

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

ORDER OF RAILROAD TELEGRAPHERS

**ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers, Atchison, Topeka & Santa Fe Railway Company, that E. D. Alford is entitled to one day's pay at the scheduled hourly rate of his regularly assigned position at Oilton, Oklahoma, because one day's time was necessarily lost by him in carrying out instructions of the carrier to report at Topeka, Kansas, June 10, 1941, for physical re-examination by the carrier's medical department.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of December 1, 1938 as to rules and rates of pay exists between the parties to this dispute; copies thereof are on file with the National Railroad Adjustment Board.

Oilton, Oklahoma, a one-man station, rate of pay 97¢ per hour, is located on what is known as the Carrier's Oklahoma Division; agent E. D. Alford, claimant herein, is regularly assigned thereto.

Pursuant to instructions from the Carrier, claimant Alford proceeded to Topeka, Kansas June 10, 1941 for a physical re-examination, losing one day's time.

POSITION OF EMPLOYES: Article III (d) of the Telegraphers' Agreement reads:

"Employees will not be required to suspend work during regular hours or to absorb overtime."

and, Article XVII (a) employs the following language:

"Regularly assigned employees will receive one (1) day's pay within each twenty-four (24) hours according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on Sundays and the designated holidays."

Nowhere is there found any rule in that agreement which modifies or nullifies, by word or implication, those rules. It is true that the Carrier has issued unilaterally made rules, but those rules are not authority for the setting aside of rules agreed to by the Organization and the Carrier. The most recent revised agreement is dated December 1, 1938, and during negotiations leading up to the signing of said agreement the Carrier did not offer any proposal which would modify the above-mentioned rules to the extent that physical

overtime hours consumed in returning from Drake to Clarkdale, Arizona. The award clearly provided that time consumed in going to and from a physical examination was not work as contemplated by the rules of the Telegraphers' Schedule and thereby denied the claim. If time spent by an employee outside his assignment in taking a physical reexamination is not work to be paid for under the schedule rules (Award 1450), it must also follow that time so consumed within the employee's regular assignment is not work such as would require payment under the schedule rules. The decision of the majority in Award 1450, in complete disregard of the previous decisions of this Division that no rule of the Telegraphers' Schedule supported such a claim, was tantamount to the granting of a new rule which is not within the authority of the Third Division. It is only through the orderly process of negotiation as provided for under the Railway Labor Act that new rules may become effective between the parties. No such rule has been the subject of negotiation between the parties in this dispute.

The claim of the Employees must be declined for the following reasons:

- (1) The current agreement effective December 1, 1938 contains no rule that supports the claim for time spent in taking a physical recheck necessary to the employee's continued employment.
- (2) The previous application of the schedule and the conduct of the parties since the negotiation of the First Telegraphers' Schedule in 1922 during which time Article XVII (a), the guarantee rule, has remained unchanged, is ample evidence that the claim is improper and has no support under the Schedule.
- (3) With the exception of Award 1450, previous awards of the Third Division have consistently sustained the Carrier's position that the claim is unsupported by the Telegraphers' Schedule and the time spent by an employee in taking a physical recheck is not "work" as contemplated by the rules of the Agreement. That the majority erred in their decision in Award 1450 is plainly evident.

OPINION OF BOARD: It is rather difficult for this Referee to understand why the Carrier is here resisting this claim, in view of three previous awards (605, 1450 and 1564) effecting this same Carrier, concerning the same rule and involving the same question, viz., whether a regularly assigned employee must respond to the Carrier's demand for a periodical physical examination at his own expense or the expense of the Company.

Rule XVII (a) reads, "Regularly assigned employees will receive one (1) day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on Sundays and the designated holidays."

The Carrier in its "position" in Award No. 605 says, in connection with the applicability of the above rule in that case (the essence of which is the same as that in the question posed above): "Article 17 (a) covers the case and has been fully complied with. It guarantees one day's pay within each twenty-four hours if the employee is ready for service and not used. Holly was allowed a day's pay * * *."

It is interesting to note, too, that the Carrier says in the same "position": "Had Holly been sent to Drake to attend court * * * he would have been entitled and would have been allowed compensation equal to what would have been earned had he not been sent to Drake * * * the same as he was paid when he made the trip to undergo physical examination."

Continuing, "This decision establishes the principle of allowing employees who lose time the amount of time lost and while in this case it was on account of attending court and the Holly case because of undergoing physical ex-

amination the principle is the same"; and finally, "It is the position of the Carrier that having allowed Holly a day's pay of eight hours under Rule 17 (a) is all that is required * * *."

It is easy to understand then why this Board went along with that position in Awards No. 1450 and No. 1564 which, as already indicated, involve the same Carrier, the same rule, and the same question, and allowed the claimant in those cases compensation for time lost while taking the required physical examination in spite of written advice that he was to take it at his own expense (1450).

Therefore, to require Alford in this case to lose a day's pay would be discrimination against an employe on the same Carrier.

It is true that Alford was disqualified by the Carrier's physician but Alford was retained in the employe relationship on the authorization of the General Manager of the Carrier and was "ready for service and not used" when ordered to go to Topeka.

The contention of the Carrier that the medical examination was for the sole benefit of the employe is not borne out by the record, and is clearly inconsistent with the theory heretofore assumed that these periodical physical examinations are necessary "as a matter of protection of the property of the railway company and of the lives of the employes and traveling public," (Position of Carrier in Award No. 1450) and "Responsibility rests with the management to exercise the utmost diligence in seeing to it that employes concerned are in good physical condition." (Position of Carrier in Award No. 1564).

Our conclusion is that the claim should be sustained.

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 Carrier violated Rule XVII (a) and the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of July, 1942.