Award No. 10176
Docket No. DC-9737

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: The Baltimore and Ohio Railroad Company violated Article 8 of the current agreement, effective March 16, 1948, when they denied Waiter-in-Charge E. M. Bowie four (4) hours pay for stocking car No. 1236 in Washington, D. C. on August 2, 1956.

We request that Waiter-in-Charge Bowie be allowed four (4) hours pay for services performed on August 2, 1956, as is provided for in Article 8 of the above mentioned agreement.

EMPLOYES' STATEMENT OF FACT: On August 2, 1956 Waiter-in-Charge E. M. Bowie was ordered by the Carrier to stock car No. 1236 with supplies. Car No. 1236 was not a line car and was being prepared for use in extra service. Waiter-in-Charge Bowie reported as directed.

Waiter-in-Charge Bowie was further ordered to deadhead from Washington, D. C. to Jersey City, N. J. on August 2, 1956; which he did. Waiter-in-Charge Bowie made out his Daily Time Report for stocking car No. 1236 as follows:

Rate of Pay	Name	Time Reported	Time Relieved	Total Time
1782	E. M. Bowie	5:00 A. M.	9:00 A. M.	4 hours

The Carrier on or about August 8, 1956 denied Waiter-in-Charge Bowie's claim for four hours pay for stocking car No. 1236.

There is in existence an agreement effective March 16, 1948 between the parties to this dispute covering stocking cars and deadheading. Stocking cars is covered by Article 8(a) and deadheading is covered by Article 11.

The Claimant in this case is concerned only with the application of Article 8(a). Article 8(a) is stated here for ready reference:

> "Employes notified or called to perform extra service, stock or strip cars, for protect service, or any work not continuous with regular assignment (unless such notification or call is cancelled before the employe leaves home or his designated calling place), will be allowed actual time on minute basis with a minimum of four (4) hours'

month shall be paid at the rate of time and one-half, except that compensation allowed **for time employes are actually not on duty such as,** but not limited to constructive allowances credited under rules providing pay for * * * (4) **stocking cars or similar duties at terminals,** * * * will not be used for the purpose of calculating punitive overtime pay." (Emphasis ours.)

Yet in the case here the employee was on duty and under pay. The rule itself describes "stocking cars" in terms of "compensation allowed for time employes are actually not on duty." The claimant qualified for no such "constructive allowance". The claimant was on duty and under pay and earned far more than the four hour minimum stipulated in Article 8(a). The claim is not valid and ought to be denied.

OPINION OF BOARD: On August 2, 1956, the Claimant, Waiter-in-Charge E. M. Bowie, reported for duty on Train No. 6 one and one-half hours before the train was scheduled to depart for Jersey City.

Prior to the train's departure and while enroute, the Claimant stocked Coffee Shop Car No. 1236, so that it would be ready for a special party on a run to Pittsburgh, Pa., out of Jersey City.

The Organization claims that the Carrier violated Article 8 of the current Agreement—the pertinent part of which reads as follows:

> "Arbitraries. (a) Employes notified or called to perform extra service, stock or strip cars, for protect service, or any work not continuous with regular assignment (unless such notification or call is cancelled before the employe leaves home or his designated calling place), will be allowed ectual time on minute basis with a minimum of four (4) hours for four (4) hours' work or less; time to be computed from the time required to report and do report, and end when extra service for which called has been completed; . . . . ."

Article 11, which has also been cited in this case, provides service pay for an Employe while "deadheading". However, Article 11 does not restrict or prevent a deadheading Employes from working or performing some service.

The Organization alleges that stocking car No. 1236 was not a regular assignment but an "extra service" and that this service was not continuous with Claimant's regular assignment. The Organization also claims that "deadheading to Jersey City is not a regular assignment".

To maintain successfully that Article 8 was violated—acceptable proof must be offered. In this instance, the burden of proof is on the Petitioner and the latter failed to establish conclusively that the Claimant's work was an "extra service" and that it was not continuous with Claimant's regular assignment.

Even if we assume—without admitting it to be true—that the stocking of car No. 1236 was an "extra service", the record indicates that the Claimant was paid more than the minimum four hour pay requirement set forth in Article 8(a).

Accordingly, we must hold that the Carrier did not violate the Agreement and deny the claim.

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 Employe involved in this dispute are respectively Carrier and Employe 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

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 13th day of November 1961.

DISSENT TO AWARD 10176, DOCKET DC-9737

In this award the majority, consisting of the Referee and the Carrier Members, erred in branding the incident involved as a "regular assignment." Quick evidence of the error is found in Article 4 of the parties' Agreement defining a basic month for regularly assigned employes. Furthermore, the incident was in connection with carrying a special party from Jersey City to Pittsburgh, Pa., on August 2, 1956, which certainly removes the operation from the category of regular assignment as the term is known and used in the railroad industry. And, still further, it was conceded throughout the record that Claimant was released at Jersey City and laid over until time to board the car for the trip to Pittsburgh on Train 7, therefore, if the operation was a regular assignment, the service performed by Claimant at Washington, D.C., and for which he claims pay under Article 8(a), patently was not continuous with the regular assignment as erroneously held by the majority.

The majority erred further in looking upon Article 8(a) as a minimum call rule then combining the time consumed in stocking the car and that consumed in deadheading to support a conclusion that Claimant received more than the four hour minimum requirement of Article 8(a). It is clear that under Article 8(a) an employe notified or called to stock car or do any other work not continuous with regular assignment is to receive an arbitrary minimum allowance of four hours for four hours work or less, where as, under Article 11, employes required to deadhead with or without dining car are to be paid on the same basis as service. The two rules pertain to different circumstances and are not susceptible to being combined. especially for the purpose of avoiding the consequence of one or the other such as happened here.

This award does not reflect the intent of the parties; therefore, I dissent.

/s/ G. Orndorff
G. Orndorff
Labor Member