductor would receive for the same service, which will be determined, in the case of a regularly assigned run, or a trip over the same district, by dividing the monthly wage by the number of trips (initial terminal to final terminal) required for a month's work.

RULE 5.—Not less than ninety-six (96) hours off duty each month in 24-consecutive-hour periods, or multiples thereof, will be allowed at designated home terminals.

We shall consider first the question of *deadheading on a pass.*

The distinguishing feature of the rules quoted above, which marks them off from the normal type of agreement covering employes on the railroads, is the method of paying for overtime. The scheme upon which the rules are based was laid down by the United States Railroad Administration during the period of federal control of the railroads. It was recognized that the general principle of an eight hour day with pay for overtime should be as applicable to the conductors as to other classes of employes, but that owing to the peculiar nature of the conductor's work, which frequently requires him to be continuously on duty for long stretches of hours followed by relatively long periods of rest or layover, it would be unduly burdensome to the carrier to calculate overtime rates on the completion of each eight hour stretch of duty. Accordingly, the formula was devised, and later incorporated by the Pullman Company in its rules, of a 240 hour month and a monthly wage with overtime payments for hours worked in excess of 240 hours in any month. But this formula, designed purely to meet the problem of overtime, should not obscure the principle underlying the rules which, as with other classes of employes, is that of the eight hour day. Rule 1, establishing 240 hours as a basic month's service, means 30 days of 8 hours each. Rule 5 in substance provides for an average of one day's rest per week. From the nature of the rules one would conclude that conductors, like other classes of employes, are being paid on an hourly basis, the only difference being that overtime payments are not made until 240 hours have been accumulated.

Thus if a regularly assigned conductor accumulates, let us say, 230 hours during the month, he is paid for each of those hours, and he is also (under the guarantee provision of Rule 1 (a)) paid for the ten extra hours during which he performed no service. Similarly, if he works for, say, 275 hours, he is paid for each of those hours, the last five of the hours being at the rate of time and one-half under Rule 2 (a). Thus a regularly assigned conductor who works the full month is paid for all hours for which he receives credit during the month whether those hours be less than 240 or more than 240. The only exception to this general principle, and it is the exception which proves the rule, is that conductors assigned to service on extended special tours are paid on a calendar day basis (Rule 2 (b)). Extended special tours are not involved in the cases before us. Apart from extended special tours, regularly assigned conductors who work a full month are in fact paid for all hours of work with which they are credited during the month.

The question naturally arises, why should not extra conductors similarly be paid for all hours of work during a month? The company's method of payment produces a curious result. If an extra conductor deadheads for eight hours on Monday and makes a special service trip of eight hours on Tuesday, he is paid for two days, and since a day's pay is nothing more or less than payment for eight hours at the hourly rate arrived at by dividing the monthly wage by 240, he is paid for every hour he works during the days in question. If, however, he deadheads for eight hours on Monday and then goes into special service for another eight hours on the same day, and does not work at all on Tuesday, he is paid for only one day's work, or eight hours, the remaining eight hours being merely credited but not paid for unless he accumulates overtime during the month; and since, beginning with the depression extra conductors have almost never obtained enough work during the month to run into overtime, the result is that for all practical purposes an extra conductor who is fortunate enough to render sixteen hours of service over two days will be paid for those sixteen hours while an extra conductor who performs the

harder assignment of working for sixteen hours on one day will be paid for only eight of those hours. Similarly, an extra conductor who is fortunate enough (and this has rarely happened since the depression) to work for 241 hours during a month is paid for all of those hours, whereas a conductor who works for 239 hours will be paid only for the number of days he worked, which normally means that a portion of the hours will not be paid for at all.

Results as manifestly unfair as these, which could not happen in the case of regularly assigned conductors (save if they worked on extended special tours, which are infrequent) ought not to be derived from the Rules unless clearly called for by the Rules. The Company justifies its method of payment by reference to Rule 3, which provides that extra conductors "performing road service in place of regularly assigned conductors or on extra assignments" will be paid the compensation "a regularly assigned conductor would receive for the same service, which will be determined, in the case of a regularly assigned run, or a trip over the same district" on a trip basis. We take it that when extra conductors are deadheading on a pass they are not, within the meaning of Rule 3, performing road service "in the place of regularly assigned conductors or on extra assignments." If so, Rule 3 with its trip or day's service basis of payment has no application to deadheading on a pass. In any event such method of payment is laid down by Rule 3 only in the case of "a regularly assigned run or a trip over the same district" and it is clear that these phrases do not include deadheading on a pass. It was conceded in the argument before the Referee that Rule 3 does not govern payment for deadheading on a pass, and we may therefore dismiss it as not applicable.

If Rule 3, with its provision for payment on a trip or day's service basis, is not applicable to deadheading on a pass but is applicable only to active road service, the very fact that the rule is thus restricted in its application implies that some other basis of payment governs deadheading on a pass. If Rule 3 had meant that extra conductors should be paid on the day's service basis for every kind of service which they render, it presumably would have said so. It did not say so, and the implication is that some other basis of payment was meant to apply to services not included in Rule 3. The only remaining basis of payment is the hourly basis, which must apply unless it can be argued that deadheading on a pass, when tacked on to other items of service preceding or following it, can be said to be an extended special tour, which also provides for payment on a day's service basis. But it has been settled by Decision No. 27 of the Conductors' Board of Adjustment, April 17, 1929, in the case of Conductor Knepper, that service of this sort does not constitute an extended special tour.

By long standing practice an "extended special tour", which is not specifically defined in the rules, has been treated as an operation of 72 hours or more in special service. In the Knepper case the services performed stretched over more than 72 hours and the conductor was paid on a day's service basis. But the service consisted first of a deadhead movement on a pass from St. Louis to Meridian, where Knepper picked up his special party; a special trip in service from Meridian to Memphis, and return; and a deadhead movement with equipment from Meridian to Jackson. The Company lumped all of these items together as constituting an extended special tour and paid the conductor on a day's service basis. Summarizing the decision by the Conductors' Board of Adjustment, the Company says:

> "The Conductors' Adjustment Board ruled that the time spent by Conductor Knepper in getting from St. Louis to the point where he picked up his special party, and in returning to St. Louis after completion of the movement with the special party, should not be considered as component parts of an extended special tour and therefore separated these going and coming movements from the special service movement and awarded * * * separate hourage credits * * * for the deadhead on pass, deadhead with equipment and held for service operations spent in going to and from the points at which he picked up and left the special party trip. As a result of such separation of hourage credits Knepper's actual time with the special party movement amounted to less than 72 hours, and therefore could not be considered as an extended special tour."

Information has been obtained from the Company showing that Knepper at the time of this service was an extra conductor. As a result of the decision

Knepper was not only credited separately with the hours spent deadheading on pass, deadheading with equipment and held for service, but he was paid for these hours, and the decision established the principle that these separate items of service cannot be combined with a special service trip to make up an extended special tour payable under Rule 2 (b) on the day's service basis. But if these items of service are to be segregated and separately credited, and are not to be paid for on the day's service basis under Rule 2 (b), how are they to be paid for? They cannot be paid for on the day's service basis under Rule 3. Since these are the only two rules which provide for payment on a day's service basis, and since neither applies to deadheading on a pass or held for service items, these services must necessarily be paid for on some other basis and the only other basis is the hourly basis. And in fact these items were paid on the hourly basis in the Knepper case, following the decision. But the Company claims that this method of payment resulted solely from the fact that the inclusion of the hourly credits for these services brought Knepper's total for the month to over 240. The carrier asserts that had Knepper's total, with these items included, been less than 240 hours, he would not have been paid on the hourly basis, but would have been paid on the day's service basis. But where is the justification for that? He could not be paid for these disputed items on the day's service basis under Rule 3 or under Rule 2 (b), and there is no other rule in the agreement which authorizes payment on a day's service basis.

But the Company asks: Where in the rules is it provided expressly that these services shall be paid for on the hourly basis? Is there not just as much warrant for paying on the day's service basis when overtime is not involved as for paying on the hourly basis? Not at all. Rule 3 and Rule 2 (b), by providing for the day's service basis in the case of extra conductors performing active road service, and in the case of extended special tours, must mean, by all principles of construction, that in the case of all other services payment shall be on some other basis than that of a day's service.

Stripped to its essentials, the view which we take is this. The day's service basis of payment is exceptional. It is provided for in only two places in the rules. It is limited to two types of service, neither of which include deadheading on a pass. The whole implication is that this exceptional method of payment applies only in the instances specified in the rules and cannot be extended to other instances not so specified. We have seen that regularly employed conductors working the full month receive payment for all hours credited. We have seen that extra conductors who work for more than 240 hours receive payment for all hours credited. We think, therefore, that the hourly basis of payment is the normal basis of payment; that the day's service basis is exceptional; and that it would be a distortion of the rules to add to the exceptions types of service not included in them. The interpretation we have arrived at seems to us the natural one and it avoids the anomalous and unjust discrimination in payment as between extra conductors working more than 240 hours and extra conductors working less, and between extra conductors performing two items of service on a single day and being paid for only one and extra conductors performing the same two items in two separate days and being paid for both days. These anomalies are sufficient in themselves to cast doubt upon the Company's method of payment and to indicate that that method ought not to be approved unless clear justification can be found in the rules. No clear justification can be found in the rules, but on the contrary their most natural interpretation is that payment should be on the hourly basis except where expressly provided otherwise.

Before concluding this portion of the opinion, we must note two other precedents which bear upon the question of deadheading on a pass. United States Railroad Labor Board Decision No. 4094 decided in substance that a conductor deadheading on a pass should "receive pay at service or pro rata rates for 8 hours for each calendar day deadheading." The reason for the limitation to 8 hours seems to have been that conductors deadheading on a pass have no responsibilities, unlike conductors deadheading with equipment, and that therefore it would be unjust to pay them for more than 8 hours. Whether or not the distinction is a sound one and can be justified by the wording of the Rules, we need not inquire, for it has been applied and acted upon constantly for over 10 years (at least so far as crediting only up to 8 hours is concerned); and the employes are not asking us to find that they are entitled to more than 8 hours for deadheading on a pass, even though the

elapsed time may be 10 or 12 hours. Moreover, while the language of the decision seems to allow 8 hours even though the elapsed time is less than 8, the practice has been to allow credit only for the elapsed hours; and the employes are not asking for more than this.

It will be noted that the Labor Board's decision was that conductors should "receive pay" (and not merely credits) for deadheading on a pass, and this decision is strongly relied upon by the employes in support of their contentions in the cases before us. The Company, however, points out that the question before the Board was the claim of certain conductors "for credit on the hourly basis" for all hours deadheading and that the reference in the decision to payment was therefore of no significance. On the other hand, the carrier contended (as shown by the report of the case) that for deadheading on a pass the conductor "should be paid his regular monthly rate for the number of days consumed while deadheading" and be credited with 8 hours in each 24 hour period. Thus the carrier itself talked the language of pay as well as credit and we do not think it proper to assume that the Board's decision in the matter of payment was merely superfluous. At least it seems to imply a general understanding that when a man is credited for something, he should be paid for it, which is all that the employes maintain in the cases now before us. The Company replies, however, that there is nothing in the decision to show that it applied to the method of paying extra conductors. Whatever view is taken of the decision, we think it is helpful to the employes' contention in the cases before us, since presumably if the Board had intended to exclude extra conductors from the effect of the decision, something would have been said about it. The cases before us, however, do not turn upon the precise effect to be given the Labor Board decision in the matter of payment, for the employes' claims for payment for the hours credited in deadheading can be sustained without regard to the decision.

But the Company urges with some force that no claim by extra conductors, deadheading on a pass, for payment on any other than the day's service basis (except where overtime was involved) was ever made until sometime in 1932 or about six years after the Labor Board decision, which apparently brought to their attention for the first time that deadheading should be paid at the hourly rates. The Company therefore asserts that what the employes are now asking is contrary to the practice and constitutes in effect a request for a new rule. The employes, on the other hand, state that prior to the depression extra conductors very frequently worked the full 240 hours and that it is only since the depression, which has involved the laying off of many conductors and the working of extra conductors for much less than the 240 hours a month, that the question of payment for deadheading on the hourly basis has become acute. They further contend that the method of calculating the payment of extra conductors is a complicated and confusing one, as indeed it is, and that many conductors have undoubtedly been ignorant of their rights. On the whole, we do not think the evidence justifies a finding that the employes have ever deliberately accepted an interpretation of the rules which would bar their claims in the cases before us, and in the absence of such an accepted interpretation the mere failure to prosecute claims would not justify our refusing to consider them. We have reached this conclusion the more readily since apart from general statements there is nothing in the record in any of the cases to show how often prior to the depression extra conductors were paid on the basis now complained of. The Company admits that since the depression it has spread the work out among the extra conductors, so that we cannot dismiss as unfounded the employes' contention that it is this practice which has brought the question of payment acutely to the forefront.

To resume the analysis: We have seen that the Labor Board decision in 1926 limited payment for deadheading on a pass to 8 hours in a calendar day. The question of what is meant by a calendar day has been clarified by the Mediation Agreement between the parties, dated June 15, 1932, and the subsequent practice. The principle was established of splitting the 24 hour period at midnight so that, for example, if a man deadheaded on a pass from 4 P. M. on a Monday to 8 A. M. on Tuesday, he would be entitled to 8 hours credit for Monday and 8 for Tuesday, and not for a single stretch of 8 hours out of the 24 in question. This principle of treating the day on a midnight to midnight basis is not disputed by the Company and is conceded to apply to the cases before us.

The Mediation Agreement just referred to disposed of a number of claims of conductors and provided that they should be paid as presented. These claims consisted mainly of claims for deadheading on a pass and held for service, and involved the same principles as in the cases now before us. Six of the nine conductors involved, according to information furnished by the Company, were extra conductors, but the Company maintains that the only reason they were paid on the hourly basis for the time credited and not on the day's service basis was because the inclusion of the contested time brought their monthly hours to over 240. The agreement is at least evidence of a practice which the Company does not dispute, namely, the payment of extra conductors for all hours credited where the total time is in excess of 240 hours, as contrasted with the Company's insistence upon the day's service method of payment where the total hours credited are less than 240. This is an anomalous result upon which we have already commented.

We may now summarize the principles governing the correct method of paying extra conductors for deadheading on a pass:

1. Deadheading on a pass is not payable on the trip or day's service basis under Rule 3.

2. Deadheading on a pass cannot be combined with other items of service to produce an extended special tour and therefore is not payable on the day's service basis under Rule 2 (b).

3. Since deadheading on a pass cannot be paid on the day's service basis under either Rule 3 or Rule 2 (b), and since these are the only rules which provide for such a method of payment, the method of payment must be something else, for otherwise these two rules would not be limited to the specified types of service which they cover. The only other possible basis of payment is the hourly basis, which, with the exception of the two types of service covered by Rules 3 and 2 (b), is in fact the basis on which all conductors are paid under the agreement, the peculiar form of the agreement being necessitated by the desire to exclude overtime rates after the first 8 hours. This peculiar form cannot, however, obscure the fact that, with the exceptions noted, regular conductors working a full month are paid for every hour credited, whether the hours be less than 240 or more. Where the hours are less than 240, regularly assigned conductors are paid for the hours credited, at least if they work the full month, and are paid in addition for the difference between the hours so credited and 240 hours—a guarantee of a month's pay. Extra conductors are excluded from this guarantee, but to suppose that they differ otherwise from all other conductors in not being paid for hours credited is to find something in the rules which is not there.

4. As a result of precedents which have been accepted by the parties in interpreting the rules, deadheading on a pass in excess of 8 hours will be credited (and therefore under our decision paid for) only to the extent of 8 hours; deadheading on a pass for less than 8 hours will be credited (and therefore under our decision paid for) only for the elapsed hours; and for the purposes of credits (and therefore of payments) the calendar day begins and ends at midnight.

Held for service.—As in the case of deadheading, the Company credits held for service items but does not pay for them except (a) where the inclusion of the hours brings the total for the month to over 240, in which case the Company pays on the hourly basis, and (b) where the held for service item is the only item credited on a particular day, in which case the Company pays for it on the day's service basis. The question of the proper method of payment, however, is not quite so simple as in the case of deadheading.

It is evident that when a conductor is held for service, the time during which he is held is considered, and properly so, as service time. Thus the Company's printed instructions to its conductors direct them to enter on their time sheets (in which space is provided for the purpose) the time spent while held for service where such time is not included as a part of a regular layover. These instructions do not constitute an agreement or any part of the rules on which the conductors rely, but they do at least indicate the accepted practice of treating held for service time as service which is to be credited and under certain circumstances paid for. The Company, as has been said, does in fact pay for this service under the circumstances already described. The claims which were paid as a result of the Mediation Agreement of June 15, 1932, referred to previously, involved held for service items credited during days when other items such as deadheading were also credited and certain of these items were

paid on the hourly basis. As in the case of deadheading, however, the Company contends that these payments were so made only because with the inclusion of the held for service hours, the total hourage exceeded 240. And the employees make the same contention as in the case of deadheading, that hours which are credited should be paid for whether overtime is involved or not.

There has been some argument to the effect that when a conductor is held for service he is in reality performing no service whatever, and that if the Company does, under certain circumstances, pay him for it, the payment is a mere gratuity and the Company is doing something that it is not required to do. On behalf of the Company it is said that some years ago in the case of extended special tours the Company voluntarily adopted the practice of crediting eight hours for each day's service, notwithstanding the provisions of Rule 2 that conductors would be credited with all hours worked, except hours of service on such tours; and that the Company did this, although not required to do so, in order to preserve the hourage accumulations of conductors when assigned to tour service. (A conductor, for example, has accumulated 235 hours of credit. A few days before the end of the month he is assigned to an extended special tour and unless credited with eight hours for each of the tour days, he will lose the overtime payments which he would have received if he had worked for the remaining days of the month on a regular assignment.) Later, the Company argues, this equitable principle was extended to held for service time. But while the crediting of hours on an extended special tour may be a gratuity because of the peculiar language of Rule 2 (a) (a point which we do not decide), there is no similarly limiting language in the case of held for service. On the contrary, whatever may be the situation in the case of extended special tours, the rules show clearly that all other service must be credited. Rule 2 (a) itself provides that conductors will be credited with all hours worked except in the case of extended special tours. The only real question, therefore, is whether held for service constitutes service. If it does it must be credited and its crediting is not a gratuity.

The instructions already referred to and the fact that the Company credits, and sometimes pays for, held for service time indicate that it is regarded as service. The rules, fairly construed, lead to the same result. Rule 1 (a) expressly provides that deadhead hours shall be counted as service hours. From the point of view of the Company and the conductors alike there can be no real difference between deadheading on a pass and held for service. Neither operation is revenue-producing. When a conductor is deadheading on a pass he is moving to get to revenue-producing work. When he is held for service he is waiting to get to revenue-producing work. In both cases he has no responsibilities, but he is in the service of the Company. If the one service should be credited the other should be credited. Rule 1 (b) is still more significant. It provides that "service time shall be computed as continuous for each trip from the time required to report for duty until released", subject to a deduction for rest at night when sleeping space is reserved, up to a maximum of four hours for the first night and six hours for succeeding nights. No other deduction is provided for. Under this rule, if an extra conductor deadheads with equipment from A to B, is held for service at B for a certain length of time, and then returns from B to A in special service, the time in which he is held for service at B must necessarily, under Rule 1 (b), be included in his continuous service time and must therefore be credited. The crediting cannot be deemed to be a mere gratuity.

This much being established, it is pertinent to note, before determining the correct method of payment for the time so credited, that the same practices which have been established in the crediting of deadhead hours on a pass have also been established in crediting held for service hours. If the held for service hours exceed eight in a given day only eight are credited. If they are less than eight only the elapsed hours are credited. The employees do not question this practice and we therefore accept it for the purposes of the cases before us.

The employees contend that held for service time should be paid on the hourly basis under the provisions of Rule 2 (d). They say that it is "extra service other than road service" within the meaning of Rule 2 (d) and therefore under that rule must be paid for on the hourly basis. But the Company contends that the provision in Rule 2 (d) for a minimum credit of three hours "for each call" implies that the service to be paid for under that rule must be performed pursuant to a "call" and that when a man is held for service he can

hardly be said to have been called. The fact that a maximum credit of eight hours for held for service time in a calendar day has become the established practice, whereas if Rule 2 (d) applied there would presumably be no such maximum limit, and the fact that if the held for service time is less than three hours the actual time is credited, whereas Rule 2 (d) requires a minimum of three hours for each call, seem to show that Rule 2 (d) has not been considered as applicable to time held for service, despite the all-inclusive language of the phrase "any extra service other than road service."

It is not necessary for us to pass on this question since Rule 2 (d) is not essential to the employees' case. Once it is established that time held for service constitutes service time, which must be credited, the same result follows as in the case of deadheading. The time cannot be paid for on the day's service basis under Rule 3 because the service is not road service, and it cannot be paid on the day's service basis under Rule 2 (b) because it is not part of an extended special tour. The time must, therefore, be paid for on some other basis, and the only other basis possible is the hourly basis.

But held for service time presents one complication not present in the case of deadheading. If an extra conductor is performing road service within the meaning of Rule 3, he is paid on the trip basis and not the hourly basis. The trip basis is determined by dividing the monthly wage by the number of trips required of a regularly assigned conductor for a month's work between the same terminals. The record (PC–105) shows that a round trip run between Chicago and New York is treated as a five day trip; that is to say, a regularly assigned conductor would normally be required to make six such trips in thirty days. He would not be required to make more than that, for he is allowed a layover at both terminals. Similarly, as PC–106 shows, a round trip operation between St. Louis and New York is treated as a five day operation. An extra conductor, then, working on a round trip between Chicago and New York or St. Louis and New York would, under Rule 3, in the cases referred to, be paid for five days, which is the equivalent of forty hours. His actual elapsed time on the two trains, less his sleep deduction, might, however, be less than forty hours. He would still be paid the equivalent of forty hours, the theory being, as we understand it, that the five day allowance includes a normal layover period at both terminals. Now the practice has been, and it is not questioned by the employees, to compute the time under Rule 3 in the case of a one-way operation between, say, St. Louis and New York, by dividing in half the number of days allowed for the round trip operation. An extra conductor, therefore, assigned to the run (PC–106) between St. Louis and New York would, as we understand the practice, be paid for two and one-half days. Now suppose that on arrival in New York from St. Louis he was held for service for a couple of hours and was then sent deadhead with equipment or on a pass to some other point. He would be paid two and one-half days for the run to New York and (in our view) be paid for the hours deadheading (up to eight in the case of deadheading on a pass). Should he also be paid for the hours held for service in New York? It might well be that the two and one-half day allowance for the St. Louis-New York run exceeded the elapsed time of the run less the sleep allowance. The excess would represent a layover allowance and he would be paid for that. If he were also paid for the held for service time, he would be paid twice for the same thing. That would obviously be unjust. The employees do not ask for double pay, and the rules should not be so construed as to require double pay unless such a conclusion is necessitated by express language or unavoidable implication.

In applying Rule 3 we think it fair to hold that where the time computed on a trip basis is that allowed a regular assigned conductor and includes a layover period, held for service time should not be included except to the extent that it exceeds the normal layover. But where the time paid for a trip under Rule 3 equals or is less than the time credited under Rule 1, no layover is included, and the held for service time which follows should be credited and paid for.

Before considering the details of the particular claims in PC–105 one further matter must be noted. Toward the end of 1934 the employees' representatives prepared for discussion with the Company a revised set of rules. Early in January 1935 the Company declined to consider the proposed revision because certain of the desired changes involved increases in pay and the so-called Washington Wage Agreement, of April 26, 1934, provided among other things that changes in basic rates of pay would not be requested by any of the Carriers

or their employees prior to May 1, 1935. Following this refusal of The Pullman Company to discuss the proposed revision, the employees sought the services of the National Mediation Board on January 14, 1935. While the matter was pending before the Mediation Board, and after the May 1, 1935, deadline fixed in the Washington Wage Agreement had expired, the employees took up with The Pullman Company again the question of the proposed revision, and at about the same time withdrew their request for the services of the Mediation Board. Conferences with the Company in June 1935 proved unavailing; the services of the Mediation Board were again invoked and the question is apparently still pending before that Board.

Copies of the proposed revision as submitted to the Mediation Board in July 1935 have been made a part of the record before us. It appears that the principles which we have arrived at in this opinion are in substance and with minor variations contained in the revised rules which the employees are seeking. The Company has urged upon us that the character of the rules being sought by the employees shows very clearly that what they are seeking from our Board is precisely what they are seeking from the Mediation Board, namely, the establishment of new rules and not the interpretation of existing rules. Our Board is, of course, without jurisdiction to establish new rules, and the fact that the employees have previously invoked the services of the Mediation Board is, in the Company's view, evidence that the employees realize that they are seeking new rules, and not the interpretation of the existing rules.

But an examination of the rules proposed by the employees discloses that they do not by any means consist wholly of new rules. Some of the existing rules are carried over intact and without change. With respect to the rest, which are to be revised, portions are clearly new. Other portions are nothing but codifications of interpretations which have already been established, and which are not questioned by the Company. For example, the calendar day is to run from midnight to midnight. Deadheading on a pass is to receive a maximum credit of eight hours in each calendar day. An extended special tour must be seventy-two consecutive hours or more in duration. All of these principles are now established and accepted, although not specifically mentioned in the existing rules. They are simply interpretations of the existing rules, which should be spelled out in any future revision. If the interpretations which we have arrived at in this opinion, and which to a large extent are embodied in the proposed revision, are, as we think they are, justified as a matter of construction, they are not new rules, and the mere fact that they are included in the proposed revision does not establish the fact that they are new rules. Admittedly parts of the revision do constitute new rules, and for this reason the employees had cause to seek the services of the Mediation Board. But together with these admittedly new rules, interpretations of the existing rules were also included, and it is perfectly consistent with what the employees have done to argue that the questions submitted to us, though covered by the proposed revision, also involve simply matters of interpretation.

We come now to a consideration of the services performed and the items claimed in PC–105. The conductor left Chicago on October 26, 1932, at 4 P. M. deadhead on a pass, arriving at Lafayette the next morning at 10 A. M. He was credited with 16 hours—8 hours for the operation on the 26th up to midnight and 8 hours for the operation from midnight to 10 A. M. He was paid, however, for only 1 day (8 hours). The conductor claims and is entitled to pay for the 16 hours. On arrival at Lafayette he was held for service from 10 A. M. to 12:30 P. M. and was credited with 2½ hours, but not paid for it. He claims pay and is entitled to it. This held for service item is not absorbed by any layover period. He left Lafayette on a special trip at 12:30 P. M., arriving at New York at 8:30 A. M. the next morning. For this he claims 1 day's pay (8 hours) on a day's service basis. There is no regular run between Lafayette and New York and whether the correct allowance for this service, treating it as road service under Rule 3, should be 1 day or something more we don't know. It could certainly not be less because the elapsed time, less a 4 hour sleep allowance, would be 16 hours, or the equivalent of two days. Only 1 day has been asked and we allow no more. On arrival in New York at 8:30 A. M. he was held for service until noon and was credited with 3½ hours, for which he should be paid. It is evident that the allowance of 1 day for the run from Lafayette to New York could not include any layover. Payment for the held for service time in New York should therefore be allowed. He left New York at noon on the 28th deadhead on a pass, arriving at Chicago the following morning at 8 A. M.

He was credited with 16 hours for the deadhead operation, 8 on each day, and should be paid for these 16 hours. His total claim adds up to 5 days and 6 hours. He was paid for 4½ days and is entitled to the difference.

It will be noted that the total elapsed time of the entire trip amounted to 64 hours, or the equivalent of 8 days. For this the employee was paid for 4½ days, and he claims an additional 10 hours, or a total of 5 days and 6 hours. There is no question of double payment or of being paid twice for the same operation—an argument repeatedly made by the Company in the cases before us. The conductor does not ask for payment first on the trip or day's service basis and then for payment in addition for the hours included therein. On the contrary, he asks that he be paid on the day's service basis for the work which is properly payable on that basis under Rule 3, and then for the other items of work which are not payable under Rule 3 he asks for payment on the hourly basis. There is no overlapping whatever and no duplication of payments.

AWARD

Claim sustained.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 9th day of May 1936.