Award No. 6755
Docket No. PC-6829

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS, PULLMAN SYSTEM

THE PULLMAN COMPANY

STATEMENT OF CLAIM: The Order of Railway Conductors, Pullman System, claims for and in behalf of Conductor C. P. Carr, Philadelphia District, that:

1. Rule 38 of the Agreement between The Pullman Company and its Conductors was violated when on January 21, 1953, the Company credited Conductor Carr with 8:40 hours on the Daily Office Record of Extra Conductors, Local District Conductors (Form 93.1377) in connection with the trip performed by him Jan. 20-21, 1953, Philadelphia to Bethlehem and return.

2. As a result of this improper action Conductor Carr failed to receive an assignment on Jan. 21, 1953, Philadelphia to Detroit. This assignment was instead given to Conductor W. J. Remy, Philadelphia District, although Conductor Remy had more credited and assessed hours than did Conductor Carr.

3. Conductor Carr be credited and paid for the assignment Philadelphia to Detroit improperly withheld from him.

EMPLOYES' STATEMENT OF FACTS:

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On January 20, 1953, Conductor Carr was given an assignment as a result of which he performed the following trip:

Report	Philadelphia,	Jan. 20	11:15 P. M.
Depart	"	"	11:30 P. M.
Arrive	Bethlehem,	" 21	1:30 A. M.
Release	"	"	1:30 A. M.
Report	Bethlehem,	"	5:30 A. M.
Depart	"	"	5:40 A. M.
Arrive	Philadelphia,	"	7:35 A. M.
Release	"	"	7:55 A. M.

proposed Memorandum of Understanding, Mr. Deckard stated (Exhibit A, p. 16):

> ". . . why was the Committee for the Management willing to make a Memorandum of Understanding that would have permitted the use of the hours paid for, for signout use, if they already had that right."

To answer Mr. Deckard is to affirm the Company's position in this case; i.e., that the working Agreement does not specify how hours are to be credited for signout use except in the case of regular assignment. A Memorandum of Understanding was (and is) desirable to establish a simple formula to be used in crediting hours for that purpose. Management's proposed formula provided that in all cases, except regular assignment, the hours to be credited a conductor for signout purposes would be the same as his hours of pay. Had this formula been accepted by the Organization, the instant controversy would not have arisen. Furthermore, the import of Mr. Deckard's question, above, is not clear. Does Mr. Deckard mean to deny that Management has the right to credit a conductor for signout purposes with hours for which paid in all cases? . . . including the case where hours for which paid are the same as hours actually worked? Certainly Management has the right to use the hours paid for for signout use under some circumstances. The Company does not contend that it now uses, or should use, hours paid for for signout use under all circumstances. The purpose of the Memorandum of Understanding was to give the Company that right (except in the case of regular assignment). Further, it believes its efforts to negotiate were not beyond approbation.

CONCLUSION

In this ex parte statement The Pullman Company has shown that (1) the working Agreement does not specify which hours shall be credited to an extra conductor who operates in deadhead service properly coupled with extra service on a continuous time basis, as in the instant case; (2) the Company properly follows past practice in crediting such a conductor with continuous, actual hours of work for signout use, which hours totaled 8:40 in the instant case; (3) the Company follows a uniform system, through use of uniform forms and instructions, in crediting hours for signout use under various circumstances, including that of the instant case; (4) the evidence introduced by the Organization at the hearing does not support its position but, rather, tends to support The Pullman Company's position; and (5) Management made a good faith proposal to reach an agreement with the Organization as to a formula for crediting hours for signout use in place of the present system, but the Organization rejected the offer.

As Conductor Carr was properly credited with 8:40 hours for signout use in connection with his assignment, Philadelphia-Bethlehem and return, January 20-21, 1953, his total number of credited and assessed hours during the signout period, January 21, 1953, exceeded the total of Conductor Remy's hours. Consequently, Conductor Carr was not entitled to the assignment, Philadelphia-Detroit given to Conductor Remy and the claim in his behalf for such assignment is without merit. Accordingly, the claim should be denied.

All data presented herewith in support of the Company's position have heretofore been submitted in substance to the employe or his representative and made a part of this dispute.

(Exhibits not reproduced).

OPINION OF BOARD: Extra Conductor Carr was given an assignment to deadhead Philadelphia to Bethlehem, Pa., and return in service. Pursuant to such assignment he reported at Philadelphia January 20, 1953, at 11:00 P.M.; deadheaded to Bethlehem, arriving at 1:30 A.M. on January 21; he reported at that point at 5:30 A.M. and arrived at Philadelphia, in extra service on the same morning, where he was released from duty at

7:55 A. M. For performance of such assignment Carr was paid for and credited with eight hours and forty minutes service. This represented the total elapsed time between his reporting for duty at Philadelphia and his release at that point, although his hours of actual work while enroute between Philadelphia to Bethlehem and return to only four hours and forty minutes.

By reason of crediting continuous service time as aforesaid, instead of crediting actual hours worked, Carrier's record, required by the Current Agreement, showed Carr with 144.15 credited hours and Conductor W. J. Remy with a total of 141.25 such hours on January 21. As a result Remy was given an assignment Philadelphia to Detroit, whereas if Carr had been credited with hours actually worked, instead of continuous hours of service, he would have been entitled to such assignment.

There is no dispute between the parties respecting the all decisive issue. Claimant states "The only question here involved is the proper interpretation of Rule 38 (f) **as written**," while Carrier asserts "The issue in this dispute is whether for signout purposes on January 21, 1953, the Pullman Company properly credited Conductor C. P. Carr, an extra conductor . . . with 8:40 hours, representing his continuous time from reporting time in Philadelphia . . . until release time in Philadelphia . . . in connection with his trip, Philadelphia-Bethlehem and return. . ."

Pertinent portions of Rule 38 (f) on which Claimant relies to sustain his position read:

> "A complete record shall be kept in each district or agency covering the credited and assessed hours of all extra conductors of that district or agency. . . . The record shall be kept on a uniform basis in all districts and agencies. . ."

At the outset Claimant begs the issue by asserting that in enacting the Agreement the portion of the Rule in controversy was adopted with the understanding that "hours worked" would be credited on the involved record. Intention of the parties is never resorted to in construing contracts unless the terms of the instrument are ambiguous. We find no ambiguity in the portions of the Rule heretofore quoted. Therefore this contention lacks merit and Claimant must stand or fall on the contract as written.

In approaching the merits, it can be said, the record clearly discloses that by far the greater portion of service performed by extra Conductors in the district in question is credited on the basis of hours actually worked and that a very small percent is credited on the basis of continuous service. This, it may be added, comes about from the fact that most of such service is performed by extra Conductors making trips in regular assignments. Upon analysis of the quoted portion of the contract we are constrained to hold the terms thereof, in clear and unambiguous language, require that the record of assessed hours of **all extra Conductors** in the district in question be kept on a uniform basis. That language, we pause to add, means just what it says and does not warrant or permit a construction that, due to a difference in the nature of their assignments, service performed by some extra Conductors shall be credited on one basis and that performed by other extra Conductors on another. Thus, since it cannot be denied that is exactly what was being done on the date in question, it appears Carrier was violating the provisions of Rule 38 (f) by failing to credit hours of service of Conductors on a uniform basis unless sound reason is to be found elsewhere in the record for refusing to give application to its clear and definite terms.

In passing it may be stated that in reaching the foregoing conclusion we have rejected, not overlooked, Carrier's contention that hours paid for continuous service are hours actually worked. That, in our opinion, cannot be regarded as true for purposes of determining whether the record of credited hours of all extra Conductors has been kept on a uniform basis.

We turn now to grounds assigned by Carrier as requiring a conclusion contrary to the one heretofore announced.

First it is urged that neither Rule 38 nor any other rule of the Current Agreement specify how the hours of an extra Conductor who operates, as in the instant case, shall be credited for signout purposes. This, as we have heretofore indicated, is fallacious for the reason Rule 38 (f) requires the record of all extra Conductors be kept on a uniform basis and that was not being done on the date in question.

Next the Carrier directs our attention to Question and Answer 11 which are to be considered as a part of Rule 38 (f). They read:

> "Q-11. When an extra conductor makes a trip in regular assignment, how shall his hours be credited in the record as kept under paragraph (f) of this Rule?
>
> "A-11. He shall be credited with the actual hours worked."

Based on the foregoing Carrier argues that Rule 38 (f) does not apply uniformly to all extra Conductors. We do not agree. The answer to this question creates no exception to the Rule nor does it exclude other extra Conductors from its terms by necessary implication. For all we know the parties, if it had been asked, would have given a similar question respecting extra Conductors in extra service a like answer.

Finally Carrier relies on past practice. It must be conceded the record discloses some evidence along that line. The trouble here from its standpoint is that past practice does not preclude enforcement of the clear and unequivocal terms of an agreement requiring action contrary to the practice relied on.

We find nothing in the Carrier's contentions which warrant a decision the manner in which it credited Claimant's hours of service in the instant situation was in conformity with requirements of the Current Agreement. Therefore based on conclusions previously announced Claimant is entitled to a sustaining Award.

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

That both parties to this dispute waived hearing thereon;

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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 10th day of September, 1954.

DISSENTING OPINION TO AWARD 6755, DOCKET PC-6829

The instant Award is based upon the erroneous presumption that, if a question similar to Question 11 covering extra conductors making trips in regular assignments had been asked covering extra conductors used in extra service, the parties would have given a like answer thereto.

In the first place, decisions of this Board cannot be based upon presumption (Award 4132) or conjecture (Award 1888).

In the second place, that the presumption, supra, is in error is demonstrated by the fact that the Rule itself does not provide for keeping records "on the basis of actual hours worked." If that had been the intent, which the Carrier denies, the parties would have so worded the Rule rather than write it as it now reads, viz., "on a uniform basis" and thus Question and Answer 11 as well as the conjectural question and answer conjured up herein would have been superfluous.

In the third place, the record herein contains a Memorandum of Understanding proposed by the Carrier and a Memorandum of Understanding proposed by the Organization both of which contemplated crediting extra conductors on the basis of "hours paid for" except covering service performed in regular assignments as provided in Question and Answer 11. While neither memorandum was accepted because of inability of the parties to agree upon appropriate language, the existence of these memoranda refutes the presumption herein that the parties, if asked, "would have given a similar question respecting extra Conductors in extra service a like answer" to that given under Question and Answer 11.

The instant Award, in effect, rewrites Rule 38 (f) to substitute, by interpretation, the phrase "on the basis of actual hours worked" for the phrase "on a uniform basis," which this Board is without authority to do. As was said by this same Referee in Award 2622:

> "To adopt the practice of broadening or extending the terms of any instrument by a tribunal such as ours will only lead to confusion and uncertainty and ultimately to injustice and hardship to both employe and carrier. Far better for all concerned is a course or procedure which adheres to the elemental rule, leaving it up to the parties by negotiation or other proper procedure to make certain that which has been uncertain."

It is noteworthy that the Majority in the instant Award construe the terms "hours paid for" and "continuous hours of service" as synonymous in the instant case notwithstanding that a deadhead trip was involved in going from Philadelphia to Bethlehem and that there was a period of four hours waiting time at Bethlehem from 1:30 A. M. to 5:30 A. M. on January 21, 1953, during which no service was performed. That is a proper construction of the terms, supra, in the instant case for the reason that claimant's assignment to duty slip placed him on a continuous time basis from Philadelphia to his destination back at Philadelphia without release at Bethlehem.

However, the Majority is in error in this Award in making an irreconcilable distinction in the instant case between the terms "continuous hours of service" and "hours actually worked." It seems elementary to the Minority herein, as was contended for by the Carrier, that these latter terms also are synonymous in the instant case for the reason that, if the deadhead trip from Philadelphia to Bethlehem was properly creditable as "hours actually worked" for purposes of the instant case, which the Majority admit herein, the waiting time paid for at Bethlehem also was properly creditable as "hours actually worked" inasmuch as the Majority also admit that time deadheading and waiting time both constitute "continuous hours of service" with the service trip.

Consequently, a denial award was requisite herein notwithstanding the Majority's erroneous presumption, supra.

For the foregoing reasons the instant Award is in error and we dissent thereto.

/s/ W. H. Castle

/s/ R. M. Butler

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ E. T. Horsley