

PUBLIC LAW BOARD NO. 1838

Award No. 12

Carrier File A-64431
File A-64431-1

Parties Brotherhood of Maintenance of Way Employees

to and

Dispute: Norfolk and Western Railway Company

Statement of Claim: Claim on behalf of Mrs. Nora June Booth, the widow of Machine Operator J. R. Booth, Jr. (deceased) and on behalf of Machine Laborer J. S. Both for coverage under Article V of the February 10, 1971 Mediation Agreement entitled "Payments to Employees injured under certain circumstances," and hereinafter sometimes referred to as the off-track vehicle agreement.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter and that the parties were given due notice of the hearing held.

Both Claimants, on Friday, June 17, 1977, were assigned to and worked as Machine Operator and Machine Operator-Helper (Laborer) on M&W Clamshell No. 514878. Said Clamshell was being used to pick up scrap behind a M&W rail gang force. One June 17, 1977 it was working in the vicinity of Iaeger, West Virginia. Said machine was tied up for the weekend about 4:00 PM that day by being placed on a siding.

Thereafter while traveling in a 1974 Datsun pick-up truck, owned and operated by James R. Booth, Jr., from their work location near Iaeger, West Virginia, north on Route 52 in the direction of Bluefield, in the vicinity of Big Four, the vehicle driven by Claimant James R. Booth, Jr. was struck head-on by another vehicle which had crossed the median line. The collision resulted in fatal injuries to Claimant J. R. Booth, Jr. and severe injuries to his Brother Claimant J. S. Booth.

Claims were instituted by the Brotherhood on or about June 21, 1977

on behalf of the widow of Machine Operator James R. Booth, Jr. and Machine Operator Helper Jacob S. Booth for the benefits set forth in appendix "M", Article V (b) 1 and V (b) 2 and 3, respectively.

Appendix M, in pertinent part, reads:

"Payments to Employees Injured Under Certain Circumstances,"

"Where employees sustain personal injuries or death under the conditions set forth in paragraph (a) below, the Carrier will provide and pay such employees, or their personal representative, the applicable amount set forth in paragraphs (b) below, subject to the provisions of other paragraphs in this Article.

(a) Covered Conditions:

This Article is intended to cover accidents involving employees covered by this Agreement while such employees are riding in, boarding, or alighting from off-track vehicles authorized by the Carrier and are

- (1) deadheading under orders
- (2) being transported at carrier expense.

(b) Payments to be made:

In the event that any one of the losses enumerated in subparagraphs (1), (2) and (3) below results from an injury sustained directly from an accident covered in paragraph (a) and independently of all other cases....the Carrier will provide,, the following benefits:

1 Accident Death or Dismemberment:

(The Carrier will provide for loss of life or dismemberment occurring within 120 days after date of accident covered in Paragraph (a):

Loss of life - \$100,000.00

2 Medical and Hospital Care:

The Carrier will provide payment for the actual expense of medical and hospital care commencing either 120 days after an accident covered under Paragraph (a) for injuries incurred as a result of such accident,....

3 Time Loss:

The Carrier will provide an employee who is injured as a result of an accident covered under paragraph (a) hereof and who is unable to work as a result thereof commencing within thirty days after such accident 80% of the employee's basic full-time weekly compensation from the carrier for time actually lost.

4 Aggregate Limit:

....

(d) Exclusions:

Benefits provided under paragraph (b) shall not be payable under any of the following conditions:

....

(b) while an employee is commuting to and/or from his resident of place of business."

The Employees contend that at the time of the accident, 4:25 PM, Claimants were on duty, were in an under pay status until 5:00 PM and were traveling in an off-track vehicle authorized by Carrier, for which decedent James R. Booth, Jr., the driver of the automobile, was receiving mileage allowance for the use of his private automobile.

The Employees aver that Claimant employees also were being compensated from the time that they left Bluefield, West Virginia, their terminal and/or on-duty point, until they returned there following a day's work at Iaeger, West Virginia. They further assert that the accident occurred at 4:25 PM between Iaeger, the work site and Bluefield, the recognized terminal. They assert that the records reflect that Clamshell No. 514878 clearly designates the recognized terminal of this machine as being Bluefield and that the work to be performed by it was located around Iaeger.

Lastly, the Employees contend that Claimants were not in a commuting status, as alleged by Carrier, because they were on duty, in an under pay status until 5:00 PM returning to Bluefield, their terminal. They offered Third Division Awards Nos. 20693, 21124, 21126, 21467, 21613, 21705, 22061 and Award No. 1 of Public Law Board No. 523 all involving an application of Appendix M. The seven Third Division Awards involved a variety of differing factual circumstances. They all sustained the claim for the application and coverage of Appendix M (Off-track vehicle agreement), when an employee had suffered an injury or death from an accident involving an off-track vehicle, while in essence such employee:

(a) was on duty and under pay; or

- (b) was the driver of or passenger in an off-track vehicle, whether company owned or employee owned or authorized during his work day; or
- (c) was a driver or a passenger in a privately owned vehicle responding to a call to work under a "Call-Rule."

Award 1 of Public Law Board No. 523 (O'Gallagher), held in essence that an employee was not "being transported at Carrier expense" if he was traveling in an authorized vehicle for an unauthorized purpose.

Also Workmen's Compensation court decisions were cited. The primary one thereof was "Voehl vs Indemnity Insurance Company, 22 US 162 (1933).

Carrier asserts that on June 17, 1977, Claimants were commuting from their work location, near Iaeger, West Virginia where they went off duty at 4:00 PM, to their respective homes located in Bluefield, West Virginia, a distance of approximately 55 miles. Thus, says Carrier, Claimants were in a "commuting status." Claimant J. R. Booth, Jr. was being paid an automobile allowance for driving his car between home and the work site and, in addition, a \$3.00 per day meal allowance under Rule 48 - Travel Time and Expense. Claimants had traveled about 25 miles from their work location at Iaeger when the collision occurred.

Carrier argues, in this instance, that the precise time when the accident occurred is not as important as is the fact that Claimants had ended their work day at 4:00 PM and they were then on their way home from work. Thus, when the collision occurred, they were "commuters."

Consequently, says Carrier, inasmuch as the Booth brothers were commuting from their work location, where their time ended, to their respective homes, they were specifically excluded from coverage under paragraph D (6) of the so called "Off-Track Vehicle Agreement." Carrier, in support of its contentions, cited Third Division Award No. 22103 (Eischen) which, in pertinent part, said:

"Based on the foregoing facts there is no question that the "Commuting exception of Section d (6) applies to this claim. Even if arguendo

it could be established that the employee was traveling under 'covered conditions'."

The gravaman of this case is whether, under the factual circumstances here involved, Claimant employees, on June 17, 1977, were covered by the provisions of Appendix "M", Article V - "Payments to Employees under Certain Circumstances," and not excluded from payments of the benefits provided therein.

We conclude that the collision occurred between 4:30 PM and 4:45 PM as documented by the West Virginia Uniform Traffic Accident Report. (Carrier's Exhibit M.)

There appears to be no factual dispute but that Claimant J. R. Booth, Jr. was being paid mileage allowance of 12¢ per mile for using his private automobile to drive between Bluefield and Iaeger. Carrier so admits. Further, Employee's Exhibit 1 - "Travelling Expense, Form. "Compt.119" confirms such payment of 110 miles for driving said vehicle the 55 miles each way on a daily basis.

However, the reason why the automobile expense allowance was authorized and paid is in dispute. The Employees assert that the mileage allowance was granted because Claimants were authorized to use their private car in lieu of Carrier provided transportation to go to the work site of the Clamshell because they went on and off duty at Bluefield, their headquarters point. Carrier, on the other hand, asserts that it was the result of a "vest pocket" arrangement made locally to permit Claimants to sleep at home each work night in lieu of staying at a motel. Claimants were non-fixed headquartered employees. They were not furnished a camp car. They came under Arbitration Award 298 and Rule 58 - "Travel Time and Expenses." Notwithstanding such contrary factual contention such conflict does not deter a conclusion that by such arrangement, Claimants came under paragraph (a) of said Article V, to wit - "they were riding in an off-track vehicle authorized by Carrier" and "were being transported at Carrier expense." Thus, they met the test of one of the "Covered Conditions."

As to the entitlement to the benefits claimed under Article V (b), we are compellingly governed by the proviso contained therein that:

"...the applicable amounts set forth in paragraph B below, subject to the provisions of other paragraphs of this Article." (Underscoring supplied.)

Paragraph (d) Exclusions" - provides that:

"benefits provided under Paragraph (b) shall not be payable for or under any of the following conditions

....

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

The Employees have consistently contended since July 21, 1977 when General Chairman J. R. Taylor instituted the instant claim, that "claimants were on duty and being paid mileage expense for transporting himself and Jack Booth." The primary proof offered for such contention are notarized affidavits from the widow of the deceased Claimant J. R. Booth, Jr. and J. S. Booth. Therein, they attest, in essence, that Claimants went on duty at Bluefield and were paid for the time between there and their work destination and that J. R. Booth, Jr., additionally, received a mileage allowance. Also offered was their Exhibit 1 which was the Expense Report of the deceased Claimant. Such reflected therein "Location - Bluefield." This, say the Employees, proves Claimants were on and off duty at Bluefield.

Carrier's Exhibit "0", page 1 of 3, is a witnessed statement taken from Claimant Jacob Booth on July 11, 1977 some 24 days after the June 17th collision in which he was injured. Therein he stated that:

"We had gotten off work at 4:00 PM..My Brother and I were working overtime under the supervision of Mr. Hale, the Roadmaster and we were on overtime. We report to work wherever our machine is located. If the machine is moved we are advised by Division Engineers office as to where to report. We are paid 12¢ a mile to drive to the various locations where the machine's located...." (Underscoring supplied.)

The rest of Claimant Booth's statement served to be corroborative of the statement given by Roadmaster Hale (Carrier's Exhibit N). He stated, essentially, that Claimant went on and off duty at the location of the machine, that they worked 7:00 AM to 5:00 PM, Monday through Thursday, their regular work week. Claimants on Friday, June 17th were on overtime. They were to be paid for only the actual hours worked. Claimants worked 7:00 AM to 4:00 PM and their pay ceased at 4:00 PM, the day of the collision.

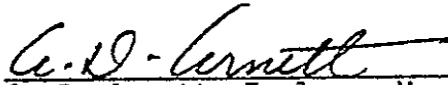
The mere fact that Claimants on June 17, 1977 were, through misunderstanding or error, paid until 5:00 PM instead of 4:00 PM, would not breath life into the alleged fact that they were always under pay between the work location and Bluefield. Such travel, under pay, would not in the particular circumstances here have been properly authorized. If not authorized then the apparent error would not therefore serve to remove the exclusionary bar of making them appear as "deadheading under orders."

We are unable therefore to conclude that there was any special arrangements to cause the Claimants' pay and service with Carrier to commence when they left Bluefield and continue on until they returned back there each day.

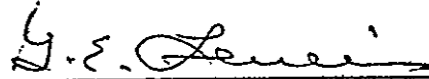
Rather, we believe that the record before us more properly satisfies the conclusion that Claimants, who coincidentally lived in Bluefield, were paid an automobile mileage allowance, as a convenience to them in lieu of providing them with lodging accommodations in the vicinity of Iaeger which would otherwise have required their staying away from home. Such arrangement to pay automobile expense allowance did not serve to change the fact that Claimant were not moving from one job site to another or traveling in an under pay status. Rather, they were "commuting" by driving their private automobile to their home.

In the particular circumstances, this claim will be denied.

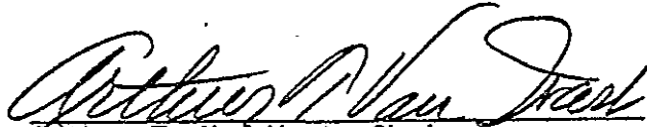
Award: Claim denied.



A. D. Arnett, Employee Member



G. E. Lewis, Carrier Member



Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Salem, N. J. January 24, 1980.