Award No. 13076
Docket No. DC-14617

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 849

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 849 on the property of the Chicago, Rock Island and Pacific Railroad Company, for and on behalf of Lindsey Moore, Boyd Thomas, Thomas Clayton, Henry Green, Cleophus Robinson, Langston Abbott, John Abrams, Eugene Patterson, and all other employes assigned to special movement May 15 and 16, 1963, that Claimants be paid the difference between the hours for which they were paid on May 16, 1963, and eight (8) hours, account of Carrier's failure to compensate Claimants for a minimum of eight (8) hours in violation of Rule 4 of the Agreement between the parties.

EMPLOYES' STATEMENT OF FACTS: Under date of June 3, 1963, Employes insituted the instant claim via the following letter:

"June 3, 1963

Mr. M. H. Bonesteel, General Superintendent
Dining and Sleeping Cars
Chicago Rock Island Railroad Company
164 West 51st Street
Chicago 9, Illinois

Dear Sir:

Accept this as a time and money claim in behalf of the following employes:

Lindsey Moore	Samuel K. Toole
Boyd Thomas	Cleophus Robinson
Jessie Jones	Harry Elliott
Thomas Clayton	Langston Abbott
John M. Carmichael	John Abrams
Henry Green	Eugene Patterson

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 each day so used."**

On May 16, 1963, Messrs. Toole, Jones, Elliott and Carmichael were paid eight hours under Rule 4, as they were required to strip their dining car. The other employes performed no work, but were deadheaded to Chicago and released.

Carrier refers the Board to the last sentence of Rule 4 as emphasized above. It is clear that Rule 4 requires that an employe perform actual work before he becomes eligible for the minimum daily payment allowance.

The question then becomes, what is and what is not actual time worked? Rule 8 of the Dining Car Employes' Agreement reads as follows:

"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). Regularly assigned employes will be permitted to earn not less hours than they would have earned had they remained in their regular assignment. No compensation shall be allowed by the carrier to employes deadheading in the exercise of seniority or for personal reasons, nor for other than the business of the carrier and upon its order."

Deadheading hours are counted as service hours.

Rule 2 of the Dining Car Employes' Agreement governs "Hours of Service." Rule 2(a)–2 reads as follows, in part: "Time paid for but not actually worked shall not be considered as time worked within the meaning of this rule."

In other words, deadhead hours, although counted as service hours, are not in reality hours actually worked or paid for as such.

Time spent deadheading is not time worked and has never been considered as such on this property or held to be time worked by the Board in previous Awards.

In Award 11275, dated March 29, 1963, on this property with the Brotherhood of Sleeping Car Porters, the Board held that deadheading was more "in the nature of arbitraries" and "extra or special allowances" than it was akin to time worked."

The instant claim asks the same question, and the Board will surely give the same answer, i.e., deadheading time is not time worked. Accordingly, the instant claim must be denied.

OPINION OF BOARD: The issue involved here is whether or not certain extra employes assigned to special movement May 15 and May 16, 1963, should have been paid a minimum of 8 hours for deadheading on May 16 without performing any actual work on that day. Organization claims that Carrier, in paying less than 8 hours, is in violation of Rule 4, and more par-

ticularly of the last sentence of Rule 4, which reads: "When used for extra service employes will be paid actual time worked, with a minimum of eight (8) hours for each day so used." Carrier claims that it is not in violation of Rule 4, inasmuch as the quoted sentence means that an employe must perform actual work before he becomes eligible for the minimum daily payment allowance.

Organization argues that on the basis of past practice and the clear language of the rule its claim should be sustained. While the Organization did not introduce evidence of specific incidents of past practice, it did introduce evidence of past practice in the last paragraph of the General Chairman's letter to Vice-President Mallery, dated July 9, 1963 (Employes' Exhibit B), and in the next to the last paragraph of Employes' Submission; neither in Carrier's letter of reply to the General Chairman's July 9th letter nor in the Carrier's Submission, is there a timely denial of the Organization's assertion: the first denial by the Carrier appears in the Carrier's Rebuttal Statement At Hearing. If the Organization had cited specific incidents of past practice, it would have been incumbent on the Carrier to deny or counter such evidence at the first opportunity, and certainly a denial and even proof of other contrary facts would be inadmissible if introduced for the first time in the Rebuttal; the evidence of practice contained in the assertions of the Organization is subject to no different consideration and must, therefore, be considered by us as uncontroverted evidence.

Carrier argues and cites awards to prove that ". . . deadhead hours, although counted as service hours, are not in reality hours actually worked or paid for as such." (Awards 11275 and 9803.) In Award 11275 the Board states the question to be: ". . . whether deadheading time, under the Agreement, should be counted for the purpose of calculating punitive overtime pay." Not only is this not the issue in this case, but the Agreement involved in the case of Award 11275 does not have the same relevant rules as those in this case. Similarly in the case involved in Award 9803, the issue (basically the same as that in 11275) and the rules are not the same as those in this case.

Another argument made with supporting awards cited to the Referee in behalf of the Carrier was that deadheading is a distinct form of service, not regular service, and not extra service. (Awards 8571, 4641, 14711, 14834 — which holds for the First Division of this Board that deadheading is not service at all — and 11177.) Each of these awards concerns different parties, agreements, rules, issues and facts from those herein, and none are in point here. For instance, in Award 8571 the rule is titled "Deadhead Service", in this case the rule is titled "Deadheading"; it is useless to speculate on the possible significance (if any) of such a difference where the two disputes involve different parties, different contract language, and different issues. The cited awards in such cases simply do not help us to reach a decision here. Awards 4641 and 14711 distinguish deadheading from freight service and passenger service.

"Extra service" and "regular service", are descriptive of the nature of the time and regularity of an assignment as distinguished from the description of the nature of the work to be performed intended in such phrases as "freight service" and "passenger service" and, in this Agreement involved in this case, "road service." Rule 8 in this Agreement commands that deadheading hours are to be counted as service hours. 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.

In Rule 2 of this Agreement, there is a careful description of time to be excluded in counting time worked under that rule; other rules as carefully define and describe what is and under what conditions it is to be counted as time for the purposes of each of those rules. Had an exception or special condition been intended in Rule 4 it must be assumed that the parties would have been no less careful in spelling it out than they were in the other rules in this Agreement. 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; no sound argument or evidence has been introduced that such a construction was intended to be placed on the language of that sentence.

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 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 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 18th day of November 1964.

CARRIER MEMBERS' DISSENT TO AWARD 13076,
DOCKET DC-14617 (Referee House)

In this erroneous award the referee has disregarded his obligation as a neutral member of the Board and on his own initiative has gone outside of the record and into his own imagination to find a material admission by Carrier which neither the Claimants nor their representatives ever asserted. In their initial submission to the Board the employes asserted that a consistent past practice dating from the inception of the controlling rule supported their interpretation of that rule, but Carrier denied the existence of the practice and the record contains no evidence on the point. The referee has supplied the evidence for the employes by imputing to Carrier an admission which is neither asserted by the employes nor substantiated by the record.

The Claimants merely deadheaded for two hours and fifty minutes on the date for which they claim eight hours' pay. They frankly admit that they

performed no work and they tell us that the "essential point in this dispute is whether or not an employe must actually perform work on a given day" in order to become entitled to the eight-hour minimum guarantee established by the last sentence of Rule 4, which reads:

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

In their initial submission, where they are required by our rules to cite all rules and authorities that support their claim, the employes cited and relied solely upon Rule 4 and an alleged past practice of the parties in applying that rule.

We believe prudent men generally would agree that in the quoted provisions of Rule 4 there is a strong and clear indication that an employe must be actually "used for extra service" and that this contemplates some "actual time worked"; therefore, to establish that the parties intended to have the rule applied to a mere deadhead movement on a day when there is no actual time worked would require a strong showing that such had been the interpretation which the parties had consistently placed on the rule during the years it has been in effect.

The Employes were apparently aware of the need to support their contentions with a showing of practice, for their initial submission contains strong and repeated assertions that their present interpretation of the rule "is exactly the interpretation the parties by their actions have placed on the rule since its inception." Significantly, however, the Employes have submitted no evidence, and their assertions with respect to practice are expressly and emphatically denied by Carrier in the record.

But, in determining what the practice of the parties has been under the rule, the referee, unfortunately, went beyond the claims of the parties in their submissions, beyond the argument of the Labor Member in his memorandum to the referee, and entirely beyond the limits of the record to impute to Carrier an admission against interest. He ruled:

> "Organization argues that on the basis of past practice and the clear language of the rule, its claim should be sustained. While the Organization did not introduce evidence of specific incidents of past practice, it did introduce evidence of past practice in the last paragraph of the General Chairman's letter to Vice President Mallery, dated July 9, 1963 (Employes' Exhibit B), and in the next to the last paragraph of Employes' Submission; neither in Carrier's letter of reply to the General Chairman's July 9th letter, nor in the Carrier's Submission, is there a timely denial of the Organization's assertion; the first denial by the Carrier appears in the Carrier's Rebuttal Statement At Hearing. If the Organization had cited specific incidents of past practice, it would have been incumbent on the Carrier to deny or counter such evidence at the first opportunity and certainly a denial and even proof of other contrary facts would be inadmissible if introduced for the first time in the Rebuttal; the evidence of practice contained in the assertions of the Organization is subject to no different consideration and must, therefore, be considered by us as uncontroverted evidence."

There are two obvious defects in this ruling that neither on the property nor in its initial submission did Carrier deny material allegations of past

practice made in the last paragraph of the General Chairman's letter of July 9, 1963. The first defect is that the statement of the General Chairman was one of opinion as to the nature of certain alleged settlements, and not a concrete allegation of consistent practice under the rule. The second obvious defect in the ruling is that the record does not substantiate the conclusion that Carrier failed to deny this statement of the General Chairman.

The paragraph of the General Chairman's letter to which the referee refers reads:

> "Claims of this nature can be eliminated if the Dining Car Department is instructed to follow the agreement reached in your office and settled in previous claims of this type, when setting forth their schedules in special movements."

To us, this is no allegation that since the inception of the rule Carrier has always paid a minimum of eight hours where only deadheading and not work is involved. This statement of the General Chairman is merely an expression of his opinion as to the effect of an alleged agreement and settlement. As we said in Award 12955 (Wolf) with reference to expressions of opinion:

> "The Organization argued that the failure of the Carrier to refute its allegation that Rule 78 has been interpreted to include the furnishing of cooks, should be decisive on this issue. The allegation is of an opinion not a fact. The failure to refute an opinion does not vest that opinion with authority. It must still stand upon its own validity and must be persuasive, regardless of whether or not the opposition refutes it."

Turning now from the content of the General Chairman's statement to the alleged failure of Carrier to deny that statement and the implication of an admission flowing from such alleged failure to deny. The record affirmatively shows that it does not contain all of the correspondence and discussion that passed between the parties in connection with this claim during handling on the property. Carrier's reply to the General Chairman's letter of July 9, 1963, to which the referee alludes, clearly indicates that further handling of the claim was in progress, for it states:

> "While we are still investigating this matter, in view of the facts as we presently understand them we must respectfully decline the claim."

The record also establishes that the parties held a conference, but the parties do not tell us what transpired in that conference. In view of these facts, plus the fact that the Employes never asserted that Carrier failed to deny the statement in the last paragraph of the General Chairman's letter, never sought to impute to Carrier any admission whatever as to the past practices alleged by the Employes, and never referred us to any alleged "agreement reached . . . and settled in previous claims" of which the General Chairman spoke in the last paragraph of his letter, there is clearly no basis in this record for a finding that Carrier admitted material allegations of the General Chairman regarding past practice by failing to deny them. From the failure of the employes to assert that Carrier failed to deny any material allegations the General Chairman may have made regarding past practices on the property, we must conclude that there was no such failure on Carrier's part, and that any material allegations made on the property were denied, rather than admitted —

This record is clear on the point that Carrier has, in fact, denied that there has been any practice or a commitment that supports the claim. Here is Carrier's emphatic statement about practice in its initial submission:

> "In other words, deadhead hours, although counted as service hours, are not in reality hours actually worked or paid for as such.
>
> Time spent deadheading is not time worked **and has never been considered as such on this property** or held to be time worked by the Board in previous Awards."*

*Emphasis ours, unless otherwise indicated.

In their initial submission the Employes said:

> ". . . The rule contemplates that when he is so used in extra service, one of two methods of payment is to apply. He is to first be paid for the actual time worked, if any, be this two (2), four (4), or ten (10) hours. He is, nevertheless, irrespective of the number of hours actually worked, and whether or not he actually worked any hours, not to be paid for less than eight (8) hours on any given day.
>
> **This is exactly the interpretation the parties by their actions have placed on the rule since its inception.** In fact, this Carrier has consistently so compensated its extra employes engaged in extra service..."

Carrier's rebuttal cites the above allegations of the employes and emphatically denies that they are true. Carrier states in rebuttal:

> "Carrier positively denies that such 'past practice' exists. In fact, the only claims that have ever been allowed were where the employes involved **did perform** some actual work on the day claimed..."

In their rebuttal the Employes say nothing further on the subject of past practice. It is thus crystal clear that the record in this case contains no foundation for the finding that Carrier admitted the existence of an adverse practice by failing to timely deny material allegations of practice made by the Employes either on the property or in their submission to the Board. The Referee's finding that Carrier made such an admission derives solely from the Referee's own imagination.

For these and other errors which are too clearly apparent on the face of the award to warrant further comment, the award is erroneous, and we dissent.

G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian
W. M. Roberts