

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12957
Docket No. 12771
95-2-93-2-127

The Second Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical
(Workers
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim and grievance on behalf of Electrician J. P. Yoder, employed by the Consolidated Rail Corporation at Enola, PA Diesel Terminal, instituted by the Organization by letter dated January 3, 1992, to Shop Manager J. E. Baranko, which reads as follows:

'Dear Sir:

I hereby file a grievance on behalf of Electrician J. P. Yoder for violation of Rules 4-D-2 and 4-E-1, and past practice, for the following reason.

On November 07, 1991 Electrician J. P. Yoder ordered to go for a hearing test at 1 pm on his relief day by Shop Manager J. R. Baranko. Electrician J. P. Yoder's regular assigned working hours are Sat. through Wed. 11 p.m. to 7 a.m. Other men who worked the same assigned working hours were given hearing tests on their tour of duty, and Electrician Yoder was not given the same opportunity.

In view of the above, the organization contends that the claimant be compensated (3) three hours at time and one half.

CLAIMANT: J. P. Yoder'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant was assigned as an electrician at Enola Terminal with working hours of 11:00 p.m. until 7:00 a.m. with Thursdays and Fridays as rest days.

OSHA Regulation 29 CFR Sec. 1910.95 requires employees be given hearing tests. As a result, the Carrier's Hearing Van was placed at Enola from June 10 through June 21, 1991 and between September 13 and 18, 1991. All employees were notified of the presence of the van and were requested to have their hearing tested during the above periods.

Because the Claimant failed to take the test the Carrier was obligated to schedule an appointment with a local doctor to give the Claimant his hearing test. The Carrier made an appointment for 10:00 a.m. on November 6, 1991. Claimant requested it be changed to 2:00 p.m. on November 7, 1991, which was done.

The Organization filed this claim for three hours at time and one half for violation of Rules 4-D-2 and 4-E-1. The rules read as follows:

"4-B-1(a) Time worked by any employee in excess of eight (8) hours in any 24-hour period, computed from the starting time of the employee's regular shift, will be considered as overtime and will be paid for at the rate of time and one-half, except that double time will be paid for time worked in excess of sixteen (16) hours in such 24-hour period."

"4-E-1. Employees called, who report for work, shall be paid not less than three (3) hours' as provided in Rule 4-B-1."

Numerous Awards have held that taking a physical or hearing test are not work or service as contemplated by the Agreement. In Second Division Award 12234 involving Carmen taking hearing tests the Board held:

"All time during which an employee is required to give up his own pursuits in order to satisfy a requirement of the Carrier is not necessarily work or service time, as those terms are used in the Agreement. The Agreement, in Rule 6(d), recognizes that some time, such as attending court, deadheading, travel time, etc., might be compensated by special allowances. We read Rules 6 and 7 to apply only when the employee is actually performing work or service. There is ample arbitral precedent holding such time is not work or service, as contemplated by the Agreement. See Second Division Awards 1162 and 3086. We concur with those decisions, and find the time spent in this case was, therefore, not subject to the overtime Rules."

After careful review of the record before this Board, we concur in the above cited Award. The Board also wishes to note that Claimant had ample opportunity to take his hearing test while on duty. Claimant by his own personal decision cannot create a situation where the Carrier is required to pay a penalty in order to comply with OSHA Regulations.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 18th day of September 1995.