

Award No. 1162

Docket No. 1086

2-CRI&P-CM-'46

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Sidney St. F. Thaxter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 6, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (CARMEN)**

**THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY**

Joseph B. Fleming and Aaron Colnon, Trustees

DISPUTE: CLAIM OF EMPLOYEES: That Car Inspectors R. W. Kicksey, Chas. D. Taylor, Loyd A. Watson, J. E. Stout, Jake O'Dell, R. Radakovich, R. B. Willis and Jake Sparrow are each entitled to be additionally compensated in the amount of four hours at the applicable straight time rate of 97¢ per hour on August 21, 1945.

EMPLOYEES' STATEMENT OF FACTS: The aforesaid car inspectors, hereinafter referred to as the claimants, are regularly employed by the carrier in the train yard at Silvis, Illinois. These claimants were ordered to report at Dr. Neuman's car, located back of the Silvis Depot, for eyesight and hearing tests outside of their regularly assigned hours of work. The date and time they were each required to report for the eyesight and hearing tests, and the regularly assigned hours of these claimants, are identified after their respective names, as indicated below:

| Name | Date | Time to Report | Assigned Shop Hrs. |
|-----------------|---------|----------------|---------------------|
| R. W. Kicksey | 8/21/45 | 1:00 PM | 4:00 PM to 12:00 MN |
| Chas. D. Taylor | 8/21/45 | 9:00 PM | 12:00 MN to 8:00 AM |
| Loyd A. Watson | 8/21/45 | 10:00 AM | 12:00 MN to 8:00 AM |
| J. E. Stout | 8/21/45 | 10:30 AM | 12:00 MN to 8:00 AM |
| Jake O'Dell | 8/21/45 | 11:30 AM | 12:00 MN to 8:00 AM |
| R. Radakovich | 8/21/45 | 3:30 PM | 12:00 MN to 8:00 AM |
| R. B. Willis | 8/21/45 | 9:30 AM | 12:00 MN to 8:00 AM |
| Jake Sparrow | 8/21/45 | 8:30 AM | 12:00 MN to 8:00 AM |

The agreement dated September 15, 1941 is controlling.

POSITION OF EMPLOYEES: It is a fact that these claimants, as carmen, were subject to be assigned to perform the duties defined as car inspectors' work in Rule 110, and by virtue of their employment as car inspectors, they were subject to be required to take the usual eyesight and hearing tests prescribed in the last paragraph of Rule 36.

There is nothing in Rule 110 which limits the right of the carrier to order the claimants to inspect a train of cars outside of their regularly assigned hours. It is obvious that Rule 110 is not a pay rule. It is necessary to consult other rules to determine what the claimants are entitled to be paid for such time outside of their regular hours. There would be no refusal on the part of the carrier to pay for this time or service, maybe they would not be paid properly, but nevertheless they would be allowed some pay.

It is a fact also that there is nothing in Rule 36, last paragraph reading:

“Employes whose duties require them to distinguish signals or do flagging shall be required to pass the usual eyesight and hearing tests.”

which limits the right of the carrier to order the claimants to take the eyesight and hearing tests outside of their regularly assigned hours. There is a duty prescribed in this rule as in Rule 110. It is comparable to Rule 110 in that it is not a pay rule. It is necessary to consult other rules to determine what the claimants are entitled to be paid for such time outside of their regular hours. The rate of pay in this latter incident would be the same as in the former illustration. The time may vary, but whatever the amount of time may be, it was required at the convenience of and at the time designated by the carrier, regardless of whether the duties under either rule could have been handled without interference to the service during the regular assigned hours of the claimants.

The duties of the claimants in Rule 36 are as vital to the carrier as are their duties in Rule 110. If they did not perform their assigned duties in both rules 36 and 110, they would be without employment with the carrier, particularly as car inspectors. The refusal to perform the duties in either Rule 110 or Rule 36 would subject the claimants to discipline or discharge, and which is substantiated in a letter addressed to the undersigned by the carrier, dated December 24, 1943, reading:

“I understand that our examining physician, Dr. J. R. Neuman, was at Council Bluffs the forepart of this month for **periodical examinations and he reports the car inspectors there refused to take the usual eye-sight and hearing tests.**

By such refusal these inspectors are **not only jeopardizing their rights with this carrier**, but are also violating the provisions of the second paragraph of Rule 36 of the agreement of September 15th, 1941.

I am sure you do not sanction such action on their part and trust you will handle with them to the end that they will respect the agreement as you would have the management do.”

This letter was signed by Mr. Mallery, the highest designated carrier officer to whom such matters are subject to appeal and the emphasis in it has been supplied by the undersigned. According to this letter, the continuity of employment of these claimants, particularly as car inspectors, if not in all other positions of carmen, solely hinges upon performing the duties in Rule 36 when required to do so, and which apparently is as fundamental to the carrier as is the proper inspection of a car. The requirements in Rule 36 are obviously woven into the inspection of cars provided for in Rule 110, and without it there would probably be no inspection of cars. That seems to be the value attached to the rule by the carrier, which is of course an erroneous theory.

The foregoing statement of facts discloses that the carrier exercised the right to require these claimants during their free off-duty hours to be back on the property at a certain place (as if to inspect a train of cars at a specific specified time, as if the train was ordered to leave at some appointed minute thereafter) to perform service by which the carrier is contractually obligated to pay therefor under the provisions of Rule 5, in part reading:

"Employees called or required to report for service reporting and used will be paid on basis of time and one-half for all time on duty with a minimum of two (2) hours and forty (40) minutes at time and one-half, and will be required to render only such service as called for or other emergency service which may have developed after they were called and which cannot be performed by the regular force in time to avoid delays to train movement."

It is a fact that these claimants, by virtue of the words "required to report for service" in the rule, were required to report for service outside of their free off duty hours. It is also an indisputable fact that these claimants did report as required and were used by the carrier. By virtue thereof, the carrier consumed their free off duty time substantially as below indicated:

| Name | Time Consumed by Requirement to Report |
|-----------------|--|
| R. W. Kicksey | 45 minutes |
| Chas. D. Taylor | 2½ hours |
| Loyd Watson | 1½ hours |
| J. E. Stout | 45 minutes |
| Jake O'Dell | 1 hour |
| R. Radakovich | 45 minutes |
| R. B. Willis | 2¾ hours |
| Jake Sparrow | 1½ hours |

by reason of many of them residing miles from where Dr. Neuman's car was located, and in case of "reporting and used" as involved here, the rule explicitly provides that they "will be paid . . . for all time on duty with a minimum of two hours and forty minutes at time and one-half rate."

It is manifest in the rule that the words "for all time on duty" means "service" of whatever nature the carrier commands of these claimants, whether working, or waiting by standing or sitting, or taking the eyesight and hearing tests in the carrier's doctor's car provided for that purpose. It will be noted that the Carrier displayed no concern whatsoever in respect to the inconvenience and the extra expense its command may have imposed upon these claimants, in that their time was not consumed continuous with the end of their shifts or continuous in advance of the starting time of their shifts. On the contrary, the arrangements were made for the benefit of the carrier, and at the convenience of its agent in charge of the test car for the eyesight and hearing tests.

In justice to these claimants and the agreement book rules, the claim should be sustained.

CARRIER'S STATEMENT OF FACTS: Rule 36, second paragraph, of agreement of September 15, 1941, reads:

"Employees whose duties require them to distinguish signals or do flagging shall be required to pass the usual eyesight and hearing tests."

The claimants are car inspectors and employes covered by the above quoted paragraph.

The carrier's examining physician's daily schedule 8:30 A. M. to 4:15 P. M. called for the usual re-examination of these employes to start as indicated below:

| | Regular Assignment | Re-examination |
|---------------|---------------------|----------------|
| R. W. Kicksey | 4:00 PM to 12:00 MN | 1:00 PM |
| C. D. Taylor | 12:00 MN " 8:00 AM | 9:00 AM |
| L. A. Watson | 12:00 MN " 8:00 AM | 10:00 AM |
| J. E. Stout | 12:00 MN " 8:00 AM | 10:30 AM |
| J. O'Dell | 12:00 MN " 8:00 AM | 11:30 AM |
| R. Radakovich | 12:00 MN " 8:00 AM | 3:30 PM |
| R. B. Willis | 12:00 MN " 8:00 AM | 9:30 AM |
| Jake Sparrow | 12:00 MN " 8:00 AM | 8:30 AM |

POSITION OF CARRIER: As we understand the employes' claim, there is no contention made by them that car inspectors are not subject to the usual eyesight and hearing tests, as in the instant case, under the provisions of the second paragraph of Rule 36, but that when required to undergo such re-examination outside of regularly assigned hours, they are entitled to pay therefor under some provision (not mentioned by them) of Rule 5 of the shop-crafts' agreement.

It is the carrier's position that there is no rule in the agreement which requires payment in a case such as now before this Board.

The presence of these employes at the examinations on August 21, 1945, was of mutual interest to both the employes and carrier and was not "work" nor "service" as those words are used in Rule 5. See Award No. 2828 of the Third Division of the Adjustment Board.

The carrier makes every effort to examine this class of employes on company time, but there are times, due to the schedule of the examining physician, and shifts worked by employes, that this is not always possible.

Under the circumstances, the claim is without merit and should be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence; finds that:

The carrier or carriers and the employe or employes 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 claimants were required to report for eyesight and hearing tests outside of their regular hours. They seek compensation under Rule 5 for time so spent. But the taking of such examination is not service as the word is used in that rule. Nor is it work as the word is used in Rule 110. There is no rule providing for compensation for time so spent and this Division is without power to write one.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois this 30th day of October, 1946.