

Award No. 4815
Docket No. 4769
2-NYNH&H-CM-'66

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 17, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. - C. I. O. (Carmen)
THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES:

1. That the New York, New Haven & Hartford Railroad Company violated the terms of the current agreement, Rule 111, when it failed to call E. C. O'Banks and W. E. McVey, regularly assigned members of the crew of the Maybrook, N.Y., wrecking outfit for wrecking service to Danbury, Conn., on Saturday, February 23, 1963.

2. That accordingly the New York, New Haven & Hartford Railroad Company be ordered to additionally compensate E. C. O'Banks and W. E. McVey as follows:

E. C. O'Banks—nineteen (19) hours at double time—less eight (8) hours at straight time already paid.

W. E. McVey—Sixteen (16) hours at time and one-half. Three (3) hours at double time.

EMPLOYEES STATEMENT OF FACTS: The New York, New Haven & Hartford Railroad Company, hereinafter referred to as the carrier, maintains a wrecking outfit at its Maybrook, N.Y., Car Department.

E. C. O'Banks and W. E. McVey, hereinafter referred to as the claimants are employed by the carrier, at this facility, as car inspectors, with hours and rest days as follows:

E. C. O'Banks—8:00 AM to 4:00 PM—Wed. thru Sun.—Rest Days Mon. & Tues. W. E. McVey—12:00 mid. to 8:00 AM—Sun. thru Thur.—Rest Days Fri. & Sat. the claimants are also regularly assigned members of the crew of the Maybrook, N.Y., wrecking outfit.

On Saturday, February 23, 1963 the Maybrook, N.Y., wrecking outfit was called for wrecking service to Danbury, Con., at 12:30 AM and the crew, minus the two claimants, who were not called and did not accompany the outfit, was released from this wrecking service at their home terminal at 7:30 PM, Saturday, February 23, 1963, a total of nineteen (19) hours of wrecking service.

Claimant O'Banks worked his regular assignment, as car inspector, 8:00 AM to 4:00 PM on Saturday, February 23, 1963.

Claimant McVey had Saturday, February 23, 1963 as a rest day. The carrier attempted to dispose of this dispute by the offer of payment of eleven (11) hours at straight time to claimant O'Banks denying any redress to claimant McVey.

This offer was rejected by the employees.

This dispute has been handled in accordance with the agreement up to and including the highest designated officer of the carrier, assigned to handle such disputes, all of whom refused to adjust the matter.

The agreement effective September 1, 1949, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that under the terms of the controlling agreement Rule 111, which reads in pertinent part:

"When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, sufficient carmen will be called to perform the work."

These claimants, regularly assigned members of the wrecking crew, possess the unquestionable right to be called to accompany the outfit, because the carrier dispatched said outfit and part of the crew outside of yard limits to perform wreck clearing service

The carrier readily admits that it made no effort to call claimant McVey, because "he had no telephone."

Claimant McVey has been a regularly assigned member of the wrecking crew for approximately ten (10) years, and never during this period has a question been raised about his availability for wrecking service, nor, was the question raised at the time of his assignment to the crew.

The carrier waived its right to subsequently raise this issue after it once agreed to his assignment to the wreck crew.

Claimant O'Banks was offered a payment of eleven (11) hours at straight time as a settlement for his claim of nineteen (19) hours at double time, less eight (8) hours at straight time already paid, because of his having worked his regular assignment on Feb. 23, 1963. This could not be considered as a fair and just offer because of the circumstances surrounding the dispute.

The claimant had been in wrecking service to Holmes, N.Y., from 6:30 PM, 2/21/63 to 11:00 PM, 2/22/63, a total of 28½ hours and was being paid at the double time rate when released.

Upon release at 11:00 PM, on the 22nd, the entire crew, including the wreck

master, knew that the outfit and crew were going to immediately proceed to a wreck at Danbury, Conn.

For some unknown reason the call for Danbury, Conn., was not received until one and one-half hours after the crew was released. If the carrier had called the claimant, as it was obligated to do under the rule, he would have continued in double time payment for the nineteen (19) hours consumed at the Danbury, Conn., wreck. This would be the equal of thirty-eight (38) hours at straight time, less the eight hours paid for his regular assignment, leaving thirty (30) hours at straight time earnings that the claimant had been deprived of because of not being called.

The offer of payment of eleven (11) hours in settlement of this dispute, would have left the claimant suffering the loss of nineteen (19) hours of his rightful earnings, because of the carrier's negligence, therefore, could not be considered as a fair and equitable offer for settlement.

CARRIER'S STATEMENT OF FACTS. Claimant E. O'Banks holds regular assignment as carman at Maybrook, New York, 8:00 AM to 4:00 PM, Wednesday through Sunday, with rest days Monday and Tuesday.

Claimant W. McVey holds regular assignment as carman at Maybrook, New York, 12:00 midnight to 8:00 AM, Sunday through Thursday, with rest days Friday and Saturday.

Both men are regularly assigned members of the crew of the Maybrook Tool Train.

On Thursday, February 21, 1963, the Maybrook Tool Train was called out at 6:30 PM to go to a derailment at Holmes, New York. Carman O'Banks accompanied the crew, but Carman McVey had reported off sick and did not go with the crew.

The New Haven Tool Train was also sent to Holmes to work on this derailment.

The Maybrook Tool Train arrived back at their home terminal and were released at 11:00 PM on Friday, February 22, 1963.

On the return trip of the New Haven Tool Train to New Haven the derrick was derailed at Danbury, Connecticut, at 10:00 PM on February 22.

Because of this derailment at Danbury, it was necessary to recall the Maybrook crew to go to Danbury. The crew were called out at 12:30 AM Saturday, February 23, and were released at their home terminal at 7:30 PM the same date.

Relief Foreman James Leetch states that in calling the crew he called Mr. O'Banks' home three times but received no answer. However, he had not verified the "No Answer" with the telephone operator. Mr. O'Banks claims that he was at home with his family, but that there were no phone calls.

Carman McVey lives approximately two miles from Maybrook Terminal. He has not provided himself with a telephone and because of the short call and the fact that there was no one available to go to his home, no attempt was made to contact him.

The Maybrook Tool Train crew were released at 7:30 PM on the same date, Saturday, February 23, an elapsed time of nineteen hours.

Saturday, February 23, was a workday of Mr. O'Banks' Carman assignment and he covered that assignment from 8:00 AM to 4:00 PM, for which he received his regular wages.

Saturday, February 23, was a rest day of Mr. McVey's Carman assignment, and he performed no service on that date during the hours when the tool train was engaged, although he worked his regular assignment starting at 12:00 Midnight, Saturday, February 23.

Copy of Agreement with System Federation No. 17, dated September 1, 1949, is on file with your Board and is, by reference, made a part of this submission.

POSITION OF THE CARRIER. The first sentence of Rule 111 states, "When wrecking crews are called for wrecks or derailments outside of yard limits, the regularly assigned crew will accompany the outfit."

The derailment at Danbury, for which the Maybrook wrecking crew were called on February 23, 1963, was on the main line, outside of Danbury Yard limits, and there is no dispute that the regularly assigned crew had the right under that portion of the rule to accompany the outfit.

The dispute that does exist, however, relates to the rights of members of the regularly assigned crew who are not available when they are needed.

In the case of Claimant O'Banks, Relief Foreman James Leetch, who was assembling the Maybrook wreck crew, advises that he called Mr. O'Banks' home on the telephone three times but received no answer. On the other hand, Mr. O'Banks insists that he and his family were at home at the time, but there were no phone calls received.

Confronted with these contradictory statements, and without in any manner questioning the veracity of either Mr. O'Banks or Mr. Leetch, the carrier offered in conference and in its decision dated March 12, 1964 to resolve this dispute by the payment to Mr. O'Banks of eleven hours at the straight time rate. This represents the nineteen hours during which the wrecking crew were engaged, minus the eight hours during which Mr. O'Banks worked on his regular assignment and for which he was paid eight hours' straight time.

Carrier's offer of payment at straight time is in line with the principal which has long been established and followed by the various Divisions of the Adjustment Board—that the penalty payment for work not performed should be at the straight time rate. The following Awards of the Second and Third Divisions, while not a complete list, are indicative:

Second	Third
2956	8414 10224
3014	8415 10362
3166	8533 10513
3177	8568 10990
3256	8766 11604
3259	8776 12135
3272	9393
3273	9489
3275	9681
3405	9748
3406	9764
3410	9811
3629	10033
3868	10070
3903	10125
3932	10190

Carrier's decision of January 22, 1960, in a claim involving dispute as to whether the claimants had or had not been called at the time the wreck crew were being assembled. In the case of Mr. Lauriola, the telephone company verified that his phone was out of order, and his claim was denied. In the case of Mr. D'Agostino, there were conflicting statements by the clerk, who said she called him but got no answer, and by the claimant, who said he was home but received no call, and the carrier offered to dispose of his claim by payment of straight time for fourteen and one-half hours, rather than eight hours at time and one-half and six and one-half hours at double time as claimed.

This settlement was accepted by the employes—see copy of General Chairman Galligan's letter of February 23, 1960.

Notwithstanding this precedent on the property, and disregarding the long established principle set by the various divisions of the board, that the penalty payment for work not performed is straight time, the employes have decided to "Go for broke." Apparently, they are approaching your board on the theory that they will not get less than straight time—which the carrier has already offered—and hoping that the board will up the ante to punitive time, including double time.

We respectfully suggest that the employes not be permitted to "use" your board in this fashion, and that having already refused to accept what they are sure your board will award, their claim should now be dismissed in its entirety.

Carrier would also point out that in General Chairman Galligan's letter dated March 12, 1964, he refers only to the non-acceptance of that part of our decision relating to the proffered settlement with Claimant O'Banks. No mention is made anywhere in this letter as to the acceptance or non-acceptance of our denial of Mr. McVey's claim.

For all of the reasons set forth herein, we again respectfully request that this claim be dismissed.

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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimants were regularly assigned members of a wrecking outfit at Maybrook, N.Y. The crew had been in service to Holmes, N.Y., from 6:30 PM, February 21, 1963, to 11:00 PM, February 22, 1963, and were released at that time. Claimant E. C. O'Banks was included in the wreck crew so assigned but Claimant W. E. McVey did not accompany them. On Saturday, February 23, 1963, the wrecking outfit was called for service to Danbury, Conn., at 10:30 AM and were released from this service at their home terminal at 7:30 PM, February 23, a total of nineteen (19) hours of wrecking service. The two claimants were not called and did not accompany the outfit.

There is no dispute but that the regularly assigned crew had the right under Rule

111 to accompany the wreck crew but the contention of the Carrier is that the Claimants were not available when they were needed.

Carrier contends that Claimant O'Banks' home was called three times but no answer was received. O'Banks asserts that he was home with his family as he had recently arrived there after the Holmes assignment and received no telephone calls. Carrier admits that the Relief Foreman who attempted to call O'Banks did not verify the "No Answer" with the telephone operator. Carrier had the burden of proving that he was not available and as Claimant O'Banks had just completed the assignment to Holmes at 11:15 P.M. the Carrier should have exercised more diligence in verifying the "No Answer" with the telephone operator. As Saturday was a work day for Claimant, he worked eight hours on his regular assignment for which he was paid.

Claimant McVey was regularly assigned as a car inspector with hours and rest days, as follows: 12:00 Midnight to 8:00 A.M. Sunday through Thursday, with rest days Friday and Saturday. He had reported off sick from his regular assignment prior to the calling of the wreck crew to Holmes on Thursday, February 21 and failed to report for his regular assignment on February 22. When the wreck crews were called on the early morning of Saturday, February 23, there was no one available to send to his home two miles away to call him and he had no telephone. Under all of these circumstances the Carrier is justified in its claim that McVey was not available and his claim will be disallowed.

Claimant O'Banks is entitled to recover compensation for 11 hours at the pro rata rate of pay as Carrier has not established he was not available to have covered the assignment.

See Award 3259 — Hornbeck.

A W A R D

Claim of E. C. O'Banks allowed in accordance with the Findings.

Claim of W. E. McVey disallowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 9th day of March, 1966.