

Award No. 1564
Docket No. TE-1379

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers, Atchison, Topeka & Santa Fe Railway that C. Hankins, agent, Frontenac, Kansas shall be reimbursed in the amount of \$8.00, representing \$7.50 automobile expense incurred by him in using his own automobile, and 50¢ for meal, while complying with instructions April 28, 1940, to report to the Company Doctor at Chanute for physical re-examination."

EMPLOYEES' STATEMENT OF FACTS: "An Agreement, bearing effective date of December 1, 1938, is in effect between the parties to this dispute.

"C. Hankins, seniority date September 5, 1919, is the regularly assigned agent-telegrapher at Frontenac, Kansas, which is located on the Chanute—Pittsburg branch, 50.2 miles east of Chanute and 3.9 miles west of Pittsburg.

"Passenger trains Nos. 57 and 58 operate between Chanute and Pittsburg daily, except Sundays; No. 57 arriving and departing Frontenac 9:51 A. M., No. 58 10:25 A. M.

"April 27, 1940, agent Hankins received instructions from his superintendent to report to Dr. R. A. Light, Chanute, Kansas for re-examination. Mr. Hankins so reported 4:00 P. M. Sunday, April 28, 1940.

"The carrier maintains a local surgeon (Dr. Fain) at Pittsburg."

POSITION OF EMPLOYEES: "The Telegraphers' Agreement reads, in part:

'Article III

'(d) Employees will not be required to suspend work during regular hours or to absorb overtime.

'(e-1) Employees will be excused from Sunday and holiday duties as much as the conditions of business will permit.

'(e-2) Time worked on Sundays and the following holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day (provided when any of the above holidays falls on Sunday, the day observed by the State, Nation, or by proclamation, shall be considered

has no application to the circumstances which form the basis for this dispute. Nowhere else does the Agreement provide for such payment.

"In the course of the handling of this dispute with the Organization, reference has been made to Article XVI of the Telegraphers' Schedule effective December 1, 1938, which reads:

'Employees taken away from their regular assigned duties, at the request of the Railway Company, to attend court or to appear as witnesses for the Railway Company will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place and, in addition, necessary actual expenses while away from headquarters. Any fee or mileage accruing will be assigned to the Railway Company.'

Obviously, this rule has no application.

"The reference by the Organization to Award No. 605, Docket No. TE-593, of the Third Division of the National Railroad Adjustment Board as being in support of the claim as presented by the Organization is without merit. The claim in Award 605 reads:

'Claim of the General Committee of The Order of Railroad Telegraphers on The Atchison, Topeka and Santa Fe, that Telegrapher V. S. Holly, Clarkdale, Arizona, be paid \$1.67 representing the difference between eight hours on November 3, 1936, for which he has been reimbursed, and nine hours and thirty minutes continuous time which he claimed for that date.'

Mr. Hankins lost no time. Further, the Board in Award 605 denied this claim and if pertinent at all, the Award requires a holding in this case that the claim must be denied because not supported by the Agreement.

"Summarizing its position, the Carrier finds that there is no basis for what is claimed in this dispute for the reasons that (1) there is no Article in the current Telegraphers' Schedule which provides for such payment; (2) Articles XVI and paragraph (a) of Article XVII of the Telegraphers' Schedule do not cover such situations as are referred to in this dispute; (3) Award 605, Docket TE-593, of the Third Division of the National Railroad Adjustment Board does not support but requires denial of the claim, and (4) there is no precedent and no equity in the claim as presented."

OPINION OF BOARD: This is a claim by the agent at Frontenac, Kansas for reimbursement of necessary expenses incurred by him in complying with the carrier's instructions to report to its doctor at Chanute for a physical re-examination.

Payment was denied by the carrier because of the absence of any applicable rule in the agreement requiring such payment.

The carrier argues that the employe by using his pass could have left home on Extra 3199 at 2:15 P. M., and arrived at Chanute at 4:10 P. M. He could have left Chanute on train 91 at 3:05 A. M. and arrived home at 5:33 A. M. This round trip of 125 miles would thus have required 15 hours and 20 minutes. The automobile trip was, of course, made in much less time. The employe suggests that his pass does not permit him to travel on freight trains and that no such permission was given.

The employes cite Rule 16 of the Agreement. By this rule the payment of compensation and expenses is limited to absence from duty "at the request of the Management, to attend court or to appear as witnesses for the Company." It would require a strained construction of language, notwithstanding the punctuation, to apply its terms to a claim of this nature.

However, under a similar rule in the Rock Island Agreement, Referee Swacker sustained a claim for expenses while attending a rules re-examina-

tion. See Award No. 773. When the Committee had progressed that claim up to the General Manager he offered to pay for automobile expense on the basis of 5¢ a mile because no train service was available on the Sunday when the examination was given. This offer was declined and the claim for both compensation and expenses was submitted to the Board.

Referee Swacker referred to previous awards denying similar claims and characterized the carrier's refusal as "so inequitable as to invite reconsideration of the justice of adhering to such precedents." He added: "As, however, they are of such widespread application, it is considered they ought not, now, be disturbed, notwithstanding the injustice involved in the particular instance." He held that "the claimants . . . are of course entitled to their automobile travel cost which the carrier offered to pay" and to this he added the cost of a meal, but denied the claim for compensation.

Referee Swacker's treatment of the problem drew a sharply worded "Special Concurrence" from the Carrier members of the Board who protested against the characterization of inequity. This "Concurrence" referred to the "misgivings" expressed by Referee Spencer in Award 134 and Referee Swacker in Award 605 where similar claims were denied. See also Award 588.

This Referee finds himself in the same situation as Referees Spencer and Swacker except that he sees no justifiable reason for accepting former erroneous awards as precedents even with "misgivings." He is aware of the absence of a specific rule in the agreement requiring payment of the claimed expenses as well as the limitation upon the power of the Board as expressed by Referee Samuell in Award 42.

The Agreement is not a contract of employment but rather a stipulation between the parties affecting that contract. See Awards 351 and 2172 of the First Division.

This Board is not limited by the Railway Labor Act to the confines of the written Agreement but extends to: Section 3 (i). "The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," etc.

The Agreement in question does not contain any language permitting the carrier to require a physical examination, yet no one could successfully argue that such requirements, as promulgated by the carrier, effective September 1, 1936 are improper or unreasonable or beyond the scope of the contract of employment. Under these rules the employe was required to submit to a physical examination or re-examination at a time and place by a physician or specialist "designated by the General Managers for their respective territories."

Such requirement implies that the employe be reimbursed for reasonable expenses incurred by reason of his obedience to such order, the language of the "Special Concurrence" to Award 773 to the contrary notwithstanding. That dissenting argument in another form was previously answered by Referee Swacker in Award 2172 of the First Division.

The situation no longer exists where employes have only those rights which may be granted them by the Management. Instead there is now a mutuality of obligation and responsibility in the operation of the transportation systems of the nation, safeguarded to both carrier and employe by Statutory enactments.

This mutuality of obligation and responsibility was met by the employe when he complied with the carrier's order on his own time. Such mutuality requires reimbursement by the carrier to the employe of his reasonable expenses; in this instance 5¢ a mile for the use of his automobile, and 50¢ for a meal while away from home. It is not enough to say that the claim of

\$7.50 should be denied because train transportation was available requiring the employe to be absent for 15 hours and 20 minutes for a simple Glycosuria examination. The claim is fair, reasonable and just.

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 employe involved in this dispute are respectively carrier and employe 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 the contract of employment and the carrier's regulations respecting physical examination imply an obligation to reimburse the employe for his reasonable expenses.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1941.

Dissent to Award 1564 (Docket TE-1379)

We disagree with the reasoning of this Award which, after recognizing both the absence of a specific agreement rule and the limitation upon the power of the Board, proceeds, by conception of unnamed statutory enactments said to create a mutuality of obligation and here considered to have been met by the latter but not the former, to find "that the contract of employment and the carrier's regulations respecting physical examinations imply an obligation" here progressed to the end of assessing payment of the claim upon the carrier solely upon equity.

/S/ R. H. Allison
/S/ C. C. Cook
/S/ A. H. Jones
/S/ C. P. Dugan
/S/ R. F. Ray