Award No. 2860
Docket No. TE-2845

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Luther W. Youngdahl, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Deleware, Lackawanna & Western Railroad, that: F. R. Dedrick, regularly assigned to the 2nd trick towerman position at Denville, New Jersey, shall be reimbursed under Rule 13 of the Telegraphers' Agreement for a day's pay of eight hours lost by him on each day, December 13th and 14th, 1943, on account of being required by the carrier to report at the Moses Taylor Hospital at Scranton, Pennsylvania, for physical examination.

EMPLOYES' STATEMENT OF FACTS: An agreement by and between the parties bearing effective date of May 1, 1940 is in evidence; copies thereof are on file with the National Railroad Adjustment Board.

On or about November 1, 1943, Chief Train Dispatcher, Mr. H. E. Cruser, by telephone, instructed Towerman F. R. Dedrick, who was regularly assigned to the 2nd trick (4:00 P. M. to 12:00 o'clock midnight) position at Denville Tower, to report to Dr. A. L. Baker, Dover, New Jersey, for physical examination. Towerman Dedrick, during his off-duty period, reported to Dr. Baker November 10, 1943, but because of previous appointments with other patients Dr. Baker could not administer the examination sufficiently in time to permit Dedrick to assume his post of duty at 4:00 P. M. Mr. Dedrick on assuming his position at 4:00 P. M. advised Chief Dispatcher Cruser of the circumstances, who then instructed him to reported to Dr. Wm. C. Stuart at Hoboken, New Jersey. Drs. Baker and Stuart are physicians for the Lackawanna Railroad.

Mr. Dedrick, during his off-duty period, reported to Dr. Stuart at Hoboken on November 11, 1943. Dr. Stuart made no report of his findings to Mr. Dedrick; instead he made some sort of a report to the Carrier, whereupon Chief Dispatcher Cruser instructed Mr. Dedrick to proceed to the Moses Taylor Hospital, a railroad company institution at Scranton, Pennsylvania, for physical examination. Towerman Dedrick complied with those instructions, losing two days' wages, December 13th and 14th.

For Towerman Dedrick, the Organization filed claim with the Carrier for the two eight hour days lost. The claim was denied, on the ground that said physical examination was entirely for the benefit of the employe. (Mr. Shoemaker's letter February 1, 1944.)

Towermen, regularly assigned at Denville and other locations where highway crossing gates are manipulated from within the tower, the same as interlocked switches, etc., are required to submit to physical examination, as against other towermen who are not required to so submit.

Nowhere in the agreement is there any rule which **forbids** the Carrier to have employes undergo physical examinations. Nowhere in the agreement is there any rule which **grants immunity** therefrom to the employes. (The employes admit as much in Docket 2668-TE, page 3, Employes Submission.) Consequently the Carrier has the right to require them.

In Award 2491 this Division said:

> "We can only interpret the contract as it is and treat that as **reserved to the Carrier** which is not granted to the employes by the agreement."
>
> **Award 2491—Third Division**

> "Labor agreements are usually less explicit in respect to the rights enjoyed by management under them * * *. In other words, all agreements of necessity **leave management a considerable zone of operation in which management has the right and duty to exercise judgment** as to the best and most efficient way to run the business."
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> **Award 311—Third Division**

The concept "safe" is implicit in the phrase "best and most efficient."

Since there is no agreement rule limiting the right of the Carrier to exercise judgment respecting physical examinations, the claim must be denied. It is axiomatic that the Board has no power to create a rule. That may be done only by negotiation on the property.

> "To adopt the practice of broadening or extending the terms of any instrument by a tribunal such as ours will only lead to confusion and uncertainty and ultimately to injustice and hardship to both employes and carrier. Far better for all concerned is a course of procedure which adheres to the elemental rule leaving parties by negotiation or other proper procedure to make certain that which has been uncertain."
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> **Award 2622—Third Division**

> "It is not advisable even to reach a result which might appear equitable to attempt to read into a rule (sic, agreement) something which is not there. The weight of authority as well as sound reason supports the principle."
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> **Award 2132—Third Division**

Since the claim is not supported by the Schedule rules it is without merit and the Carrier respectfully submits that it should be denied.

OPINION OF BOARD: Carrier contends that employe is restricted to a consideration of Rule 13 (a) because it was the only rule relied on when claim was handled with it. This contention was disposed of adversely to Carrier in the recent Award 2828, where it was stated:

> "We give little time or space to the contention that Rule 5 only was relied on by Petitioner when the claim was handled with the Carrier and that on such account we are precluded from giving consideration to Rules 4 and 13. The nature of Petitioner's demand was fully disclosed by the claim as filed and the Carrier was put upon notice compensation was claimed for an alleged violation of the Agreement. Subsequent reliance upon Rules 4 and 13 did not change its substance or character. Under such circumstances this Board has ample authority to make application of all provisions of the Contract which may be, or are, claimed to be involved."

We give consideration therefore to the question whether Petitioner's claim can be sustained under Rules 11, 13 (a) and 23. Carrier asserts that 13 (a) applies only to court activities and investigations in connection therewith; that its very title "Court duty and Investigations" restricts the subject matter

of the rule and that it does not apply to medical examinations. We need not concern ourselves with that question in this case because of our holding that under Rules 11 and 23 Petitioner is entitled to be reimbursed for necessary time lost from his work while taking medical examination.

This is not a case of an employe seeking compensation because he spent his off duty time while taking such examination but rather a case where he lost time out from his work. Under Rule 11, employes will not be required to suspend work during regular hours, and under Rule 23, regularly assigned employes will receive one day's pay within each twenty-four (24) hours. It seems to us that under these rules employe is entitled to pay for necessary time lost while taking a physical examination. The request for the examination was made by the Carrier. If employe refused to comply with this request he would have been subject to discipline. The fact that the examination may also benefit employe does not change the fact that it was employer who made the request and caused employe to leave his work. See Award 1890.

Award 2828 relied on by Carrier is not in point for it pertains to a claim for off duty time. It will be noted, however, that Referee there said:

> "There are, of course, other decisions where compensation has been allowed for time lost while undergoing a physical examination at the direction of the Carrier but they are predicated upon what is known as the Guarantee Rule—Rule 23 of the present Agreement—and the reasons for the results there are not decisive here."

The claim is based upon a day's pay of eight hours lost by employe on two days, December 13 and 14. We do not believe the record shows the necessity of losing more than one day's work on account of the examination.

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 employes involved in this dispute are respectively carrier and employes 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;

That carrier violated the Agreement; and

That employe is entitled to one day's pay for time lost in taking physical examination.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of March, 1945.